



Non-Compliance with Fishing Quota Regulations During the Pandemic: Insights from Indonesia Case Study

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ABSTRACT:

Non-compliance with a fishing quota has become a significant problem that threatens the conservation effort toward particular fish stocks and contributes to over-exploitation. The Commission for the Conservation of Southern Bluefin Tuna (CCSBT) has indicated Indonesia's over-catch issue against its national quota. Catching fish that exceeds the national allocation is classified as non-compliance. Thus the corrective measures might be taken. This study considers how State's non-compliance has been addressed in fishing for shared fish stocks. The question then is linked to the current pandemic situation and presents justification whether it can be an exception in international law. The dilemma that Indonesia is facing is to comply with the quota regulation. On the other hand the country needs to prioritize its national interest in the hard time during the pandemics. The study argues that it is an international standard in every agreement in which the position of developing States is recognised as there might be different capacity in fulfilling international obligations between developed and developing member States. Therefore when it comes to non-compliance case in extraordinary circumstances, there should be reasonable deliberation following national interest of a State. Indonesia's non-compliance with fishing quota is unique as the country has typical enormous fishing area and number of small-scale fishers are involved. The lesson learnt from Indonesia's southern bluefin tuna (SBT) case study allows us to expose such proportional measures for developing States regarding violation of fishing quota in an exceptional circumstance.

KEYWORDS: *Fishing Quota, Pandemics, Proportionality, Non-Compliance, Over-Catch*

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1.0 INTRODUCTION

The purpose of fishery regulation is to limit the fishing activities from maximum exploitation resulted from private objectives. The regulation exists to ensure sustainable fishery through controlling the level of catches [1]. Fishing quota regulation is a limitation of fishery exploitation, especially for international or shared fish stocks. To get access to international fisheries, it is mandatory between coastal States and flag States who fish in the region, as mentioned in Articles 63(2) and 64 of the United Nations Convention on the Law of the Sea (UNCLOS), to cooperate through Regional Fisheries Management Organizations (RFMOs) to ensure the conservation goal of fish stocks. In respect of highly migratory

fish stocks, an additional requirement applies that the cooperation should encourage the optimum utilization of the stocks, either within or beyond the Exclusive Economic Zones of a State.

Nevertheless, achieving the conservation goal in international fisheries is not a walk in the park. States agreed on the fishing quota process is just half of the whole battle. The cooperative arrangement within the RFMO model will only be achieved if there is a compliance incentive [2]. Mazur and Johnson said that the higher the compliance rate of conservation measures, the more effective the fisheries management [3]. Compliance enforcement is an integral part



of fisheries management, and its costs depend on the quantity caught and the size of the fish stock [4].

Understanding why fishers do not comply with regulations is an important element of credible fisheries enforcement. Foremost, it allows for the possible extent of non-compliance to be estimated in the given set of environmental, economic, and social conditions under which the policy is being imposed [1].

This study aims to facilitate the understanding of the nature of the

extraordinary circumstances, national interest, and a need for reconsideration on State's non-compliance with its international obligation. By reviewing Indonesia's over-catch case, the cause for over-quota, either before and during the pandemic, is presented (as shown in Table.1) to show the intensity difference of difficulties that Indonesia has been dealing with. By doing so, this study seeks to analyze to what extent non-compliance with international obligation during pandemics can be acknowledged.

Table 1. Indonesia's Total Allowable Catch and Over-Catch

Fishing Season	National SBT Allocation (ton)	Total SBT Catch Counted against the National Allocation (ton)	Causes for over-catch	Corrective Action Taken
2011	651	843	due to capacity building and a wide range of vessels size in the artisanal fisheries	-
2012	685	910	the existence of artisanal or small-scale fisheries	No
2013	709	1383	There is no SBT quota for vessels artisanal vessels. The reason is that the national quota is considered too small compared to the number of vessels involved. Meanwhile, there is a need to accommodate their right and interest	No
2014	750	1063	(a) SBT is considered as by-catch or un-intended catch to artisanal vessels, (b) a huge number of fleets with a wide-range of size involved, (c) a lot of people depend on their life on tuna fisheries, including SBT	No
2019	1024	1206	the COVID-19 pandemic that had a great impact on the economy, the fisheries sector in Indonesia changes its	Payback for its combined over-catch for



2020	1023	1078 (per 12 October 2020)	strategy to operate almost their entire fleet and increasing operation days.	2019 and 2020 (to be paid between 2022 and 2026)
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2.0 METHODOLOGY

The study applies a qualitative approach and uses content analysis to construct the argument in addressing the main problem. The data collection in this study was carried out in two ways. First, semi-structured interviews were conducted with some key informants in managing the fishing quota in Indonesia. Several respondents have never been specific in qualitative research [5]. However, the respondents were selected following their significant responsibility and the most relevant position to this study's main problem. The main interview was conducted through confirmation to some figures from the Ministry of Marine Affairs and Fisheries, having their role as Indonesia representative who participated in the CCSBT annual meeting. To get more knowledge concerning the real problem and practical matter, an interview was held with a Tuna Association member. In addition, the discussion was carried with the compliance manager of CCSBT to obtain confirmation regarding compliance policy and particular action plans during the pandemics. Second, relevant data were obtained by studying the law instrument and regulations and documentary materials, including the official report by Regional Fisheries Management Organization, particularly the CCSBT.

3.0 RESULTS AND DISCUSSION

3.1 Defining Non-Compliance in Fishing Quota

The United Nations Fish Stock Agreement 1995 (UNFSA) [6] defines in Article 10(b) that the States "agree, as appropriate, on

participatory rights such as allocations of allowable catch or levels of fishing effort." Compliance's member is used as a criterion in determining quota allocations in the following years. When over-quota is identified, the corrective measure will be considered by RFMO towards the non-compliant member. CCSBT is one of the fishery organizations that apply quota reductions with regards to over-quota. [2]

The corrective actions provided in the Corrective Actions Policy: Compliance Policy Guideline 3 [7] sets out a framework to respond to evidence of non-compliance by a Member. In the case of catch more than the Member's annual quota, the member is required to do quota payback. Otherwise, there will be two situations enforced, namely

"that Member shall not apply the carry-forward procedures provided in CCSBT's Resolution on Limited Carry-forward of Unfished Annual Total Available Catch of Southern Bluefin Tuna [8] until those catches have been paid back unless otherwise agreed by the Extended Commission, and the Member is not eligible for an increase in its effective catch limit until the excess catch has been paid back unless otherwise agreed by the Extended Commission."

The important part of understanding non-compliance is revealing why fishers are unwilling to comply with fisheries policy and regulations. The environmental situation,



social and economic might contribute to the possible extent of non-compliance. Kuperan and Sutinen [1] estimated that certain social, moral, and legitimacy are significant in determining compliance of fishers in Malaysia. Equally, in Italian fishers, Gambino et al.[1] found that the major influences on non-compliance are social pressure, moral influence, and their perception regarding the legitimacy and the effectiveness of the existing enforcement system.

Interestingly, instead of the perceived risk of getting caught, the perception of greater earnings constraints is more associated with higher violations. Hatcher and Gordon [1] surveyed fishers' perceptions in the United Kingdom that the study revealed how inspections at-sea had less effect on violators detection. It perhaps had a thing to do with skill at concealing over-quota fish, or the inspections were inadequate. In this context, the enforcement and economic benefit experience are the most contributing factors to fishers' non-compliance itself [9].

Indonesia's non-compliance on its total allowable catch of SBT is unique in which the non-compliance has been considered due to the small-scale fishermen caught SBT unintentionally. According to Table 1, small-scale vessels were identified during the fishing season between 2011 and 2014. For some periods, SBT in Indonesia was assumed as by-catch or not the main target fish. It means SBT was caught unintentionally. The government has allocated 300 tons for the small-scale vessel quota. The over-catch issue was continuing performed despite the quota has been provided.

During the fishing season in 2015, as confirmed by the Ministry of Marine Affairs and Fisheries' official catch, the Indonesia total catch of SBT fish was under-catch or below the national allocation. This was because of the decrease in vessels more than 30 Gross Tonnage operating in SBT fishing. By that time, the quota specified for

small-scale vessels was deleted; as predicted, the existing national allocation was sufficient to cover all catches and must be optimally used.

When the national SBT allocation was predicted sufficient, surprisingly, the small-scale fishing vessels have been more involved and impacted to mortality counts against the national quota. Therefore, again, in some reports of CCSBT's annual meeting, Indonesia was recognized for violating national quota obligation because over-catch issue (as shown in Table 1).

To comply with national allocation, CCSBT has decided the provision of Attributable SBT Catch. Small-scale fishers or artisanal fishing in SBT fisheries should be included in mortality counts against a member state's national quota. Failed to include the SBT catch resulted from fishing activities, the member is indicated as non-compliance. The Attributable SBT Catch is defined as follows: [10]

"A Member or Cooperating non Members attributable catch against its national allocation is the total Southern Bluefin Tuna mortality resulting from fishing activities within its jurisdiction or control including, among other things, mortality resulting from commercial fishing operations whether primarily targeting SBT or not; releases and/or discards; recreational fishing; customary and/or traditional fishing; and artisanal fishing."

Referring to Indonesia's over-catch in Table.1, from 2011 until 2014, no corrective action applied to Indonesia. It might have to do with the investigation made against the over-catch case found that Indonesia's capacity has not yet adequate to manage SBT fishery. The most suitable actions to be taken should be assistance measures or capacity building. On the other hand, Australia was over-catch in 2012 and 2014, and CCSBT has taken corrective action. It



can be seen that the consideration for determining actions towards non-compliance is case by case depends on the investigation. Nevertheless, it does not mean the non-compliance members are simply released from their obligation to take action against non-compliance by fishers within their jurisdiction.

Regardless of the complexity of handling small-scale fishing vessels in SBT fishery, regarding Indonesia's domestic policy to use individual quota mechanism, the practical matter of quota distribution itself is completely under the management of the tuna association. Therefore, there are two situations where non-compliance might be tracked. First, how the association conducts monitoring and sanctioning system towards all registered fishing vessels. Second, the enforcement at the port by the authorities when the fishing vessels will land their catch. Both government authority and the tuna association should put in place a mechanism that causes over-catch to be detected and the relevant punitive actions.

3.2 Pandemics as an Exception?

In response to the pandemic, most countries have issued special measures and policies to overcome domestic economic obstacles during the pandemic. The policy's purpose is to allow economic sectors that essential to the production and transportation of food to be remaining operational. The Republic of South Africa has issued a public notice concerning exemptions to all fisheries licenses holders that received fishing rights allocation. This policy gives fishers justification to fish species allocated to them without valid permits for the next ninety days [11]. The government of India has exempted the operations of the marine and fishing industry from lockdown provision. The exemption including harvesting fish, processing, sale and marketing, and also workers for all these activities [12]

While every State has a different ability to respond to the challenge of pandemics, it is essential to avoid disproportionate burdens being placed on developing countries, especially concerning the least impact possible on developing countries' interests while still achieving, or at least being likely to achieve, its international obligations [13]

3.2.1 State of Necessity

According to research hosted by the Global Strategy Lab (GSL) at York University, it is revealed that most countries are not implementing their international obligations during the pandemic situation [14]. On the other hand, the pandemic-related measures may seem like a double-edged sword because once it has been acknowledged as an exception, the system provides flexibility. Still, the practice will threaten the regime's stability [15].

In a factual situation of imminent peril, customary international law permits States to dispense their treaty obligations as the only means to protect the essential interest [15]. The explanation refers to the necessity principle, which reflects an unavoidable or uncontrollable situation that leads to the notion of force majeure, making any indispensable obligation impossible to fulfill [16].

Necessity is a rule of customary international law and is provided in Article 25 of the International Law Commission's Draft Articles on "Responsibility of States for Internationally Wrongful Acts." Nevertheless, there is no hierarchy of interest in international law. Thus, a certain rationale would be applied to identify the superior or inferior character of the State's interest. In *Gabčíkovo-Nagymaros* case, the essential character of the interest is defined as follow: [17]

"The extent to which a given interest is essential depends on all the circumstances and cannot be prejudged. It extends to particular



interests of the State and its people and the international community as a whole. Whatever the interest may be, however, it is only when a grave and imminent peril threaten that this condition is satisfied."

It can be said that there are two main elements to meet the scope of superior interest, "a grave and imminent peril to an essential interest of the State" and "the State's act is the only way to protect the essential interest in that particular circumstances." Furthermore, state of necessity cannot be used to preclude the responsibility within these three situations as follows: there has been such serious impairment to the essential interest of other States or the international community as a whole; the international obligation provides exclusion, and the State itself has contributed to the necessary situation. [18]

Apart from compliance obligation, there is a particular consideration on why Indonesia's over-quota still committed between 2019 and 2020, during the Covid-19 pandemic. Under Report of the Twenty Seventh Annual Meeting of the CCSBT [19], Indonesia delegates elaborated that the country is dealing with an economic recession situation that forced the government to consider a national policy to support the national economy by pushing the agriculture and fisheries sector's capacity and production. In this context, the element of essential interest has been fulfilled. The fisheries policy reflects a justification of Indonesia's safeguard measures towards its national interest during the pandemic situation.

3.2.2 Special Requirements of Developing States

In managing highly migratory fish, RFMOs must be compatible with allocation principles and provisions provided by the UNFSA. Provisions of "the special

requirements of developing States" are fully recognized in Article 24 concerning three fundamental points as follows:

- (a) "the vulnerability of developing States which are dependent on the exploitation of living marine resources, including for meeting the nutritional requirements of their populations";
- (b) "the need to avoid adverse impacts on, and ensure access to fisheries by, subsistence, small-scale and artisanal fishers, and women workers, as well as indigenous people in developing States";
- (c) "the need to ensure that such measures do not result in transferring, directly or indirectly, a disproportionate burden of conservation action onto developing States."

To describe how much is significant the fisheries sector for Indonesia, the country's geographical area, which consists of thousands of islands and situated between the Pacific and Indian Oceans, is sufficient to logically conclude that Indonesia is granted such a long coastline and the biggest archipelago title [20]. Since most of the communities live in the coastal areas, more than half of animal protein consumption (54%) in Indonesia came from fish or seafood [21].

Besides, the ASEAN region's fish products account for approximately 34% of Indonesia's supply [22]. The stability of domestic fishing activities will possibly impact regional food security. It shows how fisheries production contributes significantly to the national economic sector [23].

Indonesia's fishing activities consist of either fishing vessels with a big capacity (more than 30 GT) and small-scale fishing vessels. The industry in Indonesia remains strikingly dominated by small-scale fishers, with 90–95% of fish production estimated to come from this sector [24], [22],[25]. Regarding



the pandemic situation, the lockdown policy and business-activity shutdown disrupt the fish supply and demand and the fish distribution [26]. This situation seems an acute shock, especially for small-scale fishing households. [27].

Regarding the involvement of small-scale vessels in Indonesia SBT fishing, their participation cannot be categorized as the quota holder since the party must be registered in the CCSBT record to be authorized to catch SBT. However, it is a national discretion to allocate a certain amount of SBT quota to small-scale fishers because the SBT catches from small-scale fishing vessels must be counted against Indonesia's national quota. In the context of the pandemic situation, where most governments worldwide have been in a situation of no other choice in that regard since the act by the Indonesian government has reflected the act of necessity [28]. Therefore, the provision of Article 24(a) and (b) of the UNFSA does make sense for the Indonesian government to ensure all parties in the fisheries sector gain access to fish resources [29], [30].

Special Clause regarding "developing countries" as a standard in every international agreement, which the UNFSA has highlighted for recommendation to RFMO framework, should be duly brought into consideration, especially in extraordinary circumstances. CCSBT has particularly responded to this recommendation that in developing countries, it tends to refer to such bilateral arrangements among members as the CCSBT has little or no funds for such purpose [31]. It indicates that the developing State party wanting to participate in CCSBT's membership is expected to have sufficient capacity to engage with the conservation and management objectives provided by the RFMO itself.

3.3 Corrective Actions: weighing & balancing

In responding to the pandemic situation, the CCSBT has issued a "Guideline on principles for action and steps to be taken in relation to extraordinary circumstances." According to this policy, extraordinary circumstances are defined as "unpredictable events or problems that prevent the normal operation of the CCSBT's measures and/or a fishing vessel." The purpose of this policy is to ensure that all Members should not use extraordinary circumstances to justify non-compliance with regulations. The policy expects the Member States will do some practical alternatives to have constant commitment to achieve compliance obligations. Section 3 of the policy has echoed "the proportionality of the risk resulting from non-compliance and implement remedial measures to minimize such risks."

Referring to many international law instruments, the 'proportionality' term is mostly pointed to addressing the disproportionate burden among developing and developed countries. As a doctrinal tool, proportionality appears to balance the resolution of conflicts between the right and the competing interest [32]. The term itself discovers fair results and reasonable by identifying factors and criteria in a specific context and bring to mutual relations. In applying proportionality, a dual approach is essential to ensure compliance [2]. Thus, weighing and balancing different rights and interests are necessary [33].

Concerning Indonesia's over-catch, the assessment of compliance in the CCSBT annual meeting [19] concluded that Indonesia has been non-compliant, as all members have shown their sympathy to Indonesia's economic issue. Thus, they agreed to be flexible. By this official decision, Indonesia is requested to provide a concrete improvement on its SBT catch management that it will not exceed the national allocation anymore in the future.



Released from the non-compliance list, a State cannot simply invoke a defense for the sake of a state of necessity. The normal operation must be resumed when the extraordinary circumstances end and the State may have to compensate for any loss resulting from its non-compliance [34].

Indonesia's over-catch in 2019 and 2020 still counted as a violation against the national allocation of the SBT total allowable catch that all members have agreed in the annual meeting. The main consideration was referred to the current SBT stock that is still in the rebuilding process, as for some periods, the stocks were in over-fishing. By doing so, the 2020 CCSBT meeting required Indonesia to payback the over-catch gradually following the country's situation when its economy has improved.

The non-compliance act in Indonesia's context has shown the dual approach is recognized when it comes to capability between developing and developed States. In responding to the pandemics, the two States have different capacities to survive and protect their national interest. However, developing a State in Indonesia cannot excuse the country from the consequences due to the violation of an international obligation. Thus the obligation to do payback for over-catch has been charged to Indonesia. As a response, the CCSBT Commission has given its intention for flexibility in deciding the timeframe for the over-catch payback.

4.0 CONCLUSION

The Indonesia case concerning non-compliance with a fishing quota has proved that the international legal system has no effective centralized enforcement mechanism. Thus, it is the national authority that should be more powerful in handling the non-compliance act. The conservation goal of fishing for shared fish stocks such as SBT, despite the national law, governs the material and technical matter in quota

distribution to its national. When over-quota is committed, the State has breached the international obligation. This non-compliance criterion still extends to an extraordinary situation like a pandemic. However, by weighing and balancing the necessity, especially for the developing States, Indonesia has been given the flexibility to measure its non-compliance indication. Meanwhile, the pandemic has not excluded the State from its international responsibility due to its violation. Also, considering Indonesia was also over-quota for some periods before pandemics, this issue might need further study to analyze whether the enforcement mechanism needs strong improvement or it was more about disproportionate quota allocation.

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