

Policy brief

States have an obligation to act against beneficial owners of vessels involved in IUU fishing

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By Pieter van Welzen¹

In this article, the author argues that states have an obligation to act against their nationals who are beneficial owners and are involved in illegal, unreported, and unregulated IUU fishing activities. For this, the author talks about the challenges for flag and coastal states to fight against IUU fishing in many cases, introduces indications in international law for beneficial owner state responsibility and summarizes key state practice.

Overview

Coastal and flag states face various difficulties in their fight against illegal, unreported and unregulated (IUU) fishing activities. One of them is that the **state's ability to enforce sanctions against offenders who are not located within their territory is dependent on the willingness of other states to cooperate**. Given that many states do not consider illegal fishing as a serious crime, this cooperation is often not forthcoming. As a result, the main beneficiaries of the illegal activities, such as the beneficial owners of the vessels involved, can continue their illegal activities with impunity. **This article argues that states of which such beneficial owners are nationals have an obligation to act against their involvement in the illegal activities.**

¹ Pieter van Welzen is a senior lawyer with CMS South Africa. He is also a PhD student at the University Hamburg and preparing a dissertation that examines state responsibility under international law for illegal fishing activities.

1. IUU fishing and flag and coastal state responsibilities and enforcement challenges

Flag states are under international law obliged to regulate fishing activities conducted by vessels flying their flag and enforce such regulations. If the fishing activities are conducted in maritime zones (such as the Exclusive Economic Zone (EEZ)) of another state, then the rules that such coastal state imposes on these activities will also have to be observed by the vessel concerned. **The flag state has an obligation to ensure that the vessel flying its flag complies with the coastal states' rules. However, in practice, flag states (and not only so-called 'flag of convenience states') often fail to comply with this obligation.**

Although a coastal state could arrest a vessel that engages in IUU fishing in its EEZ, it may not have the financial and material resources to do so. Furthermore, there are various limitations that international law imposes on the enforcement measures that a coastal state can take. In that case, if it was determined that the measures taken by the coastal state did breach international law, for example because they were deemed to be too severe, it could result in an obligation to pay compensation to the vessel's flag state.

On the other hand, vessels engaged in IUU fishing often change name and flag state regularly or become stateless. This further complicates the ability of a coastal state to sanction the illegal activities or to require a vessel's flag state to do so. Moreover, a state cannot enforce its sanctions outside its territory without the consent of the states where such sanctions are to be enforced. Such cooperation is often not forthcoming in the context of offences that are not considered serious, such as a breach of fisheries regulations. Finally, if there is no or little chance that a coastal state will be able to enforce its sanctions, then there may not be much point in starting proceedings against the offenders in the first place.

2. Beneficial owners, the masterminds behind IUU fishing

The vessel's legal owner may for regulatory reasons be established in the flag state, but is often not more than a shell with no further activities or substance. The vessel's beneficial owner, a company or an individual who factually controls the activities of the vessel, is typically located elsewhere. This person could therefore, in addition to the vessel's legal owner, be considered responsible for the illegal activities in which it engages: **beneficial owners are the masterminds behind IUU fishing by the vessel and benefit most from it.**

The beneficial ownership of vessels engaged in IUU fishing is less likely to change on a regular basis. Also, it has become easier to obtain information about the beneficial ownership of vessels, for example as a result of information available on the internet and more stringent disclosure requirements. Reports and studies dealing with IUU fishing therefore increasingly identify the persons that can be considered as the beneficial owners of the vessels engaged in IUU fishing. Moreover, various international organisations call on their members as flag or coastal states to require the disclosure of beneficial owners of fishing vessels as part of their authorisation

requirements, as far example reflected by the Organisation of African, Caribbean and Pacific States in its first contribution made to the UNSG Report on Oceans and the Law of the Sea in June 2022².

The state in which the beneficial owner is located (a 'vessel owner state') may be better resourced to act against the illegal activities than the flag state and it may also be able to enforce its sanctions without requiring the consent of another state.

A pertinent question therefore is whether the states in which such beneficial owners are located have an obligation under international law to take measures against them if their vessels engage in IUU fishing. There are strong indications that such an obligation exists, as will be discussed in more detail below.

3. Indications in international law for beneficial owner state responsibility

A) A GENERAL PRINCIPLE: NO HARM

First, there is a general principle under international law (the 'no harm principle') that states must not allow their territory to be used for activities that prejudice the interest of other states. This principle is one of the bases of international environmental law and is, for example, also applied as a rule of international law in the context of international cybercrime.

A state allowing a person to prepare and organise IUU fishing in the EEZ of another state or, if such activities occur, failing to take measures against such person, could be considered as acting in breach of this principle, in particular if they could have a significant impact on the marine resources coastal state's EEZ.

B) WHAT THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA PROVIDES FOR

The vessel owner state's responsibility can also be based on the law of the sea and, in particular, the United Nations Convention on the Law of the Sea of 1982 (UNCLOS) to which most states are a party (or in some cases when they are not a party, have nonetheless agreed to comply with most of its provisions). Some of UNCLOS' provisions apply to all states, and others, to states in a particular capacity, such as a flag state or coastal state.

The provisions of UNCLOS have been interpreted by different international tribunals. An important decision regarding state responsibility for IUU fishing is the advisory opinion³ of the International Tribunal for the Law of the Sea (ITLOS) which it rendered in 2015. This opinion was issued at the request of the West African Sub-Regional Fisheries Commission that had raised various questions regarding among others whether flag states, whose vessels fish in the EEZs of SRFC states, have an

² OACPS, "Contribution from the Organisation of African Caribbean and Pacific States (OACPS) to the report of the UN Secretary-General on oceans and the law of the sea", Brussels, 17 June 2022. Available at: https://www.un.org/depts/los/general_assembly/contributions77/OACPS.pdf

³ ITLOS, "Request for an advisory opinion submitted by the Sub-Regional Fisheries Commission (SRFC)", advisory opinion of 2 April 2015", No 21. Available at: https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.21/advisory_opinion_published/2015_21-advop-E.pdf

obligation to ensure that their vessels comply with the fisheries regulations of SRFC states. In its response, ITLOS held that a flag state has a due diligence obligation in this respect and that a coastal state can hold the flag state liable if it fails to comply with such obligation⁴.

However, it is clear that despite this opinion, various flag states fail to observe this due diligence obligation, and states in whose EEZ the IUU fishing occurs often lack the human and financial resources, and/or political will to challenge the flag states in international tribunals. Also, the outcome of proceedings against such states is not certain, given that ITLOS did not express what such due diligence obligation entails in practice and whether a flag state can still be held liable if it can show that, due to the offenders not being within its territory, it is unable to enforce its sanctions.

Given the questions that had been raised by SRFC, ITLOS limited the due diligence obligation to flag states. However, its interpretation provides a basis for arguing that the state of which the beneficial owner of a vessel is a national also has an obligation to ensure that this person complies with the coastal state's fisheries regulations. One reason is that national fisheries regulations are typically directed at persons who are involved with a vessel such as its crew, its owner, or the operator of a vessel, and not to the vessel itself (as is often assumed by experts dealing with the law of the sea). If the relevant provisions of UNCLOS are intended to ensure compliance with a coastal state's fisheries regulations, then limiting this obligation to flag states only would ignore the fact that the addressees of the fisheries regulations are not limited to nationals of that state.

Moreover, ITLOS used as basis for its decision Article 192 UNCLOS that provides that “States have the obligation to protect and preserve the marine environment.” This provision has been interpreted as an obligation to ensure that their nationals comply with the conservation and management measures regarding a coastal state's marine resources.

C) OTHER INTERNATIONAL LEGAL SOURCES THAT REINFORCE THIS OBLIGATION

There are other international legal sources that mention an obligation on states whose nationals are involved in IUU fishing as beneficial owner of vessels to take measures against them. One such source is the FAO's International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (IPOA IUU)⁵ that provides in its paragraph 18 among others that “[i]n the light of relevant provisions of [UNCLOS], and without prejudice to the primary responsibility of the flag State on the high seas, each State should, to the greatest extent possible, take measures or cooperate to ensure that nationals subject to their jurisdiction do not support or engage in IUU fishing. All States should cooperate to identify those nationals who are the operators or beneficial owners of vessels involved in IUU fishing.”

⁴ See CFFA's comments on the case: PANOSSIAN, Anaid, “Rights and responsibilities of flag states and coastal states in West Africa - CFFA comments on ITLOS Advisory opinion about SRFC request”, CFFA-CAPE Policy Brief, 9 June 2015. Available at: <https://www.cffacape.org/publications-blog/2015/06/09/2015-6-9-rights-and-responsibilities-of-flag-states-and-coastal-states-in-west-africa-cffa-comments-on-itlos-advisory-opinion-about-srfc-request>

⁵ FAO, “International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing” 2001. Available at: <https://www.fao.org/3/y1224e/y1224e.pdf>

Although the IPOA IUU is non-binding, its provisions are considered to reflect the scope and content of the regulations that states should adopt to comply with the international legal obligations that follow from UNCLOS and related fisheries treaties. Moreover, the UN General Assembly adopts on an annual basis most recently on 5 December 2023 (by consensus) a resolution⁶ that in its paragraph 94 “[u]rges States to effectively exercise jurisdiction and control over their nationals, including beneficial owners, and vessels flying their flag, in order to prevent and deter them from engaging in illegal, unreported and unregulated fishing activities or supporting vessels engaging in illegal, unreported and unregulated fishing activities.”

The obligation on states to take measures against nationals who, as beneficial owners of vessel, engage in IUU fishing has been endorsed by various states and international governmental and non-governmental organisations in international fora. Typically, ‘nationals’ in this context does not only mean persons who have the nationality of a particular state but also those persons who are habitually resident in that state.

4. State practice: examples of beneficial owner prosecution

An important source for determining whether there is an international legal obligation is state practice, and there are various examples that support vessel owner state responsibility. For example, the EU's IUU fishing regulation (EU IUU Regulation)⁷ **imposes an obligation on EU member states to ensure that their nationals do not support or engage in IUU fishing, including by engagement on board or as operators or as beneficial owners of fishing vessels, and to take appropriate action regarding such nationals if they are engaged or support IUU fishing.**

As part of its international fisheries policy, the EU Commission requires a commitment from non-member states that export fish to the EU to act against the beneficial owners of vessels that are engaged in IUU fishing and has issued warnings (so-called ‘pre-identifications’) to states which it believes do not comply with this obligation. It has, for example, done so against Taiwan⁸, South Korea⁹ and Belize¹⁰. Given that the EU Commission agreed to revoke the designation of these warnings,

⁶ UNGA, “Sustainable fisheries, including through the 1995 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, and related instruments”, A/RES/78/68, 5 December 2023. Available at: <https://documents.un.org/doc/undoc/gen/n23/397/27/pdf/n2339727.pdf?token=zyJmGJmF5T10NbZwmc&fe=true>

⁷ “Council regulation (EC) No 1005/2008 of 29 September 2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing.” Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02008R1005-20110309&rid=1>

⁸ “Commission Decision of 1 October 2015 on notifying a third country of the possibility of being identified as a non-cooperating third country in fighting illegal, unreported and unregulated fishing.” Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32015D1002%2802%29>

⁹ “Commission Decision of 26 November 2013 on notifying the third countries that the Commission considers as possible of being identified as non-cooperating third countries pursuant to Council Regulation (EC) No 1005/2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing.” Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32013D1127%2802%29>

¹⁰ “Commission Decision of 15 November 2012 on notifying the third countries that the Commission considers as possible of being identified as non-cooperating third countries pursuant to Council Regulation (EC) No 1005/2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing.” Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32012D1117%2802%29&qid=1684165860782>

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the three countries appear to have acceded to the EU Commission's demands. However, due to a lack of transparency, it is not always clear whether this is indeed the case.

Various other states, such as Spain¹¹, Cabo Verde¹², Australia¹³ and New Zealand¹⁴ prohibit in their legislation the involvement of their nationals in IUU fishing in the waters of other states. The USA¹⁵ prohibits its nationals to be involved in dealings with fish that results from IUU fishing, including the persons involved in the preparation and organisation of IUU fishing operations. A case in point is Spain which used its regulations to sanction the activities of the Spanish Vidal Armadores group¹⁶ and its connected persons. Vessels belonging to this group, but with a foreign flag and legal owner, had been regularly and for a long period involved in IUU fishing operations. The Spanish authorities were able to show the link between the vessels involved and some of Vidal companies and their beneficial ownership of the vessels concerned.

Since vessels that are beneficially owned by EU nationals figure regularly in reports of NGOs¹⁷ on IUU fishing, it is surprising that there are not more actions of EU member states against nationals who own vessels that are involved in IUU fishing. It is also not clear to what extent the EU Commission is monitoring the actions that EU member states take (or fail to take) to meet their obligations under the EU IUU Regulation. **The EU appears to be more focused on imposing its interpretation of a state's international legal obligations relating to IUU fishing on non-member states than on its own member states.** This has been denounced by several NGOs, including CFFA in a recent publication¹⁸ on the illegal operations of Italian vessels in West Africa.

¹¹ BOE, "Ley 3/2001, de 26 de marzo, de Pesca Marítima del Estado", BOE-A-2001-6008. Available at: <https://www.boe.es/buscar/pdf/2001/BOE-A-2001-6008-consolidado.pdf>

¹² Boletim Oficial, "Decreto-legislativo nº2/2020" & others, 19 March 2020. Available at: <https://kiosk.incv.cv/1.1.33.3167/>

¹³ Federal Register of Legislation, "Fisheries Management Act 1991", C2021C00546 (C62), 26 September 2021. Available at: <https://www.legislation.gov.au/C2004A04237/latest/versions>

¹⁴ New Zealand Legislation, "Fisheries Act 1996". Available at:

https://legislation.govt.nz/act/public/1996/0088/latest/DLM397304.html?search=sw_096be8ed81dfbc74_national_25_se&=1&sr=13

¹⁵ "Code of Laws of the United States of America", Title 16, Chapter 53: "Control of illegally taken fish and wildlife". Available at: <https://uscode.house.gov/view.xhtml?path=/prelim@title16/chapter53&edition=prelim>

¹⁶ NOVAL, Nieves, "The Spanish legal process for prosecuting illegal fishing: A story of success?", ClientEarth, July 2019. Available at: <https://www.clientearth.org/media/cd0jqn3j/the-spanish-legal-process-for-prosecuting-illegal-fishing-a-story-of-success-ce-en.pdf>

¹⁷ See for example: OCEANA Europe, "Problematic EU ownership of fishing vessels in countries that fail to tackle illegal fishing", Factsheet, 26 October 2022. Available at: <https://europe.oceana.org/wp-content/uploads/sites/26/2022/10/FACTSHEET-Flags-of-convenience-6-pags-web.pdf>

¹⁸ PANOSSIAN, Anaid, "Illegal operations of Italian vessels in West Africa: when will the Commission get its head out of the sand?", CFFA-CAPE Policy Brief, 22 January 2024. Available at: <https://www.cffape.org/publications-blog/iuu-italian-vessels-west-africa-commission-address-situation>

Conclusion: states have an obligation to act against their nationals who are beneficial owners of vessels involved in IUU fishing

Based on the above, **there is a strong basis for arguing that there is an obligation under international law on states whose nationals are involved as vessel owners in IUU fishing to act against these nationals.**

Even though the question is unlikely to be clarified in new treaties or other decisions of international tribunals, **there should be no reason to wait. Coastal states that are affected by IUU fishing and organisations that have identified beneficial owners of vessels could and should start putting pressure on states of which these owners are nationals,** to challenge their role in IUU fishing. The information that is available regarding the vessels involved in IUU fishing and their owners could be used for demanding that vessel owner states take concrete measures against their nationals who are involved in these activities. This can be done especially where the relevant state has recognised (for example in regulations or expressed views) that there is an obligation to act against such nationals. It would be the case for EU member states given their obligations under the EU IUU Regulation, as well as states like Taiwan and South Korea. Such a course of action would enhance the tools that are available to fight against IUU fishing.

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