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Countermeasures and Cost Recovery against Flag States to Prevent and Deter IUU Fishing

By

Chris Wold[1*]

For more than 50 years, the international community has sought to address the "notorious failure" by many flag states to exercise effectively their jurisdiction over the vessels they flag. This failure is the root cause of illegal, unreported, and unregulated (IUU) fishing, resulting in economic losses of tens of billions of dollars, unsustainable fishing, and food insecurity. Beneficial owners of vessels have evaded legal responsibility arising from efforts to control IUU fishing by concealing their identities behind impenetrable corporate structures, reflagging their vessels to other states, and changing the name of their vessel. Legal actions against crew do little to change the economics for either the vessel owner or the flag state.

To counter these moves, legal strategies should focus on holding non-complying flags states responsible for their failure to exercise their jurisdiction effectively over the vessels they flag. Through litigation, non-flag states might recover their costs of monitoring, control, and surveillance of IUU vessels, as well as costs of enforcement and prosecution. Because international tribunals have only allowed compensation for "extraordinary costs," this article argues that the array of expensive strategies used to combat IUU fishing—for example, observer programs, vessel monitoring, and electronic monitoring—are extraordinary costs taken to combat the extraordinary problem of IUU fishing. Countermeasures—legally authorized action taken against non-complying flag states of non-compliance that would otherwise be illegal—may be a more effective response. A non-flag state could, for example, ban imports of key export goods of the non-complying flag states or engage in high seas boarding and inspection of vessels flagged to such states. Under either approach, non-flag states would create financial disincentive that outweighs the financial incentive of flagging IUU fishing vessels. Non-complying flag states may opt to begin exercising their jurisdiction effectively over their vessels or deregister those vessels and close their registry. Vessels that have sheltered under flags of non-compliance eventually should find a flag state that does exercise its jurisdiction effectively over the vessel. Only then will our fisheries resources be adequately protected.

[1*] Professor of Law, Lewis & Clark Law School; wold@lclark.edu. The author thanks Jessica H. Ford & Chris Wilcox for inviting him to take part of this research to find strategies to prevent, deter, and eliminate IUU fishing by exploring actions against flag states. He thanks Duncan Currie, X, Y, Z for proving comments on this Article.

I. Introduction

For at least three decades, the international community has been developing rules to prevent and deter illegal, unreported, and unregulated (IUU) fishing.[2] The UN Convention on the Law of the Sea (UNCLOS)[3] and the Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (FAO Compliance Agreement)[4] impose obligations on states designed to strengthen their control over the vessels they flag through cooperation and other means.[5] The FAO continued its efforts to prevent IUU fishing and promote responsible fishing practices with the non-binding FAO Code of Conduct for Responsible Fisheries (FAO Code of Conduct),[6] which makes clear that addressing labor standards and human rights are fisheries matters. The UN Fish Stocks Agreement[7] authorizes parties to board and inspect vessels flagged by other states on the high seas. Various regional fisheries management organizations (RFMOs), implementing the Fish Stocks Agreement, also allow high seas boarding and inspection. RFMOs require vessels to use vessel monitoring systems,[8] (VMS), employ onboard observers to monitor compliance with RFMO conservation

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[2] *See* Food and Agriculture Organization of the United Nations (FAO), *Illegal, Unreported and Unregulated Fishing* (undated), https://www.fao.org/iuu-fishing/international-framework/en/ (stating, "An international framework has been developing to address fisheries management since the adoption of UNCLOS in 1982, with an increasing number of fisheries management instruments beginning in the 1990s.").

[3] The United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S 3, U.N. Doc. A/CONF.62/122 (entered into force Nov. 16, 1994) [hereinafter UNCLOS].

[4] Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, Nov. 24, 1993, 33 I.L.M. 968, 2221 U.N.T.S. 91 [hereinafter FAO Compliance Agreement].

[5] *Id.* pmbl., ¶ 2, 7, 10. *See also* FAO, Illegal, Unreported and Unregulated, FAO Compliance Agreement (undated), https://www.fao.org/iuu-fishing/international-framework/fao-compliance-agreement/en/ (stating that the FAO Compliance Agreement "aims to enhance the role of flag States and ensure that a State strengthens its control over its vessels to ensure compliance with international conservation and management measures.").

[6] FAO Code of Conduct for Responsible Fisheries, *supra* note 37.

[7] 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 art. 21, § 8, Aug. 4, 1995, 2167 U.N.T.S. 3 [hereinafter UNFSA].

[8] *See*, *e.g.*, Inter-Am. Tropical Tuna Comm'n [IATTC], *Establishment of a Vessel Monitoring System*, Resolution C-14-02 (2014), http://www.iattc.org/PDFFiles/Resolutions/IATTC/_English/C-14-02-Active_Amends%20and%20replaces%20C-04-06%20Vessel%20Monitoring%20System.pdf; WCPFC, Commission Vessel Monitoring System, CMM 2014-02 (2014), https://www.wcpfc.int/doc/cmm-2014-02/conservation-and-management-measure-commission-vms. For more on the WCPFC's VMS, see *Vessel Monitoring System*, WCPFC https://www.wcpfc.int/vessel-monitoring-system.

and management measures,[9] verify catches through catch documentation schemes,[10] install electronic monitoring cameras and computer equipment,[11] and report transshipments.[12] A new international agreement—the Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing—is specifically designed to combat IUU fishing.[13]

None of this law has sufficiently abated IUU fishing and flag state failures to implement their international obligations. Researchers estimate that IUU fishing represents roughly 20 percent of the global catch, representing somewhere between US$10 billion and US$23.5 billion,[14] with some considering the US$23.5 billion figure to be a conservative estimate.[15] In fact, a recent paper suggests the number may be much higher. It reports that between 8 and 14 million metric tons of just *unreported* fish catch worth an estimated US$9 billion to US$17 billion is traded illegally every year, resulting in annual economic losses of US$26 billion to US$50 billion.[16] Moreover, IUU fishers prey on developing States that are dependent on fisheries resources; IUU fishing in the tuna fisheries alone costs these small Pacific island nations

[9] *See*, *e.g.*, WCPFC, *Conservation and Management Measure for the Regional Observer Programme*, CMM 2018–05, at ¶ 4 (2007).
[10] *See*, *e.g.*, Comm'n Conservation of Antarctic Marine Living Resources [CCAMLR], Catch Document Scheme for *Dissostichus* spp., Conservation Measure 10-05 (2022).
[11] *See*, *e.g.*, New Zealand, Fisheries (Electronic Monitoring on Vessels) Circular 2022, https://www.mpi.govt.nz/dmsdocument/53083/direct.
[12] *See*, *e.g.*, WCPFC, *Conservation and Management Measure on the Regulation of Transhipment*, at ¶ 34, CMM 2009–06 (Dec. 7-11, 2009);); IOTC, *Resolution on Establishing a Programme for Transhipment by Large-Scale Fishing Vessels*, at preamble ¶ 2, Resolution 18/06, (2018). For a comprehensive assessment of the transhipment rules for tuna RFMOs, *see* Chris Wold, *The Impracticability Exemption to the WCPFC's Prohibition on Transhipment on the High Seas*, 49 Envtl. L. 101, 151–55 (2019); Claire van der Geest, Int'l Seafood Sustainability Found., Transhipment: Strengthening Tuna RFMO Transshipment Regulations 6 (2019).
[13] Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, art. 2, Nov. 22, 2009 (entered into force June 5, 2016) ("The objective of this Agreement is to prevent, deter and eliminate IUU fishing through the implementation of effective port State measures, and thereby to ensure the long-term conservation and sustainable use of living marine resources and marine ecosystems."
[14] David J. Agnew et al., *Estimating the Worldwide Extent of Illegal Fishing*, PLoS ONE Feb. 25, 2009, at 1, 4, https://doi.org/10.1371/journal.pone.0004570.
[15] *See, e.g.*, NAFIG & INTERPOL, Chasing Red Herrings: Flags of Convenience and the Impact on Fisheries Crime Law Enforcement, at 13 (2017) [hereinafter Chasing Red Herrings], https://www.interpol.int/en/content/download/5146/file/Chasing%20Red%20Herrings%20Report.pdf.
[16] U. Rashid Sumaila, et al., *Illicit Trade in Marine Fish Catch and Its Effects on Ecosystems and People Worldwide*, Science Advances, vol. 6, No. 9 (2020).

approximately US$600 million each year.[17] An assessment of the Pacific Ocean's six major fishing areas indicates that roughly 24% of the total catch is unreported, with lost gross revenues of US$4.3 billion to US$8.3 billion per year.[18] The problem is not isolated to the Pacific region; EU-flagged vessels engage in widespread IUU fishing in the waters of West African countries.[19]

Some coastal states, including Australia,[20] Indonesia,[21] and Palau,[22] have responded by blowing up, burning, and sinking vessels caught fishing illegally in their territorial seas[23] and exclusive economic zones (EEZs),[24] areas in which they have sovereignty or sovereign rights and the authority to board, inspect, arrest, and initiate judicial proceedings against vessels that violate the coastal state's fishing laws.[25] These dramatic and necessary actions to combat IUU fishing are not enough. States continue to provide massive subsidies to the fisheries sector—estimated global fisheries subsidies at $35.4 billion in 2018—with more than $22.2 billion (63 percent) classified as capacity-enhancing subsidies.[26] Subsidies are closely linked to overcapitalization,[27]

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[17] *See* MRAG Asia Pacific, Towards the Quantification of Illegal, Unreported and Unregulated (IUU) Fishing in the Pacific Islands Region, § 3.1, 36 (2016), https://www.ffa.int/files/FFA%20Quantifying%20IUU%20Report%20-%20Final.pdf (estimating the total volume of IUU caught tuna in the Pacific region at 306,440t with an ex-vessel value of $616.11 million).

[18] *See* Manaswita Konar et al., The Scale of Illicit Trade in Pacific Ocean Marine Resources 1 (Oct. 2019) (Working Paper: World Resources Institute), www.wri.org/publication/scale-illicittrade-pacific-ocean.

[19] Ifesinachi Okafor-Yarwood & Dyhia Belhabib, *The Duplicity of the European Common Fisheries Policy in Third Countries: Evidence form the Gulf of Guinea*, 184 Ocean & Coastal Management (2020).

[20] *See*, *e.g.*, Paul Benecki, *Photos: Australian Border Force Burns Illegal Fishing Vessels*, Maritime Executive (Nov. 8, 2021) (Australian Fisheries Management Authority destroyed fifteen vessels), https://www.maritime-executive.com/article/australian-border-force-burns-illegal-fishing-vessels.

[21] *See*, *e.g.*, Basten Gokkon, *Indonesia's Crackdown on Illegal Fishing Is Paying Off, Study Finds*, Mongabay (Apr. 23, 2018), https://news.mongabay.com/2018/04/indonesias-crackdown-on-illegal-fishing-is-paying-off-study-finds/.

[22] *See*, *e.g.*, *Tiny Island Nation of Palau Very Publicly Burns Vietnamese Boats Caught Fishing Illegally*, National Post (June 16, 2015), https://nationalpost.com/news/world/tiny-island-nation-of-palau-very-publicly-burns-vietnamese-boats-caught-fishing-illegally.

[23] Territorial seas extend up to 12 nautical miles from a state's coast. UNCLOS, *supra* note 2, art. 3.

[24] Exclusive economic zones extend up to 200 nautical miles from a state's coast. UNCLOS, *supra* note 2, art. 57.

[25] UNCLOS, *supra* note 2, art. 2, 56, 73.

[26] U. Rashid Sumaila, et al., *Updated Estimates and Analysis of Global Fisheries Subsidies*, 109 Marine Policy (2019). China, the European Union, the United States, the Republic of Korea, and Japan account for $20.5 billion (58 percent)) of all fisheries subsidies. *Id.*

[27] According to one study, as much as 54 percent of the present high-seas fishing grounds—those areas beyond national jurisdiction—would be unprofitable and "without subsidies, high-seas fishing at the global scale that we currently witness would be unlikely." Enric Sala et al., *The Economics of Fishing the High Seas*, Science Advances,

meaning that too many boats continue to catch too few fish.[28] Moreover, prosecutions of fishing violations rarely touch the beneficial owners of the vessels, who hide behind shell corporations, leaving the beneficial owners to continue financing IUU fishing.[29]

The root cause of IUU fishing is the failure of some States to effectively exercise their jurisdiction and control over the vessels they flag, as required by customary international law[30] and UNCLOS.[31] These States do not require as a condition of flagging a "genuine link" between the state and the vessel, such as the crew or vessel owner have the same nationality as the flag State.[32] Instead, they pursue modest financial benefits gained from "open registers."[33] Through open registers, states offer their flag to any vessel, regardless of the nationality of the owner or crew. When these states fail to exercise effectively their jurisdiction over the vessels they flag,

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Vol 6, No. 4 (June 6, 2018). The World Bank has reported that the global fleet must be reduced by 44 percent relative to the 2012 level to reach the sustainable optimal state. World Bank, *The Sunken Billions Revisited* 3 (2016).

[28] The FAO reports that, in 2017, 34.2 percent of the wild fish stocks that it regularly monitors are overfished, a percentage that has increased from 10 percent in 1974. In other words, these stocks have population sizes too low to produce maximum sustainable yield (MSY), the largest long-term average catch that can be taken from a stock under prevailing environmental and fisheries conditions. Another 59.6 percent are fished at full capacity, leaving just 6.2 percent fished below full capacity. FAO, State of World fisheries and Aquaculture 2020, PAGE (2020).

[29] Chasing Red Herrings, *supra* note 14, at 14. A technical or legal definition of "beneficial owner" does not exist. The North Atlantic Fisheries Intelligence Group and INTERPOL describe the beneficial owner as the "key persons ultimately controlling a business entity—the 'beneficial owners' of the entity—or persons who are otherwise involved in the operation of a business venture. Importantly, in this context a 'person' refers to a natural person—a living, breathing human being—and not a 'legal' person, such as a company, partnership or a trust." *Id*. at 24. The FAO, in its International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (IPOA-IUU) also distinguished between the legal person in whose name the vessel is registered and the natural or legal person with beneficial ownership of the vessel. *See* FAO, International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing ¶ 42 (2001), http://www.fao.org/3/y1224e/Y1224E.pdf.

[30] *See* Douglas Guilfoyle, *The High Seas*, *in* Oxford Handbook of the Law of the Sea 203, 207 (Donald R. Rothwell et al., eds. 2015). The Case of the S.S. Lotus (France Turkey), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7) ("It is certainly true that—apart from certain special cases which are defined by international law—vessels on the high seas are subject to no authority except that of the State whose flag they fly.").

[31] UNCLOS, *supra* note 2, art. 94. *See* Council of Agriculture, Taiwan, Internationally Combat "IUU" Fishing and Maintain Sustainable Development of Fishery Resources (May 20, 2015) ("The root cause of IUU fishing is a lack of effective flag State control."), https://eng.coa.gov.tw/ws.php?id=2503699; Rosemary Rayfuse, Possible Actions against Vessels Flying the Flag States Not Meeting the Criteria for Flag State Performance, *in*, FAO, Report of the Expert Consultation on Flag State Performance, FAO Fisheries and Aquaculture Report No. 918, 29 (2009)(" [T]he continuing incidence of IUU fishing is testament to the continuing inability or unwillingness of at least some flag states to comply with their obligations to effectively control their vessels, to cooperate in the conservation and management of marine living resources and to prevent, deter and eliminate IUU fishing activities.").

[32] UNCLOS, *supra* note 2, art. 91(1).

[33] Judith Swan, *Fishing Vessels Operating under Open Registers and the Exercise of Flag State Responsibilities - Information and Options***,** FAO Fisheries Circular No. 980 FIPP/C980**,** § III(2), p. 20 (2002).

they are called flags of convenience.[34] As one study concludes, the most desirable flags are issued by States that "are largely non-cooperative with international efforts to sustainably manage shared fish stocks and prevent IUU fishing, regardless of their ratification of major international agreements."[35] Thus, despite widespread international acceptance of UNCLOS and subsequent efforts to strengthen flag state responsibilities to prevent, deter, and eliminate IUU fishing, many flag States fail to discharge their legal duties to exercise effective jurisdiction and control over the vessels they flag and instead facilitate IUU fishing.[36]

Because IUU fishing is a "high reward, low risk activity"[37] with vessels and vessel owners able to easily evade detection, non-flag states should pursue countermeasures against or seek restitution through the compulsory dispute settlement provisions of UNCLOS against flag states failing to exercise effective jurisdiction and control over the vessels they flag. A state injured by another state's violation of international law may adopt countermeasures, actions otherwise unlawful, provided that such countermeasures are proportionate to the breach.[38]

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[34] *Id.;* International Labour Organization, *Caught at Sea: Forced Labour and Trafficking in Indonesian Fisheries*, 24–25 (2013); International Organization for Migration, Report on Human Trafficking, Forced Labour and Fisheries Crime in the Indonesian Fishing Industry (2016); Jessica H. Ford & Chris Wilcox, *Shedding Light on the Dark Side of Maritime Trade – A New Approach for Identifying Countries as Flags of Convenience*, 99 MARINE POLICY 298 (2019).

[35] Gohar A. Petrossian, et al., *Flags for Sale: An Empirical Assessment of Flag of Convenience Desirability to Foreign Vessels*, 116 MARINE POLICY (2020), https://www.sciencedirect.com/science/article/pii/S0308597X19306372.

[36] Rayfuse, Possible Actions, *supra* note 30, at 29 ("While there may be a presumption of compliance, that presumption is clearly rebuttable. Indeed, the continuing incidence of IUU fishing is testament to the continuing inability or unwillingness of at least some flag states to comply with their obligations to effectively control their vessels, to cooperate in the conservation and management of marine living resources and to prevent, deter and eliminate IUU fishing activities.").

[37] High Seas Task Force, Closing the Net: Stopping Illegal Fishing on the High Seas, 25 (2006), https://wwfint.awsassets.panda.org/downloads/high_seas_task_force_report.pdf. Another author stated the situation as follows: "This means that the decision to engage in IUU activities is reduced to a cost/benefit analysis, where the calculus involves the probabilities of getting caught, the entry cost, the potential rewards and the penalties if the vessel is caught. In the case of the owner, the probability of any penalty other than the loss of the fishing boat is negligible." Kelly Riggs et al., *Halting IUU Fishing: Enforcing International Fisheries Agreements*, 23 (2003), https://eu.oceana.org/sites/default/files/reports/HaltingIUUFishingEnforcingInternationalFisheriesAgreements.pdf.

[38] Case concerning the Gabčíkovo–Nagymoros Project (Hungary v. Slovakia), 1997 I.C.J. 7, ¶ 85 (Sept. 25) [hereinafter Gabčíkovo–Nagymoros Project]; International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, Supplement No. 10 (A/56/10), Ch. II, (Nov. 2001) [hereinafter ARSIWA].

Countermeasures, though, must induce compliance rather than punish the wrongdoer,[39] thus limiting the options available to the non-flag state to seek compensation for the range of enforcement activities required to prevent, deter, and eliminate IUU fishing.

In light of these limitations, non-flag states might rather pursue restitution at the ICJ or through the UNCLOS dispute settlement provisions to recover from the flag state the costs of apprehending, arresting, and prosecuting the IUU fishing vessels. This approach also has limits. For example, the scope of behavior considered illegal is ill-defined, particular for states not party to relevant fisheries treaties.[40] In addition, many binding obligations, including the duty to exercise jurisdiction over vessels, are obligations of "due diligence," requiring states to make best efforts to fulfill such obligations.[41] Moreover, whether the costs of apprehending, arresting, and prosecuting violators of IUU fishing fall within the scope of recoverable costs is questionable.[42]

Despite the limitations of both approaches, this article argues that, given the urgent need to combat IUU fishing and the inadequacies of current strategies, non-flag states must pursue remedies directly against non-complying flag states. Section II begins by exploring the right of states to flag vessels based on criteria they alone establish. Section III describes the inadequacies of domestic and international law to combat IUU fishing effectively. Section IV reviews a state's legal obligations to prevent and deter IUU fishing, including the duty to exercise effectively its

[39] Gabčíkovo–Nagymoros Project, *supra* note 37, at ¶ 87; ARSIWA, *supra* note , at art. 49(1).
[40] As Professor Rayfuse noted, "a statement articulating the flag State duties that are also now considered to be binding on all States as a matter of customary international law would be a useful tool in ensuring the robustness of assessments of flag State performance." Rayfuse, Possible Actions, *supra* note , at 29.
[41] Jessica Ford, et al., *Incentivising Change to Beneficial Ownership and Open Registers—Holding Flag States Responsible for their Fleets and Costs of Illegal Fishing*, 23 FISH & FISHERIES 1240, (2022) (with Ford, Currie, and Wilcox), https://doi.org/10.1111/faf.12677; *See also* EU, 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 (2015/C 324/10), Official Journal of the European Union C 324/17 para. 7 (Oct. 2, 2015) (The concept of flag state responsibility and coastal state responsibility has been steadily strengthened in international fisheries law and is today envisaged as an obligation of 'due diligence', which is an obligation to exercise best possible efforts . . .").
[42] *See infra* Section VI.B.

jurisdiction over the vessels it flags. Section V begins the discussion of possible remedies against states that do not fulfill their international obligations by exploring the use of countermeasures. Section VI then assesses the utility of litigating claims using the compulsory dispute settlement provisions of UNCLOS, particularly in order to recover the costs of enforcing fisheries law and prosecuting IUU fishing vessels. Section VII concludes that countermeasures provide the best opportunity to combat IUU fishing by making the costs of flagging vessels engaged in IUU fishing more expensive than the financial benefits of registration and other fees from flagging them.

II. The Right to Flag Vessels

A. The Absence of a Genuine Link

Every state, whether coastal or land-locked, has the right to flag vessels,[43] which then confers the nationality of the flag state to that vessel.[44] With respect to vessels, the concept of nationality "is merely shorthand for the jurisdictional connection between a ship and a State. The State of nationality of the ship is the flag State or the State whose flag the ship is entitled to fly; and the law of the flag State is the law that governs the ship."[45] The flag state has the right to seek reparation for any loss and damage caused to the vessel,[46] but also the corresponding duty to exercise effective jurisdiction and control over the vessel.[47]

[43] UNCLOS, *supra* note 2, art. 90. *See also* Declaration Recognizing the Right to a Flag of States Having No Sea Coast, League of Nations, *Treaty Series* , vol.7, p.73. (Apr. 20, 1921) ("The undersigned, duly authorized for the purpose, declare that the States which they represent recognize the flag flown by the vessels of any State having no sea coast which are registered at some one specified place situated in its territory; such place shall serve as the port of registry of such vessels.").
[44] UNCLOS, *supra* note 2, art. 91(1).
[45] The "Juno Trader" Case (St. Vincent and the Grenadines v. Guinea-Bissau), 2004 ITLOS 17 (Dec. 18) (Joint Sep. Op. of Judges Mensah & Wolfrum , at p. 61, ¶ 9).
[46] M/V 'Norstar' (Panama v Italy), 2016 ITLOS 44 (Nov. 4, 2016), https://www.itlos.org/fileadmin/itlos/documents/cases/caseno.25/PreliminaryObjections/published/C25POJudgment20161104.pdf.
[47] UNCLOS, *supra* note 2, art. 94(1); High Seas Convention, Apr. 29, 1958, 450 U.N.T.S. 11, art. 5 (entered into force Sept. 30, 1962).

Although the state has a right to flag vessels, questions have persisted as to whether any conditions must be met prior to flagging the vessel. First the 1958 High Seas Convention and later UNCLOS provide that a state shall fix conditions for flagging vessels but that a "genuine link" must exist between the State and the ship.[48] Neither the High Seas Convention nor UNCLOS defines "genuine link," and efforts to regulate the issuance of flags have failed.[49] For example, states negotiated the 1986 UN Convention on Conditions for Registration of Ships "for the purpose of ensuring or, as the case may be, strengthening the genuine link between a State and ships flying its flag,"[50] Yet, just fourteen states signed the Registration Convention and only 15 have ratified it.[51] Because the Registration Convention requires ratification by 40 states representing 25 percent of relevant gross registered tonnage to enter into force,[52] it has no chance of entering into force.[53] Developing states, in particular, have rejected the notion of limiting the concept of "genuine link" because they hoped to capture a greater share of international shipping.[54] But neither have developed states rushed to ratify the convention; no major maritime state other than Liberia, whether developing or developed, has ratified the convention.[55]

In the early 1990s, FAO members began negotiating what is referred to as the FAO Compliance Agreement.[56] A draft of the convention prohibited a party from flagging a fishing

[48] UNCLOS, *supra* note , art. 91.
[49] For a discussion of attempts to define "genuine link" during the UNCLOS negotiations, see SATYA N. NANDAN & SHABTAI ROSENNE, EDS., UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY, Vol. III, 107–09 (1995) [hereinafter UNCLOS 1982 COMMENTARY].
[50] UN Convention on Conditions for Registration of Ships, TD/RS/CONF/23, art. 1 (Mar. 13, 1986).
[51] UN Treaty Collection, United Nations Convention on Conditions for Registration of Ships, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsgno=XII-7&chapter=12&clang=en. As one scholar writes, "[t]he Registration Convention stands as a salutary lesson about States' resistance limits on the exercise of sovereign power." Richard Barnes, *Flag States*, *in* OXFORD HANDBOOK OF THE LAW OF THE SEA 304, 307 (Donald R. Rothwell et al., eds. 2015).
[52] UN Convention on Conditions for Registration of Ships, *supra* note 50, art. 19(1).
[53] Writing in 2006, one group of fisheries experts stated that the convention "must now be regarded as a dead letter." *Closing the Net*, *supra* note 36, at 53.
[54] George C. Kasoulides, *The 1986 United Nations Convention on the Conditions for Registration of Vessels and the Question of Open Registry*, 20 OCEAN DEV. & INT'L L. 543, 543 (1986). This article also provides an excellent history of the negotiating sessions leading up to adoption of the convention. *Id.* at 556–65.
[55] *See* UN Treaty Collection, *supra* note 50.
[56] FAO Compliance Agreement, *supra* note 3.

vessel in the absence of a genuine link between the vessel and the party concerned, with a genuine link defined in relation to the nationality or permanent residence of the beneficial owner or owners of the vessel and where effective control over the activities of the vessel is exercised.[57] That draft provision was not included in the adopted convention.[58]

Nonetheless, many states implicitly interpret "genuine link" as requiring the crew or vessel owner to have the same nationality as the state.[59] These states have taken guidance from the ICJ's conclusion in the *Nottebohm* case, in which the Court acknowledged that a state may set its own rules for the acquisition of its nationality but that "it cannot claim that its rules are entitled to recognition by another State, unless . . . there is a genuine connection in existence and a real and effective link" between the individual and the state.[60] With respect to vessels, however, this approach never crystalized into customary international law.[61]

To the contrary, ITLOS has concluded that the "[d]etermination of the criteria and establishment of the procedures for granting and withdrawing nationality to ships are matters within the exclusive jurisdiction of the flag State,"[62] and that other states do not have the right to challenge those criteria.[63] ITLOS found no parallels between the nationality of ships under UNCLOS and the nationality of individuals under the *Nottebohm* case. In fact, in a subsequent case, it made this point abundantly clear, stating that the genuine link requirement of UNCLOS

[57] FAO, Report of the Twentieth Session of the Committee on Fisheries (Fisheries Report No. 488) 60 (1993), https://www.fao.org/3/am686e/am686e.pdf.
[58] *See generally* FAO Compliance Agreement, *supra* note 3.
[59] *See*, *e.g.* 46 C.F.R. §§ 67.30–67.47 (United States requiring U.S. citizenship to register a vessel). In Australia, vessels must be "Australian owned." A vessel is "Australian owned: if it is owned by an Australian national or nationals, owned by three or more people as joint owners where the majority of owners are Australian nationals, or owned in common where more than half the shares are owned by an Australian national or Australian nationals. *See* Australian Maritime Safety Authority, Register a Vessel on the Australian General Shipping Register, https://www.amsa.gov.au/vessels-operators/ship-registration/register-vessel-australian-general-shipping-register.
[60] Nottebohm Case (second phase) (Liechtenstein v. Guatemala), 1955 I.C.J. 4, 23 (Apr. 6).
[61] Barnes, *Flag States*, *supra* note 50, at 308.
[62] M/V "Saiga" (No. 2) (Saint Vincent and the Grenadines v. Guinea), 1999 ITLOS Reports 10, ¶ 65, https://www.itlos.org/fileadmin/itlos/documents/cases/caseno2/published/C2-J-1Jul99.pdf.
[63] *Id.* at ¶ 83.

"should not be read as establishing prerequisites or conditions to be satisfied for the exercise of the right of the flag State to grant its nationality to ships.[64]

The ITLOS position is consistent with the rejection of a proposal made during negotiation of the 1958 High Seas Convention, which would have allowed non-recognition of a vessel's nationality where a genuine link did not exist.[65] In addition, the ICJ, although not addressing the genuine link *per se*, agreed that, for purposes of identifying the largest ship-owning nations, taking into account nationalities of the owners or shareholders of shipping companies would "introduce an unnecessarily complicated criterion" and that "[s]uch a method of evaluating the ship-owning rank of a country is neither practical nor certain."[66]

Even if the unwillingness of ITLOS to rely on the *Nottebohm* case is reasonable, its jurisprudence tying the "genuine link" requirement to a flag state's duty to exercise jurisdiction over its vessels is problematic. According to ITLOS, the purpose of the genuine link requirement "is to secure more effective implementation of the duties of the flag State."[67] It further concluded that, "once a ship is registered, the flag State is required, under article 94 of the Convention, to exercise effective jurisdiction and control over that ship in order to ensure that it operates in accordance with generally accepted international regulations, procedures and practices. This is the meaning of 'genuine link.'"[68] By conflating "genuine link" with the exercise of effective jurisdiction, which is a distinct legal obligation, ITLOS has emptied the genuine link requirement of any content.[69] Without criteria to identify when a genuine link exists and without a means to

[64] The M/V "Virginia G" Case (Panama v. Guinea-Bissau), Judgment, 2014 ITLOS 4, ¶ 110 (Apr. 14).
[65] International Law Commission, Summary Records of the Eighth Session, YEARBOOK OF THE INTERNATIONAL LAW COMMISSION, vol. II, at 15 (1956).
[66] Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization, Advisory Opinion, 1960 I.C.J. 150, 169 (June 8).
[67] M/V "Saiga" (No. 2), *supra* note 61, at ¶ 83; "Virginia G," *supra* note 63, at ¶ 112.
[68] M/V "Virginia G," *supra* note 63, at ¶ 113.
[69] *Accord* Barnes, *Flag States*, *supra* note 61, at 309 ("Such an approach collapses the genuine link into the requirement that States exercise effective jurisdiction and control over their ships.").

challenge a state's issuance of flags where no genuine link exists, the genuine link "requirement" has no substantive content.[70]

B. Open Registries, Flags of Convenience, and Flags of Non-compliance

A large number of states—roughly 30[71]—has availed themselves of international law's absence of flagging rules and do not require a genuine link as a flagging condition. Instead, they operate open registries through which the state authorizes the use of its flag to any vessel willing to pay the required fees.[72] Many states with open registries do not themselves manage the registry. Instead, they contract with private companies, typically operating in another state; these companies typically manage flag issuance through a website.[73]

Unsurprisingly, a huge segment of the shipping and fishing industries has flagged with open registries. Panama boasts, for example, that its registry includes no nationality restrictions, no nationality restrictions for manning, no minimum tonnage or age requirements for vessels, and no re-inspections needed for vessels changing register if they have valid statutory certificates.[74] Over the past 50 years, the percentage of the merchant and fishing fleet flagged through open registries has grown significantly, from 21.6 percent of vessels in 1970 to 71.3 percent in 2015,[75] now representing approximately 70 percent of global deadweight tonnage of

[70] Kasoulides, *supra* note 53, at 554. For more on ITLOS interpretations of "genuine link," see Moira L. McConnell, *ITLOS and the Tale of the Tenacious "Genuine Link*," *in* The Development of the Law of the Sea Convention: The Role of International Courts and Tribunals, 190 (ed. Øystein Jensen, 2020).
[71] Christopher J. Watterson et al., *Open Registries As an Enabler of Maritime Sanctions Evasion*, 119 Marine Pol'y Article 104090, at 1 (2020).
[72] *See generally* Swan, *supra* note 32, at § III(2).
[73] Chasing Red Herrings, *supra* note 14, at 35–38.
[74] Embassy and Consulate of Panama in the United Kingdom, Advantages of the Panamanian Registry, https://panamaembassy.co.uk/?pageid=115.
[75] Ford & Wilcox, *Shedding Light*, *supra* note 33, at 298. Others put the 1970 figure at 25.9 percent. Kasoulides, *supra* note 53, at 548, tbl. 2 (citing Lloyd's Register of Shipping: Statistical Tables; UNCTAD, Beneficial Ownership of Open-Registry Fleets, TDIB/C.4/309/Add. 1, 1987).

all vessels.[76] Panama,[77] Liberia,[78] and the Marshall Islands,[79] the world's top three flag states,[80] all operate open registries.

Open registries do not necessarily lead to poor ship conditions, labor standards, or IUU fishing,[81] but they are often linked to flags of convenience, which do. In fact, vessels flying flags of convenience are known for their IUU fishing;[82] in one study of IUU vessels, 57.9 percent of 197 vessels were flagged to Belize, Georgia, Panama, and Togo, states known for issuing flags of convenience, but 82.2 percent of these vessels were flagged to flags of convenience.[83] They are also known to engage in human trafficking, human rights, and labor abuses,[84] as well as drug trafficking,[85] and other illegal activities.[86]

Although vessels have used flags of convenience for centuries,[87] no accepted definition of "flags of convenience" exists in international law.[88] The International Transport Workers' Federation, which has done significant work to identify flags of convenience and document harm

[76] Watterson et al., *supra* note 70, at 1.
[77] *See supra* note 56.
[78] Liberian Registry, Vessel Registration, ("The Liberian Registry is open to any shipowner in the world."), https://www.liscr.com/vessel-registration-department.
[79] International Registries Inc., The Marshall Islands Registry, 4 (undated) https://www.register-iri.com/wp-content/uploads/The-Marshall-Islands-Registry-Maritime-Corporate-Book.pdf.
[80] Lloyd's List, Top 10 Flag States 2020, https://lloydslist.maritimeintelligence.informa.com/LL1134965/Top-10-flag-states-2020.
[81] Kasoulides, *supra* note 53, at 566 ("There are many OR states that operate under the higher standards of the best of the traditional maritime nations.").
[82] U.N. Office on Drugs and Crime, Transnational Organized Crime in the Fishing Industry: Focus on Trafficking in Persons, Smuggling of Migrants, Illicit Drugs Trafficking 54 (2011), https://www.unodc.org/documents/human-trafficking/IssuePaper-TOCintheFishingIndustry.pdf
[83] Chasing Red Herrings, *supra* note 14, at 48, 54.
[84] UNODC, *supra* note 81, at 57.
[85] UNODC, *supra* note 81, at 93.
[86] UNODC, *supra* note 81, at 111; OECD, *Evading the Net: Tax Crime in the Fisheries Sector* 12, 31 (2013).
[87] Darren S. Calley, Market Denial and International Fisheries Regulation : The Targeted and Effective Use of Trade Measures Against the Flag of Convenience Fishing Industry 11–13 (2011) (tracing the use of flags of convenience to the slave trade in the 1800s but also reporting that they were used during the days f the Roman Empire); Jessica K. Ferrell, *Controlling Flags of Convenience: One Measure to Stop Overfishing of Collapsing Fish Stocks*, 35 Envtl. L. 323, 333 ("Despite the multiple problems [flags of convenience] engender, they have existed for centuries with little legal impediment.").
[88] Rosemary Gail Rayfuse, Non-Flag State Enforcement in High Seas Fisheries, 7 n. 20 (2004) ("The term 'flag of convenience' can refer to many things." *See also* Dana D. Miller & U. Rashid Sumaila, *Flag Use Behavior and IUU Activity within the International Fishing Fleet: Refining Definitions and Identifying Areas of Concern*, 44 Marine Pol'y 204 (2014) (noting differences in terms used).

to workers associated with such flags, has defined it simply to mean a "flag of convenience ship is one that flies the flag of a country other than the country of ownership."[89] That definition, however, merely restates the definition of an open registry.

Others identify a flags of convenience by looking to the financial consequences of flagging with a particular state. One scholar, writing well before UNCLOS or the Registration Convention, defined flags of convenience as

> national flags of those states with whom shipowners register their vessels in order to avoid, firstly, the fiscal obligations, and secondly, the conditions and terms of employment or factors of production that would have been applicable if their tonnage was entered in the register of their own countries.[90]

Others look not just to the financial consequences of flagging with a particular state but also to the economic advantages accruing to a vessel owner:

> [A] "flag of convenience" can be understood as any ship registry that will provide a ship owner with a competitive advantage above registration in any other ship registry by exempting the ship owner from the negative costs and tax burdens of its business. A flag of convenience will typically do this by absolving the ship owner from tax obligations, transaction costs, reputational damage, and penal sanctions, as well as by allowing the ship owner to externalize social costs (such as the costs of the consequences of non-compliance with labour, environmental or safety standards) that would otherwise have had to be paid for by the ship owning company.[91]

For many, though, the key distinction between an open registry and a flag of convenience is that a flag of convenience is either unable or unwilling to exercise its jurisdiction and control

[89] ITF, "Flags of Convenience," https://www.itfglobal.org/en/sector/seafarers/flags-of-convenience.
[90] Basil Metaxas, *Some Thoughts on Flags of Convenience*, 11 Maritime Studies & Management 165 (1974).
[91] Chasing Red Herrings, *supra* note 14, at 23.

effectively over the vessels it flags.[92] In fact, vessels flying flags of convenience that fish for species regulated by RFMOs purposefully register their vessels with states not party to that RFMO.[93] Some of these states are "professional non-joiners of RFMOs."[94] The flag is convenient because the vessel is now subject to little, if any, regulation or enforcement. For this reason, many prefer the term "flag of non-compliance."[95]

Vessel operators specifically register their vessels in states with open registries that do not comply with their obligations regarding jurisdiction and control of the vessels they flag.[96] Doing so, of course, would undermine the open registry's competitiveness by causing shipowners to flag with another state. Other vessel owners seek out registries in states with weak governance.[97] Many, in fact, flag down the governance index, flag hopping to states with ever weaker

[92] UNODC, *supra* note 81, at 57 ("a flag of convenience (i.e. a flag State that is unable or unwilling to exercise its jurisdiction over the vessel")); Kasoulides, while speaking of open registries, used language more commonly associated with flags of convenience: "They are only tangentially affected by the actual operation of vessels registered under their flags and they have no interest in exercising responsible and effective control over vessel construction and operation, certification of personnel qualifications, crew training and social conditions." *See also* Kasoulides, *supra* note 53, at 546. Rayfuse, Non-Flag State Enforcement, *supra* note, 85, at 7 n. 20 (flag of convenience refers to "any state which does not effectively exercise its flag state responsibilities in respect of fishing vessels flying its flag.").

[93] Rayfuse, Non-Flag State Enforcement, *supra* note, 85, at 35 ("The flag of convenience phenomenon is especially problematic for RFOs [regional fisheries organizations] as vessels have deliberately been deregistered from member states and reregistered in nonmember states in order to avoid application of conservation and management measures enacted by those organisations.").

[94] High Seas Task Force, *Closing the Net*, *supra* note 36, at 36.

[95] Rayfuse, Non-Flag State Enforcement, *supra* note 87, at .

[96] *L. Griggs & G. Lugten, Veil over the Nets (Unraveling Corporate Liability for IUU Fishing Offences), 31 Marine Pol'y 159, 160 (2007)* ("A further common characteristic of IUU vessels is that many are registered under 'flags of convenience' in order to take advantage of the fact that some States are either incapable of, or deficient at, monitoring their vessels."). The UN Office on Drugs and Crime states that:

> Some registries are targeted due to the inability or unwillingness of the flag State to exercise its criminal law enforcement jurisdiction in terms of international law or because they allow front companies to register as fishing vessels owners which makes the true beneficial owner difficult, if not impossible, to identify. The lack of law enforcement facilitates criminal activities. These flag States are therefore referred to as "flags of convenience" (FOC) or "flags of non-compliance" (FONC).

UNODC, *supra* note 81, at 19. *See also* Petrossian et al., *supra* note 34, at 5 ("Desirable flags were found to be those countries that are largely non-compliant with fisheries-related regulations, regardless of their ratification of major international agreements.").

[97] Henrik Österblom et al., *Adapting to Regional Enforcement: Fishing Down the Governance Index*, PLOS One 5, no. 9, at "Discussion" (2010), https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0012832.

regulations and enforcement capacity.[98] Frequently, these two attributes—weak governance and an unwillingness to enforce law—converge.[99]

International organizations are keenly aware that vessel owners seek out flags of convenience because of their unwillingness or inability to monitor vessel behavior.[100] As the OECD commented, "Owners may register vessels in open registries . . . to avoid compliance with more robust and heavily enforced regulation in their own country."[101] The International Labour Organization noted that, through the use of open registries, "some States have amassed large fleets over which they do not have the capacity to effectively exercise their flag State responsibility."[102] ITLOS acknowledged that corporations are readily able to manipulate the registry process to avoid flag State control.[103] In an ITLOS dispute, neither Belize nor France, the two disputing parties, could identify the beneficial owners of the fishing vessel engaging in IUU fishing.[104] The UN Office on Drugs and Crime succinctly summarized the impacts of flagging by states that do not effectively exercise their jurisdiction and control over their vessels: "Criminal acts committed on board vessels registered in these flag States (such as human trafficking or marine living resource crimes) are in these instances frequently conducted with impunity."[105]

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[98] *Id.*
[99] Ford & Wilcox, *Shedding a Light*, *supra* note 33, at 300–301 (linking flags of convenience to states with open registries, weak governance structures, and high levels of corruption). *See also* Gohar A. Petrossian, et al., *supra* note 34, at 2 ("Generally speaking, most countries with high rates of foreign-owned fishing vessels registered under their flags are developing countries that have ineffective fisheries surveillance capacity and weak enforcement infrastructure.").
[100] *See* Barnes, *Flag States*, *supra* note 50, at 305 ("One of the most fundamental concerns facing the law of the sea is the ability and willingness of flag States to exercise effective control over ships flying their flag.").
[101] OECD, *Evading the Net*, *supra* note 84, at 31. OECD also noted that the use of open registries "may also be combined with the use of holding companies in offshore jurisdictions which do not engage in effective exchange of information, in order for the identity of owners to remain hidden." *Id.*
[102] ILO, *Caught at Sea*, *supra* note 33, at 24.
[103] The "Volga" (Russian Fed. v. Australia), 2002 ITLOS Rep. 10, 72 (dissenting opinion of Judge Ivan Shearer) (stating, "The flag State is bound to exercise effective control of its vessels, but this is often made difficult by frequent changes of name and flag by those vessels.").
[104] The "Grand Prince" Case (Belize v. France), 2001 ITLOS Rep. 17, ¶ 32 (Apr. 20).
[105] UNODC, *supra* note 81, at 117. For more on human trafficking in the fishing industry, see Chris Wold, *Slavery at Sea: Forced Labor, Human Rights Abuses, and the Need for the Western and Central Pacific Fisheries Commission to Establish Labor Standards for Fishing Crew*, 39 WISC. INT'L L. J. 485 (2022).

III. Inadequacy of Domestic and International Law to Prevent, Deter, and Eliminate IUU Fishing

Without a means to challenge the conditions for flagging vessels and the lack of normative content to the requirement for a genuine link, fishing vessels flagged to flags of convenience have, indeed, operated largely with impunity, causing substantial harm to people and fish stocks. IUU fishing is now estimated to cause annual losses of between US$26 billion and US$50 billion,[106] touching all species and all regions of the world.[107] IUU fishing destabilizes food security,[108] diminishes fisheries resources,[109] and undermines monitoring, control, and surveillance (MCS) regimes of RFMOs.[110] Although concerns about IUU fishing typically focus on fishing by vessels flagged by non-member States, the vessels of RFMO members also engage in IUU fishing, all to the detriment of those fishing legally. For fisheries managers, IUU fishing of all types "adds pressure to already overexploited fish stocks, while simultaneously compromising efforts to rebuild them based on scientific advice."[111]

Moreover, efforts to prevent IUU fishing create a vicious feedback loop. Vessels engage in IUU fishing to obtain a competitive advantage on legal fishers, who bear the costs of reporting and compliance with fisheries management measures.[112] To address IUU fishing, fisheries

[106] Sumaila, et al., *Illicit Trade in Marine Fish Catch*, *supra* note 15, at 1.
[107] FAO, Illegal, Unreported, and Unregulated (IUU) Fishing (2022), https://www.fao.org/iuu-fishing/en/ ("IUU fishing is found in all types and dimensions of fisheries; it occurs both on the high seas and in areas within national jurisdiction, it concerns all aspects and stages of the capture and utilisation of fish . . .").
[108] *See* Food and Agric. Org. United Nations [FAO], *Illegal, Unreported, and Unregulated Fishing*, 1 (2016), http://www.fao.org/3/a-i6069e.pdf ("IUU fishing therefore threatens livelihoods, exacerbates poverty, and augments food insecurity.").
[109] *Id.* ("Fisheries resources available to bona fide fishers are poached in a ruthless manner by IUU fishing, often leading to the collapse of local fisheries, with small-scale fisheries in developing countries proving particularly vulnerable.").
[110] *See generally* Food and Agric. Org. United Nations [FAO], Implementation of the International Plan of Action to Deter, Prevent and Eliminate Illegal, Unreported and Unregulated Fishing, §§ 7–8 FAO Technical Guideline for Responsible Fisheries 9 (2002), http://www.fao.org/3/a-y3536e.pdf.
[111] Environmental Justice Found. et al, Achieving Transparency and Combating IUU Fishing in RFMOs, Reinforcing the EU's Multilateral Actions to Promote Best Practices, 3 (May 2019), https://d2ouvy59p0dg6k.cloudfront.net/downloads/rfmo_report_en_may2019.pdf [https://perma.cc/2M55-M6W4].
[112] "The central objection to open registries relates to the competitive advantage to be gained by ships (and their owners) not having to comply with labour, safety, construction, environmental and other requirements imposed by the authorities of non-open registry states on their ships." Rayfuse, Non-Flag State Enforcement, supra note 87, at 25.

managers devise new strategies that further increase costs for vessel operators to adopt new technologies to ensure their catches are legal. This, of course, creates even greater disparities in costs between legal fishing and IUU fishing, thus incentivizing additional IUU fishing.[113]

Despite the staggering scale of IUU fishing and the extreme measures taken by some countries to combat IUU fishing, both domestic and international legal constraints hinder efforts to prosecute violations of fishing CMMs. At the domestic level, prosecutors often cannot sue the beneficial owners of the vessel—those that actually benefit financially from the vessel's illegal activities—because the identity of the beneficial owners is hidden behind a web of shell corporations.[114] Thus, prosecutors cannot punish, absent extraordinary efforts, those who benefit from IUU fishing. At the international level, UNCLOS and other treaties constrain national efforts to impose penalties that deter future IUU fishing violations by granting flag states authority, even in the face of repeated violations, to exercise jurisdiction over the vessels they flag. As a result, the law has externalized the costs of IUU fishing caused by flag state failures to exercise their jurisdiction over their vessels, leaving non-flag states and the vessels they flag with expensive and uncompensated monitoring, control, and enforcement costs.

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[113] FAO, *Implementation of IPOA–IUU*, *supra* note 109, at 1 (noting that IUU fishing "undermines the morale of legitimate fishers and, perhaps more importantly, encourages them to disregard the rules as well. Thus, IUU fishing tends to promote additional IUU fishing, creating a downward cycle of management failure."). *See also* RAYFUSE, NON-FLAG STATE ENFORCEMENT, *supra* note 87, at 35 (noting that states failing to join relevant RFMOs and whose vessels fish for regulated stocks create a "double standard [that] economically disadvantages states which are members of, fund the operations of, and fund the implementation of measures adopted by RFOs, as against non-member states, whose nationals participate in the fishery, but who do not contribute to the running of the organisation and do not incur costs in respect of ensuring compliance by their fishing fleet.").

[114] UNODC, *supra* note 81, at 4 (one challenge is "a lack of transparency of the identity of the beneficial ownership of fishing vessels and a lack of international records of fishing vessels' identity and history."); OECD, *Evading the Net*, *supra* note 84, at 12 ("In particular, a lack of transparency and access to beneficial ownership information is seen as a major indicator that tax crime and related offences may be present. In the case of the fisheries sector, this lack of transparency is facilitated by use of companies in offshore jurisdictions and registry of fishing vessels under flags of convenience in countries other than those of their owners."); FAO, STATE OF WORLD FISHERIES AND AQUACULTURE 2010 105 (2010), https://epdf.pub/state-of-world-fisheries-and-aquaculture-2010.html (the "lack of basic transparency could be seen as an underlying facilitator of all the negative aspects of the global fisheries sector – [Illegal, Unreported and Unregulated] fishing, fleet overcapacity, overfishing, ill-directed subsidies, corruption, poor fisheries management decisions, etc. A more transparent sector would place a spotlight on such activities whenever they occur, making it harder for perpetrators to hide behind the current veil of secrecy and requiring immediate action to be taken to correct the wrong.").

A. Domestic Law Constraints

States with open registries often attract vessel owners by establishing minimal registration requirements, including registration without the identity of the beneficial owners.[115] As INTERPOL and other international organizations have declared, this "ability to keep one's identity hidden behind a corporate veil is a key facilitator of fisheries crime, including tax crime and other ancillary crimes in the fisheries sector, and a fundamental challenge to effective fisheries crime law enforcement."[116]

In fact, the registered shell company—a non-operational company that does not carry out significant economic activity and that may not have financial assets[117]—might simply be the tip of an ownership labyrinth in which that shell company is owned by other shell companies in multiple jurisdictions, with those companies also owned by other shell companies.[118] In fact, the "typical" IUU fishing vessel is owned by one shell corporation that itself is owned by other shell corporations.[119] As INTERPOL and the North Atlantic Fisheries Intelligence Group report, "[b]y establishing a byzantine web of legal entities across the globe, beneficial owners of fishing

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[115] CHASING RED HERRINGS, *supra* note 14, at 24. A technical or legal definition of "beneficial owner" does not exist. The North Atlantic Fisheries Intelligence Group and INTERPOL describe the beneficial owner as the "key persons ultimately controlling a business entity—the 'beneficial owners' of the entity—or persons who are otherwise involved in the operation of a business venture. Importantly, in this context a 'person' refers to a natural person—a living, breathing human being—and not a 'legal' person, such as a company, partnership or a trust." *Id*. The FAO, in its International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (IPOA-IUU) also distinguished between legal person in whose name the vessel is registered and the nationality of the natural or legal person with beneficial ownership of the vessel. *See* FAO, INTERNATIONAL PLAN OF ACTION TO PREVENT, DETER AND ELIMINATE ILLEGAL, UNREPORTED AND UNREGULATED FISHING ¶ 42 (2001), http://www.fao.org/3/y1224e/Y1224E.pdf.

[116] CHASING RED HERRINGS, *supra* note 14, at 4. *See also* OECD, *Evading the Net*, *supra* note , at 31 (" One of the most prevalent tactics utilized by those engaged in all types of crime in the fisheries sector is the flying of a flag of convenience, ... Owners may register vessels in open registries (which accept registrations of ships owned by foreign entities) to avoid compliance with more robust and heavily enforced regulation in their own country. This may also be combined with the use of holding companies in offshore jurisdictions which do not engage in effective exchange of information, in order for the identity of owners to remain hidden.").

[117] Chasing Red Herrings, supra note 14, at 24; Jaeyoon Park et al., Tracking Elusive and Shifting Identities of the Global Fishing Fleet, 9 Science Advances at 6 (Jan. 18, 2023), https://www.science.org/doi/epdf/10.1126/sciadv.abp8200.

[118] Trygg Mat Tracking, Spotlight on the Exploitation of Company Structures by Illegal Fishing Operations, (2020), https://www.tm-tracking.org/post/illegal-fishing-operators-exploit-company-structures-to-cover-up-illegal-operations.

[119] Griggs & Lugten, *supra* note 95, at 160, 162.

companies and fishing vessels can hide behind a protective layer of obfuscation in secrecy jurisdictions, including those that confer nationality to ships known as flags of convenience."[120]

Indeed, more than 60 years ago in proceedings before the Court, the representative of Panama stated that "[y]ou may have a ship under the British flag with beneficial ownership in the United States with a mortgage in the name of a citizen of Argentina, with an equity held by trustees of another nationality. The ship may be chartered to a national of another nation."[121] A representative of Liberia further commented that "[i]t is of little practical value to keep referring to a concept of 'ownership' which has become unreal and meaningless, or to a concept of 'beneficial ownership' which has become untraceable."[122] A representative of the United Kingdom commented that "the web of ownership is one which cannot, in all cases, easily be untangled."[123] While this discussion concerned the question of assigning "nationality" to a vessel, it illustrates the challenges of identifying who is ultimately responsible for, and benefiting from, IUU fishing, and then prosecuting them for violations of fisheries law.[124]

Many registries not-so-subtly indicate to vessel owners that they will be shielded from liability. The Liberian Registry, for example, operated by a third party, "recognizes the need and

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[120] Chasing Red Herrings, *supra* note 14, at 4. *See also* Griggs & Lugten, *Veil over the Net*, *supra* note 95, at 160 ("The term 'hidden owners' refers to the fact that IUU fishing vessels are traditionally owned by 'front companies' which are themselves registered in international tax havens. The 'front companies' constitute the public face of a highly complex, transnational corporate structure that deliberately disguises the identity of the corporation's beneficial owners and controllers.").

[121] Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization, Advisory Opinion, Oral Statements from April 26 to May 4 and on June 8, 1960, 262, 316 (oral statement of Dr. Octavio Fábrega (Panama)), https://www.icj-cij.org/public/files/case-related/43/043-19600426-ORA-01-00-BI.pdf.

[122] IMCO Case, *supra* note 120, at 372 (statement of Mr. Rocheforte L. (Liberia).

[123] IMCO Case, *supra* note 120, at 372 (statement of F.A. Vallat (United Kingdom).

[124] The Panamanian representative continued:

> In other words in the world of today, if you try to ascertain the nationality of a ship on the basis of beneficial ownership, you can very well run into a tower of confusion, because you may have interests distributed among various nationalities and that is why international law, which must be clear and must be precise on this subject, has adopted the simple rule that the nationality of the ship is the nationality of its flag

IMCO Case, *supra* note 120, at 316 (statement of Dr. Octavio Fábrega (Panama)).

actively protects the opportunities for asset protection" and "offer[s] flexible corporate vehicles to ensure that specific ownership options are available to meet the needs of the multitude of shipowning structures.[125] Panama notes that "[t]here are no requirements under Panamanian legislation for the owner, whether a natural or legal person, to be Panamanian," which one law firm has translated as "Panama Corporations can be created to own Panama registered vessels in order to protect their assets and profits resulting from the business made from merchant shipping outside of Panama by paying no income taxes."[126]

By chasing registration fees through laws that lack transparency, open registries and flags of convenience have created legal frameworks under which the beneficial owners "are basically unknown even to the governments of their own countries."[127] This lack of knowledge has significant consequences for law enforcement and for successful prosecution of fisheries crimes:

> By shielding beneficial ownership coastal States and other interested parties are rendered unable to conduct targeted surveillance and gather important intelligence data. According to law enforcement officials interviewed during the study the practice is also seen to significantly hamper enforcement and prosecution of criminal activities.[128]

Similarly, the vessel registries of RFMOs, including the IATTC, ICCAT, NFPC, and WCPFC, require members to submit the name and address of the owner or owners, but not the names and addresses of beneficial owners.[129] While not comprehensively reviewing each of the thousands of vessels included in the vessel registers of these four RFMOs, a meaningful search indicates that the vast majority of vessel owners are listed as corporations. In the WCPFC, for

[125] The Liberian Registry, Unique Advantages, https://www.liscr.com/unique-advantages.
[126] Fabrega Molino, Ship Registry in Panama, https://fmm.com.pa/ship-registry-in-panama/.
[127] Kasoulides, *supra* note 53, at 565.
[128] Chasing Red Herrings, *supra* note 14, at 16.
[129] *See supra* Section IV.A.

example, only one vessel was found that named an individual as the owner—for the purse seiner *1 Sooduck Ho*, the owner is listed as Park Byeong Ho.[130] In ICCAT[131] and the IATTC,[132] most, if not all, vessels are registered under corporate names, not the names of the beneficial owners; this author found no records listing an individual as the owner of a vessel authorized to fish in the waters managed by ICCAT or IATTC. In the NPFC, the publicly available vessel register does not record the owner of the vessel.[133]

In a comprehensive analysis of the impact of flags of convenience on fisheries crime law enforcement, the North Atlantic Fisheries Intelligence Group and INTERPOL reported the following:

> Without knowing the identity of persons involved in a criminal activity, investigators may be unable to determine whether they have jurisdiction to investigate a case and whether they should share information with other relevant authorities. They may also be prevented from turning intelligence into evidence through mutual legal assistance requests.[134]

They also identified a number of reasons for needing the identity of the persons engaged in and controlling commercial activities. From a law enforcement perspective, knowing the identity of the beneficial owners and operators of vessels is, in most cases, critical to identifying,

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[130] *WCPFC Record of Fishing Vessels: 1 Sooduck Ho*, WCPFC https://www.wcpfc.int/node/13144.

[131] *See, e.g.*, *ICCAT Record of Vessels*, ICCAT, https://www.iccat.int/en/vesselsrecord.asp99 (recording the name and address of the owner of the Korean-flagged *Kova* as Dongwon Industries and recording the name and address of the owner of the Chinese Taipei-flagged *Chun Fa No. 99* as Chen Feng Fishery Co., Ltd).

[132] *See, e.g.*, *IATTC Vessel Record*, IATTC, https://www.iattc.org/VesselRegister/VesselDetails.aspx?VesNo=8261&Lang=en (recording the name and address of the owner of the Korean-flagged *Oryong No. 315* as Sajo Industries Company, Ltd.). *See also IATTC Vessel Record*, https://www.iattc.org/VesselRegister/VesselDetails.aspx?VesNo=16357&Lang=en (recording the name and address of the owner of the Chinese Taipei-flagged *Da Sheng* as Jong Shyn Shipbuilding Company, Ltd.).

[133] *See, e.g.*, *NPFC Vessel Register*, https://www.npfc.int/vessels/1337NPFC https://www.npfc.int/vessels/1337 (recording the Korean-flagged *101 Haerang* as authorized to fish in the NPFC convention area but not recording the name and address of the owner of the vessel). *An Fong No. 116*, NPFC, https://www.npfc.int/vessels/91 (recording the Chinese Taipei-flagged *An Fong No. 116* as authorized to fish in the NPFC convention area but not recording the name and address of the owner of the vessel).

[134] CHASING RED HERRINGS, *supra* note 14, at 4.

investigating, and prosecuting fisheries crime and tax evasion.[135] Without being able to identify the beneficial owners, law enforcement grinds to a halt.[136] Even if the beneficial owners can be found through the layers of shell corporations,[137] states do not have authority to bring beneficial owners residing outside the country to court and extradition treaties may not exist.

Non-flag states can, of course, prosecute vessel captains and crew. The crew, however, may simply be taking orders from the captain who, in turn, may be taking orders from the beneficial owner or his agent on land.[138] Moreover, crew frequently have few financial resources because they are paid at the end of a voyage or, as too frequently occurs, they are victims of forced labor and other human rights abuses.[139]

When non-flag states pursue cases, they face significant obstacles. First, due process requires that criminal allegations be supported with credible evidence. A prosecution for an IUU fishing operation is difficult to obtain because IUU fishers "destroy[ ] evidence, even to the

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[135] *Id*. at 31. North Atlantic Fisheries Intelligence Group and INTERPOL acknowledged that the flagging of foreign-owned vessels is not, in and of itself, a law enforcement problem. Instead—

> it is the extent to which a flag state facilitates secrecy in beneficial vessel ownership. Secrecy is facilitated by open registers when they allow the registered owner of vessels on their ship register to be a local company owned by a foreign corporate vehicle without traceable beneficial ownership. These open registries become secrecy jurisdictions in their own right and provide ship owners with an added layer of secrecy over and beyond the protection already afforded them through the jurisdiction(s) where the corporate structure is situated.

Id. at 28.

[136] *See id.* at 31 ("From a law enforcement perspective, knowing the identity of owners and operators of vessels is, in most cases, critical to identifying, investigating and prosecuting fisheries crime and tax evasion.").

[137] For an excellent account of the challenges of finding beneficial owners, see Eskil Engdal & Kjetil Sæter, Catching Thunder: The True Story of the World's Longest Sea Chase, 101–09; 115–23; 302–08 (2018) (chronicling the search for the owner of the *Thunder*, Vidal Armadores, a notorious and well-known IUU fishing vessel, as well as the owners of other IUU fishing vessels). *See also* Teresa Fajardo, *To Criminalise or Not to Criminalise IUU Fishing: The EU's Choice*, 144 Marine Pol'y Article 105212, at 7–8 (2022).

[138] Engdal and Kjetil, for example, document communications of the owner of the *Thunder* directing the captain to take specific actions. Engdal & Sæter, Catching Thunder, *supra* note 136, at 88–89.

[139] U.S. Department of State, *China 2020 Human Rights Report*, 74 (2020) (reporting that Indonesian fishers on board a Chinese flagged fishing vessel "claimed they were subjected to physical violence, forced to work 20 hour days, and not paid for their work."); U.S. Department of Labor, *List of Goods Produced by Child Labor or Forced Labor* (2020); International Organization for Migration, *Report on Human Trafficking, Forced Labour and Fisheries Crime in the Indonesian Fishing Industry*, 41, 43 (2016). For an assessment of the role of forced labor in fisheries, see Wold, *Slavery at Sea*, *supra* note 104.

extent of throwing logbooks, computers, papers and navigation equipment overboard prior to being boarded."[140] In the case of the *Thunder*, a notorious toothfish poacher, the crew sank the vessel.[141] Even when evidence is not destroyed, cases can be lost because the coastal state cannot positively prove that the IUU vessel was, in fact, within the state's exclusive economic zone. For example, in 2003, Australians spotted the Uruguayan-flagged longliner, the *Viarsa*, in Australia's exclusive economic zone near Heard and McDonald islands. When the Australian patrol vessel, the *Southern Supporter*, approached the *Viarsa* and ordered it to stop, the *Viarsa* fled at high speed to the high seas and the cold, dangerous waters of the Southern Ocean. After a 20-day, 7,000 kilometer pursuit that crossed three oceans and required "a large deployment of Australian Fisheries and naval resources," officials boarded, inspected, and apprehended the *Viarsa* before ordering it back to Freemantle, Western Australia.[142] At trial, however, a jury acquitted the crew, apparently because Australia could only provide circumstantial evidence that the vessel was actually fishing in Australia's EEZ.[143] Even if Australia had been successful, the beneficial owners of the vessel would not have been punished and could continue to pay crew to continue IUU fishing.[144]

B. International Law Constraints

[140] High Seas Task Force, *Closing the Net*, *supra* note 36, at 32; *See also* Anastasia Telesetsky, *Laundering Fish in the Global Undercurrents: Illegal, Unreported, and Unregulated Fishing and Transnational Organized Crime*, 41 Ecol. L.Q. 939, 981 (2014).
[141] Catching Thunder, *supra* note 136, at 209–49; *See also* Ian Urbina, *A Renegade Trawler, Hunted for 10,000 Miles by Vigilantes*, N.Y. Times (July 28, 2015).
[142] Ribot-Cabrera & Ors v. The Queen (2004) Supreme Court of Western Australia, at ¶ 38, https://jade.io/article/143252.
[143] *Acquitted "Viarsa 1": Australia Faces Huge Damage Claims*, MercoPress (Nov. 7, 2005), *https://en.mercopress.com/2005/11/07/acquitted-viarsa-1-australia-faces-huge-damage-claims* ("Defence lawyers Mark Trowell QC said authorities had not seen the men fishing in the Australian zone and the case had been based on circumstantial evidence.").
[144] Owners themselves typically do not hire crew. Instead, they task a recruiting agency with finding crew for a vessel. *See, e.g.*, Molajaya Fishing Work, Recruitment Agency, https://www.molajaya-fishingwork.com/.

Within its EEZ, a coastal state has "sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living."[145] But, it also has "the primary responsibility for taking the necessary measures to prevent, deter and eliminate IUU fishing" within its EEZ.[146] To fulfill those duties, protect fisheries resources, and ensure compliance with fishing rules and regulations, a coastal state has broad authority to board, inspect, arrest, and prosecute vessels for violations of fisheries law that occur within its EEZ.[147] Nevertheless, UNCLOS imposes significant constraints on the coastal state's coastal state's ability to deter future IUU fishing violations. For example, UNCLOS prohibits a coastal state from imprisoning crew for fisheries violations[148] and a coastal state must promptly release the vessel upon posting of "reasonable bond or other security."[149]

On the high seas, the role of non-flag states is greatly diminished. Because UNCLOS and other agreements grant flag states exclusive jurisdiction over the vessels they flag on the high seas,[150] non-flag states have little they can do to prosecute IUU fishing vessels operating on the high seas.

1. Limits on Enforcement Measures and Penalties

UNCLOS itself specifically precludes coastal states from imprisoning crew for fishing violations, even for criminal violations of fisheries law.[151] Prison terms could keep the most valuable crew—masters, captains, and engineers—out of the water for extended periods of time.

ITLOS, though, has added other limitations to coastal state enforcement, indicating that it will judge the seriousness of the offence and the reasonableness of the penalty. In one case, for

[145] UNCLOS, *supra* note 2, art. 56(1).
[146] Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC), Advisory Opinion, 2015 ITLOS 4, ¶ 106 (April. 2, 2015).
[147] UNCLOS, *supra* note 2, art. 73(1).
[148] UNCLOS, *supra* note 2, art. 73(3).
[149] UNCLOS, *supra* note 2, art. 73(2).
[150] UNCLOS, *supra* note 2, art. 92.
[151] UNCLOS, *supra* note 2, art. 73(3).

example, Guinea-Bissau confiscated an oil tanker, the *Virginia G*, and its fuel used to bunker fishing vessels because the vessel failed to obtain written authorization to bunker and pay prescribed fees, in violation of Guinea-Bissau's laws.[152] ITLOS acknowledged that "many coastal States provide for measure of confiscation" as a sanction for violating fisheries laws,[153] but that "whether or not confiscation is justified in a given case depends on the facts and circumstances.[154] While agreeing that the *Virginia G's* breaches were "serious,"[155] ITLOS concluded that mitigating factors existed and that confiscation was thus not necessary.[156] In this case, ITLOS noted that the fishing vessels involved in the bunkering were not confiscated and that the failure to obtain written authorization was not intentional.[157] Although UNCLOS Article 73 only precludes imprisonment from the range of penalties that a coastal state may impose, ITLOS concluded that "the principle of reasonableness applies generally to enforcement measures under article 73 of the Convention."[158]

While the concept of reasonableness or proportionality pervades international law, it is unusual for a tribunal to substitute its judgment concerning prosecutorial discretion of national authorities. In fact, several dissenting judges in the *M/V Virginia G* case stated that "[i]t is in no way the task of the Tribunal to take the place of the competent national authorities."[159] In the words of another dissenting judge, "it falls within the coastal State's discretion to establish in its laws when confiscation will apply and, in specific cases, depending on the flexibility allowed by

[152] The M/V "Virginia G" Case, *supra* note 63, at ¶ 70.
[153] *Id.* at ¶ 253.
[154] *Id.* at ¶ 257.
[155] *Id.* at ¶ 267.
[156] *Id.* at ¶¶ 268–69.
[157] *Id.* at ¶¶ 268–69.
[158] *Id.* at ¶ 270.
[159] *M/V Virginia G*, *supra* note 63, at ¶ 53 (joint diss. op. Vice-President Hoffmann and Judges Marotta Rangel, Chandrasekhara Rao, Kateka, Gao and Bouguetaia). These judges also stated that "the Tribunal does not sit as a court of appeal in assessing whether or not the enforcement measures are necessary in the circumstances of the case." *Id.* at ¶ 47.

the normative system, to decide whether confiscation, or a less severe penalty, is called for."[160] Judge ad hoc Sérvulo Correia, in a dissenting opinion, concluded as follows:

> Looking at the empirical circumstances in this case, that is, at Guinea-Bissau's lack of resources for permanent monitoring of its vast [EEZ], a zone subject to heavy pressure from illicit fishing and fishing-related activities, I fail to see how it can be concluded that Guinea-Bissau committed a manifest error of appreciation by considering the penalty of confiscation necessary because of its effect as a deterrent.[161]

Indeed. At one point during the case, five vessels were under arrest in Guinea-Bissau.[162]

Various fisheries agreements and instruments, including those specific to IUU fishing, call on states to ensure that penalties "are adequate in severity to be effective."[163] Yet, ITLOS has converted the legal conclusion as to whether a state has taken measures "necessary to ensure compliance" into a question of whether the sanction was reasonable. In so doing, not only has ITLOS misinterpreted UNCLOS, but it has also deprived coastal states of the very tools they

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[160] *M/V Virginia G*, *supra* note 63, at ¶ 19 (diss. op. Sérvulo Correia). Judge ad hoc Sérvulo Correia also disagreed with the majority's view that the failure to receive authorization resulted from a misinterpretation of correspondence, instead finding "[i]ndifference to the coastal State's laws and regulations or negligent ignorance of these." *Id.* at ¶ 15. So, too, did those joining in the joint dissent, who asked, "How could there be a 'misinterpretation of the correspondence' when, as the Tribunal itself acknowledges in the same breath, that authorization was obtained on previous occasions? . . . If at all, failure or negligence to secure the authorization should be taken as an aggravating factor to justify a higher penalty."). *M/V Virginia G*, *supra* note , at ¶ 43 (joint diss. op. Vice-President Hoffmann and Judges Marotta Rangel, Chandrasekhara Rao, Kateka, Gao and Bouguetaia).

[161] *M/V Virginia G*, *supra* note 63, at ¶ 21 (diss. op. Sérvulo Correia).

[162] *M/V Virginia G*, Public Sitting, ITLOS/PV.13/C19/5/Rev.1/Corr.1, 29 (Sept. 4, 2013) (testimony of Mr. Hugo Nosoliny Vieira), https://itlos.org/fileadmin/itlos/documents/cases/case_no.19/verbatims/ITLOS_PV13_C19_5_E_Rev.1.Corr.1.pdf.

[163] FAO Code of Conduct, *supra* note 5, at ¶ 7.7.2; IPOAA–IUU, *supra* note 114, at ¶ 21 (defining IUU fishing) [hereinafter IPOA-IUU] ("States should ensure that sanctions for IUU fishing by vessels and, to the greatest extent possible, nationals under its jurisdiction are of sufficient severity to effectively prevent, deter and eliminate IUU fishing and to deprive offenders of the benefits accruing from such fishing "); FAO, IMPLEMENTATION OF IPOAA–IUU, *supra* note 109, at 34 ("MCS requires a broad-based effort to monitor fishing activity, investigate possible infractions and impose appropriately severe penalties."); Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean, art. 25(7), Sept. 5, 2000, 2275 U.N.T.S. 40532 (entered into force June 19, 2004) ("Sanctions applicable in respect of violations shall be adequate in severity to be effective in securing compliance and to discourage violations wherever they occur and shall deprive offenders of the benefits accruing from their illegal activities.") [hereinafter WCPF Convention].

need to ensure compliance with laws designed to prevent IUU fishing.[164] It may also have a chilling effect on coastal states, fearful that flag states will challenge their enforcement actions as not necessary and thus be forced to pay damages to the owner of an IUU fishing vessel.[165]

2. Prompt Release

Article 73 of UNCLOS expressly provides that "[a]rrested vessels and their crews shall be promptly released up the posting of a reasonable bond or security."[166] ITLOS has stated that this obligation of prompt release "includes elementary considerations of humanity and due process of law" and that the requirement of the reasonable bond or other security embodies a concern for fairness.[167] ITLOS has declared that Article 73—by granting coastal states authority to take measures to ensure compliance with its laws and allowing flag states the prompt release of vessels they flag—"strikes a fair balance" between coastal state and flag state interests.[168] Nevertheless, ITLOS has interpreted these obligations in such a way as to hamper coastal state efforts to prevent and deter IUU fishing in their EEZs.

For example, the Royal Australian Navy frigate *HMAS Canberra* spotted the Russian-flagged *Volga* fishing within the Australian Fishing Zone (AFZ) around the Australian Territory of Heard Island and McDonald Islands.[169] The *Volga* fled to the high seas to avoid

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[164] As Judge Jesus noted in dissent, the majority's "interpretation may create serious difficulties for coastal States in their effort to achieve proper and effective implementation of their fishing laws and regulations in their EEZs." *M/V Virginia G*, *supra* note 63, at ¶ 19 (diss. op. J. Jesus).

[165] Judge Jesus continued:

> In the future a coastal State may refrain from ever imposing the penalty of confiscation on ships caught in violation of its fishing laws and regulations in the EEZ, afraid that the Tribunal, acting on the basis of an arbitrary and subjective yardstick to measure the gravity of a given violation, may call upon it to pay compensation in favour of the violator of its fishing laws and regulations.

Id. at ¶ 20.

[166] UNCLOS, *supra* note 2, art. 73(2).

[167] "Juno Trader," (Saint Vincent and the Grenadines v. Guinea-Bissau), Prompt Release, Judgment, ITLOS Reports 2004, 17, at ¶ 77 (Dec. 18).

[168] The "Monte Confurco" Case (Seychelles v. France), 2000 ITLOS Rep. 86, at ¶¶ 70–72 (Dec. 18).

[169] The "Volga," *supra* note 100, at ¶¶ 20–21.

capture, but the *Canberra* eventually caught it.[170] Australian military personnel boarded the *Volga* and found 131,422 tonnes of Patagonian toothfish (*Dissostichus eleginoides*), but no authorization to fish in Australian waters.[171] The ships computers showed that the *Volga* had spent significant amounts of time fishing in Australia's AFZ. Australia then escorted the *Volga* to the Western Australian port of Fremantle and detained the captain and crew.[172] Australia set bail amounts of the crew at less than AU$100,000[173] but set the bond for the *Volga* at AU$3,332,500 based on the value of the vessel and its equipment and any potential fines, as well as the cost of complying with the conservation and management measures, including use of a vessel monitoring system (VMS) to track the vessel, of the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR), the RFMO managing toothfish stocks.[174] Australia also refused to release the vessel unless the *Volga's* owner provided the names of the "ultimate beneficial owners" of the *Volga*; the names and nationalities of the Directors of Olbers Company Limited, the legal owner of the vessel; the name, nationality and location of the manager(s) of the *Volga's* operations; and the *Volga's* insurers and financiers, if any.[175]

ITLOS tribunals have ruled that the amount of the reasonableness of the bond can include a number of factors, including "the gravity of the alleged offences, the penalties imposed or imposable under the laws of the detaining State, the value of the detained vessel and of the cargo seized, the amount of the bond imposed by the detaining State and its form."[176] In the *"Monte Confurco" Case*, the Tribunal expanded the possible range of conditions that may be included in

[170] *Id.* at 20.
[171] *Id.* at 22–23, 28.
[172] *Id.* at 21.
[173] *Id*. at 25.
[174] *Id.* at 28.
[175] *Id.* at 28.
[176] The "Camouco" Case (France v. Panama), 2000 ITLOS Rep. 10, at ¶ 67 (Feb. 7); The "Monte Confurco" Case, *supra* note 167, at ¶ 76. The Tribunal's ruling essentially invites coastal states and others to increase penalties so they can issue a higher bond.

the bond, declaring that the earlier list of factors "is by no means a complete list" and that the Tribunal does not "intend to lay down rigid rules as to the exact weight to be attached to each of [the factors].[177] Moreover, in assessing the reasonableness of the bond, the *Volga* Tribunal said that "due account must be taken of the terms of the bond or security set by the detaining State, having regard to all the circumstances of the particular case."[178]

In the case of the *Volga*, Australia supported its bond amount and non-financial conditions are reasonable, noting the serious and ongoing IUU fishing for toothfish and the continuing efforts of CCAMLR to prevent it.[179] The Tribunal, however, interpreted the phrase "bond or other security" in Article 73 to mean "bond or other *financial* security" due to the inclusion of that modifier in UNCLOS Article 292 concerning dispute settlement in prompt release cases.[180] As such, the Tribunal ruled that Article 73 precluded any non-financial conditions, including those required by Australia, for release of the vessel.[181] It also reduced the financial value of the bond by more than AU$1.41 million, rejecting that portion of the bond relating to future compliance with Australian law and CCAMLR CCMs.[182] The Tribunal preserved only the bond amount relating to the value of the vessel and its fuel and equipment.[183] Thus, while noting that the bond amount can take into account the gravity of the offense, the Tribunal rejected all bond amounts and conditions relating to the gravity of the offenses and efforts to prevent future IUU fishing.

Although the Tribunal said it understood the international concerns about IUU fishing,[184] scholars disagreed, stating that the Tribunal "appears to have accorded little weight to the serious

[177] The "Monte Confurco" Case, *supra* note 167, at ¶ 76.
[178] The "Volga," *supra* note 100, at ¶ 65.
[179] *Id.* at ¶ 67.
[180] *Id.* at ¶ 77; UNCLOS, *supra* note , art. 292 (1), (4).
[181] The "Volga," *supra* note 100, at ¶¶ 75, 77, 80.
[182] *Id.* at ¶ 80.
[183] *Id.* at ¶ 90.
[184] *Id.* at ¶ 68.

problem of IUU fishing or the uncontested evidence that the *Volga* was part of a fleet of vessels systematically violating Australian fisheries laws and CCAMLR conservation measures."[185] They criticized the Tribunal's exclusion of non-financial factors as "particularly narrow,"[186] "strictly legalistic,"[187] "not persuasive,"[188] and reflecting an "outdated view of how international fishing activities operate."[189] Judges Anderson and Shearer, dissenting in the *Volga* case, agreed with these scholars. Judge Anderson stated that the ordinary meaning of the term "bond" may refer to either financial or non-financial concerns but in the context of Article 73 it refers to non-financial concerns.[190] As such, Article 73 imposes no limits on the conditions composing the bond; UNCLOS merely requires, based on the circumstances of the case, that the bond be "reasonable."[191] He concludes that the Tribunal's interpretation "is not well-founded" and "based on an overly narrow, even legalistic, interpretation" of UNCLOS Article 73.[192] Judge Shearer found the Tribunal's interpretation "narrow" and failing to provide the words "bond" and "financial security" a "liberal and purposive interpretation" needed to deter future offences and to address the gravity of the offenses and seriousness of IUU fishing generally.[193]

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[185] Tim Stephens & Donald Rothwell, *Case Note on the Volga*, 35 J. Maritime L. & Commerce 283, 288 (2004).
[186] *Id.* at 291. Another calls these interpretations "narrow." Nigel Bankes, *Legislative and Enforcement Jurisdiction of the Coastal State with Respect to Fisheries in the Exclusive Economic Zone*, *in* The Development of the Law of the Sea Convention: The Role of International Courts and Tribunals, 73, 101 (ed. Øystein Jensen, 2020).
[187] Griggs & Lugten, *Veil over the Nets*, *supra* note, 93 at 166 (arguing that the Tribunal could have given greater weight to the fourth paragraph of the UNCLOS preamble, which states, "the desirability of establishing through this Convention . . . a legal order for the seas and oceans which will . . . promote the conservation of their living resources, and the study, protection and preservation of the marine environment.").
[188] Natalie Klein, Dispute Settlement in the UN Convention on the Law of the Sea 118 (2005) (arguing that modifying "bond" with "reasonable" provides sufficient flexibility to consider non-financial conditions designed to enhance a coastal state's enforcement authority under UNCLOS Article 73).
[189] Barnes, *Flag States*, *supra* note 50, at 318.
[190] Volga, *supra* note 100, at 59–61 (J. Anderson, dissenting opinion).
[191] Volga, *supra* note 100, at 61 ("Conditions may be temporal, financial or non-financial. All conditions form integral parts of a bail bond and are valid *prima facie*. No particular type of condition should be excluded *a priori*.").
[192] *Id.* at 64.
[193] Volga, *supra* note 100, at 71 (J. Shearer, dissenting opinion). To justify his broader interpretation of Article 73, Judge Shearer noted that the authentic French version of UNCLOS used the broader phrase "*autre garantie suffisante*" (other sufficient guarantee) in Article 73 rather than "other security."). *Id.* at 70.

Despite these dissenting views, the Tribunal's conclusions are clear: coastal states may not impose non-financial bond measures that might actually deter future IUU fishing violations, despite the Tribunal's "gravity of offences" language. While domestic law may include the gravity of the offence in civil or criminal penalties for fishing violations, the inability to condition release of the vessel on identifying the beneficial owners and compliance with relevant CMMs means that penalties are unlikely to touch beneficial owners.

3. Exclusive Flag State Jurisdiction on the High Seas

A coastal state's jurisdiction and its ability to enforce its fisheries laws ends at the seaward edge of its EEZ.[194] In areas beyond national jurisdiction, that is, the high seas,[195] the flag state has exclusive jurisdiction over the vessels it flags.[196] The laws of the flag state, including any regional and international agreements that it has ratified, apply to such vessels and only the flag state may take enforcement action against its vessels for violations of law.[197] As described in more detail in Section IV, the flag state must "effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag."[198]

[194] That said, a coastal state enjoys the right of hot pursuit—to chase vessels into the high seas—provided that the vessel is suspected of a violation within the coastal state's territorial sea or EEZ. UNCLOS, *supra* note 2, art. 111.
[195] UNCLOS, *supra* note 2, art. 86 (applying the provisions concerning the "high seas" to "all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State.").
[196] UNCLOS, *supra* note 2, art. 92(1)(" Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas").
[197] Some debate exists as to whether the flag state's exclusive jurisdiction relates only to enforcement jurisdiction or also includes prescriptive jurisdiction. While that issue is beyond the scope of this article, for a discussion of it, see Alex N. Honniball, *The Exclusive Jurisdiction of Flag States: A Limitation on Pro-active Port States?*, 31 INT'L. J. MARINE & COASTAL L. 499 (2016); Richard Collins, Delineating the Exclusivity of Flag State Jurisdiction on the High Seas: ITLOS issues its ruling in the M/V "Norstar" Case, EJIL: Talk! (June 4, 2019), https://www.ejiltalk.org/delineating-the-exclusivity-of-flag-state-jurisdiction-on-the-high-seas-itlos-issues-its-ruling-in-the-m-v-norstar-case/. In addition, UNCLOS specifies some exceptions to the rule for piracy, unauthorized broadcasting, slave and drug trafficking, and others. UNCLOS, *supra* note , arts. 99, 100, 111, 221.
[198] UNCLOS, *supra* note 2, art. 94(1). *See also* S.S. Lotus Case *(*France *v.* Turkey*),* (Ser. A) No. 10, at p. 22, 25 (PCIJ, 1927) ("Apart from certain special cases which are defined by international law-vessels on the high seas are subject to no authority except that of the State whose flag they fly.").

In light of the failure of some flag states to exercise their effective jurisdiction over the vessels they flag for fisheries violations,[199] international law has attempted to move beyond exclusive flag state jurisdiction. The UN Fish Stocks Agreement (UNFSA),[200] for example, grants UNFSA parties that are also party to a relevant RFMO the right to board and inspect vessels suspected of violations of that RFMO, provided that those vessels are flagged to a UNFSA party even if that party is not a member of the relevant RFMO.[201] While that aspect of the UNFSA is a radical departure from the traditional concept of exclusive flag state jurisdiction, the UNFSA does not entirely ignore flag states. Other provisions require the inspecting state to notify the flag state, at which time the flag state can assume responsibility for the investigation.[202] Even if the flag state authorizes the inspecting state to investigate the alleged violation, the flag state may, nonetheless, assume responsibility for the investigation "if evidence so warrants."[203] A third provision specifies that the flag state may, "at any time," assume responsibility for the investigation and any enforcement action.[204] In other words, exclusive flag state jurisdiction remains a potent concept, hindering the ability of non-flag states to deter, prevent and eliminate IUU fishing on the high seas.

4. IUU Black Lists and Landing Bans

Some RFMOs allow for members to deny port privileges and ban transshipments and landing of fish, but these typically only relate to vessels included on an IUU list.[205] To the extent

[199] RAYFUSE, NON-FLAG STATE ENFORCEMENT, *supra* note 87, at 22.
[200] UNFSA, *supra* note 6, art.18.
[201] *Id.* at art. 21(1).
[202] *Id.* at art. 21(6).
[203] *Id.* at art. 21(7).
[204] UNFSA, *supra* note 6, art. 21(12).
[205] *See*, *e.g.*, WCPFC, *Conservation and Management Measure to Establish a List of Vessels Presumed to Have Carried Out Illegal, Unreported and Unregulated Fishing Activities in the WCPO*, CMM 2019-07, ¶ 22 (2019) (members shall "ensure that vessels on the WCPFC IUU Vessel List that enter ports voluntarily are not authorized to land, tranship, refuel or re-supply therein but are inspected upon entry"); IOTC, Resolution 18/03 on Establishing *a List of Vessels Presumed to Have Carried Out Illegal, Unreported and Unregulated Fishing Activities in the IOTC Area of Competence*,, Resolution 18/03, ¶ 20 (2018).

that IUU vessel lists are effective,[206] they are limited by their nature to specific vessels rather than the flag state that may be facilitating that IUU fishing behavior. In addition, some RFMOs appear very reluctant to add vessels to their lists. For example, although the area managed by the Western and Central Pacific Fisheries Commission covers roughly 20 percent of Earth,[207] ~~only three vessels are included on its IUU list~~its IIU list only includes three vessels.[208] The IUU vessel list of the Inter-American Tropical Tuna Commission[209] includes just 13 vessels.[210] Other lists, however, are more expansive. The IUU vessel list of the International Commission for the

[206] One recent report, while noting that IUU vessel lists "form a very important part of the global fisheries enforcement picture," also noted that "only a few vessels are added or taken off RFMO lists each year, and the lists therefore do not represent the true number of vessels who commit illegal fishing operations." Trygg Mat Tracking, *Are RFMO IUU Vessel Lists Useful?*, 1 (July 2021).

[207] WCPFC, "Frequently Asked Questions and Brochures," https://www.wcpfc.int/frequently-asked-questions-and-brochures. It ranges from Australia and the East Asian seaboard—excluding the South China Sea—in the west, to east of Hawaii in the east. The southern boundary of the convention area borders the Southern Ocean at sixty degrees south latitude and the northern boundary reaches to Alaska and the Bering Sea. For a map of the convention area, see WCPFC, "Convention Area Map," http://www.wcpfc.int/convention-area-map. Specifically, the Convention's jurisdiction ranges,

> From the south coast of Australia due south along the 141 [degree] meridian of east longitude to its intersection with the 55 [degree] parallel of south latitude; thence due east along the 55 [degree] parallel of south latitude to its intersection with the 150 [degree] meridian of east longitude; thence due south along the 150 [degree] meridian of east longitude to its intersection with the 60 [degree] parallel of south latitude; thence due east along the 60 [degree] parallel of south latitude to its intersection with the 130 [degree] meridian of west longitude; thence due north along the 13 [degree] meridian of west longitude to its intersection with the 4 [degree] parallel of south latitude; thence due west along the 4 [degree] parallel of south latitude to its intersection with the 150 [degree] meridian of west longitude; thence due north along the 150 [degree] meridian of west longitude.

The WCPF Convention) establishes the Western and Central Pacific Fisheries Commission (WCPFC). WCPF Convention, *supra* note 161,art. 3(1).

[208] WCPFC, WCPFC IUU Vessel List for 2022 (effective from Feb. 5, 2022), https://www.wcpfc.int/doc/wcpfc-iuu-vessel-list.

[209] Inter-American Tropical Tuna Convention, May 31, 1949, 80 U.N.T.S. 3, U.S.T. 230, T.I.A.S. 2044, http://www.iattc.org/ (entered into force Mar. 3, 1950) [hereinafter IATTC Convention]. The IATTC and its rules for fishing were updated in the Convention for Strengthening the Inter-American Tropical Tuna Convention, June 27, 2003, https://www.iattc.org/IATTCdocumentationENG.htm (entered into force on Aug. 27, 2010).

[210] IATTC, Annual IUU Vessel List—22 October 2021, https://www.iattc.org/en-US/Vessel/GetPDFIUU?year=2021.

Conservation of Atlantic Tuna,[211] whose area of competence includes all of the Atlantic Ocean and the Mediterranean Sea,[212] includes more than 200 vessels.[213]

Black lists may be effective against single vessels but even then it may take years to include a vessel on the list.[214] Moreover, the consequences of blacklisting, such as the exclusion of catches from important markets, has led to strong resistance by flag states to adding their vessels to a blacklist. This resistance has shifted emphasis to diplomatic efforts to encourage compliance at the expense of blacklisting and other measures that are likely to deter future activities.[215] Due to the constraints relating to identification of beneficial owners and the ease with which vessel owners can change the name of their vessel and flag, the focus on specific IUU vessels is inadequate.

In addition, the current combined RFMO IUU vessel list shows the vast majority of vessels as flag "unknown," even though other detailed information is known about the vessel.[216] While some of these vessels may be stateless at the time they are identified, at other times the flag state simply does not want to be associated with an IUU vessel and, consequently, deregisters the vessel without taking appropriate enforcement action against it.[217]

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[211] ICCAT was established by the International Convention for the Conservation of Atlantic Tunas, May 14, 1966, 673 U.N.T.S. 63, 20 U.S.T. 2887, art. III, http://www.iccat.es/Documents/Commission/BasicTexts.pdf (entered into force Mar. 21, 1969).

[212] *Id.* art. I. A visual depiction of the convention area can be found at ICCAT, "Convention Area," https://www.iccat.int/img/misc/ConvArea.jpg.

[213] ICCAT List of IUU Vessels, https://www.iccat.int/en/IUU.asp.

[214] Rosemary Rayfuse, *To Our Children's Children's Children: From Promoting to Achieving Compliance in High Seas Fisheries*, 20 Int'l J. Marine & Coastal L. 509, 524 (2005).

[215] Email correspondence with Duncan Currie, Globelaw (Jan. 27, 2023).

[216] *See* IATTC, Vessel Register, IUU Vessels, https://www.iattc.org/en-US/Management/Vessel-register (posting the combined IUU vessel list).

[217] In correspondence with the IATTC staff, the author received this response to his query about the large number of vessels listed as flag "unknown":

> In some instances, the original listings of a vessel on an IUU list include flag, but then the vessel is later changed to "unknown flag" or some equivalent designation following communication from flag authority that the vessel's authorization to fly its flag has been withdrawn. Such a withdrawal may happen within the context of the listing process or sometime after the original listing. In such cases, absent an indication by another authority that the vessel has been granted a new flag, the IUU listing is changed to "unknown flag." Alternately, it is also the case that in some instances

Such action is, of course, an abandonment of flag state responsibility, not an exercise of it. To protect fish stocks and protect the financial and other interests of legal fishers, states must do more to disincentivize states from operating as flags of non-compliance.

IV. A State's Legal Obligations to Prevent, Deter, and Eliminate IUU Fishing

Despite a state's exclusive right to set criteria for flagging vessels, the right to flag vessels, is not unfettered. States have a corresponding duty to ~~exercise effectively~~effectively exercise their jurisdiction and control over the vessels they flag.[218] In addition, a state's failure to exercise its jurisdiction effectively over the vessels it flags may trigger violations of other obligations, such as the duty to cooperate and the duty not to cause transboundary harm. Breach of these obligations by a flag state can trigger international responsibility. As the U.N. Secretary-General remarked in 2008, "There is now a prevailing view that fishing vessels on the high seas which are not effectively controlled by their flag States are liable to sanctions by other States, should they happen to contravene international conservation and management measures."[219]

Nevertheless, identifying exactly when a state violates international law in these circumstances raises other important questions. For example, a fishing vessel's violation of fisheries law does not necessarily indicate a violation by a state. For example, when Australia alleged that a Cambodian-flagged vessel was fishing illegally, Cambodia, although known as a flag of non-compliance, immediately responded to Australia's request for information about the

> vessel are truly stateless at the time of the IUU activities, but stressing again that the circumstance of each listing is unique and might not fall into either of these general categories. Complicating this process a bit, some RFMOs including IATTC, have adopted provisions prohibiting Members from granting their flag to previously or currently listed IUU vessels until it has been demonstrated that the vessel has new ownership and no connection to previous management.
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> Email correspondence with Brad Wiley, Policy Officer and Field Offices Coordinator. Inter-American Tropical Tuna Commission (Jan. 30, 2023).

[218] UNCLOS, *supra* note 2, art. 94(1).

[219] Report of the Secretary-General, *Oceans and the Law of the Sea*, A/63/63, ¶ 249 (Mar. 10, 2008), https://documents-dds-ny.un.org/doc/UNDOC/GEN/N08/266/26/PDF/N0826626.pdf?OpenElement.

vessel, thereby fulling its flag state responsibilities in that specific circumstance.[220] Just when does a violation by a vessel transform into a violation by a state? This question concerns both the nature of the obligation, but also the conduct of the state. For example, states may be required to ensure that vessels they flag use vessel monitoring systems (VMS), but the state itself is not required to use VMS. If a vessel fails to use VMS despite the state imposing a legal requirement to use it, the state may not have breached its obligation to implement and enforce relevant law against its vessels if it exercised "due diligence." The question is whether the flag state has used its best efforts to ensure that the vessels it flags operate and maintain their VMS.

This section explores the content of the flag state's obligation to exercise jurisdiction over the vessels it flags, concluding that this obligation has broadened over time. It also describes how flag states can breach their duty to cooperate and the duty not to cause environmental harm. Recognizing that each of these obligations are obligations of conduct, it explores the meaning of due diligence.

A. The Duty to Exercise Jurisdiction and Control over Flagged Vessels

UNCLOS specifies that a flag state has an obligation to "effectively exercise its jurisdiction and control" over the vessels it flags in "administrative, technical and social matters,"[221] a phrase that should be construed broadly, given the flag state's exclusive jurisdiction, to include "any matters affecting vessel operations in order to avoid regulatory lacunae."[222] More specifically, a state must maintain a register of the names and particulars of the vessels it flags[223] and "assume jurisdiction under its internal law over each ship flying its flag and its master, officers and crew in respect of administrative, technical and social matters concerning

[220] Griggs & Lugten, *supra* note 95, at 160. *See also* CALLEY, *supra* note 86, at 21.
[221] UNCLOS, *supra* note 2, art. 94(1).
[222] Barnes, *supra* note 50, at 314.
[223] UNCLOS, *supra* note 2, art. 94(1).

the ship."[224] UNCLOS further elaborates on flag state duties by providing that "[e]very State shall take such measures for ships flying its flag as are necessary to ensure safety at sea with regard, inter alia, to . . . the manning of ships, labour conditions and the training of crews, taking into account the applicable international instruments."[225]

These requirements have been elaborated and expanded upon in a variety of binding agreements and non-binding guidelines. These instruments, thus, reinforce the basic contours of the flag state's duty to effectively exercise its jurisdiction over the vessels it flags.

For example, the Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (FAO Compliance Agreement) imposes obligations on states prior to flagging vessels designed to strengthen their control over the vessels they flag.[226] To accomplish its goals to strengthen flag state control over vessels, deter IUU fishing, and promote international cooperation, the FAO Compliance Agreement prohibits a party from authorizing a vessel it flags to fish on the high seas "unless the Party is satisfied that it is able . . . to exercise effectively its responsibilities under this Agreement in respect of that fishing vessel."[227] Likewise, the UNFSA expressly links a vessel's authorization to fish for straddling and highly migratory fish stocks on the high seas to the flag state's ability to effectively exercise jurisdiction over the vessel.[228] A range of RFMOs also embrace the connection between authorizing a vessel to fish and the flag state's ability to exercise effective

[224] *Id.* art. 94(2).
[225] *Id.* art. 94(3).
[226] FAO Compliance Agreement, *supra* note 3, art. V. *See also id.* at preamble ("Mindful that the practice of flagging or reflagging fishing vessels as a means of avoiding compliance with international conservation and management measures for living marine resources, and the failure of flag States to fulfil their responsibilities with respect to fishing vessels entitled to fly their flag, are among the factors that seriously undermine the effectiveness of such measures"). *See also* FAO, Illegal, Unreported and Unregulated (IUU) Fishing, FAO Compliance Agreement (the Agreement "aims to enhance the role of flag States and ensure that a State strengthens its control over its vessels to ensure compliance with international conservation and management measures.").
[227] FAO Compliance Agreement, *supra* note 3, at art. III(3).
[228] UNFSA, *supra* note 6, art. 18(2).

jurisdiction over the vessel, including the IATTC,[229] NAFO,[230] SEAFO,[231] SIOFA,[232] and WCPFC,[233] as well as the FAO Code of Conduct for Responsible Fisheries,[234] IPOA-IUU,[235] and Flag State Performance Guidelines.[236]

Legal instruments adopted after UNCLOS broaden the duty to effectively exercise jurisdiction over vessels by directing flag states to ensure, as described in the FAO Compliance Agreement, that they take such measures as may be necessary to ensure that fishing vessels entitled to fly its flag do not engage in "any activity that *undermines the effectiveness* of international conservation and management measures."[237] This provision, also included in the UNFSA,[238] NAFO,[239] SEAFO,[240] SIOFA,[241] WCPFC,[242] the FAO Code of Conduct,[243] and IPOA-IUU,[244] among others, requires a flag state to do more than ensure that its vessels comply with CMMs. By using the word "undermines" rather than the phrase "complies with," these agreements make clear that flag states may not authorize their vessels to fish for stocks in contravention of relevant CMMs even if they are not a party to the relevant RFMO since fishing for stocks in contravention of relevant CMMs would undermine their effectiveness.

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[229] *See supra* note 208.
[230] Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries, art. XI(2)(a), Oct. 24, 1978, 1135 U.N.T.S. 369 (entered into force Jan. 1, 1979), http://www.nafo.int/about/frames/about.html [hereinafter NAFO Convention].
[231] Convention on the Conservation and Management of Fishery Resources in the South East Atlantic Ocean, art. 14(2), 2221 U.N.T.S. 189, signed Apr. 20, 2001 (entered into force Apr. 13. 2003), http://www.seafo.org/About/Convention-Text [hereinafter SEAFO].
[232] Southern Indian Ocean Fisheries Agreement (SIOFA), art. 11(3)(a), Jul. 7, 2006 (entered into force June 21, 2012).
[233] WCPF Convention, *supra* note 161, art. 24(2).
[234] FAO Code of Conduct, *supra* note 5, ¶ 7.6.2.
[235] 4 *supra* note 114, ¶ 35.
[236] FAO, Voluntary Guidelines for Flag State Performance, ¶ 29 (2015), https://www.fao.org/3/I4577T/i4577t.pdf.
[237] FAO Compliance Agreement, *supra* note 3, at art. III(1)(a) (emphasis added).
[238] UNFSA, *supra* note 6, art. 18(1).
[239] NAFO Convention, *supra* note , art. XI(1)(a).
[240] SEAFO, *supra* note 230, art. 14(1).
[241] SIOFA, *supra* note 231, art. 11(1)(a).
[242] WCPF Convention, *supra* note , art. 24(1)(a).
[243] FAO Code of Conduct, *supra* note 5, ¶ 7.7.5.
[244] IPOA-IUU, *supra* note 114, ¶ 68.

Post-UNCLOS legal instruments also elaborate on UNCLOS's duty to maintain a register of the names and particulars of the vessels it flags.[245] The FAO Compliance Agreement restates the UNCLOS requirement for the fisheries context, but then describes the types of information that should be kept in the record of vessels and requires flag states to authorize fishing on the high seas.[246] The UNFSA goes further, by requiring parties to maintain a record of vessels and ensure that vessels are registered and authorized to fish.[247] These same requirements are found in RFMOs, typically with very detailed vessel information requirements.[248] IPOA-IUU,[249] FAO Code of Conduct,[250] and the Voluntary Guidelines for Flag State Performance include similar provisions.[251]

As another key aspect of a flag state's duties to exercise effectively its jurisdiction and control over fishing vessels, states must collect, verify, and share fisheries data, as required by

[245] UNCLOS, *supra* note 2, art 94(1).
[246] FAO Compliance Agreement, *supra* note ,3 arts. III(2), IV, VI; UNFSA, *supra* note 6, art. 18(3)(c), Annex I, art. 4.
[247] UNFSA, *supra* note 6, arts. 18(2), 18(3)(a), 18(3)(b)(ii), 18(3)(c).
[248] IATTC, *Regional Vessel Register*, Resolution C-18-06 (2018), http://www.iattc.org/PDFFiles/Resolutions/IATTC/_English/C-18-06-Active_Amends%20and%20replaces%20C-14-01%20Regional%20Vessel%20Register.pdf; ICCAT, *Multi-annual Conservation and Management Programme for Tropical Tunas* ¶ 31, Recommendation 16-01, https://www.iccat.int/Documents/Recs/compendiopdf-e/2016-01-e.pdf; The Convention on the Conservation and Management of High Seas Fisheries Resources in the North Pacific Ocean. Convention on the Conservation and Management of High Seas Fisheries Resources in the North Pacific Ocean, art. 13(8), Feb. 24, 2012, https://www.npfc.int/system/files/2017-01/Convention%20Text.pdf (entered into force July 19, 2015); NPFC, Conservation and Management Measure on Information Requirements for Vessel Registration, CMM 2019-01 (2019), https://www.npfc.int/cmm-2019-01-information-requirements-vessel-registration; SIOFA, *supra* note 231, art. 11(3)(b); WCPF Convention, *supra* note 161, art. 24(4)–(5) & Annex IV; WCPFC, Record of Fishing Vessels and Authorization to Fish, CMM 2018-06 (2018), https://www.wcpfc.int/doc/cmm-2018-06/conservation-and-management-measure-wcpfc-record-fishing-vessels-and-authorisation.
[249] IPOAA-IUU, *supra* note ,113 at ¶ 35.
[250] FAO Code of Conduct, *supra* note 5, arts. 8.1.2, 8.2.1, 8.2.2.
[251] Voluntary Guidelines, at ¶¶ 14–28.

the UNFSA,[252] FAO Compliance Agreement,[253] and RFMOs.[254] The FAO Code of Conduct,[255] IPOA-IUU,[256] and the Flag State Performance Guidelines[257] also do. As part of verifying catches, as well as ensuring compliance with other laws, flag states must also implement national inspection schemes, as required by the UNFSA[258] and RFMOs[259] and recommended by the FAO Code of Conduct,[260] IPOA-IUU,[261] and the Flag State Performance Guidelines.[262]

The UNFASA and RFMOs also require flag states to record and timely report vessel position and other fisheries data, including through the use of vessel monitoring systems that record vessel position in real time.[263] The FAO Code of Conduct,[264] IPOA-IUU,[265] and the Flag State Performance Guidelines[266] also recommend the same.

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[252] UNFSA, *supra* note , arts. 5(j), 17(4), 18(3)(f).
[253] FAO Compliance Agreement, *supra* note , art. III(7).
[254] *See*, *e.g.*, Convention for the Conservation of Antarctic Marine Living Resources, art. XX, May 20, 1980, T.I.A.S. 10240 (entered into force Apr. 7, 1982), http://www.ccamlr.org/en/document/publications/basic-documents [hereinafter CCAMLR]; IATTC, *Resolution on Data Provision*, Resolution C-03-05, para. 2 (2003) https://www.iattc.org/PDFFiles/Resolutions/IATTC/_English/C-03-05-Active_Provision%20of%20data.pdf; ICCAT Convention, *supra* note 209, art. IX(2)(a); ICCAT, *Collection of Statistics on the Atlantic Tuna Fisheries*, Resolution 66-01 (1966), https://www.iccat.int/Documents/Recs/compendiopdf-e/1966-01-e.pdf; NPFC Convention, *supra* note , art. 13(11); NPFC, *Chub Mackerel*, CMM 2019-07, para. 6 (2019), https://www.npfc.int/system/files/2019-11/CMM%202019-07%20FOR%20CHUB%20MACKEREL.pdf; SIOFA, *supra* note , art. 11(3)(d); WCPF Convention, *supra* note 161, art. 5(i); WCPFC, *Scientific Data to be Provided to the Commission*, WCPFC13 § 1 (2016), https://www.wcpfc.int/file/115986/download?token=fww6OtHi.
[255] FAO Code of Conduct, *supra* note 5, arts. 6.4, 6.11, 7.4.4, 8.4.3.
[256] IPOA-IUU, *supra* note 114, ¶ 28.3.
[257] FAO, Flag State Performance Guidelines, *supra* note 235, at ¶ 31(d).
[258] UNFSA, *supra* note 6, arts. 18(3)(g)(i).
[259] *See*, *e.g.*, WCPFC, *Conservation and Management Measure for the Regional Observer Programme*, CMM 2018–05 (2018).
[260] FAO Code of Conduct, *supra* note 5, arts. 7.7.3, 8.4.3.
[261] IPOA-IUU, *supra* note 114, ¶ 24.10.
[262] FAO, Flag State Performance Guidelines, *supra* note 235, at ¶ 31(e).
[263] UNFSA, *supra* note 6, arts. 18(3)(e), (g)(iii); *See*, *e.g.*, IATTC, *Establishment of a Vessel Monitoring System*, Resolution C-14-02 (2014), http://www.iattc.org/PDFFiles/Resolutions/IATTC/_English/C-14-02-Active_Amends%20and%20replaces%20C-04-06%20Vessel%20Monitoring%20System.pdf; ICCAT, *Minimum Standards for Vessel Monitoring Systems in the ICCAT Convention Area*, Recommendation 18-10, ¶ 1 (2019), https://www.iccat.int/Documents/Recs/compendiopdf-e/2018-10-e.pdf; SIOFA, *supra* note 231, art. 11(1)(a); WCPF Convention, *supra* note , art. 24(8)–(9); WCPFC, Commission Vessel Monitoring System, CMM 2014-02 (2014), https://www.wcpfc.int/doc/cmm-2014-02/conservation-and-management-measure-commission-vms. More information about the management of VMS by the WCPFC can be found at https://www.wcpfc.int/vessel-monitoring-system.
[264] FAO Code of Conduct, *supra* note 5, at art. 7.7.3.
[265] IPOA-IUU, *supra* note 114, ¶¶ 24.3, 47.1, 80.7.
[266] FAO, Flag State Performance Guidelines, *supra* note 235, at ¶ 31(c).

The UNFSA and RFMOs also require flag states to implement national observer programs,[267] although the scope of RFMO observer programs vary.[268] The FAO Code of Conduct promotes effective observer programs as critical components of efforts to ensure responsible fishing,[269] as do IPOA-IUU[270] and the Flag State Performance Guidelines.[271]

Moreover, these fisheries agreements require flag states to investigate possible violations of fisheries law, take enforcement action when violations are confirmed, and impose sanctions at levels that deter future violations. While the language may vary slightly from instrument to instrument, the UNFSA exemplifies these flag state responsibilities. It directs flag states to "enforce measures irrespective of where violations occur."[272] It further directs them to "investigate immediately and fully" any alleged violation of a CMM.[273] Where a violation is found, the UNFSA directs flag states to impose sanctions "adequate in severity to be effective in securing compliance and to discourage violations wherever they occur and shall deprive

[267] UNFSA, *supra* note 6, arts. 18(3)(g)(ii).
[268] FAO, About FAO, https://www.fao.org/about/en/. The FAO Conference adopted the Code of Conduct on Oct. 31, 1995. FAO Code of Conduct, *supra* note 5, at vi. COFI adopted IPOA-IUU by consensus at its Twenty-fourth Session on March 2, 2001 and the FAO Council endorsed it at its 120th on June 23, 2001. IPOA-IUU, *supra* note , at iii. The FAO's Committee on Fisheries endorsed the Flag State Performance Guidelines, but COFI is open to the entire FAO membership. Rules of Procedure of the Committee on Fisheries, Rule XXX, *in* FAO, Basic Texts, vols. I and II (2000).
[269] The Code of Conduct for Responsible Fisheries provides: States, in conformity with their national laws, should implement effective fisheries monitoring, control, surveillance and law enforcement measures including, where appropriate, observer programmes, inspection schemes and vessel monitoring systems. Such measures should be promoted and, where appropriate, implemented by subregional or regional fisheries management organizations and arrangements in accordance with procedures agreed by such organizations or arrangements. FAO, Code of Conduct, *supra* note 5, at § 7.7.3.
[270] IPOA-IUU, *supra* note 114, ¶ 28.3.
[271] FAO, Flag State Performance Guidelines, *supra* note 235, at ¶ 31(c).
[272] UNFSA, *supra* note 6, art. 19(a). *See also* WCPF Convention, *supra* note 161, arts. 24(1), 25(1); FAO Code of Conduct, *supra* note 5, arts. 6.10, 7.1.7, 8.2.7; IPOA-IUU, *supra* note 114, ¶ 78 (when bound by the rules of an RFMO); Flag State Performance Guidelines, *supra* note 235, ¶ 32.
[273] UNFSA, *supra* note 6, art. 19(b); WCPF Convention, *supra* note 161, art. 25(2), 25(6); Flag State Performance Guidelines, *supra* note 235, ¶ 36.

offenders of the benefits accruing from their illegal activities."[274] Sanctions may include refusal, withdrawal or suspension of the authorization to fish.[275]

Although the FAO Code of Conduct for Responsible Fisheries (FAO Code of Conduct),[276] Flag State Performance Guidelines, and IPOA-IUU are all non-binding,[277] they still contribute significantly to the understanding of flag state responsibilities. Not only did FAO adopt them "to prevent, deter and eliminate [IUU] fishing . . . through the effective implementation of flag State responsibilities,[278] but FAO also specifically recognized the failures of flag states and the problems of open registries and flags of convenience.[279] Moreover, they were adopted with full participation of the entire international community[280] to discharge its duty to cooperate by taking effective action against non-compliance by vessels in accordance with international law.[281]

B. The Duty to Cooperate to Conserve Fish Stocks and Prevent, Deter, and Eliminate IUU Fishing

[274] UNFSA, *supra* note 6, art. 19(2). *See also* WCPF Convention, *supra* note 161, art. 25(7); FAO Code of Conduct, *supra* note 5, art. 8.2.7; IPOA-IUU, *supra* note 114, ¶ 21; Flag State Performance Guidelines, *supra* note 235, ¶¶ 32(d), 38.
[275] UNFSA, *supra* note 6, art. 19(2). *See also* WCPF Convention, *supra* note 161, art. 25(7); FAO Code of Conduct, *supra* note 5, art. 8.2.7; Flag State Performance Guidelines, *supra* note 235, ¶¶ 32(f), 38.
[276] FAO Code of Conduct, *supra* note 35.
[277] FAO Code of Conduct, *supra* note 5, at art. 1.1; Flag State Performance Guidelines, *supra* note 235, ¶ 1; IPOA-IUU, *supra* note , ¶ 4.
[278] Flag State Performance Guidelines, *supra* note 235, ¶ 1; IPOA-IUU, *supra* note 114, at ¶ 8 ("The objective of the IPOA is to prevent, deter and eliminate IUU fishing"). The FAO Code of Conduct does not expressly mention IUU fishing and instead refers to uncontrolled exploitation and unregulated fisheries on the high seas urgently requiring "new approaches to fisheries management." FAO Code of Conduct, *supra* note 5, art. v.
[279] IPOA-IUU, *supra* note 114, ¶ 2; Flag State Performance Guidelines, *supra* note 235, at v (the guidelines, among other things, "encourage[e] and deter[] non-compliance by flag States"). The FAO Code of Conduct does not specifically include language concerning flags of convenience but indicates that overexploitation of stocks "was aggravated by the realization that unregulated fisheries on the high seas," meaning those flag states that do not participate in RFMOs. FAO Code of Conduct, *supra* note 5, at v.
[280] FAO includes 195 members—194 states plus the European Union.
[281] Flag State Performance Guidelines, *supra* note 235, at ¶ 2; FAO Code of Conduct, *supra* note 5, arts. 6.12, 7.1.3, 7.1.4, 7.1.5; IPOA-IUU, *supra* note , ¶¶ 9.3, 18, 28, 31.

Without question, states have a duty to cooperate to manage fisheries resources and protect the marine environment. In fact, the duty to cooperate is the "bedrock of international law."[282] As the U.N. Declaration of Principles on International Law declares:

> States have the duty to co-operate with one another, irrespective of the differences in their political, economic and social systems, in the various spheres of international relations, in order to maintain international peace and security and to promote international economic stability and progress, the general welfare of nations and international co-operation free from discrimination based on such differences.[283]

Due to its importance in avoiding and resolving international problems, the duty to cooperate finds expression in all spheres of international law,[284] as well as "virtually all" international environmental agreements.[285] Consequently, the ICJ, ITLOS, and other international tribunals have recognized the duty to cooperate as customary international law.[286]

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[282]Patricia Wouters, *"Dynamic Cooperation" in International Law and the Shadow of State Sovereignty in the Context of Transboundary Waters*, 3 ENVTL. LIABILITY 88, 88 (2013).
[283]G.A. Res. 2625 (XXV), Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, (Oct. 24, 1970).
[284]*See, e.g.*, *id.* (stating that "States have the duty to cooperate with one another . . . to promote international economic stability and progress").
[285]PHILIPPE SANDS ET AL., PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW 215 (4th ed. 2018); *see also, e.g.*, Vienna Convention for the Protection of the Ozone Layer, Mar. 22, 1985, 1513 U.N.T.S. 293 (entered into force Sept. 22, 1988); Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, 1522 U.N.T.S. 3, S. TREATY DOC. NO. 10, 100th Cong. 1st Sess. (1987) (entered into force Jan. 1, 1989), https://www.ozone.unep.org/treaties/montreal-protocol; Stockholm Declaration of the United Conference on the Human Environment, June 16, 1972, Principle 24 (1972), http://www.un-documents.net/unchedec.htm [hereinafter Stockholm Declaration]; Rio Declaration on Environment and Development, U.N. Doc. A/CONF.151/5/26 (vol. I), June 14, 1992), https://cil.nus.edu.sg/databasecil/1992-rio-declaration-on-environment-and-development [hereinafter Rio Declaration]; Convention on International Trade in Endangered Species of Fauna and Flora, preamble, Mar. 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243 (entered into force July 1, 1975) ("Recognizing . . . that international co-operation is essential for the protection of certain species of wild fauna and flora against over-exploitation through international trade . . . ."); The Convention on Biological Diversity (CBD) provides that the conservation of biological diversity is a common concern. Convention on Biological Diversity, June 5, 1992, 1760 U.N.T.S. 79 (1992) (entered into force Dec. 29, 1993), https://www.cbd.int/convention/text/.
[286]*See, e.g.*, Lac Lanoux Arbitration (Fr. v. Spain) 12 R.I.A.A. 281, 296 (Perm. Ct. Arb. 1957); Gabčíkovo-Nagymaros Project, *supra* note 37, at 20 ("Only by international co-operation could action be taken to alleviate these problems."); SANDS ET AL., *supra* note 284, at X.

The duty to cooperate is fundamental to UNCLOS and its regime to conserve fish stocks and other marine resources. Within its exclusive economic zone (EEZ), an area up to 200 nautical miles from the state's coastline,[287] a coastal state has sovereign rights to exploit, conserve, and manage living resources, including fish.[288] Yet, even when acting within its sovereign rights in its EEZ, a coastal state must "exercis[e] its rights and perform[] its duties" while giving "due regard to the rights and duties of other States."[289]

Moreover, coastal and other states must cooperate for the conservation and management of straddling stocks—those species that move between the exclusive economic zones of two or more states or between an exclusive economic zone and the high seas.[290] Similarly, all states whose nationals fish for highly migratory species such as tuna listed in Annex I of UNCLOS must cooperate "directly or through appropriate international organizations with a view to ensuring conservation and promoting the objective of optimum utilization.[291] They must also cooperate to conserve and manage anadromous[292] catadromous species,[293] and marine mammals,[294] as well as to protect the marine environment.[295] Concerning high seas fisheries

[287]UNCLOS, *supra* note 2, art. 57.
[288]*Id.* art. 56.
[289]*Id.* art. 56(2).
[290]*Id.* art. 63.
[291]*Id.* art. 64(1).
[292]*Id.* art. 66. Anadromous species are those, like salmon, that spawn in freshwater and spend the majority of their lives in the marine environment. *What Is an Anadromous Fish? A Catadromous Fish?*, Nat'l Oceanic & Atmospheric Admin., https://www.nefsc.noaa.
[293]UNCLOS, *supra* note 2, art. 67. Catadromous species are those, like many eels, that live their adult lives in freshwater but spawn in the marine environment. *What Is an Anadromous Fish? A Catadromous Fish?*, *supra* note 85.
[294]UNCLOS, *supra* note 2, arts. 65, 120 (providing that states shall "work through the appropriate international organizations for [the] conservation management and study" of cetaceans); *see also* Ted L. McDorman, *Canada and Whaling: An Analysis of Article 65 of the Law of the Sea Convention*, 29 Ocean Dev. & Int'l L. 179, 184 (1998) (calling the phrase "work through" in article 65 a "refinement" of the duty to cooperate that "provide[s] a degree of explicitness or guidance for the duty to cooperate.").
[295]UNCLOS, *supra* note 2, art. 197 ("States shall co-operate on a global basis and, as appropriate, on a regional basis, directly or through competent international organizations, in formulating and elaborating international rules, standards and recommended practices and procedures consistent with this Convention, for the protection and preservation of the marine environment, taking into account characteristic regional features.").

more generally, states have the duty to cooperate and must take all measures "necessary for the conservation of the living resources of the high seas."[296] Moreover, with respect to all their activities on the high seas, including fishing, states must have "due regard for the rights" of other states.[297] The UNCLOS negotiating history records that "due regard" imposes an obligation "to refrain from any acts that might adversely affect the use of the high seas by nationals of other States."[298]

Echoing that UNCLOS negotiating history, the ICJ and international tribunals have consistently concluded that the essential purpose of the duty to cooperate is to protect the rights of states that might be affected by another state's activities. In the *Fisheries Jurisdiction Cases*, for example, which involved disputes over fisheries access, the ICJ concluded that the disputing states "ha[d] an obligation to take full account of each other's rights and of any fishery conservation measures the necessity of which is shown to exist in those waters."[299] While this dispute arose prior to the adoption of UNCLOS, it did occur during negotiations of a new Law of the Sea regime.[300] In that context, the ICJ noted that "the former *laissez-faire* treatment of the living resources of the sea in the high seas has been replaced by a recognition of a duty to have due regard to the rights of other States and the needs of conservation for the benefit of all."[301] Consequently, the disputing states were required to share information and take into account relevant international agreements.[302]

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[296] UNCLOS, *supra* note 2, arts. 117, 118.
[297] *Id.* art. 87(2).
[298] UNCLOS 1982 COMMENTARY, *supra* note 48, at 86.
[299] Fisheries Jurisdiction (U.K. v. Ice.), Merits, 1974 I.C.J. 3, ¶ 72 (July 25); *see also* Fisheries Jurisdiction (Ger. v. Ice.), Merits, 1974 I.C.J. Reports 175, ¶ 64 (July 25).
[300] The *Fisheries Jurisdiction* cases took place during the early 1970s, with the ICJ's opinion published in 1974. Meanwhile, the UNCLOS negotiations began in 1973 and ended in 1982. *The United Nations Convention on the Law of the Sea – A Historical Perspective* (1998), U.N. OCEANS & L. SEA, https://www.un.org/depts/los/conventionagreements/conventionhistoricalperspective.htm.
[301] Fisheries Jurisdiction (U.K. v. Ice.), Merits, 1974 I.C.J. 3, ¶ 72 (July 25); *accord* Fisheries Jurisdiction (Ger. v. Ice.), Merits, 1974 I.C.J. 175, ¶ 64 (July 25).
[302] Fisheries Jurisdiction (U.K. v. Ice.), 1974 I.C.J. 3 (July 25); *accord* Fisheries Jurisdiction (Ger. v. Ice.), 1974 I.C.J. 175.

ITLOS and other international tribunals have reached similar conclusions when interpreting UNCLOS. In the *Chagos* arbitration,[303] the tribunal stated that giving "due regard" to the rights of others "depend[s] upon the nature of the rights held by [the affected states], their importance, the extent of anticipated impairment, the nature and importance of the activities contemplated by the [project proponent], and the availability of alternative approaches."[304] In the *Land Reclamation* case,[305] ITLOS reflected on the balance between sovereignty and the rights of other states, with two of the judges observing that "[t]he right of a State to use marine areas and natural resources subject to its sovereignty or jurisdiction is broad but not unlimited. It is qualified by the duty to have due regard to the rights of other States and to the protection and preservation of the marine environment."[306]

In *Request for Advisory Opinion Submitted by the Sub-Regional Fisheries Commission* (*SRFC Advisory Opinion*), ITLOS specifically discussed the nature and scope of the duty to cooperate in the context of fisheries resources.[307] Noting that UNCLOS Article 63 for straddling stocks and Article 64 for high migratory stocks impose a duty of cooperation with appropriate organizations, ITLOS stated that the duty to cooperate requires coastal states fishing for straddling and highly migratory stocks to take measures "consistent and compatible with those taken by the appropriate regional organization . . . both within and beyond the exclusive

[303] *See*, *e.g.*, Chagos Arbitration, Mauritius v. U.K., 2011-03, ¶ 519 (Perm. Ct. Arb. 2015), https://pca-cpa.org/en/cases/11/.
[304] *Id. See also* MOX Plant (Ir. v. U.K.), Provisional Measures, Order, 2001 ITLOS Rep. 95 (Dec. 3) ("The duty to cooperate is a fundamental principle in the prevention of pollution of the marine environment under Part XII of the Convention and general international law and that rights arise therefrom which the Tribunal may consider appropriate to preserve under article 290 of the [UNCLOS].").
[305] Land Reclamation by Singapore in and around the Straits of Johor (Malay. v. Sing.), Provisional Measures, 2003 ITLOS Rep. 10 (Oct. 8).
[306] *Id.* (Hossain, J. and Oxman, J., *ad hoc* opinion), at 34.
[307] SRFC Advisory Opinion, *supra* note 145, at ¶ 207.

economic zones."[308] Coastal states, thus, have "primary responsibility for taking the necessary measures to prevent, deter and eliminate IUU fishing."[309]

Importantly, ITLOS emphasized that flag states were not released from their obligations to prevent, deter, and eliminate IUU fishing.[310] The Tribunal acknowledged flag state rights and obligations with respect to flagging vessels, but also their obligation found in UNCLOS Article 58(3) to give "due regard" to the laws of the coastal state and in Article 62(4) for nationals of other states to comply with the laws of the coastal state.[311] As such, flag states have the obligation to effectively exercise jurisdiction and control over the vessels they flag when those vessels are in the EEZs of other States.[312] In particular, a flag state has a responsibility to investigate allegations of IUU fishing and take any action necessary to remedy the situation, even if the violation occurred in the EEZ of another State.[313]

ITLOS emphasized that the duty to cooperate to conserve and manage highly migratory species (as well as straddling stocks) applies to "each and every State Party concerned"[314] and that this duty applies irrespective of the right, found in Article 56, of a coastal state to exploit natural resources in its exclusive economic zone.[315] ITLOS concluded that under Article 64, parties to a regional fisheries management organization "have the right . . . to require cooperation from non-Member States whose nationals fish for [a highly migratory species] in the region, 'directly or through appropriate international organizations with a view to ensuring conservation and promoting the objective of optimum utilization of such species.'"[316]

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[308] *Id.*
[309] *Id.* at ¶ 106.
[310] *Id.* at ¶ 108.
[311] *Id.* at ¶ 111.
[312] *Id.* at ¶ 124.
[313] *Id.* at ¶¶ 119, 139.
[314] *Id.* ¶ 215.
[315] *Id.* ¶ 216.
[316] *Id.* ¶ 218.

In the pollution context, the ICJ and international tribunals have interpreted the duty to cooperate as including a number of specific components, including the duty to negotiate, consult, share information, monitor impacts of activities, and conduct environmental impact assessments.[317] In the fisheries context, an array of strategies to fulfill the duty to cooperate can be identified. For example, and as discussed in the previous section, post-UNCLOS agreements and numerous RFMOs have elaborated on flag state responsibilities, including the need to require vessels to report catches and use VMS to track and report vessel movements. Consistent with the *SRFC Advisory Opinion*, a flag state has a responsibility to investigate allegations of IUU fishing and take any action necessary to remedy the situation, even if the violation occurred in the EEZ of another State.

The international community has made the duty to cooperate more specific in the context of straddling and highly migratory fish stocks. While UNCLOS directs those states whose national fish for such stocks to cooperate,[318] the UNFSA reaffirms that obligation but then limits access to fish managed by RFMOs to RFMO members.[319] If a state does not become a member of the relevant RFMO, it "is not discharged from the obligation to cooperate."[320] In these circumstances, it shall not authorize the vessels it flags to fish for straddling and highly migratory fish stocks managed by that RFMO.[321] Thus, if a party to the UNFSA fails to join RFMO and authorizes its vessels to fish for stocks managed by that RFMO, it violates its duty to cooperate.

[317] MOX Plant, *supra* note 303, at ¶ 89; Land Reclamation by Singapore, *supra* note 304, at ¶ 106(1); Chagos Arbitration, *supra* note 302, at ¶¶ 521–22. As one international scholar succinctly states, the duty to cooperate "has . . . been translated into more specific commitments," including environmental impact assessment, information exchange, consultation, and notification. SANDS ET AL., *supra* note 284, at 215–16.
[318] UNCLOS, *supra* note 2, arts. 63, 64.
[319] UNFSA, *supra* note 6, art. 8(3), (4).
[320] UNFSA, *supra* note 6, art. 17(1).
[321] UNFSA, *supra* note 6, art. 17(2).

In addition, the UNFSA imposes a large number of duties on flag states. Like the FAO Compliance Agreement, it requires flag states to authorize its vessels to fish on the high seas only when it is able to exercise effectively its responsibilities over those vessels.[322] Among those responsibilities are the establishment of a national record of fishing vessels,[323] requirements for recording and timely reporting of vessel position and catch data,[324] and requirements to verify catch of target species and bycatch.[325] In addition, flag states must adopt "monitoring, control and surveillance" of its vessels and their fishing operations,[326] including the implementation of national inspection schemes,[327] observer programs,[328] and VMS.[329] The failure of a UNFSA party to adopt these measures violates that state's obligations under the UNFSA. Moreover, because the UNFSA is framed as implementing the duty to cooperate, flag states that do not establish or enforce such measures will not be exercising effective control over the vessels they flag and, consequently, also violate UNCLOS Article 117, which requires states to cooperate by adopting measures with respect to their nationals "as may be necessary for the conservation of the living resources of the high seas."[330] With 92 UNFSA parties and 168 UNCLOS parties, the vast majority of flag states are bound by these flag state responsibilities.[331]

C. The Duty Not to Cause Environmental Harm

In addition to specific flag state responsibilities, all states have a duty not to cause environmental harm derives from the general obligation of states to ensure that activities within

[322] UNFSA, *supra* note 6, art. 18(2).
[323] UNFSA, *supra* note 6, art. 18(3)(c).
[324] UNFSA, *supra* note 6, art. 18(3)(e).
[325] UNFSA, *supra* note 6, art. 18(3)(f).
[326] UNFSA, *supra* note 6, art. 18(3)(g).
[327] UNFSA, *supra* note 6, art. 18(3)(g)(i).
[328] UNFSA, *supra* note 6, art. 18(3)(g)(ii).
[329] UNFSA, *supra* note 6, art. 18(3)(g)(iii).
[330] *Accord* Rayfuse, Non-Flag State Enforcement, *supra* note 87, at 46–47.
[331] UN Div. for Ocean Affairs and Law of the Sea, Chronological Lists of Ratifications of, Accessions and Successions to the Convention and the related Agreements, https://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm.

their jurisdiction and control do not cause harm to another state and to areas not under the jurisdiction of any state.[332] In the environmental context, the duty has found specific expression in the *Trail Smelter* arbitration, in which an arbitral tribunal ordered Canada to pay damages and abate pollution from a smelter causing serious environmental harm to the United States.[333] The duty has been enshrined in the 1972 Stockholm Declaration[334] and the 1992 Rio Declaration on Environment and Development.[335]

In the *Pulp Mills* case, the ICJ elaborated on the duty not to cause environmental harm:

> A State is thus obliged to use all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State. This Court has established that this obligation "is now part of the corpus of international law relating to the environment."[336]

In these two sentences, the ICJ clarified three aspects of the duty not to cause environmental harm. First, the duty is binding international law.[337] Second, although neither the

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[332] In 1949, the ICJ stated that it is "every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States." Corfu Channel (United Kingdom v. Albania), Merits, Judgment, 1949 I.C.J. 4, 22 (Apr. 9).

[333] Trail Smelter Case (United States v. Canada), Arbitral Tribunal, 3 UN Rep. Int'l Arb. Awards 1938, 1962–66 (1941).

[334] Stockholm Declaration of the United Conference on the Human Environment, June 16, 1972, Principle 21, U.N. Doc. A/CONF.48/14/Rev.1 (1973).

[335] Rio Declaration, *supra* note 284, at Principle 2.

[336] Case concerning Pulp Mills on the River Uruguay (Arg. v. Uru.), 2010 I.C.J. 14, ¶ 101 (Apr. 20). *See also* Patricia Birnie et al., International Law and the Environment 143 (3d ed. 2009) ("It is beyond serious argument that states are required by international law to regulate and control activities within their territory or subject to their jurisdiction or control that pose a significant risk of global or transboundary pollution or environmental harm."); Philippe Sands & Jacqueline Peel, Principles of International Environmental Law 206 (4th ed. 2018) ("there is no question that Principle 21 reflects a rule of customary international law.")

[337] *Id. See also* Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nic.) and Construction of a Road in Costa Rica along the San Juan River (Nic. v. Costa Rica), Merits, 2015 I.C.J. 665, ¶ 118 (Dec. 16) (quoting the Court in *Pulp Mills*); Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 29 (July 8) ("The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment."); Gabčíkovo–Nagymoros Project, *supra* note 37, at ¶¶ 83–87 (quoting paragraph 29 of *Legality of the Threat or Use of Nuclear Weapons* as part of its discussion of necessity). In 2013, an arbitral tribunal called the obligation a "foundation principle of customary international environmental

Stockholm Declaration nor the Rio Declarations set a threshold for environmental damage,[338] the ICJ declared that any actions must cause "significant" harm to the environment.[339]

Third, "[a] State is . . . obliged to use *all the means at its disposal*" to avoid activities causing significant damage to the environment of another State.[340] As described by one group of scholars, "[t]his is an obligation to take appropriate measures to prevent or minimize as far as possible the risk of significant harm, not merely a basis for reparation after the event. It follows that states must also take measures to identify such risks, for example by environmental impact assessment or monitoring."[341]

Moreover, "[t]he obligation is a continuing one."[342] In other words, the preparation of an environmental impact assessment prior to a project does not relieve the state of its ongoing duty to monitor the project or take other action, such as inspections, to ensure the project does not cause significant transboundary harm.[343] In the fisheries context, a state would not be relieved of its duties by conducting an initial check on a vessel for registration purposes; the state must, on

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law." In re Matter of the Indus Waters Kishenganga Arbitration (India v. Pakistan), Partial Award, Int'l Court of Arb., ¶¶ 448–49 (2013).

[338] Stockholm Declaration, *supra* note 284, at Principle 21; Rio Declaration, *supra* note 284, at Principle 2. Principle 2 of the Rio Declaration reads in full:

> States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

Rio Declaration, *supra* note 284, at Principle 2.

[339] Pulp Mills, *supra* note 335, at ¶ 101. *See also* Foreign Relations Law of the United States, § 601 (activities within a state's jurisdiction and control must be conducted "so as not to cause significant injury to the environment of another state or to areas beyond national jurisdiction"); Céline Négre, *Responsibility and International Environmental Law*, *in* THE LAW OF INTERNATIONAL RESPONSIBILITY 803, 804 (James Crawford, ed. 2010). BIRNIE ET AL., *supra* note 335, at 143 (3d ed. 2009) ("It is beyond serious argument that states are required by international law to regulate and control activities within their territory or subject to their jurisdiction or control that pose a significant risk of global or transboundary pollution or environmental harm."); SANDS & PEEL, *supra* note 335, at 743. In *Trail Smelter*, the tribunal placed the threshold at pollution of "serious consequence." Tail Smelter, *supra* note 332, at 716.

[340] Pulp Mills, *supra* note 335, at ¶ 101 (emphasis added).

[341] BIRNIE ET AL., *supra* note 335, at 143.

[342] BIRNIE ET AL., *supra* note 335, at 143.

[343] Pulp Mills, *supra* note 335, at ¶ 205.

some periodic basis, conduct inspections to ensure the ship is seaworthy and examine logbooks to ensure the vessel is fishing consistently with its license and any relevant fisheries law. As the ICJ stated, "The Court also considers that an environmental impact assessment must be conducted prior to the implementation of a project. Moreover, once operations have started and, where necessary, throughout the life of the project, continuous monitoring of its effects on the environment shall be undertaken."[344]

D. Due Diligence

In international law, obligations can be classified as obligations of result and obligations of conduct.[345] Obligations of result require a state to guarantee a specific outcome, such as prohibiting torture.[346] In contrast, obligations of conduct, also called due diligence obligations, require a state to do the best it can to achieve a specific goal, but it does not need to achieve a specific result.[347] While obligations of result are "strict and rigid," obligations of conduct "are less burdensome and easier to execute."[348]

Even if implementing obligations of conduct is more flexible, the obligation is not without content. The ICJ explained that the obligation to exercise due diligence "entails not only the adoption of appropriate rules and measures, but also a certain level of vigilance in their enforcement and the exercise of administrative control applicable to public and private operators, such as the monitoring of activities undertaken by such operators, to safeguard the rights of the other party."[349] A State could be held responsible in international law if "it had failed to act

[344] *Id.* at ¶ 205.
[345] ARSIWA, *supra* note 37, at art. 12, cmt. 11. Obligations can be classified by other means, as well, including, for example, as conventional, customary, or general principle.
[346] A state could not, for example, argue that it did its best not to torture someone. Because the prohibition against torture is also a peremptory norm of international law, a state could not claim a defense of necessity.
[347] Constantin P. Economides, *Content of the Obligation: Obligations of Means and Obligations of Result*, *in* THE LAW OF INTERNATIONAL RESPONSIBILITY 371, 372 (James Crawford, ed. 2010).
[348] Economides, *supra* note 346, at 375.
[349] Pulp Mills, *supra* note 335, at ¶ 197.

diligently and thus take all appropriate measures to enforce its relevant regulations on a public or private operator under its jurisdiction."[350] Thus, while the concept of "due diligence" is variable and dependent on the circumstances, "[t]he standard of due diligence has to be more severe for the riskier activities."[351]

ITLOS has specifically addressed due diligence in the context of IUU fishing in the *SRFC Advisory Opinion*. There, ITLOS concluded that due diligence requires that the flag State investigate and take appropriate action against its vessels fishing in an EEZ of another state even if the coastal state also takes action.[352]

ITLOS placed this conclusion in the context of the duty to cooperate, holding that the duty to cooperate "extends . . . to cases of alleged IUU fishing activities."[353] It observed that the duty to cooperate is a "due diligence" obligation that requires the states concerned to consult with one another in good faith, pursuant to Article 300 of UNCLOS, which provides that "States Parties shall fulfil in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right."[354] As such, ITLOS concluded that the duty to cooperate does not require a flag State to achieve a particular result in each and every case.[355] That is, a flag State will not be held liable for each and every violation committed by persons (and vessels) under its jurisdiction. Instead, the question is whether a flag State used "adequate means, to exercise best

[350] *Id*.
[351] Responsibilities and Obligations of States with respect to Activities in the Area, Advisory Opinion, 2011 ITLOS, Reports 10, at para. 117.
[352] SRFC Advisory Opinion, *supra* note 145, at para. 139.
[353] *Id.* at para. 140.
[354] UNCLOS, *supra* note 2, art. 300; *see also* Whaling in the Antarctic (Austl. v. Japan: N.Z. Intervening), Judgment, 2014 I.C.J. 226 (Mar. 31), ¶ 83 (the ICJ observing that "the States parties to the ICRW have a duty to co-operate with the IWC and the Scientific Committee and thus should give due regard to recommendations calling for an assessment of the feasibility of non-lethal alternatives" to killing whales).
[355] SRFC Advisory Opinion, *supra* note 145, at para. 128.

possible efforts, to do the utmost" to prevent IUU fishing by ships flying its flag.[356] Whether a flag State exercised "due diligence" depends on whether it took "all necessary measures to ensure compliance and to prevent IUU fishing by fishing vessels flying its flag."[357]

Against this standard, a large number of action and inaction violates a flag state's responsibilities.[358] These include the following:

> Authorizing vessels to fish in waters managed by an RFMO, provided that the state is a party to the UNFSA;
> Failing to require vessels to report fish catches;
> Failing to investigate allegations of IUU fishing by vessels it flags;
> Failing to maintain a vessel registry;
> Failing to require vessels to operate VMS, provided that the state is a party to the UNFSA.
> Failing to impose sanctions sufficient to deter violations and deprive IUU fishers of the benefits of their illegal activities;
> Failing to adopt legislation or regulations in regard to any of the issues raised above.

To address these violations by flag states, non-flag states can unilaterally apply countermeasures or bring a claim to the ICJ or pursuant to the compulsory dispute settlement provisions of UNCLOS. As described in the next sections, the use of countermeasures provides an effective method for disincentivizing rogue flag state behavior. A claim brought to the ICJ or through UNCLOS might result in a more definitive opinion about the obligations of flag states

[356] *Id.* at para. 129.
[357] *Id.* at para. 129.
[358] As the European Union has explained:

> The concept of flag state responsibility and coastal state responsibility has been steadily strengthened in international fisheries law and is today envisaged as an obligation of "due diligence," which is an obligation to exercise best possible efforts and to do the utmost to prevent IUU fishing, including the obligation to adopt the necessary administrative and enforcement measures to ensure that fishing vessels flying its flag, its nationals, or fishing vessels engaged in its waters are not involved in activities which infringe the applicable conservation and management measures of marine biological resources, and in case of infringement to cooperate and consult with other states in order to investigate and, if necessary, impose sanctions which are sufficient to deter violations and deprive offenders of the benefits from their illegal activities.

EU, Commission Decision of 1 October 2015, *supra* note 40, at para. 7.

but decisions of the ICJ and other international tribunals cast doubt on the compensation that non-flag states can receive from flag states even if they succeed in their claims.

V. Using Countermeasures to Prevent and Deter IUU Fishing

International law permits an "injured state" to adopt countermeasures—actions otherwise inconsistent with international law—in response to a breach of an international obligation by another state.[359] Countermeasures are unilaterally adopted self-help measures allowing injured states "to vindicate their rights and to restore the legal relationship with the responsible state.[360]

Although unilateral in nature, both the ICJ and the International Law Commission have imposed a number of conditions on a state's right to adopt countermeasures. Countermeasures must be directed only at the state in breach of its international obligations[361] after that state has been asked to discontinue the wrongful act or make reparation for it;[362] be temporary, reversible actions designed to induce compliance with or make reparation for the internationally wrongful act;[363] be proportionate;[364] and not involve violations of peremptory norms or human rights[365] or the use of force.[366] None of these requirements poses any particular problem in the context of flag state breaches of international law, but questions arise as to which states may adopt countermeasures against a flag of non-compliance and what type of measures might be proportionate.

[359] Gabčíkovo–Nagymoros Project, *supra* note 37, at ¶¶ 83–87; ARSIWA, *supra* note 37, arts. 22, 49–54. The term countermeasures is not used to refer to actions that are lawful, even if they are "unfriendly," such as suspending or terminating bilateral aid, diplomatic relations, or other voluntary activities. In addition, the term is not used as a synonym for sanctions, which typically refers to actions of international organizations, such as the U.N. Security Council. ARSIWA, *supra* note 37, at 128; Rosemary Rayfuse, *Countermeasures and High Seas Fisheries Enforcement*, 51 Netherlands Int'l. L. Rev. 41, 44 (2004).
[360] ARSIWA, *supra* note 37, at 128.
[361] Gabčíkovo–Nagymoros Project, *supra* note 37, at ¶ 83; ARSIWA, *supra* note , art. 49(1)–(2).
[362] Gabčíkovo–Nagymoros Project, *supra* note 37, at ¶ 84.
[363] Gabčíkovo–Nagymoros Project, *supra* note 37, at ¶ 87; ARSIWA, *supra* note , arts. 49(2), 53.
[364] Gabčíkovo–Nagymoros Project, *supra* note 37, at ¶ 85; ARSIWA, *supra* note , art. 51.
[365] ARSIWA, *supra* note 37, art. 50.
[366] ARSIWA, *supra* note 37, art. 50(1).

A. Injured States

"Injured states" are authorized to adopt countermeasures against a state for that state's wrongful conduct.[367] With respect to flags of non-compliance, three categories of injured states exist. First, and unquestionably, a coastal state in whose waters a vessel fishes illegally is an "injured state" and may apply countermeasures if the flag state has failed to perform its international responsibilities.[368]

Second, if the vessel fishes illegally for a stock managed by an RMFO, all of those RFMO members should be considered injured states because the breach "specially affects"[369] each of those states due to their active cooperation to conserve that stock or because "any state" has the right to impose countermeasures.[370] Coastal states in whose waters the relevant stock inhabits or other states whose vessels fish for that stock should also be considered "specially affected" even if they are not members of the relevant RFMO. In fact, the International Law Commission describes coastal states as "specially affected" if their fisheries are affected by high seas pollution in violation of UNCLOS Article 194.[371]

Third, those states without a direct stake in the fishery but which are UNCLOS parties might be injured states that can also adopt countermeasures against a noncomplying flag state.

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[367] Gabčíkovo–Nagymoros Project, *supra* note 37, at ¶ 106 ("The violation of other treaty rules or of rules of general international law may justify the taking of certain measures, including countermeasures, by the injured State."); ARSIWA, *supra* note , art. 49(1).

[368] The ILC's provisions on countermeasures specifically refers to "injured state." ARSIWA, *supra* note , at art. 49. Scholars have spent considerable effort deciphering the ILC's intent in using that phrase. *See*, *e.g.*, Linos-Alexandre Sicilianos, *Countermeasures in Response to Grave Violations Owed to the International Community*, *in* THE LAW OF INTERNATIONAL RESPONSIBILITY, 1137 (James Crawford et al. eds. 2010). This article does not intend to rehash those debates. The ILC itself wrote that it "leaves open the question whether any State may take measures to ensure compliance with certain international obligations in the general interest as distinct from its own individual interest as an injured State." ARSIWA, *supra* note , at 76.

[369] ARSIWA, *supra* note 37, at art. 42.

[370] ARSIWA, *supra* note 37, at art. 54. *Accord* Rayfuse, *Countermeasures*, *supra* note 358, at 46 ("It is obvious that breaches of multilateral obligations may affect a whole group of states in general with some states being specially affected by the breach.").

[371] ARSIWA, *supra* note 37, at 119. UNCLOS Article 194 requires, among other things, UNCLOS parties to take "all measures . . . necessary to prevent, reduce, and control pollution of the marine environment from any source." UNCLOS, *supra* note 2, art. 194(1).

While the International Law Commission commented that it "[left] open the question whether any State may take measures to ensure compliance with certain international obligations in the general interest as distinct from its own individual interest as an injured State,"[372] the prevailing view is that they may.[373] Indeed, states have frequently imposed countermeasures against other states for violations of human rights.[374] In addition, in the context of defining an injured state entitled to react to a breach, the International Law Commission noted that some such states may not have suffered any quantifiable damage.[375] It used as an example a state's claim to sovereignty over an unclaimed area of Antarctica contrary to article 4 of Antarctic Treaty: "[T]he other States parties should be considered as injured thereby and as entitled to seek cessation, restitution (in the form of the annulment of the claim) and assurances of non-repetition."[376]

Similarly, UNCLOS directs states to cooperate in the conservation of a wide range of fish stocks and other living and non-living resources of the ocean.[377] It directs states to exercise their jurisdiction effectively over the vessels they flag. When a state breaches either of those obligations, other states, as in the Antarctic Treaty example, are "injured." A non-complying state undermines and adversely affects the rights of all other UNCLOS parties[378] by limiting the

[372] ARSIWA, *supra* note 37, at 76.
[373] *See*, *e.g.*, Sicilianos, *supra* note 366, at 1144–48.
[374] Martin Dawidowicz, Third-party Countermeasures in International Law 111–238 (2017) (describing the range of countermeasures taken by third-party states).
[375] ARSIWA, *supra* note 37, at 119.
[376] ARSIWA, *supra* note 37, at 119.
[377] *See supra* Section IV.B.
[378] The ILC stated that a state is injured for purposes of ARSIWA Article 42(b)(ii) if the breach is of such a character "has the effect of undermining the performance of all the other States involved" and "is of such a character as radically to affect the enjoyment of the rights or the performance of the obligations of all the other States to which the obligation is owed. ARSIWA, *supra* note 37, at 119. Elsewhere, the ILC expressly references obligations *erga omnes partes*—duties owed to a group of states with a common interest, such as other state parties to a treaty. In the context of the Convention against Torture, the Court noted that all state parties to the convention have a common interest in ensuring that torture is prevented:

> That common interest implies that the obligations in question are owed by any State party to all the other States parties to the Convention. All the States parties "have a legal interest" in the protection of the rights involved. These obligations may be defined as "obligations *erga omnes partes*" in the sense that each State party has an interest in compliance with them in any given case.

availability of resources available to them, forcing them to engage ins enforcement activities on the open seas or in ports, and adopting other monitoring, control, and surveillance mechanisms to ensure that their markets include legally caught fish and that illegal fishing and trade is prosecuted.

B. Proportionate Countermeasures

An injured state, when adopting countermeasures, must ensure that they are "commensurate with the injury suffered, taking account of the gravity of the internationally wrongful act and the rights in question."[379] Stated this way, the requirement of proportionality includes both quantitative and qualitative elements.[380] By taking into account the rights in question and the gravity of the wrongful act, the requirement of proportionality does not equate solely to financial impact of any injury or the type of countermeasure that may be adopted. As the Tribunal stated in the *Air Services Agreement*,

> It has been observed, generally, that judging the "proportionality" of countermeasures is not an easy task and can at best be accomplished by approximation. In the Tribunal's view, it is essential, in a dispute between States, to take into account not only the injuries suffered . . . but also the importance of the questions of principle arising from the alleged breach.[381]

In that dispute, the United States prohibited French flights from landing in Los Angeles as a response to France refusing to allow a US airline, Pan Am, to fly from the west coast of the

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Questions relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.), Judgment, 2012 I.C.J. 422, ¶ 68 (July 20). *See also* Barcelona Traction, Light and Power Company, Limited (Belg. v. Spain), Second Phase, Judgment, 1970 I.C.J. 32, ¶ 33 (Feb. 5) (stating that with respect to obligations of a state towards the international community as a whole, "all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.").

[379] ARSIWA, *supra* note 37, at art. 51. *See also* Gabčíkovo–Nagymoros Project, *supra* note 37, at ¶ 85 ("Countermeasures must be commensurate with the injury suffered, taking into account the rights in question."); Air Services Agreement Arbitration (United States v. France), XVIII R.I.A.A. 417, ¶ 83 (Dec. 9, 1978) ("It is generally agreed that all counter-measures must, in the first instance, have some degree of equivalence with the alleged breach; this is a well-known rule."), https://legal.un.org/riaa/cases/vol_XVIII/417-493.pdf.

[380] DAWIDOWICZ, *supra* note 373, at 347 ("Quantitative factors must be weighed against qualitative ones.").

[381] Air Services Agreement, *supra* note , at ¶ 83.

United States using a 747 but switch to a 727 in London before completing the route to Paris.[382] Although the financial impact to French airlines was greater than the financial impact to Pan Am, the Tribunal concluded that "it will not suffice . . . to compare losses" to the respective airlines because of the importance of considering air transport policy implemented through international agreements, including the one between the United States and France, which France had breached.[383] As such, it concluded that the countermeasures adopted by the United States were not "clearly disproportionate."[384]

Tribunals have also concluded that the countermeasure does not need to relate to the same subject matter as the breach; that is, they do not need to be reciprocal.[385] For example, a state would not respond to a violation of human rights by violating human rights. Similarly, a state responding to another state's failure to exercise effectively its jurisdiction and control over the vessels it flags does not need to stop exercising its own jurisdiction and control over the vessels it flags.

Any countermeasures must ~~take into account~~consider the rights in question. By ~~taking into account~~considering the rights in question, the range of countermeasures may either expand or contract. In the *Gabčíkovo–Nagymoros Project* case, Hungary clearly breached its agreement with Czechoslovakia to complete a series of water works on the Danube River; Czechoslovakia responded by diverting water out of the Danube, thus denying Hungary of its right to an equitable and reasonable share of the river's water, a shared resource.[386] Because of the shared

[382] Air Services Agreement, *supra* note , at ¶¶ 1–8.
[383] Air Services Agreement, *supra* note , at ¶ 83.
[384] *Id.*
[385] ARSIWA, *supra* note 37, at 129 ("There is not requirement that States taking countermeasures should be limited to suspension of performance of the same or closely related obligation").
[386] Gabčíkovo–Nagymoros Project, *supra* note 37, at ¶ 85.

nature of the resource, irrespective of the agreement to construct the water works, the ICJ concluded that Czechoslovakia had "failed to respect proportionality."[387]

In the context of failures to exercise effective jurisdiction and control over vessels, the nature of the rights might very well expand the range of countermeasures available. In contrast to the *Gabčíkovo–Nagymoros Project* case, in which Czechoslovakia used a shared resource as part of its countermeasure, here the failure of flags of non-compliance to comply with their international obligations is facilitating the decline of shared fish stocks for which the international community has a duty to cooperate to conserve and manage. This failure imposes significant costs on non-flag states and their vessels. As such, states adopting countermeasures for flag state failures may have greater latitude to adopt countermeasures, as the United States did in the *Air Services Agreement* arbitration.

~~Similarly~~Similarly, the gravity of the offense may expand the range of countermeasures or permit countermeasures of greater value. The failure to exercise jurisdiction over vessels might lead, for example, to a range of "serious violations," as that term is used in fisheries agreements. The UNFSA defines "serious violation" as relating to various aspects of IUU fishing: fishing in closed areas; using prohibited gear; falsifying or concealing markings, identify or the registration of the fishing vessel; misreporting of catches; among other things.[388] IUU fishing destabilizes food security,[389] diminishes fisheries resources,[390] and undermines

[387] *Id.*
[388] UNFSA, *supra* note 6, art. 21(11). *See also* WCPF Convention, *supra* note , at art. 25(4) (incorporating by reference the definition of "serious violation" in the UNFSA).
[389] See Food and Agric. Org. United Nations [FAO], Illegal, Unreported, and Unregulated Fishing, 1 (2016), http://www.fao.org/3/a-i6069e.pdf ("IUU fishing therefore threatens livelihoods, exacerbates poverty, and augments food insecurity.").
[390] *Id*. ("Fisheries resources available to bona fide fishers are poached in a ruthless manner by IUU fishing, often leading to the collapse of local fisheries, with small-scale fisheries in developing countries proving particularly vulnerable.").

monitoring, control, and surveillance regimes of RFMOs.[391] Although concerns about IUU fishing typically focus on fishing by vessels flagged by non-member States, the vessels of RFMO members also engage in IUU fishing, all to the detriment of those fishing legally. For fisheries managers, IUU fishing of all types "adds pressure to already overexploited fish stocks, while simultaneously compromising efforts to rebuild them based on scientific advice."[392] Moreover, the failure to exercise jurisdiction over vessels leads to gross violation of human rights, including indentured servitude and other forms of modern slavery.[393]

While these factors allow injured states to increase the value of countermeasures, they still must ensure that the countermeasures are designed to compel compliance rather than be punitive.[394] Nevertheless, non-flag states have numerous options that more than likely fall within the range of proportionate countermeasures. For example, they may terminate access to its EEZ, deny port privileges, and ban the landing and transshipment of fish and other cargo. They could also increase tariffs on or prohibit the importation of fish and other goods, which might otherwise violate rules of the General Agreement on Tariffs and Trade.[395] States could also undertake high seas boarding and inspection of vessels flagged to noncomplying flag states and, rather than defer to the flag state's prerogative to investigate and prosecute any violations by that vessel, order the vessel to one of its own ports for prosecution. T~~And,~~ they could do so without

[391] *See generally* Food and Agric. Org. United Nations [FAO], Implementation of the International Plan of Action to Deter, Prevent and Eliminate Illegal, Unreported and Unregulated Fishing, §§ 7–8 FAO Technical Guideline for Responsible Fisheries 9 (2002), http://www.fao.org/3/a-y3536e.pdf.

[392] Environmental Justice Found. et al, Achieving Transparency and Combating IUU Fishing in RFMOs, Reinforcing the EU's *Multilateral Actions to Promote Best Practices*, 3 (May 2019), https://d2ouvy59p0dg6k.cloudfront.net/downloads/rfmo_report_en_may2019.pdf.

[393] *See generally* Wold, *Slavery at Sea*, *supra* note 104.

[394] ARSIWA, *supra* note 37, at 135 ("[A] clearly disproportionate measure may well be judged not to have been necessary to induce the responsible State to comply with its obligations but to have had a punitive aim and to fall outside the purpose of countermeasures enunciated in Article 49.").

[395] The General Agreement on Tariffs and Trade, more commonly known as the GATT, prohibits members of the World Trade Organization (WTO) from imposing restrictions on the importation of goods and requires WTO members to tax and regulate the like products of all other WTO members the same. GATT, arts. I, II, XI.

being bound by the requirements of UNCLOS to post a reasonable bond for the prompt release of the vessel.

C. The Benefits of Countermeasures against Flags of Non-compliance

The unilateral nature of countermeasures provides an injured state with the possibility of an immediate response to a breach by another state that benefits fisheries.[396] This right is not without risk, however, as its own determination of another state's wrongful conduct might prove incorrect and actionable. Pursuant to the dispute settlement provisions of UNCLOS. A flag state could, for example, challenge another state's failure to comply with rules for prompt release or high seas boarding and inspection.[397] It could also challenge trade suspensions and landing bans as inconsistent with GATT obligations.[398] Nonetheless, the opportunity to act without recourse to international dispute settlement allows states to act quickly to remedy a state's failure to exercise jurisdiction effectively over the vessels it flags. Additionally, a flag state might determine that the financial and reputational costs of challenging a countermeasure are too great.

Whether imposed by all UNCLOS parties or "only" members of a specific RFMO, countermeasures may very likely compel a flag of non-compliance to shut down its registry. Consider, for example, the impact on Belize, historically considered a flag of non-compliance.[399] When ICCAT members banned the import of bluefin tuna products from Belize,[400] Belize responded by joining ICCAT and other RFMOs, as well as adopting measures to strengthen its control over the vessels it flags.[401] It has also partnered with Global Fishing Watch, an NGO that

[396] For an excellent discussion of the arguments for and against countermeasures generally, see DAWIDOWICZ, *supra* note 373, at 8–12, 109–10.
[397] UNCLOS, *supra* note 2, arts. 279–299.
[398] Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments — Results of the Uruguay Round, 33 I.L.M. 1125 (1994), https://www.wto.org/english/tratope/dispue/dsue.htm.
[399] CALLEY, *supra* note 86, at 30.
[400] ICCAT, Recommendation by ICCAT Regarding Belize and Honduras Pursuant to the 1994 Bluefin Tuna Action Plan Resolution, Recommendation 96/11 (entered into force Aug. 4, 1997), https://www.iccat.int/Documents/Recs/compendiopdf-e/1996-11-e.pdf.
[401] CALLEY, *supra* note 86, at 31–35.

tracks fishing vessels through various electronic means, to publicly share data on the movements of its fishing vessels.[402]

Similar import bans might be equally effective against other flags of non-compliance. Panama, for example, has long been considered a flag of convenience.[403] The European Union has issued Panama a second "yellow card" because Panama has failed to discharge its flag state responsibilities, but the EU has not issued a red card that would trigger trade bans with Panama.[404] States could start by banning imports of fish products, which represent Panama's fifth most valuable export.[405] Fish exports, while providing Panama with a $172.6 million trade surplus,[406] still pales in comparison to the $500 million generated by Panama's vessel registry.[407] Thus, states may wish to extend their countermeasures to ban imports of ores, boats, and pharmaceuticals from Panama, composing more than 56% of Panama's exports in 2021.[408] Given the scale of Panama's vessel registry and the long-time use of Panama's flag for IUU fishing, such countermeasures may very well be deemed "not disproportionate." They may also convince Panama that flagging vessels notorious for IUU fishing is no longer a financial asset but rather a liability.

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[402] Global Fishing Watch, Belize, Promoting Ocean Transparency Together, https://globalfishingwatch.org/belize/.
[403] Mary Triny Zea & Michelle Carrere, *Panama: A "Flag of Convenience" for Illegal Fishing and Lack of Control at Sea*, MONGABAY (Oct. 13, 2022), https://news.mongabay.com/2022/10/panama-a-flag-of-convenience-for-illegal-fishing-and-lack-of-control-at-sea/.
[404] European Commission, Decision of 12 December 2019 on Notifying the Republic of Panama of the Possibility of Being Identified As a Non-cooperating country in Fighting Illegal, Unreported and Unregulated Fishing, 2020/C 13/06 (Jan 15, 2020), https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32020D0115(01)&rid=4. A "yellow card" triggers consultations with the European Union. *See* European Commission, Illegal, Unreported and Unregulated (IUU) fishing in general and in Cameroon (Feb. 17, 2021) (explaining the EU red/yellow/green card system for addressing IUU fishing), https://ec.europa.eu/commission/presscorner/api/files/document/print/en/qanda_21_646/QANDA_21_646_EN.pdf.
[405] Daniel Workman, World's Top Exports, Panama's Top 10 Exports, https://www.worldstopexports.com/panamas-top-10-exports/.
[406] *Id.*
[407] Emily Benson & Catherine Puga, Flagging the Issues: Maritime Governance, Forced Labor, and Illegal Fishing, Center for Strategic & Int'l Studies (Aug. 9, 2021), https://www.csis.org/analysis/flagging-issues-maritime-governance-forced-labor-and-illegal-fishing.
[408] Daniel Workman, World's Top Exports, Panama's Top 10 Exports, https://www.worldstopexports.com/panamas-top-10-exports/.

Panama, with its sizeable and longstanding vessel registry, may be among the more difficult flags of non-compliance to reform. Other states may be easier, including Togo, Cameroon, Sri Lanka, and other states with several vessels on the RFMO lists of IUU vessels.[409] These vessel registries are much smaller, although perhaps growing fast, and consequently, these flag states might be more willing to forego the relatively small revenue generated by their registries to avoid countermeasures strategically targeting key products.[410]

VI. Litigating to Recover Costs

Because states cannot recover the costs of monitoring, control and surveillance, as well as enforcement, arrest, and prosecution through countermeasures, they may wish to pursue binding and compulsory dispute settlement under UNCLOS,[411] litigation at the ICJ,[412] or through other arbitral procedures.[413] Despite the costs and time required to litigate, litigation offers significant advantages, including a legal finding of internationally wrongful conduct and cost recovery. The approach, however, is not without risks. Perhaps most significantly, international tribunals have typically provided compensation only for "extraordinary" costs and whether costs incurred in enforcing fisheries rules are extraordinary is not clear.

A. Choice of Forum

The ICJ provides a forum for dispute settlement that can entertain claims addressing any aspect of international law.[414] Although some fisheries agreements, such as the IOTC,

[409] *See* , *e.g.*, IOTC IUU Vessel List (as of May 26, 2022), https://iotc.org/sites/default/files/documents/compliance/vessel_lists/IUU%20lists/IOTC_IUU_Vessels_List_20220526EF.pdf.
[410] The European Union has issued a "yellow card" to Cameroon because Cameroon's registration procedure "does not seem to include the verification of the history of the vessels, as IUU listed fishing vessels have been registered in Cameroon" and "Cameroon has also registered many fishing vessels under its flag in the past months (including IUU listed vessels)." European Commission, *supra* note , at 2.
[411] UNCLOS, *supra* note 2, arts. 279–299.
[412] Statute of the International Court of Justice, June 26, 1945.
[413] Disputing parties may, for example, choose binding arbitration through the Permanent Court of Arbitration. As those procedures can be tailored to specific disputes, they are not covered in this article.
[414] Statute of the International Court of Justice, *supra* note 381, at art. 38.

specifically provide that disputes be submitted to the ICJ unless the disputing parties otherwise agree,[415] the ICJ is not likely to be a viable forum in most cases because only a few states operating open registries and considered to be flags of convenience have consented to the jurisdiction of the ICJ, as required.[416] Of the forty-two states and overseas territories included on the list of flags of convenience of the International Transport Work's Federation (ITF),[417] only thirteen have consented to the jurisdiction of the Court.[418] Of these, several have excluded from the Court's jurisdiction disputes that may involve failures of a flag state to exercise its jurisdiction and control. For example, Malta has excluded from the Court's jurisdiction disputes arising under a multilateral treaty unless all parties to the treaty are party to the dispute.[419] Barbados has excluded disputes involving conservation, management or exploitation of the living resources.[420] Cambodia, Liberia, and Mauritius, as well as Barbados, have excluded disputes arising under treaties with other dispute settlement provisions.[421] From the ITF's list, only six—Cameroon, Cyprus, Equatorial Guinea, Republic of the Marshall Islands, Panama, and Togo—have consented to the jurisdiction of the Court in ways that do not automatically exclude ICJ jurisdiction for flag state non-compliance.[422] Even then, the state challenging one of these

[415] Agreement for the Establishment of the Indian Ocean Tuna Commission, art. XXIII. Nov. 25, 1993, 1927 U.N.T.S. 329 (entered into force Mar. 27, 1996).
[416] Statute of the International Court of Justice, *supra* note 381, at art. 36.
[417] ITF, Flags of Convenience, https://www.itfglobal.org/en/sector/seafarers/flags-of-convenience
[418] Barbados, Cambodia, Cameroon, Cyprus, Georgia, Honduras, Liberia, Malta, the Republic of the Marshall Islands, Mauritius, Panama, and Togo. ICJ, Declarations Recognizing the Jurisdiction of the Court as Compulsory, https://www.icj-cij.org/en/declarations**.**
[419] ICJ, Declarations Recognizing the Jurisdiction of the Court as Compulsory, Declaration of Malta, para. i (Sept. 2, 1983), https://www.icj-cij.org/en/declarations/mt.
[420] ICJ, Declarations Recognizing the Jurisdiction of the Court as Compulsory, Declaration of Barbados, para. c (July 24, 1980), https://www.icj-cij.org/en/declarations/bb.
[421] ICJ, Declarations Recognizing the Jurisdiction of the Court as Compulsory, Declaration of Cambodia, para. 1 (Sept. 9, 1957), https://www.icj-cij.org/en/declarations/kh; ICJ, Declarations Recognizing the Jurisdiction of the Court as Compulsory, Declaration of Liberia (Mar. 20, 1952), https://www.icj-cij.org/en/declarations/lr; ICJ, Declarations Recognizing the Jurisdiction of the Court as Compulsory, Declaration of Mauritius, para. i (Sept. 23, 1968), https://www.icj-cij.org/en/declarations/mu; ICJ, Declarations Recognizing the Jurisdiction of the Court as Compulsory, Declaration of Barbados, para. a (July 24, 1980), https://www.icj-cij.org/en/declarations/bb.
[422] *See* the declarations submitted by these countries, all available at ICJ, Declarations Recognizing the Jurisdiction of the Court as Compulsory, https://www.icj-cij.org/en/declarations.

states must have also consented to ICJ jurisdiction for disputes that may involve flag state noncompliance. Because many states have the same exclusions as the flags of non-compliance,[423] disputes are unlikely to arise under the ICJ.

As such, the most attractive means for challenging flag state noncompliance are the compulsory dispute settlement provisions of UNCLOS.[424] Those provisions apply to disputes concerning the interpretation or application of UNCLOS.[425] Thus, a failure to exercise jurisdiction effectively and failure to cooperate to conserve fish stocks, both requirements of UNCLOS, could be brought against any UNCLOS party. Among non-complying flag states, all except North Korea are party to UNCLOS. TAlso, the United Kingdom ratified on behalf of its overseas territories, including those included on the ITF's FOC list (Bermuda, Cayman Islands, and Gibraltar)[426] and Portugal's accession implicitly applies to Madeira,[427] although Denmark specifically noted that its accession does not extend to the Faroe Islands.[428]

[423] Australia, for example, has excluded from the Court's jurisdiction disputes involving treaties with their own dispute settlement provisions and disputes relating to exploitation of resources within Australia's territorial seas or EEZ. ICJ, Declarations Recognizing the Jurisdiction of the Court as Compulsory, Declaration of Australia, paras. a, c (Mar. 21, 2002),

[424] Parties are allowed to choose among four options. UNCLOS, *supra* note 2, arts. 279–299. This legal opinion does not describe the relative strengths and weaknesses of the four approaches. It notes, however, that many states have not specifically made a choice of forum declaration under UNCLOS, and, therefore, they are deemed to have accepted arbitration under the provisions found in UNCLOS Annex VII. Presumably, they have implicitly chosen arbitration under Annex VII because it grants states more control over the arbitral procedure; under Annex VII, a party to a dispute is able to choose one of the arbitrators and the disputing parties jointly choose three other arbitrators. *Id.* Annex VII, art. 3.

[425] UNCLOS, *supra* note 2, art. 279.

[426] United Nations, Treaty Collection, Law of the Sea, https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsgno=XXI-6&chapter=21&Temp=mtdsg3&clang=en#EndDec.

[427] Article 29 of the Vienna Convention on the Law of Treaties provides, "Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory." Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, U.N. Doc. A/CONF. 39/27, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980).

[428] United Nations, Treaty Collection, Law of the Sea, *supra* note 396.

The UNCLOS dispute settlement provisions also apply to treaties that have adopted them, such as the UNFSA,[429] the WCPF Convention,[430] SEAFO,[431] and SIOFA.[432] These treaties may expand the claims that may be brought against non-complying flag states, such as failures to require or monitor VMS consistently with the conservation and management measure adopted by the RFMO.[433]

UNCLOS's dispute settlement provisions first demand that parties settle their dispute concerning the interpretation or application of UNCLOS by peaceful means.[434] UNCLOS makes clear that parties to a dispute have freedom to choose the means of settlement of their preference,[435] including binding dispute settlement.[436] However, if the parties do not reach a final negotiated settlement using their chosen procedures, the parties may return to UNCLOS's basic procedures.[437] Under those procedures, the disputing parties must first exchange views.[438] They may then opt to settle the dispute by conciliation, although they are under no obligation to do so.[439] If these procedures do not result in a satisfactory resolution to the dispute, then one of the

[429] UNFSA, *supra* note 6, art. 30.
[430] WCPF Convention, *supra* note , art. 31 (applying the dispute settlement provisions of the UNFSA, which in turn apply the provisions of UNCLOS). Chinese Taipei (Taiwan), as a WCPFC member, would also be subject to compulsory dispute settlement under UNCLOS because UNCLOS specifically defines "states" to include . self-governing associated states and territories that enjoy internal self-government that have competence over UNCLOS matters. UNCLOS, *supra* note 2, arts. 1(2)(2), 305.
[431] *See supra* note 230.
[432] *See supra* note 231.
[433] Other RFMOs, including the CCSBT, IATTC, ICCAT, and NAFO have alternative procedures for resolving disputes that do not include binding dispute settlement. To the extent that any disputes arise under those treaties, the dispute settlement provisions of UNCLOS may not apply. *See* Southern Bluefin Tuna (New Zealand-Japan, Australia-Japan), Award on Jurisdiction and Admissibility, XXIII R, Int'l Arb. Awards 1, ¶¶ 59, 72(1) (Aug. 4, 2000) (concluding that the dispute settlement provisions of the CCSBT preclude resort to UNCLOS dispute settlement procedures). Bernard H. Oxman, *Complementary Agreements and Compulsory Jurisdiction*, 95 Am. J. Int'l. L. 277 (2001) (critiquing the *Southern Bluefin Tuna* award).
[434] UNCLOS, *supra* note 2, art. 279.
[435] *Id.* art. 280.
[436] *Id.* art. 282 (providing that parties may agree to submit a dispute to any other applicable arrangement such as general, regional or bilateral international agreement.).
[437] *Id.* art. 281.
[438] *Id.* art. 283.
[439] *Id.* art. 284.

disputing parties may initiate a dispute under UNCLOS's compulsory procedures for binding decisions.

The provisions for compulsory dispute settlement by binding decision are among the many unique features of UNCLOS. Although a party may choose one court or tribunal over another, it is not free to opt out of compulsory dispute settlement entirely.[440] A party may escape the binding dispute settlement provisions of UNCLOS only if the dispute falls under one of the exceptions or limitations provided by UNCLOS. For example, UNCLOS allows a state to make a declaration at the time of ratification limiting the jurisdiction of the courts and tribunals, but it allows such declarations only for a narrow set of disputes, none of which relate to the duty to cooperate or the failure to exercise effectively jurisdiction over vessels.[441] UNCLOS also provides exceptions that a party may invoke in specific disputes, but, again, none of these relate to issues relating to a non-complying flag state.[442]

B. Redress

When a state commits an internationally wrongful act against another state, international responsibility is established "immediately as between the two States."[443] A state's internationally wrongful act gives rise to the obligation "to make reparation in an adequate form" to the injured state or states.[444] Reparation "must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not

[440] *Id.* art. 287.
[441] UNCLOS does allow States to make declarations to opt out of disputes concerning 1) maritime boundaries with neighboring States or those involving historic bays or titles, 2) military activities and certain kinds of law enforcement activities in the exclusive economic zone, and 3) matters over which the U.N. Security Council is exercising the functions assigned to it by the Charter of the United Nations. *Id.* art. 298.
[442] *Id.* art. 297.
[443] Phosphates in Morocco, Judgment, 1938 P.C.I.J. (ser. A/B) No. 74, 10, at 28 (June 14). *See*, *also* Factory at Chorzów, Jurisdiction, Judgment No. 8, 1927 P.C.I.J. (ser. A) No. 9, at 21 (Jul. 26); Military and Paramilitary Activities in and Against Nicaragua (Nic. v. USA). Merits, Judgment. 1986 I.C.J. 14 ¶¶ 283, 292 (June 27); Gabčíkovo–Nagymoros Project, *supra* note 37, at ¶ 47; Corfu Channel, *supra* note 285, at 22–23.
[444] Factory at Chorzów, Jurisdiction 413, *supra* note 443, at 21.

been committed."[445] The identification of an immediate legal obligation to the injured state and the requirement to wipe out the consequences of the wrongful conduct imposes two distinct obligations on a responsible state. First, it must cease its wrongful conduct if the conduct is ongoing and provide assurances and guarantees of non-repetition of the unlawful conduct.[446] Second, it must make reparation through restitution; that is, it must physically restore the situation to what it would have been before the unlawful conduct, provide compensation to the extent that restitution is not feasible, or provide satisfaction, such as an acknowledgement of unlawful conduct.[447]

1. Cessation and Assurances and Guarantees of Non-repetition

In addition to any reparations for injury, the state engaged in internationally wrongful conduct must cease such conduct.[448] As the International Law Commission has noted, "cessation is the first requirement in eliminating the consequences of wrongful conduct."[449] While scholars have debated whether cessation represents a remedy different from restitution and satisfaction,[450] the Court has clearly identified cessation as a form of reparation[451] and has expressly ordered cessation, calling on states to immediately "cease and refrain" from ongoing wrongful conduct.[452]

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[445] Factory at Chorzów, Merits, Judgment 1928 P.C.I.J. (ser. A) No. 13, at 47 (Sept. 13).
[446] ARSIWA, *supra* note 37, at art. 30.
[447] ARSIWA, *supra* note 37, at arts. 31, 34.
[448] ARSIWA, *supra* note 37, at art. 30(a). *See also* Juan José Quintana, Litigation at the International Court of Justice: Practice and Procedure 1150 (2015) ("cessation is "an obligation to stop the breach.").
[449] ARSIWA, *supra* note 37, at Commentary, page 89.
[450] *See* Victor Stoica, Remedies before the International Court of Justice: A Systemic Analysis 61–69 (2021) (highlighting different scholarly views on the distinctions between cessation on the one hand and restitution, satisfaction, and specific performance on the other). Others argue that cessation is simply an expression of *pacta sunt servanda*; that is, that states implement their international obligations in good faith. *See* Olivier Corten, *The Obligation of Cessation*, *in* The Law of International Responsibility 545, 546 (James Crawford et al., eds 2010).
[451] Dispute regarding Navigational and Related Rights (C.R. v. Nic.), Judgment, 2009 I.C.J. 213, ¶ 149 (July 13) ("the cessation of a violation of a continuing character and the consequent restoration of the legal situation constitute a form of reparation for the injured State."). *See also* Certain Activities, *supra* note 333, at ¶ 138 (declining to order cessation because Nicaragua either did not breach an obligation owed to Costa Rica or because there was no ongoing violation).
[452] *See*, *e.g.*, Military and Paramilitary Activities, *supra* note 443, at ¶ 292(12) (June 27) (in light of certain breaches of international law, "the United States of America is under a duty immediately to cease and to refrain from all such acts as may constitute breaches of the foregoing legal obligations.").

To ensure that any cessation is permanent, a wrongdoing state must also "offer appropriate assurances and guarantees of non-repetition if circumstances so require."[453] Assurances of non-repetition often are verbal commitments not to repeat wrongful conduct, whereas guarantees of non-repetition include specific acts to prevent reoccurrence of the wrongful conduct.[454] Together, they are intended to rebuild trust between the disputing states.[455] The ICJ has made clear that it will order appropriate assurance and guarantees only in special circumstances because the Court must presume a state will perform its obligations in good faith.[456]

The concept of "assurances and guarantees of non-repetition" has been used to prevent wrongful extradition that results in violations of human rights. In *Israil v. Kazakhstan*, the Human Rights Committee concluded that Kazakhstan unlawfully detained a Chinese national of Uighur ethnicity and unlawfully extradited him to China where he faced a real risk of torture.[457] It thus requested Kazakhstan "to put in place effective measures for the monitoring of the situation of the author of the communication, in cooperation with [China]."[458] In two other decisions—*Kalinichenko v. Morocco*[459] and in *Ng v. Canada*[460]—the Committee against Torture and the Human Rights Committee, respectively, requested those states violating human rights

[453] ARSIWA, *supra* note 37, at art. 30(b).
[454] STOICA, *supra* note 449, at 69.
[455] STOICA, *supra* note 449, at 70.
[456] Navigational and Related Rights, *supra* note 421, at ¶ 150 ("As a general rule, there is no reason to suppose that a State whose act or conduct has been declared wrongful by the Court will repeat that act or conduct in the future, since its good faith must be presumed."). *See also* Certain Activities, Merits, *supra* note 333, at ¶ 139 (confirming the statement made in *Navigational and Related Rights*).
[457] Human Rights Committee, Israil v. Kazakhstan, Communication No. 2024/2011, UN Doc. CCPR/C/103/D/2024/2011, ¶¶ 9.1–9.6 (Dec. 1, 2011).
[458] *Id.* at ¶ 11.
[459] Committee against Torture, Kalinichenko v. Morocco (Decision), Communication No. 428/2010, UN Doc. CAT/C/47/D/428/2010, ¶ 17 (2011),
[460] Human Rights Committee, Ng v. Canada, Communication No. 469/1991, UN Doc. CCPR/C/49/D/469/1991, ¶ 18 (1994), http://www.worldcourts.com/hrc/eng/decisions/1993.11.05NgvCanada.htm.

norms to make representations or establish an "effective follow-up mechanism" to ensure subsequent violations do not occur.[461]

The *LeGrand* case remains the primary ICJ case addressing assurances and guarantees of non-repetition. In that case, the United States argued that a request for cessation "goes beyond any remedy that the ICJ can or should grant, and should be rejected. The ICJ's power to decide cases . . . does not extend to the power to order a State to provide any 'guarantee' intended to confer additional legal rights on the Applicant State."[462] The ICJ, however, rejected that argument.[463] In this case concerning the U.S. failure under Article 36 of the Vienna Convention on Consular Relations to notify German defendants of their right to contact a German consulate office,[464] Germany requested assurances and guarantees of non-repetition from the United States because "of a real risk of repetition and the seriousness of the injury suffered by Germany."[465]

The ICJ also rejected the U.S. apology as sufficient because future foreign nationals in custody may not be advised without delay of their rights to consular notification.[466] It did, however, conclude that the "substantial activities" of the United States to educate law enforcement officials throughout the United States fulfilled Germany's request for "general assurance" of non-repetition.[467] But Germany wanted more. While it did not request that the United States never violate the notification requirements of Article 36, it did ask for a guarantee

[461] For additional discussion of cessation and "assurances and guarantees," see André Nollkaemper et al., *Guiding Principles on Shared Responsibility in International* Law, 31 EUR,. J. INT'L. L. 15, 51–53 (2020).
[462] LaGrand (Germany v. United States of America), Judgment, 2001 I.C.J. 466, at ¶ 46 (June 27).
[463] LaGrand, *supra* note 461, at ¶ 48.
[464] Article 36 requires authorities to inform foreign nationals in custody without delay of their right to consular notification. Vienna Convention on Consular Relations, Apr. 24, 1963, 596 U.N.T.S. 262, art. 36(1)(b) (entered into force Mar. 19, 1967).
[465] LaGrand, *supra* note 461, at ¶ 118.
[466] *Id.* at ¶ 123.
[467] *Id.* at ¶ 124.

that the United "provide effective review of and remedies for criminal convictions impaired by a violation of the rights under Article 36."[468] The ICJ agreed:

> [I]f the United States, notwithstanding its commitment referred to in paragraph 124 above, should fail in its obligation of consular notification to the detriment of German nationals, an apology would not suffice in cases where the individuals concerned have been subjected to prolonged detention or convicted and sentenced to severe penalties. In the case of such a conviction and sentence, it would be incumbent upon the United States to allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in the Convention.[469]

The manifest need for proper assurances and guarantees of non-repetition are highlighted by the actions of Japan after the ICJ decision against it in *Whaling in the Antarctic*.[470] In that 2014 decision, the ICJ ruled that Japan's whaling in the Southern Ocean was not authorized as for "purposes of scientific research" under the International Convention for the Regulation of Whaling.[471] The ICJ concluded that Japan's whaling violated the moratorium on commercial whaling, and it ordered Japan to revoke any extant whaling permits and refrain from issuing any new permits until it complied with the ICJ's decision.[472] Japan claimed to take the ICJ's decision into account when it revised its whaling program for both the Southern Ocean and the North Pacific,[473] but the Scientific Committee of the International Whaling Commission (IWC), two

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[468] *Id.* at ¶ 120.
[469] *Id.* at ¶ 125.
[470] *See* *supra* note 339.
[471] Whaling in the Antarctic, *supra* note 339, at ¶ 247. Article XIII of the International Convention for the Regulation of Whaling (ICRW) allows an ICRW party to issue special permits for purposes of scientific research. International Convention for the Regulation of Whaling, art. XIII, Dec. 2, 1946, 62 Stat. 1716, 161 U.N.T.S. 72 (entered into force Nov. 10, 1948) [hereinafter ICRW].
[472] Whaling in the Antarctic, *supra* note 339, at ¶ 247(3). The International Whaling Commission adopted the moratorium on commercial whaling in 1982, having effect for the 1985/1986 pelagic whaling season, and included it in paragraph 10(e) of the Schedule. The Schedule is an integral part of the ICRW. *ICRW, supra* note , art. I(1). The IWC last amended the Schedule at the 67th Annual Meeting of the International Whaling Commission in September 2018. *See id.* (*amended by* the Commission at the 67th Meeting (Sept. 2018).
[473] *See*, *e.g.*, Martin Fackler, *Japan Plans to Resume Whaling Program, With Changes to Address Court Concerns*, N.Y. TIMES (Apr. 18, 2014) (summarizing Japan's Minister of Agriculture Yoshimasa Hayashi as saying "Japan was being careful to honor the court's ruling and international law.").

IWC expert panels, and the IWC itself determined that Japan provided insufficient information in its whaling plans to assess Japan's new programs.[474]

To resolve flag state failures to exercise effective jurisdiction and control, the need for assurances and guarantees is plain. If a flag state in violation of its duty to ~~exercise effectively~~effectively exercise its jurisdiction and control does not agree either to start exercising such jurisdiction and control or to close its open registry, the problem will not be solved. Vessels flagged to this state will continue IUU fishing, stocks will continue to decline, and efforts by RFMOs and those flag states in compliance with their legal obligations will be seriously undermined. States harmed by this non-complying flag state will either become discouraged by the lack of an effective resolution to this flag state or subsequent flag states will be required to bring further litigation against this non-complying flag state.

What, then, might constitute adequate assurances and guarantees so that the non-complying state "does not automatically reproduce violation after violation" interrupted by apologies for additional non-compliance?[475] In *LeGrand*, the United States distributed 60,000 copies of a brochure as well as over 400,000 copies of the pocket card to federal, state and local law enforcement and judicial officials throughout the United States describing the responsibilities of the Vienna Convention on Consular Relations.[476] In the fisheries context, a flag state could produce and provide to its vessels documents describing the importance of complying with conservation and management measures and the consequences of failing to comply. While helpful, much more is needed when it is the flag state itself that is failing to

[474] Report of the Standing Working Group on Special Permit Programmes, Int'l Whaling Commission, IWC/67/16/Rev 3 (2018) (noting that the "the Expert Panel's capacity to conduct a full review was limited by the fact that the proponent did not submit a final, fully justified proposal."); Chair's Report of the 67th Meeting, Int'l Whaling Commission, § 14 (2018).

[475] LaGrand, *supra* note 433, at ¶ 83 ("Germany states that it seeks '[nlothing . . . more than compliance, or, at least, a system in place which does not automatically reproduce violation after violation of the Vienna Convention, only interrupted by the apologies of the United States Government.'").

[476] LaGrand, *supra* note 433, at ¶ 121.

investigate and prosecute, or adopt adequate legislation or ensure vessels com with requirements to use VMS.[477] The flag state must provide relevant assurances and guarantees that it will perform all of its obligations to exercise its jurisdiction and control effectively.

To do so, the noncomplying flag state could refuse to flag vessels entirely or it could replace its open registry with one requiring an actual genuine link between the vessel and the state. The first option, of course, absolutely guarantees the non-repetition of wrongful conduct—at least once the process of deregistering currently flagged vessels is completed. The second option, while not necessarily a guarantee of non-repetition, would reduce the possibility of future failures to exercise jurisdiction and control over vessels by sharply reducing the number of vessels the state flags. A third option, of course, is for the flag to actually exercise its jurisdiction and control over the vessels it flags. This seems like the least likely outcome, however, since these states have started their registries for the financial benefit.

2. Reparations

In addition to ceasing any ongoing wrongful conduct, a flag state in violation of its international obligations must make reparation in a manner that, as far as possible, wipes out all the consequences of the illegal act and restores the situation to its pre-violation condition.[478] Restitution—materially restoring the situation to its pre-violation condition—is the preferred form of reparation. Where, for example, a state has illegally occupied the territory of another, then it should return illegally taken or occupied territory rather than compensate the injured state.[479]

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[477] *See supra* Section XXX.

[478] Factory at Chorzów, Merits, *supra* note 444, at 47; Factory at Chorzów, Jurisdiction, *supra* note 443, at 21; ARSIWA, *supra* note 37, at 91.

[479] *See*, *e.g.*, Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), Merits, 1962 I.C.J. 6, 37 (Jun 15) ("Thailand is under an obligation to withdraw any military or police forces, or other guards or keepers, stationed by her at the Temple, or in its vicinity on Cambodian territory [and] to restore to Cambodia any objects of the kind specified in Cambodia's fifth Submission which may, since the date of the occupation of the Temple by Thailand in 1954, have been removed from the Temple or the Temple area by the Thai authorities."); Legal Consequences of the

However, if material restoration is not possible, then a tribunal should award compensation "corresponding to the value which a restitution in kind would bear."[480] As stated by the PCIJ, the obligation is "to restore the [expropriated factory] and, if this be not possible, to pay its value at the time of the indemnification, which value is designed to take the place of restitution which has become impossible."[481] In the environmental context, compensation would be the appropriate remedy for environmental harm and human health impacts caused by a violation of the duty not to cause transboundary environmental harm, as in the *Trail Smelter* arbitration.[482] Similarly, compensation would be the appropriate remedy for breaches of the duties to cooperate and exercise effective jurisdiction over vessels because returning the fisheries to its pre-violation condition is not possible and, in any event, the state bringing the action would presumably also want to recoup the costs of enforcing fisheries conservation and management measures against the flag of non-compliance.

a. Injuries for which Compensation is Recoverable

Even if restitution is the preferred remedy, states may choose the form of reparation.[483] For violations of flag state duties, which impose costs on non-flag states of patrolling their waters and the high seas, detaining non-complying vessels, and prosecution, injured states will most likely request compensation to recoup these costs. In any event,

Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 153 (July 9) ("Israel is accordingly under an obligation to return the land, orchards, olive groves and other immovable property seized from any natural or legal person for purposes of construction of the wall in the Occupied Palestinian Territory.").

[480] Factory at Chorzów, Merits, *supra* note 444, at 47. *See also* Gabčíkovo–Nagymoros Project, *supra* note 37, at ¶ 152 ("It is a well-established rule of international law that an injured State is entitled to obtain compensation from the State which has committed an internationally wrongful act for the damage caused by it.").

[481] Factory at Chorzów, Merits, *supra* note 444, at 48.

[482] Trail Smelter, (U.S. v. Canada), 3 R. Int'l Arb. Awards 1905 (1938, 1945). *See also* Stockholm Declaration, *supra* note 284, at Principle 21; Rio Declaration on Environment and Development, *supra* note 284, at Principle 2.

[483] ARSIWA, *supra* note 37, at art. 43; Stoica, *supra* note 449, at 86 ("states have the right to elect the remedies which they consider suitable for the dispute without any restrictions regarding the primacy, or lack thereof, of certain remedies in international law.").

restitution is "exceptional," states rarely seek it, and the Court rarely grants it.[484] Thus, compensation may be the more frequent remedy, although it, too, is infrequently granted.[485]

According to a comprehensive review of international remedies, tribunals have sought to award "full compensation" to the injured State or individual,[486] provided that the damage is "financially assessable"[487] and substantiated.[488] Similarly, the Court has ruled that "the absence of adequate evidence as to the extent of material damage will not, in all situations, preclude an award of compensation for that damage."[489] In *Trail Smelter*, the Tribunal, in trying to determine how much evidence the United States needed to prove harm from sulphur dioxide emissions from the smelter at Trail, stated:

> Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts. In such case, while the damages may not be determined by mere speculation or guess, it will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result be only approximate.[490]

Although the *Trail Smelter* Tribunal reduced the evidentiary burden on injured states, questions remain as to how to assess the loss suffered. When the loss is the entire or partial loss

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[484] STOICA, *supra* note 449, at 82, 85.
[485] STOICA, *supra* note 449, at 108–09.
[486] JUSTINE C. GRAY, JUDICIAL REMEDIES IN INTERNATIONAL LAW 18 (1987); ARSIWA, *supra* note , at art. 31(1) ("The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act."). The term "full compensation" has no fixed meaning and, thus, must be determined by context. Gray, *supra* note , at 19.
[487] ARSIWA, *supra* note 37, at art. 36(2).
[488] *Compare* Corfu Channel, Judgment [Dec. 1949], *supra* note , at 248–50 (granting compensation for substantiated valuations of the loss of a ship, the damage to another ship, and the cost of pensions to families of sailors killed); with Diallo, *supra* note , at ¶¶ 36, 46, 49, 50, 54 (rejecting most of Guinea's claims for compensation for allegedly stolen property, bank account assets, lost income, and potential earnings as unsubstantiated).
[489] Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Compensation, 2018 I.C.J. 15, ¶ 35 (Feb. 2).
[490] Trail Smelter (United States v. Canada), 16 April 1938 and 11 March 1941, III R. Int'l Arb. Awards 1905, 1920 (quoting *Story Parchment Company v. Paterson Parchment Paper Company*, **282 U.S. 555, 563** (1931).

of a ship, as in *Corfu Channel*, monetizing the loss is straightforward: the replacement cost or the costs of repairs.[491] Other injuries, however, including environmental harm and "non-material" or "moral" injury—distress, suffering, humiliation, loss of income, loss of reputation, tampering with the victim's core values, and changes of a non-pecuniary nature in the person's everyday life, among others[492]—are compensable but more difficult to quantify.[493] For these injuries, tribunals and courts should be guided by equitable considerations to award "what is just, fair and reasonable in the circumstances of the case."[494] While some argue that compensation for non-material damage is a form of satisfaction rather than compensation,[495] such damages, however categorized, are compensable.[496]

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[491] Corfu Channel (Great Britain v. Albania), 1949 I.C.J. 244, 249 & Annex 2 at 258–60 (Dec. 15). *See also* STOICA, *supra* note 449, at 117–18 (describing assessment of destroyed or damaged airplanes, as well as physical injuries to individuals, as "easily identifiable").

[492] Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Compensation, Judgment, 2012 I.C.J. 324, ¶¶ 21–23, 40 (June 19); Opinion in the Lusitania Cases (United States v. Germany), VII RIAA 40 (1923); Gutiérrez-Soler v. Colombia, Inter-Am. C.H.R. Rep. No. 132, Series C, ¶ 82 (Sept. 12, 2005).

[493] Opinion in the Lusitania Cases (United States v. Germany), VII R. Int'l Arb. Awards 32, 40 (1923) (non-material injuries "are very real, and the mere fact that they are difficult to measure or estimate by money standards makes them none the less real and affords no reason why the injured person should not be compensated therefore as compensatory damages."); Certain Activities Carried Out by Nicaragua in the Border Area, Compensation, *supra* note , at ¶ 44 ("Costa Rica accept that there is no single method for the valuation of environmental damage and acknowledges that a variety of techniques have been used in practice at both the international and national level. It concludes that the appropriate method of valuation will depend, inter alia, on the nature, complexity, and homogeneity of the environmental damage sustained.").

[494] Diallo, *supra* note 491, at ¶ 24 (quoting with approval, Al-Jedda v. United Kingdom, Judgment, Eur. Ct. H.R. Application No. 27021/08, page 305, at ¶ 114 (July 7, 2011).

[495] In its commentary, the ILC proclaims:

> The qualification "financially assessable" is intended to exclude compensation for what is sometimes referred to as "moral damage" to a State, i.e. the affront or injury caused by a violation of rights not associated with actual damage to property or persons: this is the subject matter of satisfaction, dealt with in article 37 [on satisfaction].

ARSIWA, *supra* note 37, at 99. Stoica distinguishes non-material damage to states (satisfaction) from non-material damage to individuals (compensation). STOICA, *supra* note 449, at 130.

[496] *See*, *e.g.*, Diallo, *supra* note 491, at ¶ 25 (stating that "US$85,000 would provide appropriate compensation" for the non-material injury suffered by Mr. Diallo arising from his unlawful detention); Gutiérrez-Soler v. Colombia, *supra* note , at ¶ 85 (granting compensation for non-pecuniary damage). In *Opinion in the Lusitania Cases*, the Tribunal remarked:

> It is difficult to lay down any rule for measuring injury to the feelings, or humiliation or shame, or mental suffering, and yet it frequently happens that such injuries *are very real and call for compensation as actual damages* as much as physical pain and suffering and many other elements