Expert opinion:

WTO compatibility of an IMO number requirement for non-EU vessels supplying fisheries products into the EU market

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On 6th July 2017, the European Commission Directorate-General for Maritime Affairs and Fisheries (DG MARE) submitted its reply to the Long Distance Fleet Advisory Council (LDAC) regarding its Advice[1] that the requirement for an International Maritime Organization (IMO) Ship Identification Number currently applicable to EU vessels be extended to non-EU vessels supplying fisheries products into the EU market (hereinafter, proposed measure). DG MARE does not favour the introduction of this measure and makes a number of arguments against it, including its alleged incompatibility with WTO rules on which this short expert opinion concentrates. At the outset, it should be noted that the WTO-incompatibility concerns raised by DG MARE (i.e., last substantive paragraph) are not a model of clarity, nor well-grounded in specific provisions of WTO law.

i) DG MARE claim that regulatory measures "must be applied to fisheries products, not vessels, in order to ensure acceptability under WTO rules"

This first claim by DG MARE is not well-founded for two reasons. First, the distinction drawn by DG MARE between vessels and fisheries products is flawed, as it misrepresents the nature of the proposed measure. That is, the proposed requirement for an IMO Ship Identification Number would not apply to non-EU vessels in general, but only to those non-EU vessels supplying fisheries products into the EU market. As such, the proposed measure would clearly act as a *condition on the importation and sale of fisheries products* into the EU market, and hence it would apply to such products. Second, and most importantly, there is no general requirement in WTO law that regulatory measures apply to products only in order to ensure their compatibility with WTO rules – in fact, DG MARE does not specify any basis in WTO law in support of its allegation.

The proper characterization of the proposed measure is mainly relevant for determining which WTO agreement (*in casu*, the GATT only, or also the TBT Agreement)[2] would be applicable. In this regard, it is quite likely that the proposed measure would be covered by the national treatment (NT) obligation in Article III:4 GATT as an *internal regulation or requirement* "affecting the internal sale [or] offering for sale" of fisheries products in the EU market, and by implication, also subject to the most-favoured-nation (MFN) treatment

[1] LDAC Advice on the requirement for IMO numbers for importing seafood products into the EU market from non-EU vessels, dated 30 May 2017, available at: http://ldac.chil.me/download-doc/143981 [hereinafter, LDAC Advice].

[2] The WTO Agreement on Technical Barriers to Trade, or TBT Agreement, is a *lex specialis* vis-à-vis the General Agreement on Tariffs and Trade (GATT), as it applies to a more limited class of measures (i.e., technical regulations and standards): WTO Appellate Body Report, *EC – Asbestos (2001)*, WT/DS135/AB/R, para. 80. However, both agreements can apply cumulatively to the same covered measure, unless this results in a 'conflict' (General Interpretative Note to Annex 1A).

obligation in Article I:1 GATT.[3] Conversely, it is less clear that the proposed measure would qualify as a *technical regulation* under Annex 1.1 of the TBT Agreement,[4] and thus it is less plausible it would be subject to the TBT disciplines. But in any event, the characterization of the proposed measure (i.e., as an 'internal regulation' under the GATT, or also as a 'technical regulation' under the TBT Agreement) cannot, in and of itself, be conclusive of its WTO-consistency – this would need to be assessed against the substantive provisions of the agreement concerned (see further ii).

ii) DG MARE claim that "the requirement of having an IMO number would be considered a technical barrier to trade, as these rules are not applicable to all vessels"

This second claim by DG MARE is equally unfounded since the fact that the proposed measure applies only to some (and not all vessels) is immaterial for it to be considered a 'technical barrier to trade'. Moreover, contrary to what DG MARE appears to suggest, WTO law does not prohibit *all* technical barriers to trade, but only to the extent that there is a violation of substantive disciplines in the GATT and TBT Agreement. In this regard, DG MARE fails to substantiate any violation of a specific GATT or/and TBT provision.

It is true, as DG MARE submits, that the proposed measure is not applicable to all vessels: notably, there is a differentiation between vessels that are (covered by requirement) and are not (exempted from requirement) eligible under the IMO Ship Identification Number Scheme, as well as between vessels fishing outside (covered by requirement if 15 meters LOA or above) and exclusively inside (covered by requirement if 24 meters LOA or above) the waters under the national jurisdiction of the flag State.[5] However, it is important to stress that this differentiation between vessels is not, *per se*, contrary to WTO law unless it gives rise to *discrimination between fisheries products* originating in different WTO members.

In this respect, both the GATT and the TBT Agreement lay down similar *non-discrimination obligations* in respect of domestic/imported 'like products' (national treatment)[6] and between imported 'like products' (MFN treatment).[7] On its face, the proposed measure does not discriminate between 'like' fisheries products[8] on the basis of their origin, and hence would not seem to amount to *de jure* discrimination under either the GATT or the TBT Agreement. In addition, DG MARE has not presented any evidence to suggest that the proposed measure could give rise to *de facto* discrimination, by conferring less favourable treatment (i.e., having a disproportionally worse or disparate impact) on the group of fisheries products originating in a particular WTO member.

Even if for the sake of the argument we assume the TBT Agreement would be applicable to the proposed measure, it would not seem to be in tension with the (free-standing) necessity

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[3] Article I:1 GATT applies to "all rules and formalities in connection with importation and exportation" as well as to "all matters referred to in paragraphs 2 and 4 of Article III".

[4] This reads: "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."

[5] LDAC Advice, p. 3.

[6] Article III GATT and Article 2.1 TBT.

[7] Article I:1 GATT and Article 2.1 TBT.

[8] It seems safe to assume that all domestic and imported fisheries products covered by the proposed measure are 'like', since there is no obvious difference in terms of their physical characteristics, end-use, tariff classification, consumers' tastes and habits, and hence are quite plausibly on a 'competitive relationship' in the EU market.

obligation in Article 2.2 TBT Agreement.[9] In this regard, DG MARE has not contested the statement in the LDAC Advice that "a consistent means of identifying fishing vessels, through the carrying of Unique Vessel Identifiers (UVI), is a key tool in preventing and combatting illegal, unreported and unregulated (IUU) fishing",[10] and that the IMO "Ship Identification Number Scheme is widely recognised as the best available UVI for the global fishing fleet".[11] Accordingly, it would appear difficult for a potential complainant to make a successful violation claim under Article 2.2 TBT Agreement, since there seems to be no 'less trade-restrictive' alternative measure to the IMO Ship Identification Number that would make an 'equivalent contribution' to the objective of combatting IUU fishing.[12] Moreover, as further elaborated below, the proposed EU measure appears to be based upon a relevant international standard (i.e., the IMO Ship Identification Number Scheme) and thus, pursuant to Article 2.5 TBT Agreement, would benefit from a (rebuttable) presumption of necessity and consistency with Article 2.2 TBT Agreement.[13]

iii) DG MARE concern that the proposed measure would impose "new obligations on third countries", going beyond existing international standards

The Advice submitted by the LDAC to the Commission emphasizes the close relationship between the proposed measure and existing international standards, including the IMO Ship Identification Number Scheme.[14] The Advice also makes clear that the proposed measure should only impose an obligation to hold an IMO number on fishing vessels that are eligible under the IMO scheme.[15] Nonetheless, as DG MARE rightly asserts, the proposed measure would introduce a 'new obligation' for certain, eligible, vessels to hold an IMO number, since this is not strictly required under the IMO scheme. This is because the IMO scheme is voluntary for fishing vessels and merely permits fishing vessels to apply for a ship identification number provided they meet the eligibility conditions – namely, (i) all motorized inboard fishing vessels of less than 100 GT (24m LOA equivalent[16]) down to a size limit of 12m LOA that are authorized to operate outside waters under national jurisdiction, and (ii) all other fishing vessels, including non-steel hull vessels and those not authorized to operate outside of waters under a country's jurisdiction, provided they weigh at least 100 GT (24m

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[9] Unlike under the GATT, Article 2.2 TBT Agreement provides the possibility for a direct and independent claim against the 'necessity' of a regulatory measure, *even if* it is designed and applied in a non-discriminatory manner.

[10] This would clearly fall within the list of legitimate objectives in Article 2.2 TBT Agreement, which includes environmental protection and is furthermore non-exhaustive.

[11] LDAC Advice, p. 1. See also http://www.iuuwatch.eu/wp-content/uploads/2017/05/IMO-Numbers-FINAL-1-High-Singles.pdf, p.2.

[12] WTO Appellate Body Report, *US – Tuna II (2012)*, WT/DS381/AB/R, para. 321, stating that in order to establish whether a technical regulation is 'more trade-restrictive than necessary' to fulfil a legitimate objective within the meaning of Article 2.2 TBT Agreement, an analysis of the following factors should be undertaken: (i) the degree of contribution made by the measure to the legitimate objective at issue; (ii) the trade-restrictiveness of the measure; (iii) whether a less trade-restrictive measure is reasonably available that would make an equivalent contribution to the relevant legitimate objective, taking into account the risks non-fulfilment would create.

[13] Article 2.5 TBT Agreement provides: 'Whenever a technical regulation is prepared, adopted or applied for one of the legitimate objectives explicitly mentioned in paragraph 2, and is in accordance with relevant international standards, it shall be rebuttably presumed not to create an unnecessary obstacle to international trade.'

[14] LDAC Advice, p. 1. Similarly, 11 major Regional Fisheries Management Organizations (RFMOs) have mandated that vessels above a certain size or tonnage fishing within their Convention areas obtain and report IMO numbers.

[15] LDAC Advice, p. 3.

[16] FAO Fisheries Circular No. 966, p.7, available at: ftp://ftp.fao.org/docrep/fao/003/x9656e/x9656e00.pdf

LOA equivalent).[17] The proposed measure may be considered ‘unilateral’ only in the sense that it builds on existing international standards, by making compliance with them mandatory, and drives compliance with the mandates of Regional Fisheries Management Organizations (RFMOs)[18]. Indeed, as far as fishing vessels that are authorized to fish outside of waters under national jurisdiction are concerned, the proposed measure is slightly less strict than the IMO standards (providing for a minimum size threshold of 15m LOA rather than 12m LOA).

However, this is not necessarily problematic from a WTO law standpoint. As a matter of principle, it should first be recalled that WTO members are generally encouraged to harmonise their regulatory measures around existing international standards, but they are under no absolute obligation to do so. On the contrary, WTO members retain a sovereign right to set their own level of environmental or public health protection, going beyond existing international standards, if they so desire.[19] For our purposes, this is most notably reflected in Article 2.4 TBT Agreement, where the obligation to base technical regulations upon relevant international standards is qualified by “except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued”.[20] Assuming this TBT provision is applicable, the proposed measure would likely meet the relatively flexible requirement of being ‘based’ on the IMO scheme,[21] which seems a ‘relevant international standard’ for the purpose of Article 2.4 of the TBT Agreement.[22] As already noted, the main difference between the two concerns the threshold for vessels fishing outside national waters (i.e., 12m LOA under the IMO Ship Identification Number Scheme and 15m LOA under the proposed measure), where the proposed measure would be slightly less strict than the IMO scheme. Moreover, the fact that the proposed measure would render compliance with a (voluntary) international standard (i.e., IMO scheme) mandatory to access the EU market is not contrary to, but the very purpose, of Article 2.4 TBT Agreement.

In addition, even assuming the proposed measure results in *de facto* discrimination under Articles I or/and III GATT (see ii above; a claim that DG MARE has not substantiated), it could still be justified under Article XX GATT. This would remain the case even if it goes beyond existing international standards and even if it regulates production process methods (PPMs) rather than the product physical properties or quality as such. Indeed, the WTO Appellate Body has made clear in a report concerning an unilateral PPM-based measure that requiring exporting countries to comply with, or adopt, certain standards or policies unilaterally prescribed by the importing country does not render a measure, a *priori*, incapable of justification under Article XX GATT.[23]

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[17] International Maritime Organization, ‘Circular Letter No.1886/Rev.6’, dated 8 August 2016, available at: http://www.iuuwatch.eu/wp-content/uploads/2016/11/FINAL-Circular-Letter-No.-No.1886-Rev.6-Implementation-Of-Resolution-A.107828-IMO-Ship-Identification-Number-Scheme-Secretariat.pdf.

[18] See: http://www.iuuwatch.eu/wp-content/uploads/2017/05/IMO-Numbers-FINAL-1-High-Singles.pdf at p.3.

[19] See e.g., TBT Agreement, Preamble, para. 6.

[20] There is no similar requirement to use existing international standards under the GATT.

[21] ‘As the basis for’ in Article 2.4 TBT does not require full conformity between the technical regulation and the relevant international standard, but a ‘very strong and close relationship’ and at minimum an absence of contradiction: WTO Appellate Body Report, *EC – Sardines (2002)*, WT/DS231/AB/R, paras. 242-248.

[22] A relevant international standard within the meaning of Article 2.4 TBT Agreement needs to be adopted by a ‘standardising body’ (i.e., a body with recognized activities in standardisation), whose membership is open on a non-discriminatory basis to the relevant bodies of at least all WTO members: WTO Appellate Body Report, *US – Tuna II (2012)*, WT/DS381/AB/R, paras. 356-359.

[23] WTO Appellate Body Report, *US – Shrimp (1998)*, WT/DS58/AB/R, para. 121. This dispute was brought by India, Malaysia, Pakistan and Thailand against Section 609 of US Public Law 101-162, which imposed an

In this respect, the proposed measure would need to satisfy two sets of substantive conditions to be justified under Article XX GATT: (i) those in paragraph g (i.e., it is *related to the conservation of exhaustible natural resources*[24] and *made effective in conjunction with restrictions on domestic production or consumption*) and (ii) those in the chapeau (i.e., does not amount to *arbitrary or unjustifiable discrimination*).

The first set of conditions under paragraph g of Article XX GATT seems to be easily met by the proposed measure: it is aimed at combatting IUU fishing, which has been widely recognised as constituting "one of the most serious threats to the sustainable exploitation of living aquatic resources" and a "major threat to marine biodiversity",[25] while it would be applied 'in conjunction with' the same requirement already in place for EU vessels to hold an IMO Ship Identification Number. As to the chapeau requirements, it is important to ensure that any discrimination between countries/fisheries products resulting from the differentiation between vessels drawn in the measure[26] is 'rationally connected' to its conservation objective.[27] In other words, differentiated requirements for vessels would have to be explained by the need to combat IUU fishing.[28] In this regard, the distinction between vessels fishing inside (24m LOA) and outside (15m LOA) of national waters would seem to be rationally related to the objective of combatting IUU fishing, given that vessels fishing on the high seas or in the Exclusive Economic Zones of other countries are harder to control than those fishing within the waters of the flag State. As noted previously, this is recognized by the IMO, which allows vessels down to 12m LOA to apply for an IMO number where they are fishing outside of waters under the national jurisdiction of the flag State.[29]

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import ban on shrimp and shrimp products from non-certified countries (i.e. countries that had not used a certain net, namely approved Turtle Excluder Devices (TEDs), in catching shrimp), including the complainants. As such, the case concerned a non-product-related (npr) PPM requirement, since the prescribed harvesting methods (TEDs) may well be turtle-friendly but do not affect the physical characteristics of the shrimp products. It is worth highlighting that the revised US measure at issue in *US – Shrimp (Article 21.5 – Malaysia)*, which still conditioned market access on npr-PPM criteria but allowed for equivalence recognition of foreign regulatory programmes comparable in effectiveness, was found to be justified under Article XX GATT.

[24] This has been interpreted quite flexibly, as involving a 'close and real' relationship between the measure at issue and the conservation of 'exhaustible natural resources', which embraces both non-living and living resources: WTO Appellate Body Report, *US – Shrimp (1998)*, WT/DS58/AB/R, 136-141.

[25] See e.g., Council Regulation (EC) No 1005/2008, Preamble, paras. 3-4.

[26] LDAC Advice, p. 3.

[27] This 'rational connection' standard is key for justifying discrimination under the chapeau: WTO Appellate Body Report, *EC – Seal Products (2014)*, WT/DS400/DS401/AB/R, para. 5.318.

[28] Assuming the proposed is covered by the TBT Agreement, a similar reasoning would apply under the 'stems from a legitimate regulatory distinction' test of Article 2.1 TBT.

[29] See IMO Circular Letter, note 17 above.

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