

The Global Combat Against IUU Fishing: The United States Proposes a New Seafood Traceability Program

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I. Introduction

On 5 February 2016, the National Oceanic and Atmospheric Administration (hereinafter, NOAA), within the United States (hereinafter, US) Department of Commerce, published a Proposed Rule to create a seafood traceability programme.¹ The programme intends to combat illegal, unreported and unregulated (hereinafter, IUU) fishing, prevent fraudulent trade and to serve as the contribution of the US to the global action to combat IUU fishing, along the lines of other similar regulatory frameworks, such as the EU's extensive regulation on IUU fishing. However, despite the legitimate objectives of the measure, it is imperative that regulators take into account the potential consequences for international trade when designing such programmes.

II. Background

IUU fishing refers to fishing that: (1) lacks authorisation, does not comply with conservation and man-

agement measures developed by regional fisheries management organisations (hereinafter, RFMOs), or violates national laws or international obligations (i.e., is illegal); (2) is not properly reported under international, RFMO or national laws and regulations (i.e., is unreported); and (3) is performed by vessels with no national flag or that jeopardise fish stocks (i.e., is unregulated).² Relevant treaties and agreements regarding IUU fishing include the 1982 United Nations (hereinafter, UN) Convention on the Law of the Sea, the 1995 UN Fish Stocks Agreement and the 1995 Food and Agriculture Organisation (hereinafter, FAO) Code of Conduct for Responsible Fisheries. The FAO Port State Measures Agreement, which intends to build on previous global instruments and adds the first set of binding minimum standards specifically intended to combat IUU fishing, was adopted in 2009, but only entered into force on 5 June 2016. In line with this proposal, the US ratified said agreement on 11 February 2016. With respect to the US, according to a 2014 study, USD 2 billion, or 32%, of wild-caught seafood imported into the US was illegal. The US imports most of its seafood from China, Thailand, Indonesia, Ecuador, Canada, Vietnam, the Philippines, India, Mexico and Chile.

The 5 February 2016 proposal by the NOAA is part of a larger US strategy presented in a 17 June 2014 Presidential *Memorandum* entitled “*Establishing a Comprehensive Framework to Combat Illegal, Unreported, and Unregulated Fishing and Seafood Fraud*”. Said *Memorandum* put in place a Presidential Task Force on Combating IUU Fishing and Seafood Fraud,³ which later recommended, inter alia, that the US develop a risk-based traceability programme. On 15 March 2015, said Task Force released an “*action plan*” that articulates the steps that US federal agencies will take to implement IUU fishing measures.⁴ The action plan includes 15 recommendations for the US Government to improve its governance of fishing practices, which address issues relating to international relationships, enforcement, partnerships and traceability in the following areas: (1) port state measures; (2) best practices; (3) maritime domain awareness; (4) free trade agreements; (5) fishery sub-

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1 Magnuson-Stevens Fishery Conservation and Management Act; Seafood Import Monitoring Program, A Proposed Rule by the National Oceanic and Atmospheric Administration on 02/05/2016, available on the Internet at <<https://www.federalregister.gov/articles/2016/02/05/2016-02216/magnuson-stevens-fishery-conservation-and-management-act-seafood-import-monitoring-program>> (last accessed 5 May 2016).

2 As defined in the UN FAO International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated fishing, FAO, Rome 2001. It was developed as a voluntary instrument, within the framework of the Code of Conduct for Responsible Fisheries. The IPOA-IUU was adopted by consensus at the Twenty-fourth Session of Committee on Fisheries (COFI 24) on 2 March 2001 and endorsed by the Hundred and Twentieth Session of the FAO Council on 23 June 2001.

3 NOAA Fisheries, Presidential Initiative on Combating Illegal, Unreported, and Unregulated (IUU) Fishing and Seafood Fraud, available on the Internet at <<http://www.nmfs.noaa.gov/ia/iuu/taskforce.html>> (last accessed 5 May 2016).

4 Presidential Task Force on Combating IUU Fishing and Seafood Fraud, Action Plan for Implementing the Task Force Recommendations, 15 March 2015, available on the Internet at <http://www.nmfs.noaa.gov/ia/iuu/noaa_taskforce_report_final.pdf> (last accessed 5 May 2016).

sides; (6) capacity building; (7) diplomatic priority; (8) information sharing; (9) customs mutual assistance agreements; (10) species name and code; (11) state and local enforcement; (12) enforcement authorities; (13) a partnerships forum; (14) seafood traceability; and (15) risk-based traceability.

The proposed traceability programme is the first concrete outcome of this initiative. At the core of the proposal is the introduction of a trade permit, as well as filing and recordkeeping procedures relating to the importation of certain fish and fish products. According to the commentary published with the proposal, these measures are aimed at implementing the prohibition of the import and trade, in interstate or foreign commerce, of fish taken, possessed, transported or sold in violation of any foreign law or regulation. The requisite filing information must be collected at the time of entry *via* an electronic single window, consistent with the *Security and Accountability for Every (SAFE) Port Act of 2006* and other applicable laws and regulations. Specifically, the National Marine Fisheries Service (hereinafter, NMFS) proposes to integrate the collection of catch and landing documentation for certain fish and fish products within the government-wide *International Trade Data System (ITDS)*. The programme would require an annually renewable “*International Fisheries Trade Permit*” (hereinafter, IFTP) and specific data for certain fish and fish products to be filed and retained, as a condition of import. All this aims to enable the US to exclude the entry into commerce of products of illegal fishing activities.

The current proposal represents the first step in implementing the traceability programme. In this first step, the traceability programme would only apply to “*at-risk species*” identified by the NOAA. However, the proposal foresees expanding the application of the reporting requirements to encompass all seafood at first point of sale or import. The list proposed in 50 Code of Federal Regulations (hereinafter, C.F.R.) § 300.324(a) includes: Abalone; Atlantic Cod; Pacific Cod; Blue Crab; Red King Crab; Dolphinfin (Mahi Mahi); Grouper; Red Snapper; Sea Cucumber; Shrimp Sharks; Swordfish; Tunas (Albacore, Bigeye, Skipjack, Yellowfin, and Bluefin). In addition, 50 C.F.R. § 300.324(b) of the proposed regulation details the data that is to be provided by the importer: (a) information on the entity(ies) harvesting or producing the fish; (b) information on the fish that was harvested and processed; (c) information on where and

when the fish were harvested and landed; and (d) the IFTP number for the importer of record. As proposed, 50 C.F.R. § 300.324(d) provides for the possibility of on-site verification inspections and audits of the documentation. The importer of record is obliged to keep records regarding the chain of custody of the fish or fish products that are sufficient to trace the fish or fish products from point of entry into US commerce to the point of harvest.

Alongside the proposal, the NMFS published draft Implementation Guidelines for the proposed Seafood Traceability Program, draft US Seafood Traceability Model Forms as well as a draft Regulatory Impact Review and Initial Regulatory Flexibility Analysis.⁵ Due to technological limitations of automated data processing for imaged documents and the requirements for the phase-in of the data system, the chain of custody information would need to be maintained by the importer and would, at this stage, not be subject to a reporting requirement.

III. Comment

The programme proposed by the NOAA is intended to help authorities verify that the fish or fish products were lawfully acquired by providing information that traces each import shipment from point of harvest to entry into commerce. The EU’s existing IUU framework uses a slightly different approach and, most notably, provides for a catch certification scheme for the importation and exportation of fishery products.⁶ Through this instrument, the competent authorities of the flag State of the vessel catching the fish certify that the catch concerned has been made in accordance with the applicable laws, regulations and international conservation and manage-

5 All documents have been made available through the US Government and are available on the Internet. Regulations.gov, Magnuson-Stevens Fishery Conservation and Management Act; Seafood Import Monitoring Program Docket Folder Summary, <<https://www.regulations.gov/#!docketDetail;rpp=100;so=DESC;sb=docId;po=0;D=NOAA-NMFS-2015-0122>> (last accessed 5 May 2016).

6 The system is based on Council Regulation (EC) No. 1005/2008 of 29 September 2008 establishing a community system to prevent, deter and eliminate illegal, unreported and unregulated fishing (IUU Regulation), as amended; and Commission Regulation (EC) No. 1010/2009 of 22 October 2009 laying down detailed rules for the implementation of Council Regulation (EC) No. 1005/2008 establishing a community system to prevent, deter and eliminate illegal, unreported and unregulated fishing (Implementing Regulation), as amended, OJ L 280, 27.10.2009.

ment measures.⁷ Forms introduced by documentation schemes of Regional Fisheries Management Organisations (hereinafter, RFMOs) may also be accepted as catch certificates in respect of the fishery products from species to which such catch documentation scheme apply. The catch certification scheme of the EU's IUU Fishing Regulation is a central element of the EU's IUU fishing system that additionally introduced an IUU fishing vessel list and the establishment of a list of non-cooperating third countries in cases of continuous violations of IUU fishing rules. Thus, while the US uses a different approach from the EU to combat IUU fishing, the use of a traceability requirement to combat IUU fishing is common to both frameworks.

1. Protest by Trading Partners

Important US trading partners have been quick to denounce this recent US initiative. Unsurprisingly, Canada has been particularly outspoken as a high number of the species included in the traceability programme are important Canadian seafood exports to the US.⁸ Reportedly, the NOAA has already received official complaints from Canada and other trading partners.⁹ These countries base their criticism on the fact that they already have documentation and other good fisheries management measures in place. Therefore, they argue, they should not be required to comply with the additional rules of the new US traceability programme. Canada is especially concerned that the traceability programme could constitute a trade barrier for third country businesses while at the same time favouring domestic businesses. The US argues that the proposal follows international trade commitments requiring that the US treat all its trading partners equally and in a non-discriminatory manner.

7 Annex III to the IUU Regulation defines the information that the flag State notification must contain.

8 For example, in 2014, Canada was the second largest importer of seafood into the US. Agriculture and Agri-Food Canada, Inside the United States - The Fish and Seafood Trade, November 2015, Market Access Secretariat, Global Analysis Report, available on the Internet at <<http://www5.agr.gc.ca/resources/prod/Internet-Internet/MISB-DGSIM/ATS-SEA/PDF/6676-eng.pdf>> (last accessed 5 May 2016).

9 Christine Blank, SeaFoodSource.com, Exclusive: Canada fisheries protest US-proposed IUU rule, 3 March 2016, available on the Internet at <<http://www.seafoodsource.com/news/supply-trade/exclusive-canada-fisheries-protest-us-proposed-iuu-rule>> (last accessed 5 May 2016).

2. WTO Compliance

While the objectives of IUU fishing measures are clear, their conception and their impact on international trade must be carefully analysed in order to avoid potential trade distortions and barriers having detrimental trade consequences. IUU fishing regulations look poised to have a significant impact on fisheries trade and need to be compliant with the relevant rules, in particular of the WTO General Agreement on Tariffs and Trade 1994 (hereinafter, GATT), the WTO Agreement on Import Licensing Procedures and the WTO Agreement on Technical Barriers to Trade (hereinafter, TBT Agreement).

Arguably, even though not (yet?) notified to the WTO under the TBT Agreement, the proposed traceability programme likely qualifies as a technical regulation under the TBT Agreement. Consequently, the programme must comply with the relevant rules of the TBT Agreement, in particular Article 2.1, which contains the principle of non-discrimination. Less favourable treatment would arise “*in respect of technical regulations*”, if imported products originating in any WTO Member are at a disadvantage, compared to “*like*” domestic products and imported products originating in any other country, with respect to the preparation, adoption or application of technical regulations. This may indeed be the case here, as the traceability programme and the IFTP expressly exclude application regarding domestic fisheries. Further to that, Article 2.2 of the TBT Agreement stipulates that “*technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade*” and that “[f]or this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create.” It appears doubtful that the proposed programme is indeed the least trade-restrictive option available.

The IFTP also appears to fall under the WTO Agreement on Import Licensing Procedures, meaning that it must comply with the relevant provisions of said agreement, imposing a certain number of requirements that are, *de facto* if not *de jure*, pre-conditions for importation.

These measures may also have an impact on the US's obligation to avoid discrimination between “*like*” domestic and imported products, embodied in Article III of the GATT. The US's IUU fishing propos-

al exclusively applies to fish and fish products that are imported into the US. In regards to US domestic wild-capture fisheries, the existing data reporting and record retention requirements are deemed sufficient to ensure traceability. Hence, the IFTP, the corresponding fee and the fulfilment of the reporting requirements are likely to represent additional steps, and result in higher costs, possibly causing delays that negatively affect the conditions of competition of imported fishery products vis-à-vis products obtained by domestic catches. However, Article III:4 of the GATT allows WTO Members to apply different treatment to “like” imported and domestic products, provided that such treatment is not less favourable. In examining whether a violation of the national treatment requirement exists, the WTO Appellate Body in *Korea – Various Measures on Beef* looked at the “fundamental thrust and effect of the measure”. Whether the different requirements result in the granting of less favourable treatment to imported products vis-à-vis the “like” domestic products will then depend on the actual application and the effects of the requirements foreseen in the respective regulations. Article XI:1 of the GATT prevents WTO Members from adopting prohibitions or restrictions other than duties, taxes or other charges, at the point of importation (or exportation). Given the broad interpretation of this prohibition by WTO panels and the WTO Appellate Body, the IFTP and its inherent reporting duties may likely be qualified as such a measure and a detailed scrutiny of the scheme and of its application would need to be conducted to determine whether the exception of GATT Article XX could be resorted to by the US.

IUU fishing has already been an issue of discussions before the WTO and during WTO negotiations. The WTO-compliance of measures combating IUU fishing were subject to a debate at the meeting of the Committee on Trade and Environment on 6 October 2015.¹⁰ While hailing the overall objective of measures against IUU fishing, several WTO Members stressed the need to ensure alignment with international commitments when implementing domestic IUU strategies. In a statement on behalf of the Least Developed Countries (LDC) Group, Haiti emphasised multilateral commitments rather than domestic initiatives, which may create barriers to trade. Additionally, discussions in the WTO Negotiating Group on Rules regained momentum in late 2015 when a number of WTO Members tabled proposals on disciplines

on fisheries subsidies that made reference to IUU fishing.¹¹

3. Multilateral Approach

A multilateral approach is indeed the path that should be pursued, in particular considering the decision by an increasing number of countries to opt for different domestic (unilateral) approaches. This showcases the current dilemma for fishermen and importers of fishery products. In particular, that while complying with the ever more fragmented international and domestic fisheries regulations and IUU schemes, the administrative and financial burdens increase. An alternative multilateral effort at the FAO would appear to be the obvious way forward instead of a piecemeal and country-specific approach. However, the example of the FAO Port State Measures Agreement, adopted in 2009, but which did not enter into force until 5 June 2016, shows the difficulty of implementing common international and multilateral regulations.

Discussions are underway at the relevant Committees of the FAO. More specifically, an *Expert Consultation on Establishing Guidelines for Catch Documentation Schemes* has been established following a request included in the Fisheries Resolution adopted by the UN General Assembly,¹² and proposed by the Thirty-first Session of the Committee on Fisheries (COFI 31).¹³ The Expert Consultation took place from 21 to 24 July 2015 and proposed a draft of the Voluntary Guidelines for Catch Documentation Schemes.¹⁴ The draft is annexed to the report and provides very

10 WTO News, WTO members weigh in on measures to tackle illegal fishing, 6 October 2015, available on the Internet at <https://www.wto.org/english/news_e/news15_e/envir_06oct15_e.htm> (last accessed 5 May 2016).

11 See in particular the proposals by the ACP states (WTO Document TN/RL/W/267) and by New Zealand (WTO Document TN/RL/W/261).

12 Paragraphs 67 and 68 of UN General Assembly Resolution A/RES/68/71 on Sustainable fisheries, including through the 1995 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, and related instruments of 9 December 2013.

13 Report of the Thirty-first Session of the Committee on Fisheries (COFI 31) Rome, 9-13 June 2014, FIPI/R1101 (En).

14 Food and Agriculture Organization of the United Nations (FAO), Report of the Expert Consultation on Establishing Guidelines for Catch Documentation Schemes (CDS), FIPM/R1120 (En).

detailed and technical guidelines that should, once finalised, be taken into consideration in the development, implementation, review, harmonisation and enhancement of Catch Documentation Schemes. The scope of this initiative, however, was limited to guidelines for the certification of catch at the unloading stage and to the associated trade requirements when fish and fishery products enter international trade and, thereby, so far excludes in-country traceability systems. This was decided due to the variety and complexity of existing in-country traceability systems.¹⁵ Such guidelines on catch documentation schemes for fish and fishery products intended for international trade are a crucial first step at the multilateral level. A further *Technical Consultation on establishing the guidelines for Catch Documentation Schemes* was held from 12 to 15 April 2016. The guidelines will be finalised and then submitted to the Thirty-second Session of the Committee of Fisheries from 11 to 15 July 2016 in Rome, Italy, for review and adoption.¹⁶

IV. Conclusion

The recent US proposal shows the increasing importance of combatting IUU fishing, and the push to eliminate such fishing practices will continue. Realisation of further recommendations of the *Presidential Task Force on Combating IUU Fishing and Seafood Fraud* may only be a matter of time, and non-governmental organisations such as Oceana¹⁷ and the World Wide Fund for Nature¹⁸ (i.e., the WWF) have already

called on the US to take further steps. Comments to the proposed US traceability programme originally were to be submitted by 5 April 2016. On 25 March 2016, the National Marine Fisheries Service announced an extension of the comment period until 12 April 2016, citing a number of international stakeholders who are potential commenters and who needed additional time to comment.¹⁹ Stakeholders appear to have made extensive use of this consultative opportunity in order to give input to the finalisation of the proposed US measure. Comments will be analysed and the draft measure potentially revised, taking into account comments and further discussions. The law is expected to be finalised by August 2016,²⁰ and published in autumn 2016. Importers will likely have up to one year from the date of publication to implement the new requirements.²¹

15 Food and Agriculture Organization of the United Nations (FAO), Report of the Expert Consultation on Establishing Guidelines for Catch Documentation Schemes (CDS), FIPM/R1120 (En), p. 3, available on the Internet <<http://www.fao.org/3/a-i5063e.pdf>> (last accessed 5 May 2016).

16 Committee on Fisheries, Fifteenth Session, COFI:FT/XV/2016/5, p. 3, available on the Internet <ftp://ftp.fao.org/FI/DOCUMENT/COFI/cofifit_15/5e.pdf> (last accessed 5 May 2016).

17 Andrew Sharpless, CEO Note: U.S. Administration's Actions to Combat IUU Fishing Are a Commendable but Insufficient Start, 18 February 2016, available on the Internet at <<http://oceana.org/blog/ceo-note-us-administration%E2%80%99s-actions-combat-iuu-fishing-are-commendable-insufficient-start>> (last accessed 5 May 2016); Oceana, Presidential Task Force Takes Bold Steps to Address IUU Fishing & Seafood Fraud, 4 February 2016, available on the Internet at <<http://oceana.org/press-center/press-releases/presidential-task-force-takes-bold-steps-address-iuu-fishing-seafood>> (last accessed 5 May 2016).

18 WWF, WWF Statement on Proposed Federal Regulations on Illegal, Unreported and Unregulated Fishing, 4 February 2016, available on the Internet at <<http://www.worldwildlife.org/press-releases/wwf-statement-on-proposed-federal-regulations-on-illegal-unreported-and-unregulated-fishing>> (last accessed 5 May 2016).

-releases/wwf-statement-on-proposed-federal-regulations-on-illegal-unreported-and-unregulated-fishing> (last accessed 5 May 2016).

19 The extension was published in the Federal Register on 31 March 2016. Federal Register, The Daily Journal of the United States Government, Magnuson-Stevens Fishery Conservation and Management Act; Seafood Import Monitoring Program, Extension Of The Comment Period, available on the Internet at <<https://www.federalregister.gov/articles/2016/03/31/2016-07258/magnuson-stevens-fishery-conservation-and-management-act-seafood-import-monitoring-program>> (last accessed 5 May 2016).

20 Final Action envisioned for August 2016 as mentioned in the regulatory docket, available on the Internet at <https://www.regulations.gov/#!docketDetail;rpp=100;so=DESC;sb=docId;po=0;D=NOAA-NMFS-2015-0122> (last accessed 5 May 2016).

21 Christine Blank, SeaFoodSource.com, Exclusive: Canada fisheries protest US-proposed IUU rule, 3 March 2016, available on the Internet at <<http://www.seafoodsource.com/news/supply-trade/exclusive-canada-fisheries-protest-us-proposed-iuu-rule>> (last accessed 5 May 2016).