

Burning and/or Sinking Foreign Fishing Vessels Conducting Illegal Fishing in Indonesia

Some Obligations and Loopholes

Zaki Mubarok Busro

PhD Candidate, Australian National Centre for Ocean Resources and Security,
University of Wollongong
jbusro@gmail.com

Indonesia's abundant marine resources attract not only Indonesian fishermen but also nationals from other countries who fish in maritime zones under Indonesia's national jurisdiction. When these national and foreign fishermen undertake unauthorized fishing operations in Indonesian waters, they are guilty of illegal fishing under Indonesian law. The Minister of Marine Affairs and Fisheries, Susi Pudjiastuti revealed national data on the illegal operations of foreign vessels and stated that on some days, "over 70 vessels of 50 to 70 gross tons entered Indonesian waters".¹ According to the Ministry of Marine Affairs and Fisheries (MMAF) Indonesia suffers annual losses amounting to around Rp. 101 trillion (US\$ 8.8 million) due to illegal fishing activities including not only losses of tax revenue for the State and income for local fishermen but also the abuse of fuel subsidies.² Illegal fishermen use fuel allocated for authorized Indonesian fishermen and subsidized by the Indonesian Government.³ In order to avoid paying taxes on harvests, illegal fishermen will use counterfeit licenses. These fishermen also employ destructive fishing gears leading to the decline of catch for local fishermen.⁴

1 Sunan J. Rustam, 'Legal Review of "Sink the Vessel" Policy', 6 December 2014, <<http://www.thejakartapost.com/news/2014/12/06/a-legal-review-sink-vessel-policy.html#sthash.zY2qA-Wj3.dpuf>>.

2 Antara News, "New Indonesian Maritime Affairs Minister Declares War Against Illegal Fishing", 31 October 2014, <<https://www.antaranews.com/en/news/96351/new-indonesian-maritime-affairs-minister-declares-war-against-illegal-fishing>>.

3 Ibid.

4 Ibid.

In responding to this matter, Indonesian authorities have committed to eradicating illegal fishing by imposing tough measures such as burning and/or sinking illegal fishing vessels. Between January and April 2014, the Indonesian maritime police seized sixteen ships illegally fishing in Indonesian waters; eight of these were Vietnam-flagged vessels. Before Minister Susi Pudjiastuti assumed her post in 2014, MMAF had confiscated 130 Thai fishing vessels between 2007 and April 2014.⁵ Between 2007 and 2012, MMAF sunk 33 of 38 seized illegal foreign vessels. Most of these were Vietnam-flagged fishing vessels caught fishing in Natuna Island waters.⁶

After Minister Susi assumed leadership of MMAF in 2014, the number of vessels being confiscated by the State and sunk increased significantly. From 2014 to April 2016, a total of 176 illegal foreign fishing vessels were sunk, including FV “VIKING”, a notorious stateless fishing vessel sought worldwide by INTERPOL and by 13 countries.⁷ By flag, the greatest number of fishing vessels seized and sunk were from Vietnam (63), followed by the Philippines (43), Thailand (21), Papua New Guinea (2), and one vessel each from Belize and China.⁸ This State practice article provides an overview of Indonesia’s legal framework on the practice of burning and/or sinking illegal foreign fishing vessels.

Legal Perspective

Within the ambit of domestic legal instruments, marine resource management in Indonesia is covered through a complex regulatory system.⁹ Providing the framework for Indonesia’s marine laws and regulations, the 1945 Constitution of Article 33(3) reads “Land and water and natural resources therein shall be controlled by the State and shall be utilized for the greatest

5 Ibid.

6 The Jakarta Post, “RI to Sink 3 Foreign Ships for Illegal Fishing”, 5 December 2015, <<http://www.thejakartapost.com/news/2014/12/05/ri-sink-3-foreign-ships-illegal-fishing.html>>.

7 United Nations Environment Program, ‘Catching Crime: Fighting illegal fishing has led to a more sustainable industry, increasing food supplies and well-being’, May 2016 <<http://web.unep.org/ourplanet/may-2016/articles/catching-crime>>, (see chap. II, footnote 111).

8 The Jakarta Post, ‘Zero Tolerance for Poachers’, 22 June 2016 <<http://www.thejakartapost.com/news/2016/06/22/zero-tolerance-for-poachers.html>>.

9 Asian Development Bank, *State of Coral Triangle: Indonesia* (the Philippines, 2014). Available from <http://coraltriangleinitiative.org/sites/default/files/resources/SCTR-IN.pdf> (accessed 17 October 2016), p. 15.

benefit of or welfare of the people”.¹⁰ The main legal instrument governing fisheries resources is Law No. 45/2009, as amended by Law No. 31/2004 (Fisheries Law).

In general, the Fisheries Law provides for strong penalties including imprisonment and fines to punish individuals and corporations committing illegal fishing. However, according to Rose, relevant domestic laws and regulations under MMAF do not address clearly transnational criminal activities in fisheries.¹¹ Under the Fisheries Law, penalties for illegal acts are divided into criminal penalties and penalties for a “violation” of the law.¹² For all criminal violation, there is a strict 4 year minimum imprisonment term and heavy fines. Criminal penalties can be enhanced. For example, for those caught using unsustainable fishing gear, there is a minimum 5 year imprisonment and a maximum fine of Rp. two billion (approximately US\$ 150,000).¹³ In contrast, if the offence falls under the category of a “violation”, they shall be sentenced to a maximum two year imprisonment term and/or an amount less than the fine for a criminal act. In the Fisheries Law, some provisions curbing illegal fishing are the prohibition of unsustainable fishing gears¹⁴ and a licensing system for fishing vessels.¹⁵ The Law provides a “no flag-hopping” rule in Article 63(3).¹⁶ In respect to law enforcement in the Economic Exclusive Zone (EEZ), imprisonment will not be enforced unless a bilateral agreement has been concluded between Indonesia and the relevant flag State.¹⁷

In the case of burning and/or sinking illegal fishing vessels, the authority for an Investigator and/or Fisheries Inspector to undertake this “Distinctive Measure” shall be based on sufficient preliminary evidence.¹⁸ A “Distinctive Measure” is permitted when there is proof that a fisheries crime has been committed by foreign fishing vessels, such as fishing without a license¹⁹ and those vessels are found catching and/or transporting fishes in a Fisheries

10 See Article 33(2) of the Constitution 1945 of the Republic of Indonesia.

11 Gregory Rose, “Combating Transnational Environmental Crime: Future Direction”, in *Following the Proceeds of Environmental Crime: Fish, Forests and Filthy Lucre*, Gregory Rose ed. (London and New York: Routledge, 2014), 104.

12 See Article 103 of Law No. 31/2004 as amended by Law No. 45/2009 on Fisheries.

13 *Ibid*, Article 85.

14 *Ibid*, Article 9.

15 *Ibid*, Articles 27 and 28.

16 *Ibid*, Article 63(3).

17 *Ibid*, Article 102.

18 *Ibid*, Article 69(4).

19 See Elucidation of Article 69, Law No. 31/2004 as amended by Law No. 45/2009 on Fisheries.

Management Area of Indonesia.²⁰ Further technical and detailed arrangements are regulated under the Director-General of Marine and Fisheries Resources' Surveillance Regulation Number 11/PER-DJPSDKP/2014 concerning "Technical Guidelines on the Implementation of Distinctive Measure towards Foreign Fishing Vessels."²¹ Under this regulation, a "Distinctive Measure" is a measure undertaken by Fisheries Civil Servants Investigators and/or Fisheries Supervisors when executing their duties to enforce fisheries legislation in order to protect themselves.²²

Two sets of conditions must be met before an Investigator or Supervisor can issue a "Distinctive Measure" to burn and/or sink foreign fishing vessels in accordance with Article 6; these conditions include both subjective and objective factors.²³ Subjective conditions include:²⁴

1. Resistance from the master and/or crews of a foreign fishing vessel or dangerous maneuvering by the foreign fishing vessel when the foreign vessel is being requested to stop as part of an investigation or is being taken to the nearest port that threatens the safety of the Indonesian fishing enforcement efforts;
2. It is not possible to take or escort the identified vessel to the nearest port due to weather conditions;
3. Identified foreign fishing vessels are severely damaged and can endanger the safety of perpetrators and fisheries patrol vessels.

Meanwhile, the objective conditions consist of cumulative and/or alternative conditions:²⁵

-
- 20 See Article 1 of Regulation of Director General of Marine and Fisheries Resources Surveillance Regulation Number 11/PER-DJPSDKP/2014 concerning Technical Guidelines on the Implementation of Distinctive Measure towards Foreign Fishing Vessels.
 - 21 Regulation of Director General of Marine and Fisheries Resources Surveillance Regulation Number 11/PER-DJPSDKP/2014 concerning Technical Guidelines on the Implementation of Distinctive Measure towards Foreign Fishing Vessels, <<http://djpsdkp.kkp.go.id/public/upload/files/perdirjen-psdkp-nomor-11-tahun-2014-tentang-tindakan-khusus-terhadap-kapal-perikanan-berbendera-asing.pdf>>.
 - 22 See Article 1 of Regulation of Director General of Marine and Fisheries Resources Surveillance Regulation Number 11/PER-DJPSDKP/2014 concerning Technical Guidelines on the Implementation of Distinctive Measure towards Foreign Fishing Vessels.
 - 23 Ibid, Article 6.
 - 24 Ibid, Article 7.
 - 25 See Article 8 of Regulation of Director General of Marine and Fisheries Resources Surveillance Regulation Number 11/PER-DJPSDKP/2014 concerning Technical Guidelines on the Implementation of Distinctive Measure towards Foreign Fishing Vessels.

1. Cumulative conditions include:
 - a. The fishing vessel is not equipped with valid licenses;
 - b. Evidence of catching and/or transporting fish in the Fisheries Management Areas of Indonesia; and
 - c. The fishing vessel is a foreign fishing vessel with all foreign crew.
2. Alternative conditions shall include:
 - a. Foreign fishing vessels captured are not highly valued; and/or
 - b. The vessels cannot be taken into the closest port, because:
 - 1) The vessels endanger navigational safety and/or there are quarantine concerns;
 - 2) The vessels carry poisonous and dangerous materials or individuals on the boat have communicable diseases;
 - 3) It is impossible for enforcement official due to the number of captured vessels to escort all vessels to port; and/or
 - 4) High cost to take or escort the vessels.

Some procedures should follow prior to imposing a “Distinctive Measure”, such as giving warning to crews to leave the vessel, providing for evacuation of crews, attempting to detach the flag, and documenting and taking note of the vessels’ position when it is burnt and/or sunk.²⁶ The “Distinctive Measures” can also be carried out in EEZ in the event that subjective conditions are fulfilled.²⁷ Unfortunately, the Director General’s regulation is silent to the steps following after imposing the “Distinctive Measure” with regard to notification to the flag State of the fishing vessels.

Nevertheless, sending a notification is stipulated under the Vienna Convention on Consular Relations of 1993, Article 36(b) which reads “the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner”.²⁸ Therefore, flag States shall be informed through diplomatic channels if the fishing master and crew are arrested or detained for fishing illegally. If a foreign fishing vessel is arrested or detained in another State’s EEZ, the coastal State has a duty to promptly notify the flag State of the measure

²⁶ Ibid, Article 10.

²⁷ Ibid, Article 12.

²⁸ See Article 36(b) of Vienna Convention on Consular Relations of 1993. Indonesia is State Party on 4 June 1982, <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-6&chapter=3&clang=_en>.

taken and any penalties imposed through appropriate channels.²⁹ Nevertheless, the time extended to send notification remains unclear and therefore bilateral agreement should be agreed upon to regulate a maximum time to send the notification. One instance of a bilateral agreement is between Indonesia and Australia through the signing of the Arrangement on Consular Notification and Assistance on 10 March, 2010. Section 6 of this arrangement reads “the competent authorities of the receiving State will without delay and within three working days inform the consular post or diplomatic mission of the sending State that a national of the sending State has been arrested, detained, or apprehended”.³⁰

In summary, burning and/or sinking illegal foreign fishing vessels are regulated under Indonesia’s domestic law. Several steps and conditions must be followed before imposing such a measure as sinking and/or burning a vessel. Moreover, international law identifies that fishing masters and crews have rights, including the right to receive assistance if they are detained. Due to gaps in both Indonesian domestic and international law regarding the duty to notify in a timely manner, bilateral agreements should be negotiated between Indonesia and relevant States to provide prompt and proper legal assistance to foreign fishing masters and crews of vessels caught fishing illegally in Indonesian waters.

29 See Article 73(4) of the United Nations Convention on the Law of the Sea.

30 See Article 30 of the Arrangement on Consular Notification and Assistance between Australia and Indonesia, <http://treaty.kemlu.go.id/uploads-pub/4629_AUS-2010-0180.pdf>.