
Legal opinion on the engagement of foreign companies in Ghana's industrial trawl sector

SUMMARY

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Key points:

- The intendment of Section 47(1) of the 2002 Fisheries Act (Act 625) is to ensure that Ghanaians are the beneficiaries of local industrial fishing licenses.
- To comply with Section 47(1), the local fishing vessel must not only be locally owned and controlled, it must be locally *beneficially owned* as well.
- It is illegal for any fishing vessel, irrespective of its Flag State, that is partly or wholly beneficially owned by a non-Ghanaian to be granted a local industrial fishing licence.
- The new 2019 Companies Act (Act 992) expands the definition of the term 'beneficial owner' and creates additional obligations on companies to disclose information on beneficial ownership.
- Due to the common rule of interpretation that provides that later legislation impliedly amends earlier legislation, the provisions of the 2019 Companies Act have implications for the matter of beneficial ownership in Section 47(1) of the 2002 Fisheries Act.
- Businesses with permitted foreign participation (according to sector legislation) are required to register with the Ghana Investment Promotion Centre.

Introduction

This briefing summarises the key findings of a legal opinion delivered by the Taylor Crabbe Initiative (TCi) to the Environmental Justice Foundation (EJF) in November 2019. In the opinion, TCi analyses the law governing the nationality of industrial trawlers fishing in Ghanaian waters, including licensing requirements in the 2002 Fisheries Act (Act 625), and implication of expanded provisions on beneficial ownership in the recently enacted 2019 Companies Act (Act 992). The opinion also analyses the regime governing foreign investment in Ghana's industrial fishing sector.

The opinion was commissioned by EJF with a view to understanding the content and scope of these legislative provisions, and assessing compliance of ownership arrangements in the trawl sector with national law.

In October 2018, EJF published a report entitled *China's Hidden Fleet in West Africa: A spotlight on illegal practices within Ghana's industrial trawl sector*¹. The report found that Chinese companies operate through local front companies to import their vessels into the Ghanaian fleet register and obtain a licence to fish. Although foreign involvement is prohibited in the trawl sector, an estimated 90% of industrial trawlers operating under the Ghanaian flag are linked to Chinese beneficial ownership. The result is a complete lack of transparency as regards the true nature of ownership of industrial trawl vessels operating in Ghana, and the inability to effectively identify and sanction perpetrators of large-scale illegal fishing.

Findings of the legal opinion

Licensing of local industrial fishing vessels in Ghana – Section 47(1) of the 2002 Fisheries Act

The 2002 Fisheries Act considers the nature of a vessel's ownership to decide whether the vessel qualifies as a Local Industrial Fishing Vessel (as defined in Section 47(1) of the 2002 Act) or a Foreign Fishing Vessel (as defined in Section 140).

A 'Local Industrial Fishing Vessel' has been defined in Section 47(1) of the 2002 Fisheries Act as:

"...a fishing vessel owned or controlled by a citizen, the Government, or owned or controlled by a company or partnership registered by law in the Republic which has its principal place of business in the Republic and the **share of which is beneficially owned wholly by the Government, a citizen, a public corporation established by law in the Republic or a combination of any of them**, and in the case of a tuna fishing vessel, where at least fifty percent of the shares in the vessel is beneficially owned or controlled by the persons listed above."

Industrial fishing vessels that do not fit into the definition of a Local Industrial Fishing Vessel are classified as a Foreign Fishing Vessel. This is defined in Section 140 of the 2002 Fisheries Act as: “A fishing vessel other than a local industrial or semi-industrial fishing vessel or a canoe”.

The intendment of Section 47(1) is to ensure that Ghanaians are the beneficiaries of local industrial fishing licenses. Section 47(1), as currently worded, allows only industrial fishing vessels fully owned by Ghanaians, or companies fully owned by Ghanaians, to be granted a local industrial fishing licence.

Section 47(1) specifically refers to beneficial ownership. To comply with Section 47(1), the local fishing vessel must not only be locally owned and controlled, it must be locally *beneficially owned* as well. Other fishing vessels, except for tuna vessels, with some degree of foreign ownership do not qualify to be granted local industrial fishing licences.

It is therefore illegal for any fishing vessel, irrespective of its Flag State, that is partly or wholly beneficially owned by a non-Ghanaian to be granted a local industrial fishing licence. The practice of setting up front companies with beneficial owners being foreign companies, in order to acquire a fishing licence as a Local Industrial Fishing Vessel, is contrary to Section 47(1). Fronting by Ghanaians for foreigners contravenes the intention of the legislation to make the local industrial trawl licence only accessible to Ghanaians.

It is an offence for a person to provide false or misleading information to secure registration of a fishing vessel as a Ghanaian fishing vessel.² The penalty for such an offence is a minimum fine of US\$1 million, revocation of the fishing licence, and deletion of the vessel from the registry. Information on a vessel's beneficial ownership must be provided to the Fisheries Commission as part of an application to register a vessel as a Ghanaian fishing vessel³. The Commission is required to verify the information submitted⁴ and where satisfied that the requirements for disclosure under the law have been complied with, recommend to the Ghana Maritime Authority to register the ship as a fishing vessel.⁵

Provisions on bareboat charters – Section 47(2) of the 2002 Fisheries Act

Section 47(2) of the 2002 Fisheries Act also provides that a bareboat chartered by any of the persons listed in Section 47(1)(a) (i.e. a citizen, the Government, or a company or partnership registered by law in Ghana which is beneficially owned by Ghanaians) qualifies as a Local Industrial Fishing Vessel.

A bareboat charter is effectively a lease under which the bareboat charterer will employ the crew and be responsible for all technical and commercial operations and management expenses. The vessel owners put the vessel, without crew, at the complete disposal of the charterers. In effect, the bareboat charterer becomes the owner of the vessel for the period of the agreement and has both commercial and technical responsibility for the vessel.

The tenor and intendment of Section 47(1) of the 2002 Fisheries Act is to ensure that Ghanaians are fully the beneficiaries of local industrial fishing licenses. Hence, a bareboat charter, in its typical nature, whereby the vessel is at the complete disposal of the charterers (Ghanaians) and Ghanaians are responsible for both its technical and commercial operations is consistent with the intendment of Section 47(1).

It is important to note that Section 47(1) and (2) are qualifying provisions in law and both speak to the same item (Qualification of a Local Industrial Fishing Vessel). Therefore, the intendment of both must be consistent and coherent in character and either must not be read to arrive at an absurdity. As noted, the intendment of Section 47(1) is to ensure that Ghanaians are fully the beneficiaries of local industrial fishing licenses. As Section 47(2) is a dependent provision of Section 47(1), its provisions must be consistent with the intendment of that section.

Therefore, a bareboat charter whereby the vessel owners continue to exercise control over the chartered vessels by employing the captain and crew, and overseeing the landings of the vessels and export arrangements, etc., goes contrary to the settled practice of a bareboat charter and cannot be considered a bareboat charter for the purposes of Section 47(2). This would be contrary to the tenor and intendment of Section 47(1), which aims to make Ghanaians the exclusive beneficiaries of a local industrial fishing licence.

New provisions on ‘beneficial ownership’ – implications of the 2019 Companies Act

In a bid to increase transparency in the business dealings of companies and to forestall the tendency of companies to hide business dealings behind a complicated web of shell companies⁶, the new Companies Act, 2019 (Act 992) has created additional requirements with respect to beneficial owners of a company.

The 2019 Companies Act gives the term ‘beneficial owner’ a more expansive meaning. According to Section 383 of the Act, a ‘beneficial owner’ means an individual:

- a) who directly or indirectly ultimately owns or exercises substantial control over a person or company;
- b) who has a substantial economic interest in or receives substantial economic benefits from a company whether acting alone or together with other persons;
- c) on whose behalf a transaction is conducted; or
- d) who exercises significant control or influence over a legal person or legal arrangement through a formal or informal agreement.

Due to the common rule of interpretation that provides that later legislation impliedly amends earlier legislation, the definition in the 2019 Companies Act⁷ has implications for the matter of beneficial ownership in Section 47(1) of the 2002 Fisheries Act.

In light of these developments, a local fishing vessel that is beneficially owned by a foreign individual or company, **per the newly expanded definition of a ‘beneficial owner’ in the 2019 Companies Act**, does not meet the qualifications set out in Section 47(1) of the 2002 Fisheries Act and loses its character as a Local Industrial Fishing Vessel. Any such vessel would need to be licensed as a Foreign Fishing Vessel, which is associated with different requirements and fees⁸.

The 2019 Companies Act introduces further requirements to improve beneficial ownership transparency. The Act establishes a Central Register of beneficial ownership information to be maintained by the Registrar of Companies and made accessible to the public.⁹ Companies are required to disclose the details of beneficial owners for inclusion in the register, including the nature of interest giving rise to the beneficial ownership (e.g. whether a legal, financial or informal arrangement) and whether the beneficial owner is a politically exposed person. Failure to provide accurate information on beneficial owners amounts to a punishable offence.¹⁰

The Act also imposes an obligation on companies to maintain a register of shareholders and beneficial owners of the company.¹¹ This register is to be open for inspection by both shareholders and non-shareholders of the company and a non-shareholder may request for a copy of such register at a fee.¹²

Companies are required to submit annual returns to the Registrar General at least once every year. The annual returns must include the particulars of every beneficial owner of that company. The Act makes it an offence to wilfully make a false statement in documents to be filed with the Registrar General's Department. The penalty for the offence is a fine not exceeding GHC 6,000 and/or imprisonment not exceeding two years.¹³

Laws on foreign investment – registration of foreign interests with the Ghana Investment Promotion Centre

The Ghana Investment Promotion Centre (GIPC) is the government agency tasked with encouraging and promoting investments in Ghana.

Businesses with permitted foreign participation (according to sector legislation) are required to register with GIPC¹⁴. The registration is to be renewed every two years. It is an offence for a company with foreign participation to commence operations without prior registration with GIPC or fail to renew the registration when it expires.¹⁵ The penalty for the offence is a fine ranging between GHC 6000 to GHC 12,000.¹⁶

The 2006 Foreign Exchange Act (Act 723) requires that transfers of foreign exchange to or from Ghana are to be made through persons licensed to carry out the business of money transfers or any other authorised dealer. Payments in foreign currency to or from Ghana between a resident and a non-resident, or between non-residents, are required to be made through a bank.¹⁷ As a directive, the Bank of Ghana does not allow repatriation of profits from a company with foreign participation unless GIPC registration has been completed.

Technology Transfer Agreements¹⁸ must also be registered with GIPC to be effective.¹⁹ GIPC reviews and monitors such agreements to ensure compliance with legal requirements²⁰ and maintains a record.²¹ Technology Transfer Agreements cannot require the following:

- the transferee to export exclusively through the transferor on unfavourable terms;
- the transferor's permission before any export transaction is made and the transferee to pay extra royalty on export sales;²²
- the transferee to acquire parts, inputs and equipment exclusively from the transferor or any other specific source unless such items are not commercially available elsewhere;
- employment of personnel appointed by the transferor unless such an obligation is indispensable considering the nature of work to be done in respect of the transferred technology. In such an instance, the parties must execute a properly drawn up management/technical services agreement.

Compliance of ownership arrangements with applicable laws

Ordinarily, the law permits freedom of contract and allows parties to enter into commercial engagements without questioning the terms of engagement so long as the object and the performance of the contract does not offend the law or public policy.

The law, in principle, permits agreements such as Fishing Technology Consultancy and Management Service Contracts, Hire Purchase Agreements and Lease Arrangements. However, where there is ample evidence that these contracts were executed with the aim of circumventing legal requirements they may be declared void by a court of law. Where such commercial arrangements, in substance, go beyond traditional terms to give the foreign party absolute control of the fully owned Ghanaian company they would be nullified.

Indicators of acts of control include the foreign entity providing the general direction of the local company, appointing directors, determining how and when profit is distributed, employing personnel and generally dominating the affairs of the company. In the case of a fishing vessel, the following situations may indicate control: where the commercial arrangement gives the other contracting party control over exports, landings of catches at the port, conduct of vessel inspections, and provision of captains and senior crew, and where fishing activities are documented in the language of choice of the contracting party.

On the issue of fronting, where there is ample evidence that the Ghanaian company was incorporated with a view to front for foreign counterparts to engage in unlawful activity such as fishing on a local fishing licence, the company so formed may be wound up on application by either the Registrar General of companies or the Attorney General.

Remedies in law - winding up of sham companies or declaration of fishing licence as void

Civil society groups may petition the Attorney General or Registrar General to petition the High Court for companies that have been set up to front for foreigners to be wound up for being operated for an illegal purpose.²³ This remedy would require the submission of evidence that the said company is a sham and has been formed or is being operated for the purpose of perpetrating an illegality²⁴.

A case may also be commenced in the High Court for a fishing licence to be declared void on account of misrepresentations in the application for a fishing licence and/or registration as a Ghanaian-flagged vessel²⁵. Such a case would rely on the existence of cogent evidence with probative value of the existence of fronting and other seemingly unlawful activities to circumvent the law. A successful outcome may be the basis to petition the Attorney General or Registrar General to have the company wound up because it was set up to commit an illegality.

Recommendations to tighten Ghana's regulatory framework on the ownership and control of industrial trawl vessels

1. Amend Section 47(1) of the 2002 Fisheries Act to expressly state that fishing in Ghanaian waters is the sole preserve of citizens/indigenes.
2. Amend the 2002 Fisheries Act to provide an explicit definition of a bareboat charter to clarify the kind of arrangements allowed between the owner of the vessel and the charterer. The definition should provide that the chartered vessel must be under the full control and direction of the charterer and should prescribe the range of activities that are the responsibility of the charterer.
3. Amend the 2002 Fisheries Act to expressly prohibit the involvement of foreign interests or assistance in the activities of local industrial trawlers. The amendment could read:

"A non-Ghanaian or a foreign company shall not own or provide fishing support services for Local Industrial/Semi-industrial Fishing Vessel fishing operations."
4. Create an offence for a Ghanaian who permits or facilitates a non-Ghanaian to undertake or partake in the fishing activities of Local Industrial/ Semi-Industrial Fishing Vessels.

Endnotes

- 1 EJF (2018). China's hidden fleet in West Africa: A spotlight on illegal practices within Ghana's industrial trawl sector.
- 2 Regulation 24F of the Fisheries (Amendment) Regulations, 2015 (L.I. 2217)
- 3 Regulation 24A(2)(e) of the Fisheries (Amendment) Regulations, 2015 (L.I. 2217)
- 4 Regulation 24C of the Fisheries (Amendment) Regulations, 2015 (L.I. 2217)
- 5 Regulation 24D of the Fisheries (Amendment) Regulations, 2015 (L.I. 2217)
- 6 Memorandum to the Companies Bill, 2018
- 7 Section 383 of the Companies Act, 2019 (Act 992)
- 8 Foreign trawl vessels may obtain a licence either through an access arrangement as specified in Section 64 of the Fisheries Act, 2002 (Act 625) or under the exemption created in Section 63(3) of Act 625.
- 9 Section 373 of the Companies Act, 2019 (Act 992)
- 10 Section 345 of the Companies Act, 2019 (Act 992)
- 11 Section 35 of the Companies Act, 2019 (Act 992)
- 12 Section 36 of the Companies Act, 2019 (Act 992)
- 13 Section 345 of the Companies Act, 2019 (Act 992)
- 14 Section 24 of the GIPC Act, 2013 (Act 865)
- 15 Section 40 of the GIPC Act, 2013 (Act 865)
- 16 Section 41 of the GIPC Act, 2013 (Act 865)
- 17 Section 15 of the Foreign Exchange Act, 2006 (Act 723)
- 18 Section 40 of the GIPC Act, 2013 (Act 865): "technology transfer agreement" means an agreement relating to an enterprise to which this Act applies that involves—(i) the assignment, sale or use of foreign patents, trademarks or other industrial property rights; (ii) the supply of foreign technical know-how or technological knowledge; (iii) foreign technical assistance, design and engineering, consultancy or other technical services in whatever form they may be supplied; (iv) foreign managerial, marketing or other services except that an agreement shall not be regarded as a technology transfer agreement for the purpose of this Act if its duration does not exceed a period of eighteen months.
- 19 Section 37 of the GIPC Act, 2013 (Act 865)
- 20 Section 37 of the GIPC Act, 2013 (Act 865)
- 21 Section 37 of the GIPC Act, 2013 (Act 865)
- 22 Regulation 4 of the Technology Transfer Regulations, 1992 (L.I.1547)
- 23 Section 4(1) of Bodies Corporate (Official Liquidations) Act, 1963 (Act 180).
- 24 The law permits only a creditor, a member or contributory, the Registrar General or the Attorney General to submit a petition to the High Court for the winding up of sham companies. Civil society may therefore use the Registrar General or the Attorney General to petition the High Court for the winding up of sham companies.
- 25 Requirements of Section 47(1) of the Fisheries Act, 2002 (Act 625) and Regulation 24F of the Fisheries (Amendment) Regulation, 2015 (L.I. 2217).