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Consistency of the U.S. Seafood Import Monitoring Program (SIMP) with the WTO principles

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Abstract

To combat illegal, unreported, and unregulated (IUU) fishing, a major cause of both declining fish stocks and potential human rights violations, the US has established in 2018 its own import measure the Seafood Import Monitoring Program (SIMP) based on its prior law – the Magnuson-Stevens Fishery Conservation and Management Act. SIMP requires US importers to submit catch information for fish and fish products of thirteen imported species. This requirement might potentially violate the US obligations under the provisions of the WTO agreement because it could discriminate against imported fish and fish products by imposing conditions different from the US domestic fish and fish products or because it might impose unnecessary conditions on the importations of the products with the purpose or effect of undue discrimination. However, based on facts investigated in the literature and understandings founded on GATT or WTO dispute settlement cases, SIMP is arguably not in violation of relevant provisions of the WTO agreement. This result is largely due to the good faith efforts by the US and domestic practices to pursue its objective, combatting IUU fishing and conserving marine living resources in the world.

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1. Background

As one of major causes of decreases in fish stocks and potential human rights violations, illegal, unreported, and unregulated (IUU) fishing has gained international attention. For example, the United Nation's Sustainable Development Goals 2030 calls for overfishing, IUU fishing, and destructive fishing practices to be stopped by 2020.[1] Various methods including enforcement activities to prevent IUU fishing have been discussed and implemented internationally.[2] One of the methods is the straightforward exclusion of potential IUU fishery products from international markets. One study estimates that 20 – 32% by weight of wild-caught seafood imports into the US was from illegal and unreported catches.[3] Several international fisheries management agreements require each member to enforce submission of catch documents of their target fish species such as tuna at each member's customs in order to prove non-IUU fishery origin, and thus, to stop IUU fishery products traded in member's market. Further, the EU, Republic of Korea, and the US have introduced their own catch documentation requirements for all or some species of fish since 2010, 2017, and 2018 respectively.[4,5,6] These measures are taken unilaterally, not bound by any international agreements. For instance, the US enforces the Seafood Import Monitoring Program (SIMP), established and entered into force in 2018 based on the Magnuson-Stevens Fishery Conservation and Management Act (MSA).[7] The

[1] General Assembly resolution 70/1, Transforming our world: the 2030 Agenda for Sustainable Development, A/RES/70/1 (25 September 2015), https://www.un.org/ga/search/view_doc.asp?symbol=A/RES/70/1&Lang=E.
[2] Erceg, D., Deterring IUU fishing through state control over nationals, 2006, Marine Policy 30, 173-179.
[3] Pramod, G., Nakamura, K., Pitcher, T.J., and Delagran, L., Estimates of illegal and unreported fish in seafood imports to the USA, Marine Policy 48 (2014) 102-113.
[4] An official website of the European Union, Illegal fishing, https://ec.europa.eu/fisheries/cfp/illegal_fishing_en.
[5] Republic of Korea, Committee on Import Licensing, Agreement on Import Licensing Procedures, Notification under article 5 of the Agreement, G/LIC/N/2/KOR/2, February 3, 2017.
[6] Seafood Import Monitoring Program, NOAA Fisheries, National Oceanic and Atmospheric Administration, U.S. department of Commerce, https://www.fisheries.noaa.gov/international/seafood-import-monitoring-program [hereinafter SIMP].
[7] Federal Register Vol. 81, No. 237, Friday December 9, 2016, https://www.federalregister.gov/documents/2016/12/09/2016-29324/magnuson-stevens-fishery-conservation-and-management-act-seafood-import-monitoring-program [hereinafter Federal Register Vol. 81].

program requires the US importers to submit catch or harvest information for fish and fish products of thirteen species imported.[8]

The measure might potentially violate US obligations under the relevant provisions in the WTO agreement because it could discriminate against imported fish and fish products by imposing either intentionally or in its effect different conditions from its domestic fish and fish products. On the other hand, the measure also might be permissible under the other relevant provisions in the WTO agreement, such as Article XX: General Exceptions.

This paper will focus on the applicability of GATT 1994 Articles III, XI, and XX, and the TBT Agreement to the issue of IUU fishing and seafood fraud. It addresses whether Article XX (g) is a legitimate exemption for the US from obligations under GATT 1994 Article XI (prohibiting quantitative restrictions) when it requires catch information to import certain fish and fish products. Also addressed is the question whether the US violates the TBT Agreement by requiring catch information.

The US is a founding Member of the GATT and the WTO.[9] Pursuant to the customary law principle of *pacta sunt servanda*, all states have an obligation to abide by the terms of any agreement they enter.[10] This analysis is premised on the principle that the US must abide by the provisions of the WTO agreement.

[8] SIMP, supra note 6. Federal Register Vol. 81, supra note 7; "[the] rule establishes permitting, reporting and recordkeeping procedures relating to the importation of certain fish and fish products, identified as being at particular risk of illegal, unreported, and unregulated (IUU) fishing or seafood fraud, in order to implement the MSA's prohibition on the import and trade, in interstate or foreign commerce, of fish taken, possessed, transported or sold in violation of any foreign law or regulation or in contravention of a treaty or a binding conservation measure of a regional fishery organization to which the United States is a party."

[9] The WTO GATT members, https://www.wto.org/english/thewto_e/gattmem_e.htm.

[10] Vienna Convention on the Law of Treaties, May 23, 1969, entered into force on 27 January 1980, United Nations, Treaty Series, vol. 1155, p. 331.

2. The US measures: The Seafood Import Monitoring Program (SIMP) and others

2.1. Historical Background of establishment of SIMP

On June 17, 2014, the White House released a Presidential Memorandum entitled "Establishing a Comprehensive Framework to Combat Illegal, Unreported, and Unregulated Fishing and Seafood Fraud."[11] The Memorandum established a Presidential Task Force on Combating Illegal, Unreported, and Unregulated Fishing and Seafood Fraud. The Task Force is co-chaired by the Department of Commerce (DOC), through National Oceanic and Atmospheric Administration (NOAA), and by the Department of State (DOS). It comprises twelve additional federal agencies with "different missions and areas of focus and expertise."[12]

The Task Force submitted to President Obama fifteen "recommendations for the implementation of a comprehensive framework of integrated programs to combat IUU fishing and seafood fraud that emphasizes areas of greatest need" through the National Ocean Council.[13] The Task Force initiated a public engagement process to gain broad input to inform and advise development of these recommendations, including two public meetings, two webinars, input from thirty two countries, and a public comment period notified in the Federal Register.[14] The Task Force proposed identifying target species, methods, action plans, regulations under relevant laws, and again sought public comments. The final rule for SIMP was published in the Federal

[11]Presidential Memorandum – Comprehensive Framework to Combat Illegal, Unreported, and Unregulated Fishing and Seafood Fraud, June 17, 2014, https://obamawhitehouse.archives.gov/the-press-office/2014/06/17/presidential-memorandum-comprehensive-framework-combat-illegal-unreporte.

[12]Action Plan for Implementing the Task Force Recommendations, Presidential Task Force on Combating IUU Fishing and Seafood Fraud, https://www.iuufishing.noaa.gov/Portals/33/noaa_taskforce_report_final.pdf [hereinafter Task Force Action Plan]. Member are The Council on Environmental Quality, the Department of Agriculture, the Department of Defense (Navy), the Department of Health and Human Services (Food and Drug Administration), the Department of Homeland Security (Customs and Border Protection, Immigration and Customs Enforcement, U.S. Coast Guard), the Department of Interior (U.S. Fish and Wildlife Service), the Department of Justice, Federal Trade Commission, Office of Management and Budget, Office of Science and Technology Policy, U.S. Agency for International Development (USAID), National Security Council, and Office of the U.S. Trade Representative.

[13]Ibid.

[14]Federal Register Vol. 79, No. 243, Thursday December 18, 2014, https://www.federalregister.gov/documents/2014/12/18/2014-29628/recommendations-of-the-presidential-task-force-on-combating-illegal-unreported-and-unregulated.

Register on December 9, 2016,[15] and it was made effective January 9, 2017 with the compliance date set January 1, 2018.[16,17]

2.2. Current SIMP Requirements

SIMP requires submission of catch information for all imports of fish and fish products of thirteen species identified as particularly vulnerable to IUU fishing and/or seafood fraud**:** abalone, Atlantic cod, blue crab from Atlantic, dolphinfish, grouper, red king crab, Pacific cod, red snapper, sea cucumber, shark, shrimp, swordfish, and tuna (albacore, bigeye, skipjack, yellowfin, and bluefin).[18,19] The information to be submitted is about fish harvesting vessels or aquaculture farming facilities, species caught, place of landing, quantity, area of harvesting, any transshipment of product, records on processing, re-processing, and commingling of product.[20] Model catch certificates are illustrated in NOAA website.[21] NOAA states that SIMP "is not a labeling program, nor is it consumer facing," and that "the information collected under this program is confidential."[22]

[15]Federal Register Vol. 81, supra note 7.
[16]Ibid.
[17]Implementation and compliance of the rule for shrimp and abalone delayed when NOAA determined that "current data collection for shrimp and abalone aquacultured in the U.S. [wa]s not equivalent to the data that would have been required to be reported for imports of these products." See Federal Register Vol. 83, No. 79, Tuesday April 24, 2018, https://www.federalregister.gov/documents/2018/04/24/2018-08553/magnuson-stevens-fishery-conservation-and-management-act-lifting-the-stay-on-inclusion-of-shrimp-and [hereinafter Federal Register Vol. 83]. At this time, "NOAA Fisheries has issued a proposed regulation to implement the first-ever traceability program for U.S. aquacultured (farmed) shrimp and abalone – establishing comparable reporting requirements to those required for imported seafood products under the Seafood Import Monitoring Program (SIMP)." See Aquaculture, Seafood Traceability Program, https://www.fisheries.noaa.gov/national/aquaculture/seafood-traceability-program.
[18]Seafood Import Monitoring Program Facts, https://www.fisheries.noaa.gov/international/seafood-commerce-certification/seafood-import-monitoring-program-facts [hereinafter SIMP Facts].
[19]Harmonized tariff codes for the targeted products under the program are specified and updated. See Harmonized Tariff Codes for Seafood Import Monitoring Program, March 11, 2019, https://www.fisheries.noaa.gov/resource/form/harmonized-tariff-codes-seafood-import-monitoring-program [hereinafter SIMP HT codes].
[20]SIMP Facts, supra note 18.
[21]Model Catch Certificate for Seafood Import Monitoring Program, March 11, 2019, https://www.fisheries.noaa.gov/resource/form/model-catch-certificate-seafood-import-monitoring-program [hereinafter SIMP model catch certificate].
[22]SIMP Facts, supra note 18.

2.3. The US domestic regulations of recordkeeping on retailers and dealers of fish and fish products

2.3.1. Federal Regulations

Under the Magnuson-Stevens Fishery Conservation and Management Act, "Federally permitted dealers, and any individual acting in the capacity of a dealer, must submit to the Regional Administrator or to the official designee a detailed report of all fish purchased or received for a commercial purpose, other than solely for transport on land."[23]

According to NOAA's website, "Seafood dealers who purchase federally managed species from federally permitted vessels require a federal Seafood Dealer Permit," and "if a person or company purchases or receives any federally managed species from the owner or operator of a vessel permitted by [Greater Atlantic Regional Fisheries] office, and for a commercial purpose other than solely for transport on land, they must have a federal seafood dealer permit for this region. Though there are several exceptions, they must also submit weekly trip-level reports for most species purchased, using one of our approved electronic means."[24] Seafood dealers who are issued a federal permit for one or more of the species lists must submit reports, but the lists include some but not all of the species that are covered under SIMP.[25] In the South Atlantic and Gulf of Mexico, federally permitted dealers who purchase reef fish from the

[23]Tittle 50 Wildlife and Fisheries, Code of Federal Regulations, Section 648.7, https://www.govinfo.gov/content/pkg/CFR-2010-title50-vol8/pdf/CFR-2010-title50-vol8-sec648-7.pdf.
[24]Federally Permitted Seafood Dealer Reporting Requirements, https://www.fisheries.noaa.gov/new-england-mid-atlantic/resources-fishing/federally-permitted-seafood-dealer-reporting [hereinafter Federally Permitted Seafood Dealer Reporting Requirements].
[25]The list includes Atlantic Bluefish, Atlantic Deep-Sea Red Crab, Atlantic Hagfish, Atlantic Herring, American Lobster, Atlantic Mackerel, Atlantic Sea Scallop, Black Sea Bass, Butterfish, Monkfish, Northeast Multispecies, Ocean Quahog, Scup, Skate, Spiny Dogfish, Squid (*Illex* or *Loligo*), Summer Flounder, Surf Clam, Golden Tilefish, and Atlantic Tunas; https://www.fisheries.noaa.gov/new-england-mid-atlantic/resources-fishing/dealer-reporting-greater-atlantic-region.

area are also required to report under the South Atlantic and Gulf Reef Fish Dealer Reporting system.[26]

2.3.2. State Regulations

State agencies have similar reporting requirements. For example, the California Department of Fish and Wildlife (CDFW) requires landing data on "fish receivers" in "fish businesses."[27] Effective on July 1, 2019, the submission form was changed from paper-based provided by CDFW to electronic form managed by the Pacific States Marine Fisheries Commission (PSMFC), an interstate agency.[28]

PSMFC is an interstate compact agency to help resource agencies and fishing industry sustainably manage Pacific Ocean resources in a region consisting of five states of California, Oregon, Washington, Idaho, and Alaska; it was established in 1947 by consent of Congress, and its activities are funded through federal grants, special contracts, and dues from its member states. PSMFC has no regulatory or management authority. Its objective is promotion and support of policies and actions for conservation, development, and management of fishery resources in the five states through coordinating research activities, monitoring fishing activities, and facilitating a wide variety of projects.[29]

States along the East Coast also require electronic reporting on fish dealers through Standard Atlantic Fisheries Information System (SAFIS), a coast-wide fisheries data collection

[26]Southeast Recordkeeping and Reporting Forms, https://www.fisheries.noaa.gov/southeast/resources-fishing/southeast-recordkeeping-and-reporting-forms.
[27]User Guide for Electronic Fish Ticket Submission, 2019, California Department of Fish and Wildlife [hereinafter E-Fish Ticket]. "Landing receipts must be completed at the time of the receipt, purchase or transfer of fish (whichever occurs first) by the fish receiver or a fisherman with a fisherman's retail license."
[28]Ibid.
[29]Pacific States Marine Fisheries Commission, homepage, overview, https://www.psmfc.org/psmfc-info/overview.

system developed to meet the needs of scientists, managers, and industry, managed by the Atlantic Coastal Cooperative Statistics Program, a state-federal cooperative program.[30]

2.4. Foreign and Domestic Stakeholders in fish and fish products industry

2.4.1. The US fish and fish products trade

The total edible fish and fish products imported into the US was $22.4 billion (2,761 thousand tons) in 2018.[31] The top ten countries from which the US imported fish and fish products in value in 2018 are Canada, China, India, Chile, Indonesia, Viet Nam, Thailand, Norway, Ecuador, and Mexico. Canada, China, and India account for more than one third of the total value; the top five for more than half; and the top ten for more than three quarters.[32] Shrimp occupies about 30 percent of the US total edible fish and fish products imported. Salmon, tuna, groundfish, freshwater fish, crab and crab meats, and squid are round out the list of major imports.[33]

2.4.2. The US shrimp industry

The Southern Shrimp Alliance (SSA) comprises shrimp fishermen, shrimp processors, and others in the eight warmwater shrimp producing states of Alabama, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Texas.[34] It is largely motivated by the stated concern that "The livelihoods of U.S. shrimpers are threatened by cheap, unfairly

[30]Standard Atlantic Fisheries Information System, About SAFIS, https://www.accsp.org/what-we-do/safis/ [hereinafter SAFIS].
[31]Current Fishery Statistics No 2018-2, Imports and Exports of Fishery Products, Annual Summary 2018, revised July 16, 2019, NOAA Fisheries, https://www.st.nmfs.noaa.gov/Assets/commercial/trade/Trade2018.pdf [hereinafter Annual Summary 2018 of Imports and Exports of Fishery Products].
[32]NOAA Data, retrieved from "Annual Data, Product by country/association," Foreign Fishery Trade Data, NOAA, https://www.fisheries.noaa.gov/national/sustainable-fisheries/foreign-fishery-trade-data [hereinafter NOAA Foreign Fishery Trade Data].
[33]Annual Summary 2018 of Imports and Exports of Fishery Products, supra note 31.
[34]Southern Shrimp Alliance, https://www.shrimpalliance.com/about/ [hereinafter Southern Shrimp Alliance].

traded imported shrimp. The U.S market has become a dumping ground for shrimp that are turned away from other major seafood importing countries."[35]

There was political pressure to implement SIMP for shrimp whose implementation was extended due to the lack of the similar traceability system in the US domestic market. A bipartisan group of eleven senators called for inclusion of shrimp in SIMP legislation and sent a letter to the Senate Appropriations Committee, showing their support for relevant US agencies' appropriations bill to add shrimp in SIMP.[36] In the letter, it is stated that "[the] primary sources of imported shrimp [to the US] include India, Indonesia, Thailand and Vietnam. These countries all export heavily subsidized, farm-raised shrimp, in contrast to the vast majority of American shrimp, which is wild-caught. We believe that SIMP is a key step to restoring a level playing field for the U.S. shrimp industry."[37]

Shrimp, and abalone, eventually were included in the target species listed in SIMP, along with the establishment of SIMP-equivalent traceability system for reporting and recordkeeping requirements for the US domestic aquacultured shrimp and abalone. SSA was "extremely pleased to report that the final Fiscal Year 2018 Omnibus appropriations bill includes a long sought-after provision that will once and for all put imported shrimp under the U.S. Seafood Import Monitoring Program (SIMP)."[38] SSA showed its appreciation on leadership by Senators Cochran (R-MS) and Shelby (R-AL) who negotiated funding for the Federal government and

[35]Ibid.
[36]Megget, K., Fearing fraud, US pushes for imported shrimp to be tracked, SecuringIndustry.com, February 13, 2018, https://www.securingindustry.com/food-and-beverage/fearing-fraud-us-pushes-for-imported-shrimp-to-be-tracked/s104/a6919/#.Xey-lm5Fyav.
[37]U.S. Domestic Shrimp Industry Receives Strong Bipartisan Support from Senate Leaders to Place Shrimp in Seafood Import Monitoring Program, February 9, 2018 at 12:25 AM, Mississippi Commercial Fisheries United, Inc., https://www.mscfu.org/apps/blog/show/45339932-u-s-domestic-shrimp-industry-receives-strong-bipartisan-support-from-senate-leaders-to-place-shrimp-in-seafood-import-monitoring-program.
[38]Southern Shrimp Alliance, U.S. Congress Acts to Place Imported Shrimp Under the Seafood Import Monitoring Program, March 22, 2018, https://www.shrimpalliance.com/u-s-congress-acts-place-imported-shrimp-seafood-import-monitoring-program/

overcame the opposition from seafood importers, represented by the National Fisheries Institute, and retailers, including the National Restaurant Association.[39]

2.4.3. United States international cooperation

USAID cooperates with other organizations to promote and establish catch documentation and traceability system. It funds the Oceans and Fisheries Partnership (USAID Oceans), working in partnership with the Southeast Asian Fisheries Development Center (SEAFDEC) and other institutions.[40] Its aim is "to improve integrated and sustainable fisheries management through enhanced catch documentation and traceability (CDT), focusing on priority species[…]under threat from IUU fishing and seafood fraud," and it "[collaborates] with organizations and agencies such as [NOAA], [DOI], [DOS], the Food and Agriculture Organization of the United Nations (FAO), the Government of Sweden, the Government of Japan through the Japanese Trust Fund (JTF), among others."[41] It states in its website that "[t]he CDTS will seek to leverage ongoing compliance efforts including those to meet import market regulations from the EU, US, and national regulations in order to limit data collection burdens and improve data compatibility across user needs."[42]

USAID is also a partner in the Seafood Alliance for Legality and Traceability (SALT), a public-private partnership between USAID, the Walton Family, Packard, and Moore Foundations, and implemented by FishWise, a sustainable seafood consultancy.[43] SALT "is a global community of governments, the seafood industry, and non-governmental organizations working together to share ideas and collaborate on solutions for legal and sustainable seafood,

[39]Ibid.
[40]The Oceans and Fisheries Partnership, https://www.seafdec-oceanspartnership.org/about/.
[41]Ibid.
[42]Ibid.
[43]The Seafood Alliance for Legality and Traceability, https://www.salttraceability.org/what-is-salt/.

with a particular focus on traceability – the ability to track the movement of seafood through supply chains."[44]

2.4.4. Concerns by other countries (China and India)

China

China raised its concern on SIMP in six WTO SPS committee meetings held from 2016 to 2018. China repeatedly insisted that SIMP would be "inconsistent with a number of key principles of the WTO such as transparency, national treatment, scientific justification and least trade restrictiveness" with various plausible justifications of its arguments.[45] For example, it considered that "US traceability requirements and catch certification for at-risk species applied only to imported fish and fish products, and not to domestic products", that "the measure was not based on science as it would finally apply to all imported aquatic products[46], regardless of risk levels, and making no distinctions between aquaculture products and wild capture fisheries", and that "the regulation required more information than necessary and overlapped with other rules, including the International Trade Data System (ITDS), which increased costs and generated unnecessary market access delays." China thus claimed, "the rule would do little to combat illegal fishing."

China urged the US to delay the implementation of SIMP for aquacultured products or even remove aquacultured products from SIMP, particularly of prawns and abalones. It is shown, in fact, that "China considered that the requirements of the programme were SPS-related, according to the definition of SPS measures in Annex A(1) of the SPS Agreement" and that it "requested clarification on the rationale for indicating that the requirements were not SPS-related,

[44]Ibid.
[45]Sanitary and Phytosanitary Information Management System, STC Number – 415, US seafood import monitoring programme, http://spsims.wto.org/en/SpecificTradeConcerns/View/415 [hereinafter China's claim in SPS meetings].
[46]The US noted that "[t]he rule would eventually cover all seafood species in subsequent phases" in the same meeting, but the current program covers thirteen species of fish and fish products.

and including additional species into the programme's scope of application."[47,48] Then, in the SPS committee meetings, China brought arguments about another US regulation "the Fish and Fish Product Import Regulations under the Marine Mammal Protection Act" which is outside of scope of SIMP.[49] China "noted that aquaculture products had no relation to the false capture of marine mammals" and "considered that the traceability of aquaculture products outside the United States did not help to prevent IUU fishing and fraud in aquatic products", so it "requested an explanation of the rationale for the inclusion of aquaculture products in the scope of application of the two bills [i.e. SIMP and the Marine Mammal Protection Act], and further urged the United States to consider removing these products from the bills and to formulate laws consistent with the SPS Agreement." China repeated urging the US to remove aquacultured products from both SIMP and the Marine Mammal Protection Act, and "requested updates on the relevant bills under the regional fishery management organizations and the relevant international management organizations."

In addition, "China urged the United States to notify the SIMP to the WTO for comments by Members" and "to postpone its implementation until Members' comments were sought and taken into consideration"; however, the US carried out the notification and public comment procedures as the previous sections in this paper describe.

[47]According to Annex A (1) of the SPS Agreement, sanitary or phytosanitary measures are basically quarantine measures to protect life or health of humans, animals or plants within territory of Members from damages or risks arising from additives, contaminants, toxins, pests, diseases, disease-carrying/causing organisms, and such.

[48]China pointed out possible "human health risks," one of seven principles on which the US determination of SIMP target species was based. (For the determination of SIMP target species or at-risk species, see Federal Register Vol. 80, No. 210, Friday October30, 2015, https://www.federalregister.gov/documents/2015/10/30/2015-27780/presidential-task-force-on-combating-illegal-unreported-and-unregulated-iuu-fishing-and-seafood.) However, the scope of SIMP is to confirm imported fish and fish products originate from legal or reported fishery, and thus SIMP requires catch documents that show the products originate from legitimate harvests. SIMP is not a sanitary or phytosanitary measure which requires sanitary inspections.

[49]Even though the concern to be discussed in the meetings was about SIMP, "The United Stated also indicated its willingness to have bilateral discussions on the other measure mentioned by China, which was outside the scope of this trade concern on the US seafood import monitoring programme."

It seems China did not understand scope and purpose of SIMP or the SPS Agreement, and the US repeatedly rebutted that "the final rule was not an SPS measure and therefore fell outside the scope of the SPS Agreement." The US reiterated the objective and requirement of SIMP, and "further explained that the rule had been developed through a transparent process of public notice and comments involving domestic and foreign stakeholders, as well as exporting authorities" and it "had received many comments, including from China, which were being considered in the first phase of the programme covering a reduced list of species."

India

Even though India did not raise its potential concerns on SIMP at the WTO, it would be affected since the US is one of the biggest shrimp markets for India. The US consumes one-third of India's seafood exports, of which frozen shrimp constitutes 95%.[50] India's seafood exports rose 22% in 2017-2018,[51] with shrimp export's rising 29.5% in 2017.[52] India would consider shrimp export seriously as an important export item to the US as the government "announced a target to double exports of marine products" and would prepare measures to support for marketing and strengthen aquaculture production, including shrimp, in the various Indian states.[53,54]

[50]Narasimhan, T.E., Seafood export rises 22% to nearly $7.1 billion in 2017-18, Business Standard, Last Updated at Jul. 3, 2018 01:06 IST, https://www.business-standard.com/article/markets/seafood-export-rises-22-to-nearly-7-1-billion-in-2017-18-118070300045_1.html.
[51]Ibid.
[52]Sackton, J., SeafoodNews.com, US launches WTO fight over Indian export subsidies; shrimp trade could be issue, March 15, 2018 15:16 GMT, Seafood.com News, https://www.undercurrentnews.com/2018/03/15/wto-fight-over-indian-export-subsidies-shrimp-trade-could-become-an-issue/.
[53]Ibid.
[54]Chakraborty, S., Modi govt sets firm eyes on the sea as new source of major exports, Business Standard, Last Updated at Feb. 1, 2018 01:52 IST, https://www.business-standard.com/article/economy-policy/india-sets-firm-eye-on-the-sea-to-double-exports-rope-in-new-buyers-118013100637_1.html.

Although the SIMP requirements would not be a strong barrier for most of the medium and large Indian shrimp exporters, who would be ready for the requirements,[55,56] the measures would impose "an increase in compliance cost as documentary evidence needs to be provided for every container regarding its traceability for exports to US", stated a managing director of a cold storage packer.[57] Some Indian stakeholders such as an official and an exporter call SIMP as a non-tariff barrier.[58,59] "Trade sources also say that small exporters may find it extremely difficult to ship to the US, their largest market by value"[60] as they would lose their distribution channels circumventing other countries. The vice-president and sector head of corporate sector, ICRA[61] said that "while most of the medium and large Indian shrimp exporters to the US and the European Union use registered farms, shrimp exports to Vietnam go both from registered and unregistered farms. This would hamper Vietnam's reexport prospects to the US (owing to the lack of traceability), in turn curtailing Indian demand temporarily."[62] Hence, total Indian shrimp export would be affected by implementation of SIMP.

[55]Behera, N., New US norms on seafood imports may cool demand for Indian shrimps: Icra The US is a major market for India's seafood exports and is valued at $7 billion, Bhubaneswar, Last Updated at Dec. 31, 2018 22:35 IST, https://www.business-standard.com/article/markets/new-us-norms-may-cool-demand-for-indian-shrimps-in-2019-says-icra-report-118123100971_1.html [hereinafter ICRA].
[56]Undercurrent News, Indian exporters gear up for SIMP, Dec. 27, 2018 10:04 GMT, https://economictimes.indiatimes.com/news/economy/foreign-trade/us-tightens-two-norms-on-import-of-shrimps/articleshow/65776717.cms [hereinafter Undercurrent News].
[57]Ibid.
[58]Ibid.
[59]Suneja, K., US tightens two norms on import of shrimps, The Economic Times, Sep. 12, 2018, 06.40 AM IST, https://economictimes.indiatimes.com/news/economy/foreign-trade/us-tightens-two-norms-on-import-of-shrimps/articleshow/65776717.cms.
[60]ICRA, supra note 55; Undercurrent News, supra note 56.
[61]ICRA is an independent and professional investment Information and Credit Rating Agency, leading Indian financial/investment institutions, commercial banks and financial services companies, https://www.icra.in/Home/Profile.
[62]ICRA, supra note 55.

3. Was SIMP violation or an exception under the WTO Agreement?

Based on the above information, other relevant facts, and introduction of precedent WTO dispute settlement cases, I will discuss possibility of violations of the US obligations under provisions of the WTO Agreement with respect to SIMP.

3.1. General Agreement on Tariff and Trade 1994 (GATT 1994)

3.1.1. Article III: National Treatment

Issue: Did the US violate its obligations under GATT 1994 Article III when it requires submission of catch information for the certain species of fish and fish products to be imported?

Relevant International Law: GATT 1994 Article III:4[63]

GATT 1994 Article III:4 states that any imported product shall be no less favourably treated than a like product of that import produced in the domestic markets. The US, in fact, places the same catch reporting requirement on imports of the thirteen species of fish and fish products that it requires of its domestic dealers. Given that the US regulations are entirely in line with GATT 1994 Article III:4, a decision finding no violation would be appropriate.

However, Members that import raw fish from other countries, process it, and export to the US may complain that it imposes more burden on exporters of such fish and fish products, in violation of Article III. For instance, as asserted by the vice-president of ICRA, "shrimp exports [from India] to Vietnam go both from registered and unregistered farms. This would hamper Vietnam's reexport prospects to the US (owing to the lack of traceability)."[64]

However, SIMP also applies to fish and fish products that are initially harvested in the US and subsequently sent to a foreign country for processing, reprocessing, and/or storage, and

[63]GATT 1994: General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 17 (1999), 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994) [hereinafter GATT 1994], Article III:4.
[64]ICRA, supra note 55.

later imported back into the US. Those fish and fish products are subject to the reporting and recordkeeping requirements for re-entry into the US.[65] The requirements are not applied to certain highly processed fish products such as "fish oil, slurry, sauces, sticks, balls, cakes, puddings, and other similar highly processed fish products, in cases where these products cannot currently be traced back to one species of fish or a specific harvest event(s) or identified through product labeling."[66] SIMP also does not intend to require segregation of each and every harvest event through the supply chain such as processing and shipment in order to trace back from point of entry.[67] NOAA considers that "An imported shipment may be comprised of products from more than one harvest event. In such instances, an importer of record must provide information on each harvest event relevant to the contents of the product offered for entry, but does not need to specify which portions of the shipment came from particular harvest events."[68] In addition, "SIMP exempts an importer from the requirement to individually identify small-scale vessels – or small scale aquaculture facilities – if the importer provides other required data elements based on an aggregated harvest report."[69]

Considering the above information from the US side, SIMP would not discriminate the import fish and fish products from the domestic ones.

3.1.2. Article XI: General Elimination of Quantitative Restrictions

Issue: Did the US violate its obligations under GATT 1994 Article XI when it requires submission of catch information for the certain species of fish and fish products to be imported?

[65]Compliance Guide for the Seafood Import Monitoring Program, NOAA, March 11, 2019, https://www.fisheries.noaa.gov/resource/document/compliance-guide-seafood-import-monitoring-program [hereinafter SIMP Compliance Guide].
[66]Ibid.
[67]Ibid.
[68]Ibid.
[69]Ibid. (The aggregated harvest report is defined as a record that covers: (1) harvests at a single collection point in a single calendar day from small-scale vessels (i.e., twelve meters in length or less or 20 gross tons or less); (2) landing by a vessel to which catches of small-scale vessels were made at sea.)

Relevant International Law: GATT 1994 Article XI[70]

GATT 1994 Article XI paragraph 1 says that Members shall not institute or maintain prohibitions or restrictions on importations or exportations of any product of Member countries by means such as quotas, import or export licenses other than duties, taxes or other charges. Paragraph 2 of the article states exemptions for the provisions of the paragraph 1; it says in part that the requirements pursuant to the paragraph 1 shall not apply to imported products of agricultural or fisheries commodities if governments enforce measures to regulate quantities of the like domestic product for which the imported product can be substituted in its domestic market.

Clearly, the US imposes prohibitions or restrictions other than duties or taxes on the importations of the thirteen species of fish and fish products because it does not allow those importations without the required catch documents. The exemptions stated in the paragraph 2 may or may not apply to the certain species of fish and fish products in SIMP, depending on how to interpret the meaning of "regulations on quantities of the like domestic product." The US federal or state government fisheries agencies allocate catch quotas for certain fish species to fishers in order to manage fisheries resources based on scientific evidence. In this narrow sense, the US regulate quantities of the like domestic products, and thus, the US trade regulations can limit imports of fish and fish products into its market by means other than duties, taxes or other charges.

3.1.3. Article XX: General Exceptions

Issue: Is the US action permissible under GATT 1994 Article XX?

Relevant International Law: GATT 1994 Article XX (b) and (g)[71]

[70]GATT 1994, supra note 63, Article XI.

SIMP would be permissible pursuant to GATT 1994 Article XX (b) or (g). Article XX(b) states an exception from the principal GATT disciplines for measures necessary to protect human, animal or plant life or health while Article XX(g) does for measures relating to the conservation of exhaustible natural resources. If measures are made effective in conjunction with restrictions on domestic production or consumption, any provisions shall not be construed to prevent the adoption or enforcement of the measures, subject to certain conditions set out in the chapeau of Article XX, which states that "the 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."

US disputes before the WTO – notably pre-WTO and WTO eras such as *US – Tuna Case I*[72], *US – Tuna Case II*[73], *US – Shrimp Case I*[74,75], and *US – Shrimp Case II*.[76,77] – contributed substantially to current interpretation and implementation of Article XX. This section reviews the major arguments in those precedent cases and discusses how the key factors in those arguments should guide implementation of SIMP.

WTO Appellate decisions have broken the analysis into three parts: (1) appropriateness of the application of SIMP measure; (2) necessity of the measure to pursue its objectives; and (3) chapeau requirements. The order in this analytical framework is based on *US – Shrimp Case I*. It is worth stating the case here briefly.

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[71]Ibid, Article XX.
[72]United States – Restrictions on Imports of Tuna, Report of the Panel, DS21/R, September 3, 1991 [hereinafter US – Tuna Case I].
[73]United States – Restrictions on Imports of Tuna, Report of the Panel, DS29/R, June 16, 1994 [hereinafter US – Tuna Case II].
[74]United States – Import Prohibition of Certain Shrimp and Shrimp Products, Report of the Panel, WT/DS58/R, May 15, 1998 [hereinafter US – Shrimp Case I Panel Report].
[75]United States – Import Prohibition of Certain Shrimp and Shrimp Products, Report of the Appellate Body, WT/DS58/AB/R, October 12, 1998 [hereinafter US – Shrimp Case I AB Report].
[76]United States – Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 by Malaysia, Report of the Panel, WT/DS58/RW, June 15, 2001 [hereinafter US – Shrimp Case II Panel Report].
[77]United States – Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 by Malaysia, Report of the Appellate Body, WT/DS58/AB/RW, October 22, 2001 [hereinafter US – Shrimp Case II AB Report].

In *US – Shrimp Case I*, the Appellate Body rejected the order of justifications of each element by the Panel, which first started its investigation with regards to the chapeau requirements of GATT 1994 Article XX.[78] The Appellate Body claimed that "[t]he standards established in the chapeau are, moreover, necessarily broad in scope and reach" and "[t]he task of interpreting the chapeau so as to prevent the abuse or misuse of the specific exemptions provided for in Article XX is rendered very difficult, if indeed it remains possible at all" if the specific exception threatened with abuse has not been first identified and examined.[79] Then, the Appellate Body continued that "[w]hen applied in a particular case, the actual contours and contents of these standards will vary as the kind of measure under examination varies…The standard of ['']arbitrary discrimination['], for example, under the chapeau may be different for a measure that purports to be necessary to protect public morals than for one relating to the products of prison labour."[80]

Following the logic of *US-Shrimp I*, subsequent cases with Article XX begin arguments with appropriateness of application of a measure under each item of Article XX, move to necessity of the measure to pursue its objectives, and at last investigate the chapeau requirements of Article XX. I will follow the same line of analysis.

(1) The APPROPRIATENESS of the application of the measure

First, the objectives of the measure must be the protection of human, animal or plant life or health to accord with the principle of Article XX(b), or the conservation of exhaustible natural resources to accord with the principle of Article XX(g).

[78]US – Shrimp Case I AB Report, supra note 75.
[79]Ibid, para 120.
[80]Ibid.

SIMP is a system of reporting and recordkeeping requirements on the importations of the fish and fish products to pursue blocking IUU fishery-caught and bogus fish products from entering the US market through assurance of traceability.[81] The measure applies to US fishery resources equally as to other nations' fishery resources since the thirteen target species include not only highly migratory fish species such as tuna but also non-migratory species such as abalone. It is apparent that the measure targets the protection of animal life or health and the conservation of natural resources both in the United States and in other countries.

In *US – Tuna Case II*, the Panel accepted that a policy to conserve dolphins, whose stocks could potentially be exhausted but whose present level was not dependent upon the conservation policy, was nonetheless "a policy to conserve an exhaustible natural resource."[82] The Panel observed that "measures according different treatment to products of different origins could in principle be taken" under GATT 1947 provisions "with respect to things located, or actions occurring, outside the territorial jurisdiction of the party taking the measure", noting that two panels previous to this *US – Tuna Case II* had considered Article XX (g) to be applicable to policies related to migratory species of fish such as herring, salmon, and tuna and that the two panels thus had made no distinction between fish caught within or outside the territorial jurisdiction of the contracting parities, namely Canada and the US.[83] In addition, the Panel observed "that, under general international law, states are not in principle barred from regulating the conduct of their nationals with respect to persons, animals, plants and natural resources outside of their territory"[84] The Panel then "noted that the statements and drafting changes made during the negotiation of the Havana Charter and the General Agreement did not clearly support

[81]SIMP, supra note 6.
[82]US – Tuna Case II, supra note 73, para 5.13-33.
[83]Ibid.
[84]Ibid.

any particular contention of the parties with respect to the location of the living thing to be protected under Article XX [(b)/(g)].”[85] Thus, it “found that the policy to [protect the life and health of dolphins/conserve dolphins] [outside of its territory]”, which the US pursued over its nationals and vessels within its jurisdiction, “fell within the range of policies covered by Article XX [(b)/(g)].”[86]

In *US – Shrimp I*, the Appellate Body made arguments that “exhaustible natural resources” include not only mineral or non-living natural resources but also living natural resources.[87] Then, it concluded that sea turtles that were to be conserved under the US trade measures were “[‘]exhaustible natural resources[’] for purposes of Article XX(g)” in part because species of the targeted sea turtles were listed in Appendix 1 of Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), meaning “all species threatened with extinction which are or may be affected by trade.”[88]

Regarding the thirteen species under SIMP, some highly migratory species such as tuna or shark can be covered in the same way as species in the above cases. However, abalone, sea cucumber, and shrimp are non-migratory species, and “sufficient nexus” would be questionable. It has been unclear whether imposition of measures that purport to protect exhaustible natural resources completely outside the imposing Member’s territory would be appropriate to be applied.[89] It would be difficult to judge only based on straightforward interpretation of this element of the article, but it may depend on how to interpret the element based on recent social norms. Since fish and fish products of those non-migratory species are traded internationally,

[85]Ibid.
[86]Ibid.
[87]US – Shrimp Case I AB Report, supra note 75, para 127-131.
[88]Ibid, para 132-134.
[89]Ministry of Economy, Trade and Industry, 2019 Report on Compliance by Major Trading Partners with Trade Agreements – WTO, EPA/FTA and IIA –, Part II: WTO Rules and Major Cases, Chapter 4 Justifiable Reasons, page 230.

they already have become global common natural resources; thus, they could be also regarded as natural resources of the world including the US. Some species of sea cucumber are also listed in CITES due to its overfishing led by international trade. In future, the appropriateness of application of GATT 1994 Article XX (g) would be taken broadly as the similar trend of broader interpretation in other provisions, which aims to keep balance between pursuit of legitimate objectives of regulations and elimination of trade barriers, can be seen in the following arguments in this paper.

(2) The NECESSITY of the measure for pursuing its objectives

Second, the measure as such must be necessary for protection of human, animal or plant life or health to accord with the principle of Article XX(b), or related to the conservation of exhaustible natural resources to accord with the principle of Article XX(g).

In *US – Tuna I*, the Panel considered that the US measures would not meet the requirement of necessity set out in the provision under GATT 1947 XX (b). The Panel argued that the US should have had to show "*all options reasonably available*" to pursue objectives of the measures that are consistent with the GATT 1947 "*in particular through the negotiation of international cooperative arrangements*," which would seem to be desirable due to high migratory characteristics of dolphins in the adjacent waters (emphasis in Italics added).[90]

In addition, the US linked rate of dolphin bycatch by tuna fishers between the US and Mexico, but "the Mexican authorities could not know whether, at a given point of time, their policies conformed to the United States' dolphin protection standards;" thus, "[t]he Panel

[90]US – Tuna Case I, supra note 72, para 5.28.

considered that a limitation on trade based on such *unpredictable conditions* could not be regarded as necessary to protect the health or life of dolphins (emphasis in Italics added)."[91]

In *US – Tuna II,* the measures *that force other countries to change their policies and become effective only with such changes* "could not be considered ['']necessary['] for the protection of animal life or health in the sense of Article XX (b)" nor "could not be primarily aimed either at the conservation of an exhaustible natural resource, or at rendering effective restrictions on domestic production or consumption, in the meaning of Article XX (g) (emphasis in Italics added)."[92] Thus, the Panel concluded that the US measures, which prohibited import of certain tuna and tuna products, were not justified by Article XX (b) nor (g).

On the other hand, in *US – Shrimp Case I*, the Appellate Body found that "the general structure and design of [the measure] is fairly narrowly focused" such that the measure excludes aquaculture shrimp, harvest methods that do not affect sea turtle mortality.[93] Under the measure, "a country wishing to export shrimp to the United States is required to adopt a regulatory program that is *comparable to* that of the United States program and to have a rate of incidental take of sea turtles that is *comparable to* the average rate of United States' vessels (emphasis in Italics added)."[94] Thus, the Appellate Body concluded that the measure is not disproportionately wide in its scope and reach in relation to the policy objective and that "[t]he means and ends relationship between [the measure] and the legitimate policy […] is observably a *close and real* one (emphasis in Italics added)."[95]

By applying each precedent case, I will discuss whether SIMP may or may not violate the necessity requirement under GATT 1994 Article XX.

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[91]Ibid.
[92]US – Tuna Case II, supra note 73, para 5.27, 5.37-39.
[93]US – Shrimp Case I AB Report, supra note 75, para 138.
[94]Ibid, para 140.
[95]Ibid, para 141.

(i) "*all options reasonably available*" to pursue objectives of the measures that are consistent with the GATT 1994 "*in particular through the negotiation of international cooperative arrangements*"

Regarding international fishery management, regional fisheries management organizations (RFMOs) usually establish scheme to require catch certificate for certain fish species to be imported into Members. They are established based on international fisheries agreements. For example, the International Commission for the Conservation of Atlantic Tunas (ICCAT) was established in 1966.[96] The Commission scientifically evaluates stock status of their target species and decide total allowable catch. Members negotiate allocation of catch quota. Monitoring, control, and surveillance systems are established, and each member is responsible for its enforcement activities. Some Members cooperate to enforce their fishing fleets on high sea areas.

FAO also deals with fisheries management.[97] It adopted the Code of Conduct for Responsible Fisheries in 1995, and the International Plan of Action to Prevent, Deter, and Eliminate IUU Fishing in 2001. These are basically voluntary standards with no specified enforcement mechanism. However, FAO established the Agreement on Port State Measures (PSMA), adopted in 2009 and made effective in 2016. PSMA is the first binding international agreement to specifically target IUU fishing. The Members deny vessels associated with IUU fishing, including transshipment vessels that carry fish and fish products from fishing area, entry into their ports, whether to land the catches, supply fuels, or for any purposes. PSMA also allows the importing Members to inspect foreign fishing vessels or related vessels, including submission of copies of catch certificates.

[96]ICCAT, homepage https://www.iccat.int/en/.
[97]FAO homepage, http://www.fao.org/iuu-fishing/en/.

There are also other relevant international environmental agreements, such as the United Nations Convention on the Law of the Sea (UNCLOS), Agreement for the implementation of the provisions of the UNCLOS of 10 December 1982 relating to the Conservation and Management of Straddling and Fish Stocks and Highly Migratory Fish Stocks, CITES, and other agreements. The legitimate objectives of those international agreements in part or all, which are conservation of natural resources in principle, are the same or similar to those of SIMP. However, some of the SIMP target species may not be specifically related to those international agreements.

While the fact that some target species of SIMP are not managed by international organizations could be an issue between the US and potential complainants, US has expanded its efforts to combat IUU fishing internationally. It has offered international cooperation with respect to traceability and catch document scheme to Southeast Asian countries.[98] It also has actively participated and played a leading role in a newly established international framework, "Our Ocean" Conference, the themes of which are sustainable fisheries, marine pollution, and ocean acidification.[99] The US Department of State hosted the first "Our Ocean" Conference in Washington, D.C. in 2014, and invited individuals, experts, practitioners, advocates, lawmakers, and the international ocean and foreign policy communities from nearly 90 countries to gather lessons learned, share the best science, offer unique perspectives, and demonstrate effective actions. In the conference, Secretary Kerry outlined "Our Ocean Action Plan," which describes a set of actions the US Government intends to undertake in its territory and to pursue with other nations and stakeholders at the international level.[100]

[98]The Oceans and Fisheries Partnership, supra note 40.
[99]U.S. Department of State, 2014 Our Ocean Conference, https://2009-2017.state.gov/e/oes/ocns/opa/ourocean/2014/index.htm.
[100]Ibid.

Supported by the international fisheries agreements and US international cooperative arrangements, the US has shown its "*all options reasonably available*" to pursue objectives of the measures that are consistent with the GATT 1994 "*in particular through the negotiation of international cooperative arrangements*."

(ii) *unpredictable conditions*

As described earlier, the measure was initiated in 2014, went through several public comments, and implemented in 2018. Thus, there should not be unpredictable conditions.

(iii) *measures that force other countries to change their policies and become effective only with such changes*

Since SIMP has flexibility on small scale fisheries and its form of catch certificates,[101] it does not seem such a prima facie measure that requires other countries to change their policies and become effective only with those changes. However, it might actually force other countries to change their fisheries management scheme such if those countries do not have catch documentation scheme for certain species. Some fisheries authorities manage and control fisheries resources by limiting access to fishing ground, banning destructive fishing methods, and keep their sustainable fishing practices without reporting catch information; thus, they do not need catch documentation system as long as they keep constantly catching a sustainable amount of fish. Having no catch documentation at the point of harvest does not necessarily mean the fishery is not sustainable. That type of practices can be seen in a number of developing countries.

In contrast, the Appellate Body in *US – Shrimp Case I* accepted the US measure that required an exporting country to adopt its regulatory program comparable to the US program, and it concluded that the general structure and design of the US measure was reasonably related

[101] SIMP Compliance Guide, supra note 65.

to its legitimate objectives.[102] SIMP would be within the scope set forth in this case, hence, it should not be regarded as a trade restrictive measure *that force other countries to change their policies and become effective only with such changes.*

(iv) *comparable to* and *close and real* relationship

Regarding comparableness, the requirement to collect catch information under SIMP would be comparable to that of other Members since SIMP allows the flexibility as discussed above. A possible concern might be the application of SIMP to aquacultured fish and fish products, which China raised in the SPS committee meetings. China claimed that SIMP made no distinctions between wild capture fisheries and aquacultured products while the traceability of aquacultured products outside the US did not help to prevent IUU fishing and fraud in aquatic products. However, that the collection of catch information includes aquacultured products is justifiable because the US could not prove that the products are not from wild fisheries, in part of which IUU fishing activities take place, without the documentation for aquacultured products. In addition, use of illegal forced labor might be possible even in aquacultures. If the US would be able to investigate and identify such illegal fishing activities with the collected data, the measure would help to achieve the objective. Thus, the general structure and design of SIMP is fairly narrowly focused.

On the other hand, strictly speaking, "close and real" relationship[103] might not be currently found with SIMP-unfavorable view between the measure and the submission requirements of catch information. The documented information can be easily forged and submitted unless an importing state inquires of an exporting state as to the legitimacy of the

[102]US – Shrimp Case I AB Report, supra note 75, para 137-142.
[103]Ibid.

documents in catch document schemes. The SIMP provision does not *de jure* include procedures for inquiry; therefore, it might not truly closely relate to the conservation of exhaustible natural resources. In contrast, for example, Russia and Japan established and implemented electronic confirming system for catch certificates of Russian crabs in December 2014.[104] There used to be forged paper certificates for Russian crab imports to Japan. After the bilateral agreement and introduction of the special on-line system to check authenticity between Russia and Japan in 2014, the paper-based documentation was abandoned, and both Japan and Russia can simultaneously check whether the electric documents are legitimately issued. As a result, the volume of the crab imports was dramatically reduced by 44% from 26,551 tons in 2014 to 14,871 tons in 2015,[105] which indicates the volume of illegally fished or distributed crabs.

Unlike the Russian crab case, the US fish trade data on the thirteen species do not seem to show rapid decrease from 2017 to 2018, after the introduction of SIMP in January 2018.[106] However, regarding electronic catch documentation system, USAID has recently cooperated with the Southeast Asian countries to establish electric catch documentation and traceability scheme.[107] One of its aims is "to meet import market regulations from the EU, US, and national regulations in order to limit data collection burdens and improve data compatibility across user needs."[108] In this sense, the US can be said to demonstrate its efforts to prove the "close and real" relationship.

(3) The CHAPEAU requirements

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[104]Illegal Russian crab: an investigation of trade flow (2015) World Wildlife Fund, https://www.worldwildlife.org/publications/illegal-russian-crab-an-investigation-of-trade-flow.
[105]Trade statistics of agricultural, forestry and fishery products, the Ministry of Agriculture, Forestry and Fisheries of Japan (in Japanese), http://www.maff.go.jp/j/tokei/kouhyou/kokusai/.
[106]NOAA Foreign Fishery Trade Data, supra note 32.
[107]The Oceans and Fisheries Partnership, supra note 40.
[108]Ibid.

The chapeau of GATT 1994 Article XX requires "that [a measure] is not applied in a manner which would constitute ['a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail[']], and is not ['a disguised restriction on international trade[']]"[109]

(i) *a means of arbitrary or unjustifiable discrimination*

In *US – Shrimp Case II*, the Panel concluded that the US had the following obligations specified by the Appellate Body in *US – Shrimp Case I* in order to avoid "unjustifiable discrimination":

> (a)the United States had to take the initiative of negotiations with the appellees, having already negotiated with other harvesting countries (Caribbean and Western Atlantic countries);
> (b)the negotiations had to be with all interested parties (['across-the-board[']) and aimed at establishing consensual means of protection and conservation of endangered sea turtles;
> (c)the United States had to make serious efforts in good faith to negotiate; and
> (d)serious efforts in good faith had to take place before the enforcement of a unilaterally designed import prohibition.[110]

Based on its careful review, the Panel concluded: "the United States would be entitled to maintain the implementing measure if it were demonstrated that it was making serious good faith efforts to conclude an international agreement on the protection and conservation of sea turtles" and "[t]he Panel is of the view that the US efforts since 1998 meet the standard established by the Appellate Body Report."[111]

The Appellate Body in US – Shrimp Case II further evaluated good faith efforts by the US to provide all exporting countries with similar or "comparable" opportunities to negotiate and

[109]WTO rules and environmental policies: GATT exceptions, https://www.wto.org/english/tratop_e/envir_e/envt_rules_exceptions_e.htm.
[110]US – Shrimp Case II Panel Report, supra note 76, para 5.66.
[111]Ibid, para 5.87.

reach international agreements; it stated that "the conclusion of an international agreement might nevertheless not be possible despite the serious, good faith efforts" and "[f]or a variety of reasons, it may be possible to conclude an agreement with one group of countries but not another"; thus, it concluded that the US avoided "arbitrary or unjustifiable discrimination"[112]

Regarding SIMP, the US actions before and during the implementation of SIMP demonstrate, in its good faith, all the factors relevant to the four obligations in *US – Shrimp Case*. The US DOS initiated "Our Ocean" Conference and played a leading role in 2014, three and half years before the implementation of SIMP, and the USAID cooperates with Southeast Asian countries to establish catch documentation scheme as already mentioned in the previous section of this paper.

(ii) *a disguised restriction on international trade*

In *US – Shrimp Case II*, the Panel stated that US shrimp fishermen "are subject to constraints comparable to those imposed on exporting countries' fishermen insofar as [US fishermen] have to use [Turtle Exclusive Devices (TEDs)] at all times" while "the United States has demonstrated that the mandatory use of TEDs in certain circumstances is no longer a condition *sine qua non* for certification if other comparable programmes are applied" in exporting countries.[113] Thus, the Panel considered that "US fishermen are likely to incur little commercial gain from a ban" and that "by allowing exporting countries to apply programmes not based on the mandatory use of TEDs, and by offering technical assistance to develop the use of

[112]US – Shrimp Case II AB Report, supra note 77, para 122, 123.
[113]US – Shrimp Case II Panel Report, supra note 76, para 5.143.

TEDs in third countries," the US measure "is not applied so as to constitute a disguised restriction on trade."[114]

US dealers of their domestic fish and fish products have to report landing information in every single harvest while US seafood importers do not need to segregate fish products based on particular harvest events as long as they collect and report all catch information that account for contents of their imported fish shipments.[115,116] The US has considered the fact that an import shipment may comprise products from more than one harvest event. In addition, 90 percent of US seafood consumption relies on import.[117,118] Thus, the overall economic benefit of SIMP to US fishers may be small. Considering those facts and other relevant points showing good faith by the US, SIMP would not be considered as "a disguised restriction on international trade."

3.2. Agreement on Technical Barriers on Trade (TBT Agreement)

Issue: Did the US violate its obligations under the TBT Agreement when it requires submission of catch information for the certain species of fish and fish products to be imported?

Relevant International Law: TBT Agreement Annex 1 and Articles 2.1, 2.2, and 2.4[119]

Past dispute settlement cases have addressed the TBT Agreement and its relation to the GATT 1994, specifically the difference in meaning of elements with literally the same expressions such as "like product." Past dispute settlement cases allow more flexibility to

[114]Ibid.
[115]Federally Permitted Seafood Dealer Reporting Requirements, supra note 24; E-Fish Ticket, supra note 27; SAFIS, supra note 30.
[116]SIMP Compliance Guide, supra note 65.
[117]NOAA homepage, Office of International Affairs and Seafood Inspection, https://www.fisheries.noaa.gov/about/office-international-affairs-seafood-inspection; U.S. Aquaculture, https://www.fisheries.noaa.gov/national/aquaculture/us-aquaculture.
[118]It should be noted that the number of percentage has been argued since 90% does not exclude re-export of US domestically caught fish for processing in foreign countries. See "Study questions just how much seafood the US actually imports" Bittenbender, S., June 25, 2019 https://www.seafoodsource.com/news/supply-trade/study-questions-just-how-much-seafood-the-u-s-actually-imports.
[119]TBT Agreement: Agreement on Technical Barriers to Trade, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 17 (1999), 1868 U.N.T.S. 120 (1994) [hereinafter TBT Agreement].

interpret elements in provisions of the TBT Agreement in order to keep balance between the pursuit of legitimate objectives of regulations and elimination of trade barriers.[120] TBT Agreement Article 2.2 states that "technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective" and that "[s]uch legitimate objectives are, *inter alia*: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment" (emphasis in Italics added).[121] This is "a non-exhaustive list," and technical regulations for other objectives may be included.[122] The TBT Agreement, unlike the GATT 1994, has no provision on general exceptions corresponding to the list of exceptions (a) to (j) of GATT 1994 Article XX. Instead, the TBT Agreement may allow more flexibility than the GATT 1994.[123]

In the following analysis of the possibility of violations of the US obligations under provisions of the TBT Agreement with respect to SIMP, I will review the major arguments in precedent WTO dispute settlement cases that involved the TBT Agreement. I mainly introduce *US – Tuna (TBT) Case I*,[124] which covers the relevant arguments broadly, and examine whether SIMP be in line with the TBT Agreement.

(1) Was the measure TECHNICAL REGULATION? (TBT Agreement Annex1: terms and their definitions for the purpose of this Agreement), and
(2) Did the measure direct to a SPECIFIC product? (Is the product identifiable?)

TBT Agreement Annex 1.1 defines "technical regulation" as follows:

[120]Kyogoku-Tanabe, T. and Fujioka, N., The Jurisprudence of the TBT Agreement: An Analysis of the Interpretations in the US – Clove Cigarettes, US – Tuna II, and US – COOL cases, Journal of Agricultural Policy Research No.23 (Dec. 2014), Policy Research Institute, Ministry of Agriculture, Forestry and Fisheries (in Japanese) [hereinafter PRIMAFF].
[121]TBT Agreement, supra note 119, Article 2.2.
[122]United States – Certain country of origin labelling (cool) requirements, Reports of the Panel, November 18, 2011, WT/DS384/R; WT/DS386/R [hereinafter US COOL Panel Report], para 7.632.
[123]PRIMAFF, supra note 120.
[124]United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products, Report of the Appellate Body, WT/DS381/AB/R, May 16, 2012 [hereinafter US – Tuna (TBT) Case I AB report]; United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products, Report of the Panel, WT/DS381/R, September 15, 2011 [hereinafter US – Tuna (TBT) Case I Panel report].

> 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.[125]

The TBT Agreement covers not only domestic measures relating to product characteristics but also targets ones relating to processes and production method (PPM) regulations. The *EC – Asbestos Case* made clear requirements to define this "technical regulations." Those requirements are that: (a.1) the products subject to the regulation are identifiable (characteristics of the products are described) or (a.2) the regulation lays down the product characteristics or its related PPM; and (b) compliance with the regulations is mandatory.[126] Other WTO dispute settlement cases basically follow this precedent case for defining technical regulations.

In the *US – Tuna (TBT) Case I*, the Panel decided that compliance with the US regulation for the dolphin safe labeling was mandatory because selling tuna products with any other type of dolphin safe labelling was not legally possible in the US unless tuna was caught using specific fishing methods specified in "a binding or compulsory fashion" by US government, while other fishing methods also were safe to dolphins.[127,128]

PPM does not always affect the characteristics of final products, as discussed in *EC – Hormone Beef,* under provisions of SPS Agreement. Arguments in this case were raised about

[125]TBT Agreement, supra note 119, Annex1.
[126]European Communities – Measures Affecting Asbestos and Products Containing Asbestos, Report of the Appellate Body, March 12, 2001, WT/DS135/AB/R, para 66-70.
[127]US – Tuna (TBT) Case I Panel report, supra note 124, para 7.131-7.144.
[128]One of the panelist members disagreed with the rest of members of the Panel and agreed with US views that the labeling was not mandatory because tuna could be sold in the US market without labelling; the panelist argued that the basic idea of "mandatory compliance" in TBT Agreement Annex 1.1 related to whether the measure imposes compliance with specific requirements in order to allow a product to be marketed. However, the Appellate Body rejected this argument because text of TBT Agreement Annex 1.1 does not contain the words "market" or "territory" and hence, it does not indicate what the United States and the one of panelists claimed. The Appellate Body emphasized on the fact that "any [']producer, importer, exporter, distributor or seller['] of tuna products must comply with the measure at issue in order to make any [']dolphin-safe['] claim" because the US measure set conditions for claiming dolphin safe "in a broad and exhaustive manner" "regardless of the manner in which that statement is made." See US – Tuna (TBT) Case I Panel report, para 146-164, and US – Tuna (TBT) Case I AB report, para 191-199.

like products, such as whether beef from cows raised with growth hormone were different from ones without growth hormone. The Appellate Body concluded that they could not be treated as different products unless the difference was scientifically proved by authorities.[129] Following this logic, it is clear that any final tuna products are not differentiable by the methods that the tuna was caught; the final products seem unrelated to PPM.

However, in *US – Tuna (TBT) Case I*, there was no difference in perception between the complainant and the respondent that the dolphin safe label was specifically "applied to" tuna products; so the Appellate Body judged that the labeling regulation, which specifies tuna harvesting methods, was "related to" the products and thus specified characteristic of the products because the Appellate Body interpreted the phrase of the second sentence of TBT Agreement Annex 1.1 "they apply to a product, process or production method" as "they relate to and concern a product, process or production method."[130]

Regarding SIMP, the measure specifically defines its commodities to apply the thirteen species of fish and fish products with corresponding HT code specified by NOAA.[131] Thus, the target products are specifically identifiable. However, a question to be possibly discussed here is how to be able to identify whether the fish and fish products are lawfully harvested and distributed. Based on the understanding in U*S – Tuna (TBT) Case I*, how fish are caught does matter even though they end up in identical final products. The US started SIMP in order to check the legitimacy of the products, but it is possible that importers or exporters may submit counterfeit documents, as also discussed previously in this paper ("3.1.3. Article XX: General Exceptions"). If the issue of identifying authenticity of catch information was raised, the US

[129]European Communities – Measures Concerning Meat and Meat Products (Hormones), Report of the Appellate Body, January 16, 1998, WT/DS26/AB/R; WT/DS48/AB/R.
[130]US – Tuna (TBT) Case I AB report, supra note 124, para 183-189.
[131]SIMP HT codes, supra note 19.

would have difficulty justifying its actions under SIMP unless it conducted investigations identifying the legality of documents.

SIMP is an obviously mandatory requirement since it does not allow foreign fish and fish products to be imported or sold into the US market without catch information that demonstrates legality of the products. Importers have to comply with the regulations. On the other hand, US fish dealers of domestic fish also have to comply with the similar regulations as mentioned in this paper; both fish importers and domestic-fish dealers must obey the requirements similarly.

(3) Did the measure use a relevant international standard to fulfil its legitimate objective? (TBT Agreement Article 2.4)

US – Tuna (TBT) Case I clarifies the definition of "international standard" under the TBT Agreement.[132] The Appellate Body considered that "a required element of the definition of an ['']international['] standard for the purposes of the TBT Agreement is the approval of the standard by an ['']international standardizing body['] […] that has *recognized activities in standardization* and whose membership is *open to the relevant bodies of at least all Members*" (emphasis in Italics added).[133]

The Appellate Body noted that in order for an international body to have recognized activities in standardization, "evidence of recognition by WTO Members as well as evidence of recognition by national standardizing bodies would be relevant" in line with the context of provisions under the TBT Agreement.[134] Then, in order for the international body's activities in standardization to be recognized by WTO Members, the body should follow the principles and procedures, which are set out by the TBT Committee's Decision on Principles for the

[132]Naiki, Y., WTO Case Review Series No.6, United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (DS381): Implications for future TBT disputes, Research Institute of Economy, Trade and Industry, August 2013 13-P-014 (in Japanese).
[133]US – Tuna (TBT) Case I AB report, supra note 124, para 359.
[134]Ibid, para 363.

Development of International Standards, Guides and Recommendations with Relation to Articles 2, 5, and Annex 3 to the Agreement (the TBT Committee Decision), that "WTO Members have decided [']should be observed['] in the development of international standards".[135] The Appellate Body further explained "the recognition of those who participate in the development of a standard would not necessarily be sufficient to find that a body has recognized activities in standardization, since the obligations and privileges associated with international standards pursuant to the TBT Agreement apply with respect to all WTO Members, not merely those who participated in the development of the respective standard",[136] and the Appellate Body "[did] not consider that only a body whose standards are widely used can have recognized activities in standardization for the purposes of the TBT Agreement."[137]

Regarding openness of the international standardizing body, the Appellate Body considered that the international standardizing body be open to any WTO Members without any conditions "on a non-discriminatory basis" at any time including "every stage of standards development", not only at a particular point in time, for the purpose of the TBT Agreement, based on the TBT Committee Decision.[138]

Regarding the US SIMP, Regional Fisheries Management Organizations (RFMOs) such as the International Commission for the Conservation of Atlantic Tunas (ICCAT) might be listed as possible international standardizing bodies for catch documentation schemes in international fish and fish products trading system. However, the concern is whether RFMOs have recognized activities in standardization and whose membership are open to the relevant bodies of at least all WTO Members. The Appellate Body of *US – Tuna (TBT) Case I* stated that for the purpose of

[135]Ibid, para 376.
[136]Ibid, para 390.
[137]Ibid, para 392.
[138]Ibid, para 374-375.

the TBT Agreement, a body whose standards were widely used did not necessarily satisfy that that body recognized standardization activities. It is highly possible that only members of RFMOs participated in development of standards before *US – Tuna (TBT) Case I* was made. For example, ICCAT only has 52 contracting parties and 6 cooperating non-contracting parties.[139]

While RFMOs may not be regarded as "international standardizing body", the FAO should be the most likely international standardizing body because it established "Voluntary Guidelines for Catch Documentation Schemes" in 2017.[140] It clearly states "FAO has an established role in facilitating the collaborative development by States of international instruments that set out principles and *standards* for responsible practices in the management, conservation and development of fisheries (emphasis in Italics added)" and "[t]herefore, [the UN Fisheries Resolution on Sustainable Fisheries of 9 December 2013] calls upon States to, inter alia, initiate within FAO as soon as possible the elaboration of guidelines and other relevant criteria relating to catch documentation schemes." The guidelines were crafted through a series of meetings in FAO and officially adopted by the FAO Conference at its fortieth session in 2017. Almost all members of the WTO are members of the FAO, so the FAO fairly provided forums to WTO Members in the development of international standards for catch documentation scheme in international fish trading system.

Required pieces of information for SIMP are identifications of fish harvesting vessels or aquaculture farming facilities, species caught, place of landing, quantity, area of harvesting, any transshipment of product, records on processing, re-processing, and commingling of product;[141] almost all of them are comparable to the FAO Voluntary Guidelines except application of the

[139]ICCAT Contracting parties, https://www.iccat.int/en/contracting.html.
[140]FAO, Voluntary Guidelines for Catch Documentation Schemes, 2017 [hereinafter FAO CDS Guidelines].
[141]SIMP Facts, supra note 18.

measure to aquacultured fish. The FAO Guidelines "cover Catch Documentation Schemes (CDS) for wild capture fish caught for commercial purposes in marine or inland areas, whether processed or not"[142] while SIMP covers some aquacultured fish products, so this would be a conflicting issue, as China claimed in the SPS meetings.[143] However, as discussed earlier in this paper, asking catch information for aquacultured fish is justifiable to fulfil the legitimate objective of SIMP preventing seafood frauds because wild fish dealers could declare their fish products as aquacultured fish to evade their duties to prove legitimacy of their products unless SIMP did not require the same or similar information on aquacultured fish.[144]

(4) Did the measure treat the imported fish and fish products NO LESS FAVOURABLE than the LIKE PRODUCTS of national origin? (TBT Agreement Article 2.1)

TBT Agreement Article 2.1 describes national treatment. However, it should be noted that the Appellate Body in *US – Tuna (TBT) Case I* claimed that "the obligations under Article 2.1 of the TBT Agreement and Article III: 4 of the GATT 1994 are not substantially the same".[145] The Panel also previously confirmed that the term, for example, "like products" "must be interpreted in light of the context, and of the object and purpose, of the covered agreement in which the provision appears."[146]

In *US – Tuna Case I*, a dispute settlement case in the pre-WTO era, the Panel stated that GATT 1947 Article III "covers only measures applied to imported products that are of the same nature as those applied to the domestic products, such as a prohibition on the importation of a product which enforces at the border an internal sales prohibition applied to both imported and

[142]FAO CDS Guidelines, supra note 140.
[143]China's claim in SPS meetings, supra note 45.
[144]It should be also noted that many aquacultures breed juvenile fish which are caught in wild.
[145]US – Tuna (TBT) Case I AB report, supra note 124, para 405.
[146]US – Tuna (TBT) Case I Panel Report, supra note 124, para 7.219-220.

like domestic products."[147] The Panel noted that the US measure in this case regulated the US domestic method of harvesting tuna to reduce bycatch of dolphin, but that the regulations could not be regarded as being applied to the tuna products as such because they would not directly regulate the sale of the tuna products and could not possibly affect the tuna as a product. Then, the Panel dismissed the US claims that the US measures were internal regulations affecting the sale, offering for sale, purchase, transportation, distribution or use of tuna and tuna products consistent with GATT 1947 Article III, and concluded that the measure violated GATT 1947 Article XI.[148]

On the other hand, the Appellate Body in *US – Tuna (TBT) Case I* noted that "technical regulations […] establish distinctions between products according to their characteristics or their related processes and production methods," and "any distinctions [as such]" "should not" "per se constitute ['']less favourable treatment['] within the meaning of Article 2.1."[149] Then, the Appellate Body analyzed the case with respect to the meaning of "less unfavorable treatment" of imported products under TBT Agreement Article 2.1 with two parts: (i) "whether the measure modifies the conditions of competition in the US market to the detriment of Mexican tuna products" and (ii) "whether the detrimental impact reflects discrimination."[150]

(i) "whether the measure modifies the conditions of competition in the US market to the detriment of Mexican tuna products"

The Appellate Body found that the US measure modified the conditions of competition to the detriment of Mexican tuna products in the US market by excluding most Mexican tuna products from access to the dolphin-safe label, which adds a significant commercial value in the

[147]US – Tuna Case I, supra note 72, para 5.11.
[148]Ibid, para 5.10-14.
[149]US – Tuna (TBT) Case I AB report, supra note 124, para 211.
[150]Ibid, para 231.

US market, while treating tuna products from the US and other countries as being eligible for access to the label on certain conditions.[151]

(ii) "whether the detrimental impact reflects discrimination"

The Appellate Body considered that it was necessary to assess whether the regulatory distinction by the US measure was "calibrated" to the risks to be prevented by the measure in order to assess whether the measure lacked "even-handedness"[152] The Appellate Body found that the provisions under the US labeling regulation did not require the same condition (in this case, a certification of the observer who checks dolphin-bycatch on board) for Mexican large purse seine fishing as for other fishing methods. As a result, the tracking and verification requirements led to impose more burden on the Mexican large purse seine fishing than other fishing methods. Thus, the Appellate Body concluded that the US measure could not be said to be designed to be "calibrated" to the risks to dolphins arising from different fishing methods. Such detrimental impact of the US measure could not be said to stem exclusively from a legitimate regulatory distinction.[153]

Regarding SIMP, the national treatment under the GATT 1994 has been discussed in the previous chapter "3.1.1. Article III: National Treatment." Since the US domestic measures impose the similar requirements on domestic dealers, it would not violate GATT 1994 Article III: 4.

In terms of like products under TBT Agreement Article 2.1, the *US – Cigarettes Case* showed that the comparison of "products of the complainant" with the "domestic like products" will suffice instead of comparing the "overall imported products" and "domestic like

[151]Ibid, para 233-239.
[152]Ibid, para 232.
[153]Ibid, para 240, 298-299.

products."[154] A dispute settlement case concerning this point might happen if a Member does not have a catch documentation system on the thirteen species of fish in its domestic fisheries, and it has already happened in some places, for example, Viet Nam;[155] therefore, conditions on the products of that Member may differ from ones on the like products in the US. However, if a Member has a catch documentation system for the species, SIMP may not modify the conditions of competition nor have detriment impacts on the fish products from that Member in the US market because the US imposes the same conditions, just requiring reporting and recordkeeping of catch information, on every country including itself; there would be no difference in treatment of any specified fish products unlike the Mexican tuna products that were treated differently from the ones from the US and other countries in *US – Tuna (TBT) Case I.*

Regarding calibration and even-handedness, the case also needs to be considered under two conditions: a Member with a catch documentation system and one without any system. A Member having a catch documentation system may not have this issue because the US shows much flexibility on the form of catch certificates. It does show a model certificate but does not require the identical type of catch certificates. The US allows other forms of catch documents and even in any language.[156] However, if a Member does not have a system, the US may require importers or their foreign counterparts to use some form of declaration of catch certificate to be signed by foreign fishers, such as the model certificate or the US dolphin safe declaration form signed by the foreign captain of the tuna fishing vessel. The US dolphin safe labeling measure has been modified based on the recommendations of WTO DSB in the succeeding *US – Tuna*

[154]United States – Measures Affecting the Production and Sale of Clove Cigarettes, Report of the Appellate Body, WT/DS406/AB/R, April 4, 2012.
[155]ICRA, supra note 55.
[156]SIMP Compliance Guide, supra note 65.

(TBT) cases for the US to comply with its obligations under the TBT Agreement, so the similar declaration form be applicable to SIMP requirements.

(5) Is the measure NECESSARY to fulfill its LEGITIMATE objective? and
(6) Is the measure more TRADE-RESTRICTIVE than necessary to fulfill the legitimate objective? (TBT Agreement Article 2.2)

TBT Agreement Article 2.2 states that:

> Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create. Such legitimate objectives are, inter alia: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment. In assessing such risks, relevant elements of consideration are, inter alia: available scientific and technical information, related processing technology or intended end-uses of products.[157]

NECESSITY of LEGITIMATE objective

For the obligations under TBT Agreement Article 2.2, two conditions have to be met; the necessity of the measure and no more trade-restrictive than necessary. Regarding the necessity of the measure, TBT Agreement Article 2.2 illustrates an open list of legitimate objectives. In *US – Tuna (TBT) Case I,* the Panel stated that "a measure that aims at the protection of animal life or health need not [,…,] be directed exclusively to endangered or depleted species or populations, to be legitimate. Article 2.2 refers to [']animal life or health['] in general terms, and does not require that such protection be tied to a broader conservation objective. We therefore read these terms as allowing Members to pursue policies that aim at also protecting individual animals or species whose sustainability as a group is not threatened."[158] The scope of this article is broader than one in GATT 1994 Article XX.

[157]TBT Agreement, supra note 119, Article 2.2.
[158]US – Tuna (TBT) Case I, Panel Report, supra note 124, para 7.437.

In *US COOL Case,* the Panel found that "the fact that Article 2.2 refers to [a non-exhaustive,] open list of [legitimate] objectives [with use of the term 'inter alia'] without any modifying language initially indicates that a wide range of objectives could potentially fall within the scope of legitimate objectives under Article 2.2" and that "[t]he type of objectives explicitly listed in Article 2.2 nonetheless demonstrates that the legitimacy of a given objective must be found in the ['] genuine nature ['] of the objective, which is ['] justifiable ['] and ['] supported by relevant public policies or other social norms ['] ."[159] The Panel even stated that "whether an objective is legitimate[…] must be assessed in the context of the world in which we live. Social norms must be accorded due weight in considering whether a particular objective pursued by a government can be considered legitimate."[160] Accordingly, the Panel reviewed origin labelling practices in the complainants and third parties,[161] and considered that "consumers generally are interested in having information on the origin of the products they purchase" among the WTO Members.[162] The Panel concluded that the labelling requirements intended to provide consumers with information on origin of food products and that providing consumers with the information was the requirement of current social norms; therefore requiring labeling is a legitimate objective among the WTO Members under TBT Agreement Article 2.2.[163] The Appellate Body in *US COOL* supported the Panel, pointing out that "the list of legitimate objectives is not a closed one" by "[t]he use of the words ['] inter alia ['] in Article 2.2" and that all the evidence, including objectives of other covered agreements, texts of statutes, legislative history, and structure and operation of a technical regulation, should be considered in

[159]United States – Certain country of origin labelling (cool) requirements – Final Reports of the Panel, November 18, 2011, WT/DS384/R; WT/DS386/R [hereinafter US COOL Panel Report], para 7.632-634.
[160]US – Tuna (TBT) Case I Panel Report, supra note 124, para 7.650.
[161]Complainants: Canada for DS384, Mexico for DS386; Third countries: Argentina, Australia, Brazil, China, Colombia, European Union, Guatemala, India, Japan, Republic of Korea, Mexico, New Zealand, Peru, Chinese Taipei
[162]US COOL Panel Report, supra note 159, para 7.650.
[163]Ibid, para 7.638, 7.650-7.651.

the analysis of the legitimate objective for the technical regulation under Article 2.2.[164] The Appellate Body found the legitimate objective of the labeling requirement in other relevant provisions in the WTO Agreement, and it related to TBT Agreement Article 2.2. For example, it stated that the objective of preventing deceptive practices is reflected in both TBT Agreement Article 2.2 and GATT 1994 Article XX(d), which is related to the provision of product origin information to consumers.[165] The Appellate Body also found the legitimate nature of the objective of providing consumers with information on product origin in GATT 1994 Article IX, entitled "Marks of Origin", which expresses the right of WTO Members to require imported products to carry a mark of origin.[166] The Appellate Body accepted broad interpretation of the "legitimate objective" under TBT Agreement Article 2.2.

Considering these interpretations of Article 2.2, SIMP can be fairly judged to provide the necessity of its legitimate objective under the Article 2.2. The catch documentation scheme has been generally accepted and recommended by RFMOs, and the traceability of fish and fish products have been stressed as the key to denying IUU fishery products entry into markets and to prevent, deter, and eliminate IUU fishing. The UN Sustainable Development Goals 2030 targets elimination of IUU fishing and FAO initiated the voluntary guidelines for catch documentation schemes to pursue responsible practices in the management, conservation, and development of fisheries. Thus, SIMP is fully in line with the necessity to fulfill its legitimate objective.

TRADE-RESTRICTIVENESS

[164]United States – Certain country of origin labelling (cool) requirements – Reports of the Appellate Body, June 29, 2012, WT/DS384/AB/R; WT/DS386/AB/R [hereinafter US COOL AB Report], para 370-371.
[165]Ibid, para 445.
[166]Ibid.

In *US – Tuna (TBT) Case* I, the Appellate Body "consider[ed] that an assessment of whether a technical regulation is [']more trade-restrictive than necessary['] within the meaning of Article 2.2 of the TBT Agreement involves an evaluation of a number of factors […] : (i) the degree of contribution made by the measure to the legitimate objective at issue; (ii) the trade-restrictiveness of the measure; and (iii) the nature of the risks at issue and the gravity of consequences that would arise from non-fulfilment of the objective(s) pursued by the Member through the measure. In most cases, a comparison of the challenged measure and possible alternative measures should be undertaken."[167] In addition to a comparison of the challenged measure and possible alternative measures to assess the trade-restrictiveness, the Appellate Body stated that "the degree of achievement of a particular objective may be discerned from the design, structure, and operation of the technical regulation, as well as from evidence relating to the application of the measure."[168]

Based on the three factors the Appellate Body listed, SIMP would be evaluated as follows.

(i) the degree of contribution made by the measure to the legitimate objective

Since under SIMP the US does not allow the thirteen species of fish products to be imported without their catch information, at least the US acquires evidence to try to prove catch or harvest legitimacy regardless of whether the submitted information is false or not. If the US did not have the documents, it would not be able to identify the legitimacy of fish products at all. For example, if the US finds the documents false somehow, it can design and take measures against such fraud both in the instant case and in the future. The US has to investigate contribution of IUU fishing to the US seafood import by collecting relevant data and evidence,

[167]Ibid, para 322.
[168]Ibid, para 317.

and it needs to take measures to stop possible frauds such as counterfeit catch documents, based on its investigation.

(ii) the trade-restrictiveness of the measure

Currently with limited enforcement capability, SIMP may do little to stop IUU fishery products entering into the US market with possible counterfeit catch documents.[169] Looking ahead, the US must be able to more rigorously investigate and verify reporting data in a way to prevent IUU fishery products from being imported into the US. Unlike any former or existing US trade measures concerning marine environments that have been challenged and modified through WTO dispute settlement cases, SIMP is much less restrictive as it is neither a labeling requirement nor a requirement for providing consumers with information.

(iii) the nature of the risks at issue and the gravity of consequences that would arise from non-fulfilment of the objective(s) pursued by the Member through the measure

The US is one of the largest seafood markets in the world and has substantial purchasing power. A study estimates that 20-32% of US seafood import in volume comes from IUU fishing and that this trade represents 4-16% of the global illegal fish catch in value.[170] If the estimates are correct, the US market, by virtue of its size, supports a large portion of IUU fishing. Having no measures against IUU fishery products being imported to the US would continue its unintended contribution to IUU fishing. Thus, it is fair to say SIMP is not more trade-restrictive than necessary.

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[169]Import shipments of fish or fish products under SIMP may be subject to both random and directed audits, and finding violations of the regulation may lead to Civil Administrative Penalties and Permit Sanctions. See Guide to Audit Requirements for the Seafood Import Monitoring Program, https://www.iuufishing.noaa.gov/Portals/33/SIMP%20Audit%20Guidance%202020%20Revised.pdf?ver=2021-01-11-142011-600, and Policy for the Assessment of Civil Administrative Penalties and Permit Sanctions, NOAA Office of General Counsel – Enforcement Section, https://www.gc.noaa.gov/documents/Penalty-Policy-CLEAN-June242019.pdf. However, fish and fish products entering into the US market with counterfeit documents may be possible as an example of Russian crab import to Japan is described in this paper.

[170]Pramod, G., et al., supra note 3.

Future complaints against SIMP should have to demonstrate the availability of a less trade-restrictive alternative measure that fulfills the legitimate objective of SIMP. For example, a plausible alternative that might be proposed could be a voluntary-base catch documentation program, but it would not be accepted as an appropriate alternative because it would not accomplish the legitimate objective of the measure. In fact, a similar case such as a voluntary labeling system instead of a mandatory system was proposed in *US COOL*, which was rejected.[171]

4. Conclusion and Future of the Measure

Overall, the US SIMP would not be violation under the discussed provisions of the WTO Agreement currently. It may fit to the WTO principles by reflecting understanding of the provisions of the WTO Agreement in the precedent cases discussed in this analysis. It has to be noted that this analysis is made solely based on available information on literatures, but field studies to investigate what actually happens at sites are not carried out. Field research on US seafood importers and US-domestic-fish dealers, interviewing to the US federal and state officials, will make the analysis and discussions more persuasive. Apart from that, the US, one of the most experienced Members in WTO dispute settlements, seems to have been well prepared to set up various conditions in order to establish SIMP, and its dedication to the conservation of marine living resources is clear.

The precedent cases prove that, even though a trade measure would eventually change other countries' policy or touch sovereignty of other countries, an objective of the measure will be accepted as legitimate if the country imposing that measure shows its good faith and if the

[171]US COOL AB Report, supra note 164.

measure well fits to social norms. It should be surely noted, however, that "the possibility to impose a unilateral measure […] is more to be seen […] as the possibility to adopt a provisional measure allowed for emergency reasons than as a definitive [']right[’] to take a permanent measure.[172] So, "[t]he extent to which serious good faith efforts continue to be made may be reassessed at any time," and "steps which constituted good faith efforts at the beginning of a negotiation may fail to meet that test at a later stage"[173] It also should be noted that the generic term in legal texts can be "not [']static[’] in its content or reference but is rather [']by definition, evolutionary[’]"[174] Thus, the current status of SIMP does not mean that it will not be violation under the same legal texts of the WTO Agreement in future.

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[172]US Shrimp Case II Panel Report, supra note 76, para 5.88.
[173]Ibid.
[174]US Shrimp Case I AB Report, supra note 75, para 129-130.

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