THE NEED FOR TRADE MEASURES IN CCAMLR

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Abstract

Last year the Commission considered a proposal for a Conservation Measure concerning the adoption of a trade measure that will promote compliance with CCAMLR’s agreed upon rules to bring sustainable fishing. The proposal received the support of all but one State. ASOC would like to support the adoption of this Conservation Measure by the Commission at its XXVII Meeting, and clarify why the adoption of such a measure is a positive step for CCAMLR. ASOC reviews in this paper the relevant international legal framework, and concludes that a measure such as the one proposed does not challenge in any way the existing international legal regime, including neither the rules of the WTO nor the rules and principles of CCAMLR. On the contrary, there is full international support to taking trade measures to combat IUU fishing.
THE NEED FOR TRADE MEASURES IN CCAMLR

At its last meeting, the CCAMLR Commission reported an increase in Illegal, Unreported and Unregulated (IUU) fishing in the CCAMLR Area for the preceding three years.\(^1\) CCAMLR’s Scientific Committee has estimated that in this period levels of IUU fishing exceeded levels of sustainable catch several times, and that the level of IUU fishing in several CCAMLR areas is undermining any attempt to provide the basis for sustainable fishing.\(^2\)

The United Nations General Assembly (“General Assembly”) has repeatedly emphasized in its Resolutions on Sustainable Fisheries that States must take “all necessary measures” consistent with international law when there is clear evidence that vessels have been engaged in or have supported IUU fishing.\(^3\) The FAO’s International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (IPOA-IUU) foresaw the use of a wide range of measures to combat IUU fishing.\(^4\)

Thus, when confronted with the current threats posed by IUU fishing, the CCAMLR regime can, and should, make use of new tools. Only in this way it will be able to reach its objective of conservation of Antarctic marine living resources stated in Article II of the Convention.

As indicated by ASOC in its paper “The use of trade-related measures to deter IUU fishing: a step ahead for CCAMLR,” submitted to the XXVI Commission Meeting,\(^5\) meaningful progress would be made if the Commission adopted trade-related measures against flag States that undermine CCAMLR’s conservation and management measures and fail to cooperate with the CCAMLR regime. Such measures can be extremely effective, as they have a direct impact on the economic incentives to engage in IUU fishing by reducing access to international markets.

Last year, the CCAMLR Commission considered a proposal for a Conservation Measure concerning the adoption of a trade measure to promote compliance.\(^6\) In spite of receiving the support of all but one Member State, consensus could not be reached and the proposal was rejected. ASOC would like to support adoption of this Conservation Measure by the Commission at its XXVII Meeting.

In the present paper ASOC argues why the adoption of trade-related measures, such as the one proposed at CCAMLR XXVI, and others that may be needed in the future, constitutes a positive, effective and necessary step for CCAMLR. The adoption of such measures would be consistent with the existing international legal regime, including the rules and principles of CCAMLR and of the Antarctic Treaty System, and of the World Trade Organization (WTO).

1. International support for trade-related measures

In October 2007, ministers from the EC Member States and from developing States attending the high-level conference on the eradication of IUU fishing, held in Lisbon,\(^7\) adopted a Ministerial Declaration in which, after calling for a further reinforcement of existing measures designed to strengthen control and surveillance of fishing activities, encouraged “international bodies and multilateral organisations, and in particular RFMOs, to promote, put in place or reinforce instruments designed to identify, prevent and sanction the trade of fisheries product stemming from IUU fishing.”\(^8\)

Two months later, the UN General Assembly welcomed the adoption of this Ministerial Declaration,\(^9\) and urged States

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\(^1\) SC Report CCAMLR XXVI, para. 5.20. See Annex 5, Table 3.
\(^2\) SC Report CCAMLR XXVI, para. 8.4.
\(^4\) The IPOA-IUU was adopted at the 24th Session of COFI on 2 March 2001 and endorsed by the 120th Session of the FAO Council on 23 June 2001.
\(^5\) CCAMLR-XXVI/IBG/26 (“ASOC Report”).
\(^6\) CCAMLR-XXVI/33.
\(^7\) The Ministerial Declaration was adopted on 29 October 2007 by fisheries ministers of EC member States, of Norway and Iceland, and by the EC’s main international counterparts in fisheries agreements such as Ivory Coast, Guinea-Bissau, Morocco, Mauritius, Mozambique, Senegal, and Seychelles. Representatives of the European Parliament and FAO also attended this meeting.
\(^9\) See UNGA Res. 62/177, supra note 3, para. 47: “Welcomes the adoption of the Ministerial Declaration of the high-level conference on the eradication of illegal, unreported and unregulated fishing, held in Lisbon on 29 October 2007, in relation to the need to reinforce fisheries control and surveillance measures and address the commercial dimension of the problem, so as to deprive all those involved in illegal, unreported and unregulated fishing of any profits arising from such activities.”
“individually and through regional fisheries management organizations and arrangements, to adopt and implement internationally agreed market-related measures in accordance with international law, including principles, rights and obligations established in World Trade Organization agreements, as called for in the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing.”

The IPOA-IUU, when contemplating the different set of measures to prevent, deter and eliminate IUU fishing, expressly recommends in paragraphs 65 to 76 the use of market-related measures.10

More recently, The Draft Technical Guidelines for Responsible Fish Trade, as adopted by the Technical Consultation on Technical Guidelines for Responsible Fish Trade of 5-7 November 2007, endorsed the use of trade measures against IUU fishing.11

Finally, it is also important to note that other similar measures have been adopted by bodies such as the International Commission for the Conservation of Atlantic Tunas (ICCAT) and the Commission for the Conservation of Southern Bluefin Tuna (CCSBT). The former has proven to be quite effective, as it has brought into the regional agreement a number of States that formerly had not complied with ICCAT provisions. The latter, potentially more sensitive as it applies only to non-Members, has gone unchallenged under WTO rules since its adoption in 2000.12

2. Trade-related measures are consistent with the CCAMLR regime

The function of the CCAMLR Commission is to give effect to the objective and principles set out in Article II of the Convention.14 To this end, it shall take any conservation measure that it considers necessary for the fulfilment of such objective.15 Nothing in the Convention or in any of the ATCM Recommendations that led to the signing of CCAMLR prevents the Commission from taking any specific type of measure to achieve its goals, as long as measures are adopted in conformity with the Convention.16

The CCAMLR Commission has already adopted a number of measures that have an economic impact on the activities of IUU fishing operators. CCAMLR Members have adopted them unanimously and in accordance with international law. The most notable measure in the CCAMLR regime is its Catch Documentation Scheme for Dissostichus spp. (CDS), which generates a restriction to the imports of toothfish.17

The Commission has also adopted a measure to close ports to IUU-listed vessels, including vessels flagged to States which are not Parties to CCAMLR.18 This measure has obvious economic implications for IUU operators and has the effect of preventing market access to fish caught undermining CCAMLR conservation measures. It should be noted that the establishment of an IUU-vessel list is in itself a trade-related measure. The Commission has approved Conservation Measures for inclusion of vessels in both Contracting Party and non-Contracting Party IUU-vessel lists.19 A non-Contracting Party vessel shall be included in the list if engaged in IUU fishing activities in the Convention Area that threaten to undermine the effectiveness of CCAMLR conservation measures.

In addition, the possibility of taking multilaterally agreed trade-related measures in respect to flag States of IUU-listed vessels, both Contracting and non-Contracting Parties, is already contemplated in CCAMLR conservation measures.20 Therefore, the proposal submitted to the XXVI CCCAMLR Commission did not add essentially a new measure to the CCAMLR regime. Rather, it provided a consistent and transparent procedure for the Commission to implement existing rules.

10 See UNGA Res. 62/177, supra note 3. para. 55. See also Res. 61/105, UN Doc. A/RES/61/105, of 6 March 2007, para 46.
11 See ASOC report, supra note 5, at 5.
12 At para 74: “States should support measures to deter, prevent and eliminate IUU fishing on the high seas by i.a. exercising adequate control of vessels flying their flag and through relevant international fisheries management bodies with a view to ensure sustainable and responsible fisheries, including the use of measures that affect international trade, consistent with international law and WTO agreements.” FAO Fisheries Report No. 854, FIU/R854 (Tri). The remaining paragraphs of these Technical Guidelines shall be discussed by the Technical Consultation that will take place in conjunction with the eleventh session of COFI/T, to which they will be submitted for consideration.
13 See ASOC report, supra note 5, at 12.
14 CCAMLR, Art. IX.1.
15 CCAMLR, Art. IX.1(f) and IX.2(i).
18 See generally CCAMLR Conservation Measures 10-06 and 10-07.
19 See CCAMLR Conservation Measure 10-06, para. 25, and 10-07, para. 30.
3. The proposed trade-related measures are in compliance with international law

Trade-related measures need to comply with international law, as indicated in the IPOA-IUU and recent Resolutions of the UN General Assembly. There is a concern that some trade-related measures could result in a violation of a rule of the WTO, particularly as a result of this measure being discriminatory or constituting a disguised barrier to trade. In this section ASOC would like to clarify that the trade measures considered at CCAMLR XXVI do not fall under the latter category and are fully in accordance with international law.

For the purposes of this argument, it is important to recall both the United Nations Convention on the Law of the Sea (UNCLOS) and the rules of the World Trade Organization (WTO), particularly of the General Agreement on Tariffs and Trade (GATT 1994).

A. UNCLOS

UNCLOS establishes under Article 117 a duty of States to adopt, individually or in cooperation with others, with respect to their nationals, measures for the conservation of the living resources of the high seas. Article 118 establishes a general obligation of States to cooperate with each other in the conservation and management of living resources in the areas of the high seas.

Thus, States party to UNCLOS, even if they were not party to CCAMLR, have an obligation to take measures for the conservation of living resources in the high seas with respect to their nationals fishing in the high seas of the CCAMLR Area, and to cooperate with other states in the conservation and management of living resources in that same area. Those flag States that provide support to vessels that operate in contravention of CCAMLR conservation rules are clearly in breach of this obligation.

B. WTO

The opportunities for friction between environmental and trade regimes has grown in the past 15 years, particularly as a result of the development of new multilateral environmental agreements (MEAs). This has generated some case law resulting from disputes brought before the former GATT Panel and the WTO Dispute Settlement Body, which assist in the clarification of the applicable rules. In the sections below we provide a review of the main rules and principles to be considered when examining the compatibility of a measure such as the one proposed at CCAMLR XXVI with international trade law.

i) Applicable WTO rules

The rules governing the matter are in themselves rather simple. We can find them in Articles I, III, XI, and XX of the GATT. As explained in the aforementioned ASOC paper on the use of trade-related measures, by means of the general exception provided in Article XX, the GATT allows the adoption of trade restrictive measures for the purposes of conserving marine living resources. Building on Article XX, original of 1947, the Agreement Establishing the WTO of 1994 introduced some key considerations in its Preamble that rendered sustainable development and the protection of the environment not only valid exceptions to the GATT, but positive principles to pursue in the implementation of the WTO Agreements and according to which interpret WTO rules. Dispute settlement decisions, such as the Appellate
Body’s decision in the Shrimp/Turtle case in 1998, stressed that sovereign states should act together bilaterally, plurilaterally or multilaterally to protect endangered species or to otherwise protect the environment.\textsuperscript{28}

If the CCAMLR Commission considers that it is necessary to adopt trade-related measures to promote compliance and combat IUU fishing, such as the one proposed at CCAMLR XXVI, it may lawfully do so. It only has to do it under the following requirements set under Article XX of GATT and clarified by its case law:

(a) The measure adopted is not “arbitrarily” or “unjustifiably” discriminatory

Exceptions under Article XX GATT allow for some degree of discrimination if the measure is “necessary to protect human, animal or plant life or health” or related “to the conservation of exhaustible natural resources.” However, the measure proposed at CCAMLR XXVI does not discriminate at all. The basis of the application of the measure is related to the compliance with multilaterally-agreed, science-based conservation measures aimed at allowing the sustainable use of the resources, and have no link with the nationality or the economic circumstances of the fishing operators.

(b) The measure is not a “disguised restriction on international trade”

Article XX allows certain restrictions on international trade, as long as they are not disguised. The proposed measure is clear as to its goal and transparent as to its procedure and final publicity.

(c) Multilaterality

GATT does not impose any obligation upon States to take trade measures through multilateral mechanisms, but in some of its case law on environmental disputes it has indicated a preference for States taking trade-related measures through multilateral mechanisms. This reasoning was present in the Tuna/Dolphin case, resolved by GATT’s Panel in 1991,\textsuperscript{29} and in the Shrimp/Turtle case, resolved finally by the Appellate Body in 1998 and 2001.\textsuperscript{30} The ongoing work of the WTO Committee for Trade and Environment (CTE) has also emphasized that MEAs and WTO rules are mutually supportive, and that “a range of provisions in the WTO can accommodate the use of trade-related measures needed for environmental purposes.”\textsuperscript{31}

The preference for taking efforts in adopting trade measures multilaterally has also been supported by the IPOA-IUU.\textsuperscript{32}

Related to this point, it is to be noted that the trade measure considered at CCAMLR XXVI does not only arise in a multilateral context, but also foresees extensive cooperation efforts among all concerned parties. It gives the opportunity to flag States to respond and react to the CCAMLR-proposed measures before they are adopted. According to this proposal, a recommendation to take trade measures against a State constitutes the final and exceptional step, to be taken only when no space has been left for cooperation.

\textit{ii) Existing CCAMLR trade measures are consistent with WTO rules}

As indicated in section 2 above, the CCAMLR Commission has adopted in past years a number of trade measures, most notably the CDS for toothfish and port State measures applicable to vessels listed on CCAMLR’s IUU vessel lists.

As in the new trade measure tabled at CCAMLR XXVI, CCAMLR Conservation Measures 10-05 (CDS), 10-06 (Scheme to Promote Compliance by Contracting Party vessels) and 10-07 (Scheme to Promote Compliance by non-Contracting Party vessels) introduce market-related tools to foster CCAMLR’s objectives, and are applicable to both Contracting and non-Contracting Parties.

\begin{thebibliography}{99}
\bibitem{wto-case} WTO case Nos. 58 (and 61), India, Malaysia, Pakistan and Thailand v. US. Ruling adopted on 6 November 1998; Appellate Body’s decision of 12 October 1998, Doc. WT/DS58/AB/R. At para 185: “In reaching these conclusions, we wish to underscore what we have not decided in this appeal. We have not decided that the protection and preservation of the environment is of no significance to the Members of the WTO. Clearly, it is. We have not decided that the sovereign nations that are Members of the WTO cannot adopt effective measures to protect endangered species, such as sea turtles. Clearly, they can and should. And we have not decided that sovereign states should not act together bilaterally, plurilaterally or multilaterally, either within the WTO or in other international fora, to protect endangered species or to otherwise protect the environment. Clearly, they should and do.”
\bibitem{mexico-case} Mexico v. US. This decision was never formally adopted and thus never became binding upon the US.
\bibitem{supra-note} See supra note 28.
\bibitem{asoc-paper} See ASOC paper, supra note 5, at 8.
\bibitem{ipoa-iiu} “States should cooperate to adopt appropriate multilaterally agreed trade-related measures, consistent with the WTO, which may be necessary to prevent, deter and eliminate IUU fishing for specific fish stocks or species.” See IPOA-IUU, supra note 4, para. 68.
\end{thebibliography}
WTO's CTE has considered that both the CDS and the Scheme to Promote Compliance by Non-Contracting Party Vessels with CCAMLR Conservation Measures are in compliance with its rules:

“Although ICCAT and CCAMLR, for example, contain trade-related provisions, these agreements do not deal specifically with subsidization. Both are considered to provide examples of appropriate and WTO-consistent (i.e. non-discriminatory) use of trade measures in multilateral environmental agreements.”

Other international instruments, such as the IPOA-IUU support this view.

4. Concluding remarks

It can be concluded from the preceding review that trade measures such as the one proposed at CCAMLR XXVI can be adopted in the CCAMLR regime with full confidence as to their effectiveness and their legality. In particular, it should be considered that:

- There is widespread support in global fora such as the UN General Assembly and the FAO to taking trade-related measures to combat IUU fishing. These measures are perceived as a useful and necessary tool to combat IUU fishing.
- There is full consistency between the measures proposed and other measures already in place in CCAMLR. CCAMLR has adopted measures with an incidence in international trade, such as the CDS. CCAMLR has also adopted measures applicable to non-Contracting Parties, such as the scheme to promote compliance with CCAMLR Conservation Measures. All these measures have been considered by the WTO to be fully in compliance with WTO rules.
- There is a general obligation under UNCLOS to take measures to conserve marine living resources and to cooperate with other States to this end. This general obligation is applicable to all parties to UNCLOS, regardless of whether they are Contracting or non-Contracting Parties to CCAMLR. This general obligation should not be forgotten when considering the need to take action against States that have failed to take measures to ensure the conservation of marine living resources.
- The trade measure proposed at CCAMLR XXVI if fully compatible with WTO rules, because: 1) it aims at the conservation of marine living resources and therefore falls under one of the exceptions foreseen in art. XX of GATT; 2) it is non-discriminatory, as it is adopted on the basis of solid scientific data and has no link with either the nationality or the economic circumstances of the fishing operators; and 3) it is clear and transparent as to its implementation process. In addition, it is adopted in a multilateral context, allowing for ample space for cooperation between the Parties, in the full spirit of CCAMLR.
- The trade measure proposed at CCAMLR XXVI is not different in its goals or in its essence to any of the trade measures already in force in the CCAMLR regime.
- Current international law, including WTO rules, is clear on the matter. However, as it happens with all sources of law, interpretation of those rules may be necessary at times. The process to better ascertain the relationship between conservation measures and trade rules is not finite, but ongoing. GATT and WTO case law has been and will be of assistance to this end. The CTE continues to be active, but is currently focusing on other important matters. There is no expectation of any new step being taken by the WTO with regard to the adoption of trade-related measures in multilateral agreements in the near future. Instead, action against IUU fishing is needed today.

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33 CTE, Doc. WT/CTE/W/167, 16 October 2000. CCAMLR had previously made a communication to the CTE explaining the trade-related measures adopted so far at CCAMLR, including the CDS. See Doc. WT/CTE/W/148, 30 June 2000, especially at paras. 11 and 14-23.

34 See supra note 4, at para 69: “Trade-related measures could include the adoption of multilateral catch documentation and certification requirements, and multilaterally-agreed import and export controls and prohibitions, among others.”

35 See generally website of the WTO on Trade and Environment: www.wto.org/english/tratop_e/envir_e/envir_e.htm.