

# Can the WTO Help Fight IUU Fishing through Clarity-Enhancing Market Measures?

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**SUMMARY** Clarity enables insight and the ability to make and implement a plan. Nowhere is this more important than when addressing chronic problems that proliferate despite significant efforts to curb them—like illegal, unreported, and unregulated (IUU) fishing. United Nations (UN) narratives make clear that preventing, deterring, and eliminating IUU fishing is an objective of global importance, yet the problem persists. But could a factor in this be a lack of clarity in understanding what IUU fishing is when it comes to specific actions and infractions? And could the World Trade Organization (WTO) help bring about a more accessible way of understanding the problem? This brief argues for this approach and explains how it might be achieved.

Illegal, unreported, and unregulated (IUU) fishing implies a widespread range of undesirable fishing and fishing-support practices that involve breaching or undermining legal rules—for example, hiding catches from governing authorities. Such practices make fish stocks difficult to manage sustainably and ultimately deplete stocks and undermine the food and economic security of those who depend on them for their livelihoods.<sup>1</sup> The impacts of IUU fishing have concerned the international community over several decades, and concerted global and regional efforts have been devised and implemented, largely under the auspices of the United Nations (UN) Food and Agriculture Organization (FAO), since before the United Nations Convention on the Law of the Sea came into force.

First, a number of global and regional treaties have been developed in order to support states who wish to improve the governance of fishing vessels and the sustainability of their operations.<sup>2</sup> Second, UN policies have also highlighted the importance of combating IUU fishing. As part of the UN's Sustainable Development Goals (SDGs), and specifically SDG 14, "Conserve and Sustainably Use the Ocean, Sea, and Marine Resources for Sustainable Development," the eradication of IUU fishing has been identified as Target



14.4.<sup>3</sup> Further, as IUU fishing is a complex chronic problem, SDG 14 sets another target for its prevention and control, namely Target 14.6, seeking to “prohibit certain forms of fisheries subsidies which contribute to overcapacity and overfishing, and eliminate subsidies that contribute to IUU fishing, and refrain from introducing new such subsidies, recognizing that appropriate and effective special and differential treatment for developing and least developed countries should be an integral part of the WTO fisheries subsidies negotiation.”<sup>4</sup>

## RECENT INNOVATIONS

In the context of the work carried out by the WTO, some significant innovations have taken place with respect to the fight against IUU fishing. After more than two decades of negotiations, the WTO member states concluded their first environmental treaty and adopted an Agreement on Fisheries Subsidies in June 2022, which meets the target set by SDG 14.6 and lays the groundwork for further progress in the context of fisheries sustainability for WTO state parties.<sup>5</sup> Additionally, and significantly for those states, a broad range of market measures have also been developed during the past few decades to support the implementation of international and national laws—laws designed to strengthen IUU fishing controls and enhance the traceability and legality of fishery products.<sup>6</sup> These measures have been supported by the FAO and deployed by some regional fisheries management organizations (RFMOs) as a tool to combat IUU fishing,<sup>7</sup> on the condition that the measures adopted should comply with the international obligations established, *inter alia*, in the WTO agreements.<sup>8</sup>

The role of states that actively import fish in maintaining oversight over product traceability cannot be overstated; this is linked with certain aspects of legal compliance and is part of market due diligence as well. Indeed, actors that possess important international markets, such as the United States and the European Union (EU), have devised and implemented legislation that enables their domestic authorities to raise unilateral market measures as part of efforts to optimize IUU fishing control. Market mechanisms prohibiting the entry or unloading of fishing vessels identified as having engaged in IUU fishing practices into ports, or the importation of IUU fishing products, have been established by legislative tools such as EU Council Regulation 1005/2088 (widely known as the “IUU Regulation”) or, in the United States, the High Seas Driftnet Fisheries Enforcement Act. These are far-reaching and capable of significant impact. Such measures can provoke the strategic prioritization of IUU fishing control among trading partners of the EU and the United States.<sup>9</sup>

## THE ROLE OF RFMOS

RFMOs have also devised and implemented market tools to fight IUU fishing. Such mechanisms and controls are operated via the ports and borders of their contracting parties, with the principal objectives of enhancing traceability, identifying products originating from IUU practices, and rewarding good practices with market access.<sup>10</sup> Once implemented, trade measures can have important consequences not only for exporting states but also for private companies and individuals who either capture or export

seafood products.<sup>11</sup> As Margaret A. Young indicates, such measures “include enhanced seafood traceability and catch documentation schemes, the blocking of port access and landings, the identification and assessment of vessels engaged in IUU fishing and the prohibition on imports, transshipments or trade of fish products. It is important that such measures are in accordance with international law, including the agreements of the World Trade Organisation (WTO).”<sup>12</sup>

A key weakness in ensuring that the IUU fishing controls are compatible with WTO requirements is the lack of agreement on the definition of IUU fishing. The most widely relied-on definition of IUU fishing, originally adopted as part of the 2001 FAO “International Plan of Action [IPOA] to Prevent, Deter, and Eliminate Illegal, Unreported, and Unreported Fishing” (IPOA IUU) and set out in its Paragraph 3, lacks clarity and objectivity.<sup>13</sup> Far from being an actual definition, the “IUU fishing” concept operates as an interpretive lens in which legal, nonlegal, domestic, and international elements converge. This results in confusion as to what specific activities states should identify and which activities require market measures.<sup>14</sup> Further, neither of the definitions of IUU fishing included by the United States and the EU in their respective legal frameworks (i.e., for market controls on the importation of fishing products) replicate the framework set out in the IPOA IUU in identical terms.<sup>15</sup> This means that, for states and international organizations attempting to articulate market measures, “IUU fishing” represents different things to different entities. As seen in the international fisheries law literature, this has implications for the objectivity and legitimacy of international market measures.<sup>16</sup> Particularly problematic is lack of legitimacy, which risks eroding the international community’s quest for effectiveness that has always been the *leitmotif* of IUU fishing as a governance concept and tool.<sup>17</sup>

Despite its appearance in many sustainability and enforcement narratives, stopping IUU fishing is a nebulous objective. The aim must be to prevent, curb, and ultimately eliminate specific actions that those who operate fishing vessels choose to carry out. It is through such actions that persons with legal responsibilities breach legal obligations as defined in the domestic legislation that applies to them. At the same time, states with responsibility must through their domestic rules and authorities regulate—and, where appropriate, prohibit—those activities or expose themselves to infringements of applicable international fisheries law. Where no such law is applicable, they will nonetheless risk undermining other states’ efforts in developing and maintaining best practices or in meeting their own obligations.<sup>18</sup>

As a result of the new WTO Agreement on Fisheries Subsidies, state parties to the WTO must (a) consider the extent to which they must curb subsidies to their own vessels that enable or perpetuate IUU fishing and (b) consider whether wrongly subsidized fishing activities should also be defined as IUU fishing. Market states that import large amounts of subsidized fishing products will be at the forefront of such decisions. The suspension of international markets to wrongly subsidized fishing products might not have a significant effect on products supplied by domestic vessels for their own national markets. Nevertheless, it could have a profound impact on subsidising practices, as well as capture and post-capture practices, of seafood products destined for international markets, provided that IUU fishing definitions are clearly and appropriately clarified and expanded.

## CLEAR AND OBJECTIVE CONDUCT STANDARDS

WTO state parties are in a privileged position to support actions aimed at ensuring that IUU fishing market controls are strengthened and better suited to detect and counterbalance possible flaws in the measures being implemented against third states. While it might seem counterintuitive to assess market mechanisms established to enhance control of IUU fishing, clarifying definitions and introducing objectivity safeguards could have important benefits.

First, because the IUU fishing concept is sufficiently opaque to allow for bias or error in significant decisions made by leading market actors, explicit reference should be made to exactly what fishing or fishing-support activities are considered to form part of the IUU fishing framework. (Some examples are listed in Article 21.11 of the 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—informally, the UN Fish Stocks Agreement.) This is particularly appropriate in the case of state parties of the WTO that are also parties to the Fish Stocks Agreement. Those measures should also be coupled with clear outlines of what constitutes harmful subsidization. Efforts to introduce clear and objective conduct standards will strengthen the objectivity of the definition and any associated market mechanisms, and ultimately their legitimacy, acceptance, and effectiveness.<sup>19</sup>

Further, because state practice is an important basis for the development of international law, this approach could have positive and far-reaching consequences for the clarification and strengthening of international fisheries law, with the potential to address some of the flaws and gaps that its framework contains today.<sup>20</sup> Finally—and significantly for developing states that export seafood products to the major international markets of the United States and the EU—a more objective and transparent definition of IUU fishing would provide the regulatory confidence required if investment in policy and compliance measures, or far-reaching decisions on subsidization, are to be taken to secure access to high-value markets.

One relatively straightforward tool that WTO state parties could consider adopting is a set of voluntary guidelines for states and international organizations that deploy market mechanisms to curb IUU fishing. Such guidelines could contain a process-based methodology to ensure that the arguments that support market measures are linked to clear definitions and specific conduct standards and parameters. As previously stated with reference to the Fish Stocks Agreement, specific IUU fishing related obligations within existing international treaties should be identified. Associated conduct rules and standards could then either be clarified and defined where appropriate or could otherwise be openly subjected to a transparent process of public argumentation and justification by the authorities engaged in the key market access decisions.

The guidelines might not necessarily change the powers of key market actors or the outcomes of their decisions, but they would help strengthen the objectivity and acceptance of the current IUU fishing market-control systems. They could also guide states toward the establishment of a clearer and more

effective IUU fishing definition and interpretive framework, and associated practices that are more transparent, as well as international law affirming, legitimacy enhancing, and ultimately more effective.<sup>21</sup>

## ABOUT THE AUTHOR

Mercedes Rosello, PhD, is a senior lecturer in law at the University of Lincoln (United Kingdom). She specializes in the international law of wild marine fisheries, covering a wide range of topics including the management of pelagic and demersal stocks, the prevention and control of illegal and unregulated fishing, human security on board fishing vessels (and, more broadly, in the fisheries sector), legal security in fishing-activity regulation, governance of global seafood markets, the Common Fisheries Policy of the European Union, the relationship between maritime insecurity and unsustainable fishing practices, and international legal development in civil and criminal matters involving fishing activities in the high seas. Rosello is interested in international, transnational, comparative, and critical approaches to the analysis of fisheries law and regulation in all its manifestations.

## ABOUT THE SERIES

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## NOTES

1. For more information, see Food and Agriculture Organization of the United Nations (FAO), “What is IUU Fishing?,” <https://www.fao.org/iuu-fishing/background/what-is-iuu-fishing/en/>.
2. For more information of the global fisheries agreements adopted under the auspices of the UN, see FAO, “Fisheries and Aquaculture: Other Related Agreements,” <https://www.fao.org/fishery/en/166350/en>.
3. United Nations, Sustainable Development Goal (SDG) 14, accessed September 25, 2023, <https://sdgs.un.org/goals/goal14>.
4. United Nations, SDG 14, Target 14.6, accessed October 11, 2023, <https://indicators.report/targets/14-6/>.
5. Pew Charitable Trusts, “Fisheries Subsidies Agreement: What’s the Big Deal?,” fact sheet, May 2023, accessed September 25, 2023, <https://www.pewtrusts.org/-/media/assets/2023/05/fisheries-subsidies-agreement.pdf>.
6. Traceability in national and international markets is an essential tool to eliminate IUU fishing. See FAO, *The State of World Fisheries and Aquaculture 2022*. <https://www.fao.org/3/cc0461en/online/cc0461en.html>.
7. RFMOs are a range of international bodies established and funded by fishing and coastal states specifically for managing fish stocks that require international agreement for sustainable management. Such shared stocks typically straddle two or more Exclusive Economic Zones or occur partially or wholly in the high seas.
8. See Paragraphs 66 and 68 of the FAO’s “International Plan of Action to Prevent, Deter, and Eliminate Illegal, Unreported, and Unregulated Fishing” (<https://www.fao.org/fishery/en/ipoa-iuu>). For a discussion on the compatibility of trade measures with the WTO Agreements, see Margaret A. Young, “International Trade Law Compatibility of Market-Related Measures to Combat Illegal, Unreported and Unregulated (IUU) Fishing,” *Marine Policy* 69 (July 2016): 209–219.
9. Arron N. Honniball, “Unilateral Trade Measures and the Importance of Defining IUU Fishing: Lessons from the 2019 USA ‘Concerns’ with China as a Fishing Flag State,” *Journal of Territorial and Maritime Studies* 7, no. 2 (2020): 7–26.

See also Antonia Leroy et al., “The EU Restrictive Trade Measures against IUU Fishing,” *Marine Policy* 64 (February 2016): 82–90, <https://doi.org/10.1016/j.marpol.2015.10.013>

10. See Mary Ann Palma et al., *Promoting Sustainable Fisheries* (Leiden, The Netherlands: Brill Nijhoff, 2010), 173–200.
11. See, for example, Andrew M. Song et al., “Collateral Damage? Small-Scale Fisheries in the Global Fight against IUU Fishing,” *Fish and Fisheries* 21, no. 4 (July 2020): 831–43, <https://doi.org/10.1111/faf.12462>. See also A. Honniball, “Unilateral Trade Measures,” footnote 9, p. 8.
12. Young, “International Trade Law Compatibility of Market-Related Measures.”
13. See Jens T. Theilen, “What’s in a Name? The Illegality of Illegal, Unreported and Unregulated Fishing,” *The International Journal of Marine and Coastal Law* 28 no. 3 (2013): 542–43, <https://doi.org/10.1163/15718085-12341284>; Andrew Serdy, “*Pacta Tertiis* and Regional Fisheries Management Mechanisms: The IUU Fishing Concept as an Illegitimate Short-Cut to a Legitimate Goal,” *Ocean Development International Law* 48, no. 3–4 (2017): 355–56.
14. Mercedes Rosello, *IUU Fishing as Flag State Accountability Paradigm: Between Effectiveness and Legitimacy* (Leiden, The Netherlands: Brill Nijhoff, 2021), 27–28.
15. The differences are more obvious in the case of the United States. See Honniball, “Unilateral Trade Measures,” footnote 9, 8.
16. See Honniball, “Unilateral Trade Measures,” footnote 9, and Rosello, *IUU Fishing*, footnote 15.
17. See Rosello, footnote 14, 111–23.
18. Rosello, footnote 14, 27.
19. See the Cambodia case, for example—Rosello, footnote 14, 120.
20. Rosello, footnote 14, 27–28.
21. Rosello, footnote 14, 184–90.