

# The European Community And The Fight Against Illegal Fishing: The Effective Exercise Of Jurisdiction And Control Of The Flag-State

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**Abstract:** Combating illegal fishing is one of the major difficulties the International Law of the Sea faces. The European Community is aware of this problem and has taken some measures to fight against illegal fishing, amongst which there are those related to the effective exercise of jurisdiction and control of the Flag-State over its fishing fleet. This paper tries to extract some criteria that allow to better define the genuine link and the effective responsibility of the Flag-State over the flagship boats within in. It also proposes that the authentic relation that should exist between a State and a vessel that is granted that State's flag should be the ability of that State to exercise effective control over the vessel. If such a control does not exist, no genuine link exists. This suggested characterisation of the genuine link would move away from the traditional economic and internal vision into the field of international responsibility whereby a non-fulfilment of a behaviour obligation which could be, in some cases, an *erga omnes* obligation.

**Keywords:** European Community - Illegal Fishing - Flag State jurisdiction - Flags of convenience - Genuine link - International responsibility

## 1. Introduction

The illegal unreported and unregulated fishing (IUU fishing) is one of the major difficulties the International Law of the Sea meets, since it affects directly and negatively the conservation and management of fisheries resources, the maritime safety and the fair competition among the economic operators of the fisheries sector. In connection with the IUU fishing, we find the phenomenon of the vessels flying "flags of convenience", ships in which an authentic or genuine connection with the Flag-state does not exist, that is, vessels over which the mentioned State does not exercise an effective jurisdiction.

In order to face these illegal fishing activities, the International Community has undertaken, following the example of the United Nations Convention on the Law of the Sea (UNCLOS) of 1982, the preparation of a series of international instruments with different legal significance, amongst which the most important are: The FAO Compliance Agreement (1993), the Code of Conduct for Responsible Fisheries (1995), the UN Fish Stocks Agreement of 1995 and, above all, the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (IPA-IUU fishing) of 2001. The European Community (EC) has taken part in both the preparation and elaboration of these international legal instruments.

The present communication includes a series of considerations about some problems the EC, as well as the rest of the International Community, faces at the time of establishing a jurisdiction able to avoid, discourage and eliminate the IUU fishing and it pays special attention to those questions regarding the effective exercise of jurisdiction and control of the Flag-state over its fishing fleet. Particularly, the pages that follow try to extract some criteria that allow to better define *the genuine link and the effective responsibility of the Flag-state over the flagship boats within it*.

## 2. The European Community has exclusive competence in international relations in the domain of fisheries.

As an international legal person, the EC has signed some Fishing International Agreements, it has taken part in the Fisheries International Conferences and it has operated within the Regional Fisheries Organisations (RFOs), it has expressed its concern in all those international forums about the IUU fishing and its negative effects over the conservation and sustainable exploitation of fisheries resources. There are some reasons for this international participation: the EC controls one of the most extensive coastal fishing area in the world, it has a powerful fishing fleet that ranks fourth in the world, it has an important fishing converter sector and, above all, it is one of the major fishing markets in the world largely supplied with imported products.

Moreover, within the framework of the Common Fisheries Policy, at the time of defining its fishing legislation, it is applying the established criteria or those the IPA-IUU fishing it is based on, as it is shown, for instance, by the Council Regulation (EEC) No 2846/98 of 17 December (OJ L358, 31.12.98,p.1), by which the system of fishing control is modified, or the Article 7.3.b) of Council Regulation (EEC) No 179/2002 of 28 January, that determines the conditions and procedures of the community structural assistance in the fisheries sector (OJ L31, 01.02.2002, p.25). In the same way, within this domain and focusing on the reform of the Common Fisheries Policy, we can highlight the *Communication from the Commission about the community action plan for the eradication of illegal, unreported and unregulated fishing COM(2002) 180 final*, 28.05.2002, as well as the EU Council of Minister Conclusions of 11.06.2002, with relation to the illegal, unreported and unregulated fishing, both documents being used to clarify the definition of the laws and jurisdictions which to combat IUU fishing.

The fight against these activities of illegal fishing implies, amongst other things, a compromise on the part of the Flag-state of assuming its responsibilities by means of the control of the fishing floats that fly their flag. But sometimes, this compromise does not exist, as is the case in the States with flag of convenience and open registers.

As the European Commission says in the above-mentioned Communication about the EU Plan of Action in order to eliminate the IUU fishing, the flag of convenience phenomenon entails a considerable risk for the survival of the world fishing. Therefore, the Commission considers it its duty to take action against such practices. In order to combat this phenomenon, to fight against illegal fishing, the EC has stressed the importance of the existence of a substantive constraint between the Flag-state and its flagship and, by doing so, it has urged its Member States to assure the existence of that constraint; it has also decided, as the European Parliament made in its Resolution about the role of the flags of Convenience in the fisheries sector in December 13<sup>th</sup> 2001, to propose the establishment of a European naval registration system ("European naval register") working in a parallel direction to the port State control.

At the same time, the EC has been strictly censuring those who participate in the fisheries sector with a flag of convenience, and has suggested a series of control and sanction measures to be applied by the Community and its Member States and intended to make the activity of the ships with flags of convenience difficult when that activity is an IUU fishing method.

On the other hand, and in line with what has been said, the EC supports the definition of objective legal criteria to guarantee that the authorisation to sail flying the flag of a state respects the existence of a substantial link between the state and the fishing boat; that is, to say it guarantees the definition of the genuine link. According to the EC, the present legal vacuum allows a state to grant its flag to fishing boats enjoying the lack of effective control, which permit them to violate, in many cases, the Fisheries Policy of the Coastal States in the case of the fishing EEZ, and the international obligations established for high sea fishing. In order to attain this objective, it supports, amongst other things, the celebration of an international conference, in which the application conditions of the 91 UNCLOS article should be established with respect to fishing vessels.

### **3. The effective exercise of the State jurisdiction over fishing vessels flying its flag.**

Article 94.1 of the 1982 UNCLOS, *every State shall effectively exercise its jurisdiction and control over ships flying its flag*. Each state shall be responsible for the determination of the necessary requirements in order to provide its nationality to the vessels (article of the 1958 Convention on the High Sea and Article 91 of the 1982 UNCLOS). Nevertheless, all too frequently some countries cannot exercise this jurisdiction because of the non-existence of a *genuine link*, an authentic relation, between them and the ships that fly its flag. That situation, which is favoured by the countries with *open registers*, makes the existence of many ships sailing and developing their fishing activities under *flags of convenience* much easier. This means that the main part of the international measures relating to grant the long term conservation and the sustainable use of the fish stocks are practically illusory.

These States that can hardly exercise an effective jurisdiction over its vessels, are clearly unable to fulfill the international obligations from the international regulations about this matter. Thus, it is not likely that a State that provides flags of convenience could meet the requirements imposed by Article 117 of the

1982 UNCLOS of “take, or to co-operate with other States in taking, such measures for their respective nationals as may be necessary for the conservation of the living resources of the high seas”. It is also doubtful whether it could face the provisions of the 1993 FAO Compliance Agreement, specially its Article III, that says that the Flag-state must issue an authorisation in order to practise offshore fishing operations, as well as to make a file with the fishing vessels entitled to sail with its flag and to be used in high sea fishing. They do not also seem to be able to face the responsibilities derived from the UN Fish Stocks Agreement of 1995 regarding the control of the fishing vessels’ activities flying its flag and, in particular, the provision in Article 18.1, that says: “A State whose vessels fish on the high seas shall take such measures as may be necessary to ensure that vessels flying its flag comply with subregional and regional conservation and management measures and that such vessels do not engage in any activity which undermines the effectiveness of such measures.”

Neither are they in the position of fulfilling the recommendations in Article 6.11 of the Code of Conduct for responsible fisheries, that says: “ Those states that give its fishing vessels and fishing-aid vessels permission to fly its flag might have an effective control over those ships, with the aim of ensuring the adequate application of this Code. In the same way, they must ensure that the activities of those ships do not diminish the effectiveness of the conservation and ordination measures taken according to the International Laws and applying at a national, subregional, regional or world-wide level. The States must also ensure that the ships flying its flag should fulfil its obligations regarding the data gathering and supplying as for their fishing activities.”

This kind of State could hardly ensure that its vessels do not fish in the territorial waters of a third State, consequently attacking the sovereign rights of coastal States regarding the conservation and management of the living marine resources.

In short, it can be deduced from the UNCLOS, the FAO Compliance Agreement, the Code of Conduct for Responsible Fisheries, and the UN Fish Stocks Agreement, that the flag-State might have an effective control over the fishing vessels flying its flag and over its flag’s vessels giving assistance to the latter. It might also ensure that the activities of those ships do not diminish the effectiveness of the conservation and management measures in agreement with International Law and approved at a national, subregional, regional or world-wide level.

The fulfillment of this duty for all the Flag-states would necessarily lead to the eradication of the IUU fishing. However this duty could not be fulfilled by States that do not demand that its vessels have a real and effective link with those, having open records and favouring the flags of convenience.

#### **4. Problems to face: open registers and flags of convenience.**

The national and international regulations pressure and the correlative control mechanisms to make the conservation and management resources measures effective, encouraged some ship owners to register their ships in some countries where they could obtain fiscal benefits (low taxes), administrative benefits (minimum administrative and technical control services), or labour advantages (lack of protection of the sea worker). This has frequently led to a situation in which they tend to obtain economic benefits at the expense of the vessel’s safety, human lives or the operating conditions of the vessel, which has given rise to countless marine frauds and tax evasion.

In most cases, in countries with open registers is not compulsory fulfill the minimum safety standards or the labour, social and unions rights of workers. This practice, widespread in the merchant navy, is becoming also very popular in the fisheries sector. As a matter of fact, this practice begins to be very popular in the fisheries sector. Some shipowners take their vessels to the countries with “*Open registers*” or with free registration, where the existence of a real link (or genuine link) is not necessary between the flag-State and their vessels and the effective localisation of the vessel’s property.

By means of the flags of convenience, when this authentic relation between shipowner and the flag the vessel flies does not exist, the owner of the vessel tries to avoid the conservation and management measures imposed by the ORP or by the States in their EEZ as well as preventing the non-discriminatory trade measures imposed for that purpose.

Although the IUU fishing does not always coincide with that of the flags of convenience, the fact is that, in most cases, both phenomena go together. In relation to this situation, the article 19 of the IPA-IUU asks the States to advise its nationals not to register the fishing vessels under the jurisdiction of a State not fulfilling the responsibilities of a flag-State. The international response was quick and some States, as well as the EU, are developing this recommendation.

### **5. Legal response: Flag-state responsibilities and the question of the “genuine link”.**

In the International Law, there are a series of legal principles derived from nationality, including those that imply the subjection of the vessel and all its situations to a determined legal system, that of the country that gave it the flag.

According to the art. 91, 1<sup>st</sup> of the UNCLOS *“Every State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship”*.

We can deduce from this provision, according to the International Tribunal for the Law of the Sea (ITLS), (Sentence July 1<sup>st</sup> 1999, The “Saiga 2” Case, Saint Vincent and Grenadines v. Guinea), that every state has an exclusive competence concerning the assignment of its nationality to the vessels. Its job being to fix the necessary conditions and formalities for the assignment and withdrawal of its nationality to vessels, for the registration of ships in its territory and for the right to fly its flag. The determination of the criteria and the formalities concerning the assignment and withdrawal of the nationality to ships are of the exclusive competence of the flag-state (point 65).

But, as is recognised by the ITLS in this Sentence, the 1982 UNCLOS also contains some detailed provisions concerning the flag-states obligations with respect to the ships flying their flags. Articles 94 and 217 specifically express the flag-state obligations. These obligations must be carried out by the exercise of the appropriate jurisdiction and control over natural and legal persons such as the shipmaster and other crew members, shipowners or those who obtain benefits from the vessel, as well as any other person related to its activities.

From all this, we can deduce the existence of a strained relation between, on the one hand, the State’s sovereignty declared by the exclusive competence in the determination of the criteria and conditions of the nationality assignment and, on the other hand, the international obligations of this State with respect to the international community and the rest of the States for the effective exercising of the jurisdiction and control of the vessels they gave its flag to.

Let us briefly examine this strained relation briefly. It was at the Geneva Conference, held in 1958, when discussions, taking into account the idea of sovereignty, over the extent to which a State can be forced to exercise a real jurisdiction over their vessels in order to control the security and the social conditions aboard, so as to combat the crimes committed on those vessels.

As a result of this concern article 5 of the 1958 Convention on the High Sea, states says, referring to nationality, that : *“there must exist a genuine link between the State and the ship” and, in particular, “the State must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag”*.

Nevertheless, from the point of view of sovereignty, it is the State that must determine the conditions to assign its flag. This affects the authentic and effective link that becomes imprecise, since it depends on the final decision of each State. Moreover, what happens when there is no such link? The question has no answer because the consequence of that absence was not determined.

Due to this, the next step taken was in the UN’s **Conference on Commerce and Development**, where a Convention on registration of vessels was approved in Geneva February the 7<sup>th</sup> 1986. This convention does not try to eradicate the flags of convenience but to ensure an effective jurisdiction and control by the State assigning the flag, in order to combat the maritime fraud and ensure the safety of human lives in the sea. This convention, which has not come into force yet, tries to determine the contents of the substantial link by means of not very constraining economic elements (a “sufficient” participation of nationals in the

vessel ownership; a “satisfactory” proportion of nationals among the officials and the crew of the vessel) and by means of administrative elements (the existence of a maritime legislation and an administration entitling its application, through the implementation of periodical inspections aimed at ensuring the correct application of the international rules). As one can see, this convention’s approach to the genuine link is purely of a socio-economic nature.

Some years later, we find the FAO Compliance Agreement of 1993, where the principle of liability of a flag-state fishing vessel sailing in high sea was included and defined. As it is known, the initial goals of this negotiation leading to this Agreement were much more ambitious; they intended to strictly regulate the assignment conditions of the flags and define a more precise concept of “authentic relation” in order to avoid the reflagging practice of the vessels. Nevertheless, it was impossible to achieve an agreement regarding this question, and the attention was drawn from the legal act of the assignment and registration of a flag to the legal act of authorisation to a vessel to fish in high seas. But if it was not possible to define the concept of an “authentic relation”, it did mean however a progress in the development of the flag-state principle of liability, as it stated that this principle implies that such State should commit itself to avoid any fishing activity affecting the effectiveness of the international measures on conservation and management on high seas.

The FAO Compliance Agreement is developed in the following ways:

- It approves the UNCLOS demands about the maintenance of a fishing vessel registry;
- It imposes the subjection of the fishing activities in high sea to the previous authorisation obtaining issued according to some requirements;
- It establishes some limitations to grant the flag to a fishing vessel that has been involved in previous activities forbidden by international measures;
- It promotes the international co-operation and the exchanges of information exchange on these subjects.

Finally, the UN Fish Stock Agreement of 1995 proposes some new ideas regarding this matter; thus 21 and 22, although it accepts the flag-State effective jurisdiction in high sea, it also anticipates some temperaments to this jurisdiction in the case of violation of the Fisheries International Law on the matter of fishing by a vessel.

In short, in the current situation of the Law of the Sea, a strained relation still exists between the exclusive jurisdiction of the State over a vessel flying its flag and the real and effective exercise of this jurisdiction which will enable the mentioned State to face its obligations concerning the conservation and management of marine living resources. This strained relation decreases with the existence of a real link between the vessel and the flag-State and increases in the cases of vessels with flags of convenience.

The existence of these uncertainties regarding International Law, as well as the need to eradicate the practice of the flags of convenience requires the setting of rules in maritime sector based on the principle of “authentic relation” between the flag of the vessel and the territory which controls this vessel and where the owner is based.

In the previously mentioned « Saiga 2 » Case of 1999, the ITLS had to study the subject of the « authentic relation » between State and vessel because of the presentation by the defendant of a non-admissibility appeal based on the absence of this real link between the mentioned vessel and the claimant State. In order to defend this appeal it assured that a State cannot fulfill the obligations prescribed by the 1982 UNCLOS, while being a flag-State vessel, if it does not exercise a executive competence over the owner. The absence of this competence implies the non-existence of a real link. In response to this argument, the defendant State maintained that there is nothing in the 1982 UNCLOS which justifies the affirmation that the existence of an authentic relation is a necessary pre-condition for the conceding of the vessel’s nationality.

Having studied if the absence of an authentic relation among a flag-state and a vessel give other State the right not to recognize the nationality of the mentioned vessel, the Hamburg Court announced that the article 91.1. of the CNUDM, as well as the art. 92 and 94 of the mentioned document, do not provide any answer. Nevertheless, the Court remembers that the Commission of International Law, in the art. 29 of the Article project on Law of the Sea of 1956, proposed the concept of substantial link as criteria, not only referring to the nationality assignment to a vessel, but also to the recognition of this nationality on the part

of other States. In the mentioned provision, after establishing that « the vessels have the nationality of the State that gives them the authorisation to fly its flag », it adds that « Nevertheless, with the object of the recognition of the vessel national nature on the part of other states, the existence of a real link among vessel and State is imperative. » The Court points out that this sentence was not included in the text of art 5, paragraph 1 of the Convention of the High seas of 1958 ; it says, amongst other things, that «A substantial link among State and vessel must exist; The State must effectively exercise its jurisdiction and control in technical, administrative and social matters, in particular over the vessels flying its flag ». As it is stated by the Court, although the obligation of a substantial link has been maintained in the 1958 Convention, this did not happen with the proposition that reads that the existence of such a link is the base of the nationality recognition. Apart from that, according to the Court, this is the line taken by the UNCLOS in articles 91 and 94. In the opinion of the Court, these provisions do not allow a State, which discovers the absence of an appropriate jurisdiction or control from the Flag –state of a vessel, the right of refusing the recognition of the vessel to fly the Flag-state flag.

The Court considers that the aim of the UNCLOS provisions regarding the necessity of a substantial link is that of ensuring a more effective respect for the flag-State and their obligations, and not that of establishing some criteria liable to be invoked by other states in order to refute the flag-state vessel registration validity.

From the point of view of the strained relation between exclusive jurisdiction and effective application of the international obligations, it can be extracted from this case-law that, although the ITLS does not provide a legal content to the considered concept, it can be accepted that, if it is possible that the substantial link was not a previous requirement for a vessel's registration, it can indeed support the urging of the flag-State to fulfill its obligations in accordance with International Law with respect to the vessels that fly its flag.

This assertion can be expressed by means of three solutions to try to reach an explanation about the significance of the genuine link from the point of view of the eradication of the IUU fishing :

1. The non-literal approach: The vessel's nationality is not only of the exclusive interest of the flag-state, but it concerns all the International community. From this point of view, the assignment of the flag is not only a demonstration of the flag-state sovereignty, but also the expression of the mission that the International community put on the Flag-state to take the vessel responsibility allowing it to sail under its flag. Therefore, if its nationality is of the interest of all the states, it might be the demonstration of an effective link between the State and the vessel that flies its flag. In this respect, the administrative formality of the registration is not enough: an authentic relation is required. These two conditions will be accumulative, so that the rest of the states could ignore the flag-state vessel nationality at the non-observance of these conditions.
2. The literal approach: The International Law is not interested in the socio-economic elements between the vessel and a national legislation. On the contrary, it is concerned by the fact that the Flag-state can ensure the exercising of an effective jurisdiction and control over the vessel which appears in the country register. From this point of view, the International Community will defend itself against INDNR fishing not by reporting the absence of an authentic relation of the vessel with the Flag-state, but by asking the Flag-States fulfilment of the due international obligations. The starting point would thus be from the concept of an authentic relation as it is inferred from jurisprudence, which, as is known, allows a « formal » authentic relation and to extract the existence of an obligation of the Flag-state with respect to third parties and to the International community – which in some cases can be an *erga omnes* obligation – for the fishing activities of the vessels flying its flag. In case of non-fulfilment, it will commit an international responsibility.
3. The intermediate approach : It will be based on the combination of the Flag-state obligation of ensuring a jurisdiction and an effective control over the vessel flying its flag and the effectiveness of the authentic relation (an obligation of diligence). The beginning is the fact that a « formal » link (not effective) impedes the State from carrying out these obligations. This would practically affirm the fact that, since the State grants a vessel its flag without worrying about the existence of an authentic relation, it starts to violate the obligations in the matter of conservation and management of marine resources as well as protection of the environment imposed by the International Law.

What then is the genuine link in the fight against IUU fishing?

The flag is the external manifestation of the link between a vessel with a State. This link is the nationality that constitutes a demonstration of the state's sovereignty. Thus, the nationality assignment to a vessel is a sovereignty act, and it is a job of the State, as we have seen, to set the appropriate conditions. The consequences of the assignment of a nationality are, on the one hand, the application of the national legal rules to the vessel and, on the other hand, the State obligation to control the activity of that vessel. The non-observance of this rule can lead to an international responsibility.

Apart from some historic exceptions or derived of the existence of International Organizations, flag and nationality coincide: It is because of the fact that a vessel has a determined nationality that it can fly the flag of that country.

Nationality and its external expression-the flag, are important factors of legal security. Therefore, they must express the existence of an authentic link. However, what does this link consist of?

In the case of the nationality of individuals, this juridical link confirms the existence of a pre-existent and effective authentic relation (Nottebohm Case), so that its lack implies the loss of international effects on the relation. However in the case of the nationality of vessels, this link urges the State to ensure the international harmlessness of the vessel, imposing the respect for its safety, labour, fishing and environmental rules, so that the lack of this authentic relation does not imply the loss of its international effects and it does not prevent its opposition against third parties. This lack implies the responsibility of the State, which has not respected its observation and control obligations as regards fishing. Moreover, it has failed to observe the due diligence obligation by including a vessel in its records without taking into account the existence of a genuine link with it.

From this point of view, the authentic relation that should exist between a State and a vessel that is granted its flag could be the ability of that State to exercise an effective control over the vessel activities and to act industriously so that this can really happen. If this control does not exist, the discussion over an authentic link could not be possible.

This suggested characterisation of the genuine link would go away from the traditional economic and internal vision to enter the field of international responsibility (violation of a behaviour obligation). This would be more useful. It seems more effective and powerful to act repeatedly against a State of open register because it does not control its vessels, proving that it is fishing illegally, than to act against the vessel and to consider it without nationality owing to the lack of that genuine link.

## Conclusion

The EC has defended in the different international forums, in which the subject of the IUU fishing eradication was discussed, the convenience of defining objective juridical criteria to guarantee that the authorisation of sailing under a State's flag respects the existence of a genuine link, one may maintain that this genuine link is the one that allows this State to exercise an effective control over the vessel activities. If such a control does not exist, no authentic link exists.

This suggested characterisation of the genuine link would go away from the traditional economic and internal vision to enter the field of international responsibility (owing to a non-fulfilment of a behaviour obligation, which would identify itself with the due diligence obligation, which could have an *erga omnes* nature in some cases).

I believe that this interpretation would be more useful to combat the IUU fishing since it seems more effective and powerful to act repeatedly against a State of open register because it does not control its vessels, proving that it is fishing illegally, than to act against the vessel and to consider it without nationality owing to the lack of that genuine link.

Thus, this proposal stresses, the ability of the Flag-state to effectively exercise its responsibility over the fishing vessels which fly its flag. Now, not every country is able to exercise such a responsibility, therefore the need to plan aid to developing countries willing to undertake this responsibility and to respect the commitments derived from the PAI over IUU fishing. Therefore, a double responsibility arises

if we want to eradicate IUU fishing: the first is, related to the developed fishing powers, such as the EC, aimed at helping economically and administratively the developing countries so that the latter can guarantee the existence of a genuine link with the vessels they grant their flag to; and, the second is, related to those countries which are not willing to give an authentic content to the genuine link. In this last case, if they are not able to ensure the effective jurisdiction and control over their fishing vessels and if their activities violate a Law of Nations rule, I think they fail to observe an international obligation and that this obligation, in some cases, could be *erga omnes*, giving rise to an international responsibility to the international community and, therefore, a responsibility which may be demanded for by any international qualified entity, for examples, by the EC.