

JOINT MAC-LDAC ADVICE

Fostering the European Union's leadership in reducing the detrimental impact of flags of convenience in the fishing sector

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1. Introduction

Illegal, Unreported and Unregulated (IUU) fishing imperils the sustainability of the world's fisheries, depletes fish populations, costs the global economy billions annually¹, skews scientific stock assessments, and deprives communities that rely on healthy fish populations for their food security and livelihoods.

The European Union (EU) has been a long-standing pioneer in the global fight against IUU fishing. The European Commission has endorsed this leadership position, working to promote a "zero-tolerance" approach to IUU fishing and make this policy a priority on the international agenda². To counteract the lucrative illicit trade of IUU fishing products, the EU IUU Regulation established an EU-wide system to prevent, deter and eliminate the import of IUU fishery products into the EU market and has been remarkably successful in bringing reforms in non-EU countries through its carding scheme. However, the latest Commission report³ on the implementation of the EU

¹https://advances.sciencemag.org/content/6/9/eaaz3801?utm_source=TrendMD&utm_medium=cpc&utm_campaign=TrendMD_1.

²<https://www.euractiv.com/section/energy-environment/opinion/fighting-for-the-ocean-the-story-of-tackling-iuu/>.

³ <https://ec.europa.eu/transparency/regdoc/rep/1/2020/EN/COM-2020-772-F1-EN-MAIN-PART-1.PDF>.

IUU Regulation lists some of the challenges the EU faces in implementing the Regulation. The use of "flags of convenience" - meaning flag States which regularly fail to exercise jurisdiction or effective control over the vessels registered under their flag - has been identified as one major challenge. The problem as described by the European Commission relates to flag States 'selling' their flags to non-EU countries' operators. As for the EU, the MAC and the LDAC acknowledge that the EU IUU Regulation covers activities of EU nationals regardless of the flag of their vessels.

Although flags of convenience are widely used in the maritime sector as a whole, they can be particularly detrimental in the fishing sector⁴. Certain States allow vessels to fly their flag with only minimal monitoring and enforcement. This can be extremely problematic in the fishing industry, since without flag State oversight these vessels may engage in IUU fishing practices that would have to be addressed through coastal, port and market State controls. As a consequence, the vast majority of rule-abiding fishing operators under stricter control and enforcement regimes are put at a disadvantage, including those legal operators/investors that legitimately flag their vessels in compliant third countries. In this context, it is to be noted that some operators fly the flag of certain third countries that in time may be considered as flags of convenience, due to the quota allocation in Regional Fisheries Management Organisations or due to national market protectionist measures.

Beyond the lack of monitoring by lax flag States, some flags of convenience present a second, equally significant problem. They hinder efforts to identify and sanction the ultimate

⁴ Goodman, C., (2009), The Regime for Flag State Responsibility in International Fisheries Law - Effective Fact, Creative Fiction, or Further Work Required?, *Australian and New Zealand Maritime Law Journal*, Volume 23, 157-169, <https://ssl.law.uq.edu.au/journals/index.php/maritimejournal/article/viewFile/115/153>.

beneficiaries of IUU fishing activities, and provide them with an easy escape route. Vessels are able to "flag-hop" regularly, creating confusion around their identity and ownership. It is important to note that, in accordance with UNCLOS, there must be a "genuine link" between the ship and the flag State⁵. Abusive re-flagging practices can also mean vessel owners may escape sanctions for offences committed under a previous flag, particularly in cases where there is no cooperation between countries. The ability of poor-performing vessels to change flags in this way can also undermine efforts by flag states to reform their fisheries governance regimes. Essentially, flags of convenience in fisheries confound accountability.

The EU has already taken bold steps to achieve higher transparency standards and to tackle issues relating to non-compliant flags of convenience, especially through the adoption of the EU IUU Regulation and of the Regulation for the Sustainable Management of External Fishing Fleets (SMEFF)⁶. On the international scene, the EU has been a key promoter of the FAO Global Record of Fishing Vessels, Refrigerated Transport Vessels and Supply Vessels ('FAO Global Record') crucial to foster transparency and combat IUU fishing.

Any initiative that fosters transparency should be encouraged, one such example is ProActive Vessel Register of the International Seafood Sustainability Foundation⁷.

⁵ Article 91, UNCLOS, https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf.

⁶ Article 39 and 40 of Council Regulation (EC) No. 1005/2008. Establishing a community system to prevent, deter and eliminate IUU fishing; Regulation (EU) 2017/2403 of the European Parliament and of the Council of 12 December 2017 on the sustainable management of external fishing fleets.

⁷ <https://iss-foundation.org/knowledge-tools/public-vessel-lists/proactive-vessel-register/>

2. Recommendations

As such, given the challenges flags of convenience pose to the implementation of the EU IUU Regulation and their significant contribution to IUU fishing⁸, the MAC and the LDAC recommend that the European Commission:

Fully adopt and/or implement existing measures designed to close the loopholes offered by non-compliant flags of convenience in fisheries through:

- a) Ensuring, notably through guidance, support and coordination and where appropriate, taking remedy actions, that EU Member States fully implement Articles 39 and 40 of the EU IUU Regulation. These articles set out an obligation for EU Member States to take appropriate action with regard to their respective nationals responsible for benefiting from, supporting or engaging in IUU fishing under any flag, including foreign ones, to circumvent the protection provided by certain flags of convenience;
- b) Ensuring, in line with Article 40 of the EU IUU Regulation, that EU Member States encourage nationals to report legal, beneficial or financial interests in foreign flagged vessels in order to:
 - i) Map where their nationals have registered the vessels they own and/or operate under flags of convenience and for the European Commission to evaluate these countries in the context of the EU carding scheme;
 - ii) Facilitate implementation of Article 39 of the EU IUU Regulation when EU nationals are found to have supported or engaged in IUU fishing and continuing

⁸ EJF (2020), Off the Hook, https://ejfoundation.org/resources/downloads/EJF_Off-the-hook_2020_final.pdf.

to support EU Member States' efforts in cooperating with non-EU countries in the context of the implementation of Articles 39 and 40 of the EU IUU Regulation;

- c) Facilitating public access to beneficial ownership information (limited to the name, country of residence and nationality of the beneficial owners, as well as the nature and extent of the beneficial interest held) when there is an overriding public interest in disclosure of this information in case of documented involvement in IUU fishing operations, corruption or money laundering⁹.

Use its bilateral relationships, work with partner countries and in international fora to reduce the detrimental impact of flags of convenience in fisheries through:

- d) Prioritising action on States having adopted policies of convenience, with a particular focus on well-established and emerging flags of convenience, and/or having an inadequate administrative environment to ensure the efficient and effective performance of their duties as flag, coastal, port or market States;
- e) Providing support to partner countries and other willing States whether they engage in a formal or informal dialogue with the European Commission under the EU IUU Regulation to increase their capacity to fight IUU fishing and effecting fundamental reforms of their fisheries policies;
- f) Continuing to emphasise, in this context and in line with international legal instruments, the importance for State agencies responsible for flagging vessels and fisheries

⁹ This would align the implementation of the SMEFF with Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents, Regulation 1367/2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, and the fifth EU Anti-Money Laundering Directive, which provides that Member States must make the registers of beneficial owners of companies publicly accessible to any member of the general public under conditions as stipulated above.

- management to work in close cooperation, while also ensuring that fisheries managers have substantive input on decisions on whether or not to flag a fishing vessel;
- g) In the same vein, continuing to emphasise the importance of cooperation between former and possible new flag States before vessels are registered and, in this context, offering support to facilitate cooperation, even more so when operations involve EU Member States;
 - h) Tabling and supporting ambitious proposals in Regional Fisheries Management Organisations and other regional fishery bodies, aiming at increasing transparency over beneficial ownership;
 - i) Encouraging non-EU countries to adopt policies on the restriction and prohibition of at sea trans-shipments, since these operations have been shown to be disproportionately often linked to IUU fishing activities and hinder the control and monitoring of vessels by their flag State and coastal countries;
 - j) Joining forces at the global or regional level to carry out coordinated law enforcement actions targeting "higher risk" vessels registered in flags of convenience or connected to opaque ownership systems with support from relevant organisations such as INTERPOL;
 - k) Encouraging non-EU countries to adopt policies on the model of the Regulation for the Sustainable Management of External Fishing Fleets (SMEFF), which aims to stop abusive re-flagging and to increase transparency regarding fishing vessel registration and ownership;
 - l) Engaging non-EU countries to publish their list of vessels registered to their flag and make the relevant information available through the FAO Global Record of Fishing Vessels, Refrigerated Transport Vessels and Supply Vessels ('FAO Global Record'), mandating

- International Maritime Organization numbers for all eligible vessels and national unique vessel identifiers for all other vessels¹⁰;
- m) In the framework of the carding scheme, ensuring that coastal States require details on the ownership systems behind vessels when reviewing fishing licence/authorisation applications. When it cannot be established with certainty who the beneficial owner is, coastal States should refrain from licensing those vessels;
 - n) Encouraging non-EU countries to accede to and effectively implement the FAO Port State Measures Agreement (PSMA)¹¹ and, in determining which vessels to inspect, also consider those described under paragraph j);
 - o) Increasing scrutiny over imports of raw and processed fishing products into the EU from countries which are non-signatories to key international fisheries treaties¹², through standardised checks, verifications and inspection procedures in accordance with risk criteria under the EU IUU Regulation catch certification scheme, and making the absence of ratification and implementation of such key international fisheries treaties an automated risk criterion in upcoming iterations of 'CATCH', the future EU-wide database for catch certificates;
 - p) Engaging other countries, and in particular other major fishing nations, to adopt and implement mechanisms similar to the EU IUU Regulation allowing them to identify and sanction nationals responsible for, benefiting from, supporting or engaging in IUU fishing under a foreign flag;

¹⁰ LDAC (2017), LDAC Advice on the requirement for IMO numbers for importing seafood products into the EU market from non-EU vessels,

https://ldac.eu/images/documents/publications/LDAC_Advice_on_IMO_Number_30May2017.pdf.

¹¹ http://www.fao.org/fileadmin/user_upload/legal/docs/037t-e.pdf.

¹² Namely, UNCLOS, FAO Compliance Agreement, UNFSA, PSMA.

- q) Working with other major market States, such as the United States or Japan, to encourage trade-related measures similar to the EU IUU Regulation requiring that imported seafood be caught and transported by vessels flagged to States that fulfil their obligations under international law to cooperate in the fight against IUU fishing. When there is documented evidence of non-compliance, they shall close their market to products stemming from countries that are not taking measures to ensure that the vessels they flag do not engage in IUU fishing.