

Legal opinion

1. On 19 October 2007 the European Commission presented its proposal for a Community Regulation on *Establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing* to the Council of Ministers and the European Parliament. The proposed system shall apply to all IUU fishing and related activities “*carried out within the territory or within the maritime waters subject to the sovereignty or jurisdiction of the Member States or by Community fishing vessels or nationals. It shall also apply, without prejudice to the jurisdiction of the flag state or coastal state concerned, in relation to IUU fishing activities carried out by non Community vessels on the high seas or in the waters under the jurisdiction of a third country.*”¹

2. FIELD has been asked to consider whether the exclusion of Community fishing vessels or maritime waters subject to the sovereignty or jurisdiction of individual Member States would be compatible with the Agreement establishing the World Trade Organisation and its Annexes.

3. The Agreement encompasses, *inter alia*, the General Agreement on Tariffs and Trade 1994 (GATT 1994) and the Agreement on Technical Barriers to Trade (TBT). The measures envisaged under the proposed Regulation impair the free trade in fish and fishery products and may be incompatible with the GATT 1994 provisions, in particular Articles I (*General Most-Favoured-Nation Treatment*), Article III (*National Treatment on Internal Taxation and Regulation*), Article VIII (*Fees and Formalities connected with Importation and Exportation*), Article XI (*General Elimination of Quantitative Restrictions*) or Article XIII (*Non-discriminatory Administration of Quantitative Restrictions*). The proposed Regulation also addresses certain product characteristics and may therefore be incompatible with Articles 2 (*Preparation, Adoption and Application of Technical Regulations by Central Government Bodies*) and Article 12 (*Special and Differential Treatment of Developing Country Members*) of TBT.

4. To the extent the measures breach obligations under the GATT 1994, they could be justified on the basis of the general exceptions set out in Article XX of GATT 1994 which, *inter alia*, provides that:

“*Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:...*

(b) necessary to protect human, animal or plant life or health;...

(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;...”

¹ Art. 1 para.3, Proposal for a Council Regulation Establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing, COM(2007) 602 final 2007/0223 (CNS), 17.10.2007

Conservation of exhaustible natural resources

5. Article XX (g) may allow for the adoption of measures combating IUU fishing with the objective of conserving exhaustible fish stocks if the measures are made effective “*in conjunction with restrictions on domestic production or consumption*”. In the *US Gasoline Standards* case the Appellate Body found that the clause was appropriately read “*as a requirement that the measures concerned impose restrictions, not just in respect of imported gasoline but also with respect to domestic gasoline*”.² Hence an exclusion of EU vessels and waters from the restrictions envisaged by the Regulation may not meet the requirements of Article XX (g) which could therefore not be invoked as a defence.

6. However, the Appellate Body also pointed out that while “*in conjunction*” implies a certain amount of even-handedness it did not require the identity of measures. In the *Shrimp/Turtle* case the Appellate Body found that new restrictions (addressing the mode of harvesting of imported shrimp) met the ‘in conjunction’ requirement as there were comparable restrictions on United States shrimp trawl vessels (pursuant to regulations under the Endangered Species Act).³

7. It is therefore necessary to determine whether the proposed Regulation introduces restrictions which already exist in a similar form for European vessels and waters. At present IUU fishing is addressed as part of the Common Fisheries Policy (CFP). Council Regulations (EEC) 2847/93 establishing a control system applicable to CFP, (EC) 2371/2002 on the conservation and sustainable exploitation of fisheries resources under the CFP and several Council Regulations laying down control measures for areas under regional management arrangements provide for an array of restrictions.

8. The proposed Regulation, however, introduces a new comprehensive system targeting all the activities that offer an outlet for IUU fishing. Although primarily aimed at fisheries products caught by third country fishing vessels, the system also requires a particular conduct of EU vessels (e.g. transshipment and export of catches) to operate successfully. Through simplified control and inspection rules it aims to improve effectiveness while some of the measures envisaged under the Regulation also exceed the scope of current deterrents to IUU fishing (e.g. liability of EU citizens and level of financial sanctions).

9. Within the WTO dispute settlement system the burden of showing that an Article XX exception applies lies with the party ascertaining it as a defence.⁴ An IUU Regulation whose scope of application excluded EU vessels and waters would therefore be difficult to justify on the basis of Article XX (g).

Necessary to protect animal life

10. The proposed Regulation addresses activities related to the trade in caught fish and does introduce new measures (e.g. fishing gear restrictions or catch quotas) directly protecting animal life. However, the establishment of a system which effectively limits EU

² US - Standards for Reformulated and Conventional Gasoline, WT/DS2/AB/R, 1996

³ US- Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R, 1998

⁴ Thomas J. Schoenbaum in Patricia Birnie and Alan Boyle, *International Law and the Environment*, 2nd ed., Oxford, 2002

market access for IUU fishing products may make a significant contribution to the conservation of fish stocks in the medium and long term.

11. Hence the Regulation could also be justified as a necessary measure for the protection of animal life. To determine whether a measure is “*necessary*” the Appellate Body weighs and balances several factors: the importance of the policy objective pursued, the contribution of the measure to this objective and the restrictive impact of the measure on international commerce. In the *Brazil – Measures Affecting Imports of Retreaded Tyres* case it also recognised that “*certain complex public health or environmental problems may be tackled only with a comprehensive policy comprising a multiplicity of interacting measures*”.⁵

12. But the Appellate Body maintained the position previously expressed in WTO jurisprudence: that a measure is “*necessary*” only if there is no less trade restrictive alternative reasonably available.⁶ The Regulation provides for an import ban on fishery products obtained from IUU fishing. By design an import ban is the most trade-restrictive measure possible. Its impact on international commerce has to be weighed against the measure’s contribution to the objective pursued. It appears that the exclusion of EU vessels and waters would weaken the new system and consequently reduce its contribution to the protection of animal life. Hence the overall balance of factors is likely to change to the effect that other alternative measures (e.g. further efforts to integrate third country vessels into arrangements under the CFP) would need to be considered.

Discrimination

13. Measures that meet the criteria of Article XX paragraphs (b) or (g) are nevertheless illegal if they “*constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail*”.

14. There are a number of countries outside the EU with detailed and strict regulations to manage their fisheries. A recent report by the European Court of Auditors indicates that Member States often fail to enforce the CFP. It finds that the control, inspection and sanction mechanisms in place are not capable of ensuring that the rules on managing the fisheries resources are effectively applied. The Member States’ inspection systems do not prevent infringements; they do not ensure effective detection of violations and consistent follow up; and even when penalties are imposed they prove to have little deterrent effect.⁷

15. Hence there is significant evidence that the situation in the EU is similar (if not worse) to the conditions prevailing in other countries (e.g. Australia, Canada or Norway). In the *Shrimp/Turtle* case the Appellate Body found that “*discrimination results not only when countries in which the same conditions prevail are differently treated, but also when the application of the measure at issue does not allow for any inquiry into the appropriateness of the regulatory program for the conditions prevailing in those exporting countries*”.

⁵ Brazil - Measures Affecting Imports of Retreaded Tyres, WT/DS332/AB/R, 2007

⁶ EC - Measures Affecting Asbestos and Asbestos Containing Products, WT/DS135/AB/R, 2001

⁷ Special Report No 7/2007 (pursuant to Article 248(4) second paragraph, EC) on the control, inspection and sanction systems relating to the rules on conservation of Community fisheries resources

16. Thus excluding only EU vessels and waters from the application of the proposed Regulation without careful assessment of the conditions prevailing in other jurisdictions (or the establishment of a mechanism that allows for such an assessment) is likely to amount to an arbitrary or unjustifiable discrimination between countries.

Agreement on Technical Barriers to Trade

17. Any measures that fall under both the GATT and the TBT are to be reviewed under the TBT only.⁸ Technical regulations obstructing international trade may be justified if they are not more trade-restrictive *“than necessary to fulfil a legitimate objective taking account of the risks non-fulfilment would create”*.⁹ Such legitimate objectives include the protection of animal life or the environment. While the level of protection is in principle up to the WTO member state it shall not be more restrictive than necessary.¹⁰ The considerations above would apply.

18. Article 12 TBT requires parties to provide differential and more favourable treatment to developing countries taking into account their special development, financial and trade needs. Developing countries shall receive technical assistance “to ensure that the preparation and application of technical regulations, standards and conformity assessment procedures do not create unnecessary obstacles to the expansion and diversification of exports from developing country”. There are no decision of WTO dispute settlement bodies interpreting Article 12 and its relationship with national environmental protection efforts.

19. The provision recognized that developing countries *“may face special problems, including institutional and infrastructural problems, in the field of preparation and application of technical regulations, standards and conformity assessment procedures”*. It appears to suggest that actions to curb IUU fishing should not create unnecessary obstacles to the expansion and diversification of exports from developing countries. Trade-related international actions on combating IUU fishing may therefore not be taken into effect until developing countries capability in fishery regulation has been improved to a certain level.

Done in London, 10 April 2008

Contact:
Joy Hyvarinen
Director
FIELD
3 Endsleigh Street
London WC1H 0DD, UK
Tel: +44 20 78727200
Email: Joy.Hyvarinen@field.org.uk

⁸ Note Annex 1 A to the Agreement Establishing the World Trade Organization

⁹ Article 2 para.2 TBT

¹⁰ Thomas J. Schoenbaum in Patricia Birnie and Alan Boyle, International Law and the Environment