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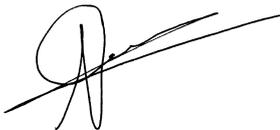
Date: 16 May 2011  
Our reference: 1011PRAC96/AC  
Subject: Response to consultation on trade sanctions  
CC: Ms Isabelle Viallon (by e-mail)  
[mare-shared-stocks-consultations@ec.europa.eu](mailto:mare-shared-stocks-consultations@ec.europa.eu)

Dear Mr Astudillo,

Thank you for consulting the Pelagic RAC on the issue of an impact assessment on the possible utilisation by the EU of trade-related measures against non-cooperating states for the purpose of conservation of fish resources, which is an issue of the utmost importance to the Pelagic RAC.

Please find attached in annex 1 the Pelagic RAC's response to all the questions in the consultation document. If you have any questions, please do not hesitate to contact the secretariat.

Yours sincerely,



Ms Aukje Coers  
Pelagic RAC secretariat

## **Annex 1: Pelagic RAC response to the consultation document for the purpose of an Impact Assessment on the possible utilisation by the EU of trade-related measures against non-cooperating States for the purpose of conservation of fish resources**

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### **1. DESCRIPTION OF THE PROBLEM**

The UN Convention on the Law of the Sea<sup>1</sup> as well as the UN Fish Stocks Agreement<sup>2</sup> provide for the obligation of coastal States and States fishing for such stocks on adjacent high seas to cooperate in managing responsibly straddling and highly migratory fish stocks in order to ensure their long-term sustainability, either by direct consultation amongst each other or via the appropriate Regional Fisheries Management Organizations (RFMOs) in their geographical context.

Disagreement on the management of straddling and highly migratory stocks is frequent and to arrive at useful arrangements the willingness of all parties concerned to cooperate, is required, including the EU, and third countries. It is not infrequent that one or more of the third parties refuse to show the willingness to cooperate and prefer to fish at a unilaterally chosen intensity for a number of years. Such behaviour may lead to considerable depletion of the fish stock in question even if other parties engage in moderating their fishing rates.

The EU is now suffering the consequences of too long and unsuccessful consultations and negotiations both between the North-East Atlantic coastal states and in the framework of the North-East Atlantic Fisheries Commission (NEAFC) before finally an arrangement was reached on the management of the North-East Atlantic stock of blue whiting. Due to a series of years of disagreement that led to very serious depletion of the stock and as a consequence, the Total Allowable Catch (TAC) for this species had to be set for 2011 at 40100t, less than 7% of the level of 2010 (540000t). This has resulted in disastrous consequences for the viability of this fish stock and therefore for certain EU fleets, and in a very meager probability of rebuilding the stock to sustainable levels in the medium term. Such outcomes run contrary to the fundamental objectives of the EU's Common Fisheries Policy.

At present the EU faces such a problem with the stock of North-East Atlantic mackerel. In this case the lack of agreement among coastal States, is compounded by the setting by Iceland and Faroe Islands of autonomous catch limits at very high and biologically unviable levels, not sustained by any objective argument either on the basis of historical rights or stock distribution, and contrary to scientific advice.

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<sup>1</sup> United Nations Convention on the Law of the Sea (Montego Bay Convention), OJ L 179, 23.6.1998, p.3.

<sup>2</sup> The United Nations 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 (in force as from 11 December 2001), OJ L 189, 3.7.1998, p. 17.

The EU cannot remain inactive in a situation where third countries refuse to abandon harmful unilateral behaviour and fail to show the necessary goodwill to achieve an arrangement for the management of migrating fish stocks (such as mackerel). Indeed, in that situation to maintain the unlimited access to a lucrative EU market for such stocks constitutes not only a political contradiction but also a stimulus to continue the intensive over-exploitation of the stock by third countries. The EU should therefore be able to have an instrument to address these cases efficiently.

As a summary, the problem is perceived at two levels: (i)

A concrete problem...

At present the EU faces the immediate threat of overexploitation of the stock of mackerel due to the attitude of certain third States, which appear to exploit the short-term benefit for part of their fleet of pelagic fishing in total disregard of the international obligations to cooperate with the other coastal States and the viability of the fish stock.

(ii) ...that raises a general problem

It is possible that such a lack of cooperation and risk of overexploitation becomes evident in the short term for other shared stocks and other parties. Any such situation cannot be excluded in other areas where the EU shares fisheries with other States.

When facing situations of unwillingness by any given third country to cooperate on the management of a straddling and highly migratory fish stock on which the EU shares an interest, and where the attitude of such country poses a risk of overfishing that would require subsequent sacrifices by all parties engaged in rebuilding the stock to sustainable levels, there is a need to take appropriate action. However, the existing legal framework does not provide with any effective measure in support of this approach, and it becomes imperative to find new avenues.

Questions:

**(1) Do you agree with this perception of the problem?**

Fully	Mostly	Partially	Barely	Not at all
X				

Observation:

The Pelagic RAC would like to reiterate what it expressed to the Commission on a number of occasions, last in a letter in August 2010, pleading for strong action against the irresponsible decisions taken by Iceland and the Faroese Islands, which are setting excessively high autonomous mackerel TACs for their respective fleets. This is putting the health of this stock at great risk.

The pelagic RAC, therefore is in full agreement with the Commission's description of the problem and is content that the Commission is preparing the necessary action to guarantee the sustainability of the stock, by bringing to a halt the irresponsible actions of

Iceland and the Faroese Islands, with whichever political means necessary, without compromising the interests of the EU pelagic fishing fleet. The Pelagic RAC is hopeful that the Commission, on behalf of the EU fishermen (which historically have together by far been the largest stakeholder in this fishery), should be able to yield enough power to take back control over the situation.

Action in the form of sanctions should be taken in the very short term, when possible utilising existing legal instruments, such as the IUU regulation. The development of a broader legal instrument, which might not be directed at specific coastal states, but could be used in relation to problems regarding the management of any widely distributed or straddling stock, should start immediately as well and hopefully provide a solution in the medium to long-term.

**(2) What is your perception of the importance of the problem?**

Very severe	Severe	Moderate	Appreciable	insignificant
<b>X</b>				

Observation:

The combined TACs set in 2010 exceeded the ICES advice by approximately 50%. The potential 2011 outtake from the mackerel stock could be in the region of 1 million tonnes, i.e. 45% higher than recommended by ICES. Such order of magnitude overexploitation cannot be sustained by any stock, making this problem an extremely urgent problem. In terms of economic importance of the stock to the EU industry, others have estimated its value (including the processing sector) around 2,5 billion euro. The mackerel stock generally speaking is *the single most valuable* stock to the EU's pelagic catching industry, which is why the Pelagic RAC is of the opinion that the EU should not allow its major interests in this stock be compromised by irresponsible action by third countries.

**(3) Do you agree on the need to take action?**

Fully	Mostly	Partially	Barely	Not at all
<b>X</b>				

Observation:

See also previous comment. Ideally, action should be taken before the fishing season in the summer of 2011 starts for the Faroese Islands and Iceland, but in any case before the end of 2011.

## 2. POSSIBLE APPROACHES

The present initiative aims at exploring the possibility of using trade-related measures against countries and products from stocks that are in situations such as those described above for blue whiting and mackerel. These measures would mainly aim at promoting conservation of the stocks concerned by inducing a reduction of the intensity of fishing of the third parties concerned, this without prejudice to the need to continue consultations and, where required, use the existing mechanisms of dispute settlement. They would only be implemented when bilateral or regional cooperation has failed to establish an appropriate management regime for the stocks concerned.

The "IUU Regulation"<sup>3</sup> contemplates *inter alia* the use of trade restrictions for vessels engaged in illegal, unreported and unregulated fishing. However, it is not considered as applicable for the problem described above. The IUU Regulation addresses issues of lack of compliance with applicable international and domestic conservation and management measures, whilst the measures that are being envisaged in the present context target fisheries not covered by agreed conservation and management measures, conducted in absence of cooperation with other coastal States and constituting a threat to sustainability.

Other examples of the application of trade restrictions for conservation purposes are the CITES Convention, transposed in EU legislation by Regulation (EC) No 338/97<sup>4</sup>, and certain recommendations made in the context of RFMOs . None of these instruments can be used in the cases above-mentioned. In the case of CITES, mainly because this Convention allows trade restrictions only when the danger is imminent and very serious, which may be too late when the threat is just overexploitation and not necessarily complete depletion of the stock. In the case of RFMOs, trade restrictions have been agreed in certain cases (bluefin tuna in ICCAT, toothfish in CCAMLR), but this is not a generalized approach. Furthermore, RFMOs adopt rules for the management in their regulatory area, which does not necessarily coincide with the area where the problem is found, as it was the case for mackerel and blue whiting described above.

The approach that is being envisaged needs to be analyzed in the context of the relevant international law, including international customary law, the International Law of the Sea, international treaty law, international trade law, mainly the GATT Agreement, and any other bilateral or multilateral international agreements such as the EEA. Any measure imposing trade restrictions will have to be fully consistent with this legal framework.

*Questions:*

**(4) Do you agree with this analysis of the possible approaches?**

Fully	Mostly	Partially	Barely	Not at all
		X		

Observation:

This is a difficult question to answer for the Pelagic RAC, because of its very technical nature. During discussions at the Pelagic RAC Executive Committee it became apparent that some members were of the view that existing EU legislation such as the IUU regulation or the TFEU provide possibilities for action in the short-term. Considering that the Commission was represented at this meeting the Pelagic RAC trusts that the

Commission is aware of this and will explore such approaches together with the relevant organisations. For medium and long-term solutions, the Pelagic RAC generally agrees that a specifically developed new legislative framework is preferable.

**(5) Do you agree in particular that trade restrictions may be a solution?**

Fully	Mostly	Partially	Barely	Not at all
<b>X</b>				

Observation:

Removing (part of the) incentive for the Olympic fishery of non cooperating countries in the form of ceasing to provide a market for their product indeed should be effective. However, trade restrictions should be wide ranging and progressive starting with imports of mackerel products in any form including fishmeal products, then moving on to include other pelagic fish products and finally if these prove not to be dissuasive sanctions on whitefish and other associated products.

**3. POSSIBLE OPTIONS TO ADDRESS THE IDENTIFIED PROBLEM**

A first option would be to take no action and expect that external circumstances change, inducing a change in the attitude of the third countries in cause. As an example, in the case of mackerel one could expect a change in the distribution and migration of the stock, so it becomes unavailable or scarce in the waters of Faroe Islands and Iceland, as it was the case a few years ago. This scenario is however associated to the risk of a worsening of the situation if the expected changes operate in opposite direction.

A second option would be to take measures in the form of non-legislative instruments, such as mechanisms of the type "blame and shame", sustainability labels or diplomatic démarches in different forms. Such measures would aim at discouraging consumers from buying the fish products originating from a non-cooperating country or to put direct political pressure on that country. Such mechanisms have to be studied to see if they can be effective but there may also be (technical or other) drawbacks that need to be studied carefully, since in addition their associated administrative burden can be non-negligible.

A third option would be to provide the common fisheries policy with a regulatory instrument allowing a quick response to the problem by imposing trade-related measures on fish products derived from the relevant fish stock and that have an origin in the country concerned. At first sight, this would seem to be an effective approach, but it should be carefully defined so that it is compliant with multilateral and bilateral trade agreements and obligations. The approach also necessitates identifying and determining the origin of the products at the customs, in particular where the products have been transformed or elaborated substantially in different countries.

A fourth option would be to impose limited trade restrictions so as to exclude from them products for which the determination of the origin would be disproportionately difficult.

A fifth option would consist of a regulatory instrument providing for "counter-measures" in response to an "internationally wrongful act" committed by another State. Recourse to

such "counter-measures" is recognised under customary international law provided that due process and proportionality requirements are met. "Counter-measures" could consist of trade-restrictive measures, limitations of access to ports and/or of any other measures that are capable of inducing the offending State to discontinue its wrongful conduct.

In the cases of options 2 to 4, the measures taken should be either limited in time or subject to revision on account of a change in the circumstances that had led to their adoption. In the case of "counter-measures", the measures taken must be reversible; they must actually be lifted once the offending State has put an end to its wrongful conduct.

The burden associated to the legislative process not only for the adoption of the regulation setting out the instrument, but also for subsequent specific acts applying the instrument to one or another situation, should also be weighed against the expected benefits.

Other options are possible and can be suggested for consideration.

*Questions:*

**(6) Which kind of measures would you consider effective in solving the problem identified?**

	Effective	More or less effective	Last resort	Ineffective
<b>Option 1:</b> no action				X
<b>Option 2:</b> soft instrument				X
<b>Option 3:</b> regulatory instrument (trade restrictions on fish products derived from the relevant fish stock)		X		
<b>Option 4:</b> regulatory instrument (more limited trade restriction)			X	
<b>Option 5:</b> regulatory instrument ("counter-measures")	X			
<b>Other option (6):</b> Trade sanctions on all fish and fishery products from the non-cooperative states	X			
<b>Other option (7):</b> Using existing EU legislation such as the IUU regulation or TFEU		X		

<b>Other option (8):</b> Suspension of accession negotiations with Iceland		X		
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Observation:

A trade restriction on the imports of all fish and fishery products from Faroe Islands and Iceland should be considered as a serious option. See also observations under question 4 and 5.

**4. POSSIBLE EFFECTS OF IMPORT LIMITATIONS OR RESTRICTIONS**

This section enters into some detail about the specific effects of one or another option.

The EU market of fish products is partly dependent on imports. Any limitation or restriction of these may have a non-negligible impact on the supply to the EU market. The degree of such impact will depend very much on the type of product, the quantities being subject to restriction or allowed, the possibility to find alternative sources of supply and the final destination of the product (direct human consumption, fish processing industry, fish meal and oil industry, etc). Although at this juncture it would be difficult to evaluate the effects of trade restrictions as a general measure, perhaps stakeholders could give an opinion on the following assertion:

*"It is possible to assume the implications of a trade restriction or limitation on the EU market in the short term, if this is done for the sake of ensuring the sustainability of the stock and avoid stock depletions, which is the main condition to guarantee the long-term supply of the EU market"*

*Question:*

**(7) Do you agree with this assertion?**

Fully	Mostly	Partially	Barely	Not at all
X				

Observation:

Action must be taken at present, before irreversible damage is done. If the mackerel stock is subjected to the same level of immense fishing pressure as blue whiting there can only be one result: stock depletion and in tandem a deterioration of the EU´s pelagic fishing community.

The effects of the possible introduction of import limitations or restrictions will also be highly dependent on what is meant by "import". For example, the IUU Regulation defines importation as "the introduction of fisheries products into the territory of the Community, including for transshipment purposes at ports in its territory". This definition encompasses therefore goods that are landed in the EU in transit towards other countries and has

therefore a much wider coverage than a consideration of imports as goods having the EU market as immediate destination.

As evoked in the description of the options, any trade restriction, including by "soft" approaches, will impose a certain administrative burden. In some occasions this additional burden may be alleviated by the rational use of existing administrative mechanisms, but in any case the increase in costs may be substantial. You are requested to synthetically describe, for your preferred option, how you perceive this additional administrative burden.

*Final question:*

**(8) Please include below any other comments you may have on this proposal**

Observation:

The Pelagic RAC would like to thank the Commission for the invitation to comment on the current issue, which is of the utmost importance to the members of the Pelagic RAC. As said previously, the issue is of a very technical and legal nature which makes very detailed response difficult. The Pelagic RAC hopes that the Commission found the discussion that took place during the Executive Committee meeting on 12 April in Bilbao useful and informative. For any questions or assistance in facilitating dialogue with individual members of the Pelagic RAC on specific remarks made there, please do not hesitate to contact the secretariat.