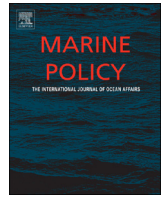




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The EU restrictive trade measures against IUU fishing

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ABSTRACT

The opportunities for operators to increase their revenue when illegal, unreported and unregulated (IUU) fishing catches are converted to currency through the market encourage the persistence and growth of this activity. It is often the same market that is targeted for the legal trade of fish. Thus, paradoxically, the market demand creates and incites it, at least from an economic point of view. To deter IUU fishing activities, some fish and fishery products importing countries have started to enact or implement additional regulatory measures, the goal of which is to tackle the problem from a new trade-related perspective. This contribution provides an analysis of various aspects of the market state competence. Within the framework of the European Union (rights and markets) the study analyses the emergence of regional trade-related measures and explore how they are linked to the international trade law regime especially the World Trade Organization rules. Finally, the paper draws implications for the market state measures and considers their limits and potential in combatting IUU fishing.

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1. Introduction

Illegal, unreported and unregulated (IUU) fishing refers to diverse fishing methods or activities, or to the conditions under which they are carried out. Illegal fishing refers to activities conducted in contravention of national or international laws and regulations. Unreported fishing refers to fishing activities which have not been reported, or have been misreported, to the relevant national authority or RFMO. Unregulated fishing refers to fishing activities in the area of application of a relevant RFMO that are conducted by vessels without nationality, or by those flying the flag of a State not party to that organization, or by a fishing entity, in a manner that is not consistent with or contravenes the measures of that organization [1]. Fisheries without adapted infrastructure or constraints rules to report catches, especially in developing countries [2], are not perceived as IUU fishing as well as the unreported bycatch.

IUU fishing is currently considered a serious threat to the health of fish stocks, and thus to food security for countries that depend on fishing resources. It is also at the source of damage to the biological diversity, from species to marine habitats and their interactions. It has an economic impact on the resources available

to all stakeholders involved in legal fishing activities, often creating unfair competition with the consequences to lower revenue and, ultimately unemployment. Ironically, this may, in turn, even boost illegal fishing, should the law-abiding fishermen consider breaking the law simply to survive. IUU fishing is conducted everywhere around the world. In their constant search for profit, illicit operators quickly move to fishing areas that fall under more permissive national legal systems or regional agreements, according to non-adapted legislation (social, marine or environmental), weak or non-existent control capacity, the nature of any applied sanctions, comfortable tax regulations, etc. The profits made by these IUU fishing operators bring heavy losses to the world economy, estimated between 10 and 23 billion dollars per year (without considering unregulated one) [3]. This affects especially the developing countries, where the fishing sector is particularly important for food security, poverty alleviation and the financing of long-term development. Both developed and developing countries are impacted by the loss of revenue, such as when tax avoidance is present. Such avoidance can be exemplified by incorrect declarations about the origin, volume or categorization of catches [4], considered as illegal or unreported. Since the 2008 financial crisis, the loss of state revenue due to IUU fishing is a sensitive issue, especially when many governments have to cope with less revenue and higher cost to ensure compliance.

The opportunities for operators to increase their revenue when IUU catches are converted to currency through the market

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encourage the persistence and growth of this activity. It is often the same market that is targeted for the legal trade of fish. If the fish buyers fail to make the distinction or do not have the capacity or wish to draw a distinction between legal or non-legal product origin, IUU products can be “re-legalized” through fish processing activities or distribution channels [5]. This by itself becomes a glaring problem for law enforcement. The market price of the fish thereby determines whether there is an important economic incentive to engage in IUU fishing, except as in the case of food security [6].

The difficulties of reinforcing the duties of coastal states and flag states under international law to fight against IUU fishing has generated increasing interest in exploration of other compliance measures, most notably those related to international trade. In this case, to deter IUU fishing, some countries that import fishery products have started to enact or implement additional fishing regulatory measures to tackle the IUU fishing question by adopting new trade-related perspectives. The international regulations of the sea mention the flag states, coastal states and port states¹ as legal actors, but, up to now, there is no specific international definition and duties for state competence in trade that directly mentions the fight against IUU fishing. Although the international plan of action against illegal, unreported and unregulated fishing (IPOA-IUU), developed by FAO in 2001, does mention the responsibility for states 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 [1]. This legal text is not a binding instrument.

Currently, while the majority of involved actors refer to “internationally agreed market-related measures” [1] or “market-related measures” [7] in accordance with the principles, rights and obligations established in the World Trade Organization, the EU refers to the duties of the “market state” in its IUU regulation [8]. For the purpose of this paper, the “market state” responsibilities refer to those applied to any state that trades fishery products (either processed or raw), e.g. countries that import into or exported from its territory. The globalization of fish trade has led to substantial product that is exported to one country, processed, and then re-exported; sometimes back to the original fishing country [2]. Imports in this context can be qualified as “direct” when the trade takes place between two countries, or “indirect” meaning that import comes from the territory of a third country other than the flag State of the fishing vessel responsible for the catch [8]. Importations are considered as the introduction or transhipment of fish products at port (or by other transports means e.g. air or ground transportation) into a state’s territory. Each territory involved will be expected to adhere to the responsibilities of a “market state”.

To provide recourse in such an instance, a market state may adopt trade measures to limit the import of fish products that are not verified as being totally legally sourced. As such, a market state can apply a ban on the import of fishery products from a third country in the case when the third country’s vessels are suspected to be involved in IUU fishing activities or when any processed products are not legally sourced. The market state thus performs an economic control function and can enact measures to limit the entry of fish products caught or processed under conditions that it considers illegal. These measures are intended to increase both the operating and capital costs of IUU vessels, such as when an operator is prevented to land its catch in a given port, which, in turn, increases both fuel cost and steaming time [6]. The market state’s actions however are limited in space because they are only legal

on its own domestic territory, in contrast to when the jurisdiction is that of the flag state.

In the fight against IUU fishing and non-cooperating states, it is imperative to analyse market state jurisdiction, as well as its capacity to undermine non-compliant land-based processing and marketing chains, that are ostensibly easier to dismantle than fishing corporations that use flags of convenience and shell companies that are protecting IUU fishing operators from any legal action [9]. The existing control systems at sea are presently far from adequate, due in great part to the cost of it, especially in the high seas.

The transnational nature of IUU fishing activities raises questions about numerous links between international trade law and fishing trade-related measures. This contribution provides an analysis of various aspect of the market state competence. It will explore how emerging trade related measures, identified as tools to improve legal fishing, can be used against IUU fishing when its products are intended for export to the international market. Section 2 examines the interactions between international trade rules and restriction measures concerning the importation of fish products. To fully comprehend the practical difficulties that a state can encounter when a product is allegedly illegal, unreported or unregulated, the analysis takes into account that different cases call for different responses. Section 3 examines the EU experience with trade-restrictive measures regarding IUU fishing products and the practical constraints applying to use of catch certificates. The final discussion draws implications for the market state measures and considers their effectiveness in combatting IUU fishing. In the conclusion, the findings concerning the consequences of international policies towards developments in and the evolution of the international fisheries law are summarized.

2. The context of market state measures for fish trade within WTO regulation

The WTO institutionalized, within the Marrakech agreement framework signed in 1994, the international economic law of trade and became responsible for regulating international trade, including that of fishery. In order to fall under the scope of WTO law, fishery products must therefore be part of such international trade. The sole extraction of a fishery resource does not create a product subject to WTO regulations. However, conflicts have arisen within the WTO framework regarding fishery products, including the ways in which they could be exempted from trade. Simultaneously, the exploitation of exhaustible living marine resources can damage the environment with proof now existing that IUU fishing has an impact on that damage (Section 2.1). Tensions could appear between global trade rules and regional rules when a resource becomes subject to various juxtaposed laws (economic, fisheries, environment, etc.), hindering any global effective efforts to prevent IUU fishing (Section 2.2).

2.1. The exception of WTO regulation for fisheries resources as exhaustible natural resources

Nowadays, fish continues to be one of the most-traded food commodities worldwide [10]. With fisheries products classified as trade goods, WTO’s main function is to ensure “that trade flows as smoothly, predictably and freely as possible” [11]. In the first article of the General Agreement on Tariffs and Trade (GATT), the WTO addressed the “most-favoured-nation treatment” and highlights that “The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of

¹ The 1995 Agreement on straddling stocks mentions the coastal, flag and port state responsibilities however, the concept of market state is recent.

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