

# COUNTERMEASURES AND COST RECOVERY AGAINST FLAG STATES TO PREVENT, DETER, AND ELIMINATE IUU FISHING

BY  
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*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 vessels. 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 flag states responsible for their failure to exercise effectively their jurisdiction 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 for 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*

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either approach, states would create a 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. States could also pay non-complying flag states to close their vessel registries. Vessels that have sheltered under flags of non-compliance eventually would find a flag state that does exercise its jurisdiction effectively over the vessel to avoid being stateless. Only then will our fisheries resources be adequately protected.

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## I. INTRODUCTION

For at least three decades, the international community has been developing rules to prevent, deter, and eliminate illegal, unreported, and unregulated (IUU) fishing.<sup>1</sup> The UN Convention on the Law of the Sea (UNCLOS)<sup>2</sup> and the Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (FAO Compliance Agreement)<sup>3</sup> impose obligations on states designed to strengthen states' control over the vessels they flag through cooperation and other means.<sup>4</sup> The Food and Agriculture Organization of the UN (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),<sup>5</sup> which makes clear that addressing labor standards and human rights are fisheries concerns.<sup>6</sup> The UN Fish Stocks Agreement<sup>7</sup> authorizes parties to board and inspect vessels flagged by other states on the high seas.<sup>8</sup> Various regional fisheries management organizations (RFMOs), implementing the Fish Stocks Agreement, also allow high

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<sup>1</sup> See *Illegal, Unreported and Unregulated Fishing*, FOOD & AGRIC. ORG. OF THE U.N. [FAO], <https://perma.cc/PUQ6-N6BC> (last visited Mar. 20, 2023) (“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.”).

<sup>2</sup> U.N. 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].

<sup>3</sup> Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, Nov. 24, 1993, 2221 U.N.T.S. 91 [hereinafter FAO Compliance Agreement].

<sup>4</sup> *Id.* pmb., ¶¶ 2, 7, 10; see also FAO, *Illegal, Unreported and Unregulated (IUU) Fishing, FAO Compliance Agreement*, <https://perma.cc/BU3K-2X3A> (last visited Mar. 20, 2023) (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”).

<sup>5</sup> See FAO, *Code of Conduct for Responsible Fisheries* at Introduction, art. 1.1, <https://perma.cc/KA6L-FD6V> (last visited Mar. 20, 2023) [hereinafter FAO, *Code of Conduct*].

<sup>6</sup> *Id.* art. 6.17–6.18.

<sup>7</sup> 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, §§ 7–8, Aug. 4, 1995, 2167 U.N.T.S. 3 [hereinafter UNFSA].

<sup>8</sup> *Id.* art. 21, ¶¶ 7, 8.

seas boarding and inspection.<sup>9</sup> They also require vessels to use vessel monitoring systems (VMS);<sup>10</sup> employ onboard observers to monitor compliance with RFMO conservation and management measures;<sup>11</sup> verify catches through catch documentation schemes;<sup>12</sup> install electronic monitoring cameras and computer equipment;<sup>13</sup> and report transshipments.<sup>14</sup> A new international agreement—the Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing<sup>15</sup>—is specifically designed to combat IUU fishing.<sup>16</sup>

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% of the global catch—somewhere between \$10 billion USD and \$23.5 billion USD<sup>17</sup>—with

<sup>9</sup> CLAIRE VAN DER GEEST, INT'L SEAFOOD SUSTAINABILITY FOUND., TRANSSHIPMENT: STRENGTHENING TUNA RFMO TRANSSHIPMENT REGULATIONS (VERSION 2) 29, 59 (2019). See also Office of International Affairs, Trade, and Commerce, *International and Regional Fisheries Management Organizations*, NAT. OCEANIC & ATMOSPHERIC ADMIN. (Feb. 13, 2023), <https://perma.cc/AW25-VL9H> (listing RMFOs to which the United States is an “observer” or “member,” including the Western and Central Atlantic Fisheries Commission).

<sup>10</sup> See, e.g., Establishment of a Vehicle Monitoring System ¶ 1, July 18, 2014, Inter-Am. Tropical Tuna Comm'n Res. C-14-02, at 1, <https://perma.cc/6LBV-8Q7K>; Conservation and Management Measure 2014-02: Commission Vessel Monitoring System ¶ 4, Dec. 5, 2014, W. and Cent. Pac. Fisheries Comm'n, <https://perma.cc/LHW7-JQBZ>. For more on the Western and Central Pacific Fisheries Commission (WCPFC)'s VMS, see *Vessel Monitoring System*, W. AND CENT. PAC. FISHERIES COMM'N (Mar. 27, 2023), <https://perma.cc/Z3CS-7FGC>. See also Office of International Affairs, Trade, and Commerce, *International and Regional Fisheries Management Organizations*, NAT. OCEANIC & ATMOSPHERIC ADMIN. (Feb. 13, 2023), <https://perma.cc/CBN8-WRTD>.

<sup>11</sup> See, e.g., Conservation and Management Measure 2007-01: Conservation and Management Measure for the Regional Observer Programme ¶ 6, Dec. 7, 2007, W. and Cent. Pac. Fisheries Comm'n.

<sup>12</sup> See, e.g., Conservation and Management Measure 10-05: Catch Document Scheme for *Dissostichus* spp ¶¶ 2–3, 6, 2022, Comm'n Conservation of Antarctic Marine Living Res., <https://perma.cc/5WYC-BA9U> (documenting a “Catch Documentation Scheme” regarding a vessel that the Commission is concerned is participating in IUU fishing).

<sup>13</sup> See, e.g., Fisheries New Zealand Circular, “Fisheries (Electronic Monitoring on Vessels)” (Sept. 7, 2022), at 4 <https://perma.cc/8PYS-SCLF>.

<sup>14</sup> See, e.g., Conservation and Management Measure 2009-06, Conservation and Management Measure on the Regulation of Transshipment ¶ 35, Dec. 7–11, 2009; Indian Ocean Tuna Comm'n [IOTC] Res. 22/02, ¶¶ 15, 16 (2022). For a comprehensive assessment of the transshipment rules for tuna RFMOs, see Chris Wold, *The Impracticability Exemption to the WCPFC's Prohibition on Transshipment on the High Seas*, 49 ENV'T L. 131, 151, 153 (2019); VAN DER GEEST, *supra* note 9, at 59.

<sup>15</sup> FAO, *Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing* (Nov. 22, 2009) (entered into force June 5, 2016).

<sup>16</sup> *Id.* art. 2 (“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.”).

<sup>17</sup> See David J. Agnew et al., *Estimating the Worldwide Extent of Illegal Fishing*, PLOS ONE (Feb. 25, 2009), at 2, <https://perma.cc/5A9W-GZP7> (showing an estimated 18 to

some considering the \$23.5 billion USD figure to be a conservative estimate.<sup>18</sup> In fact, a recent paper suggests the number may be much higher.<sup>19</sup> The paper reports that between 8 and 14 million metric tons of just *unreported* fish catch worth an estimated \$9 billion USD to \$17 billion USD is traded illegally every year, resulting in annual economic losses of \$26 billion USD to \$50 billion USD.<sup>20</sup> Moreover, IUU fishers prey on developing states that are dependent on fisheries resources; IUU fishing in the tuna fisheries alone costs some small Pacific Island nations approximately \$600 million USD each year.<sup>21</sup> 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 \$4.3 billion USD to \$8.3 billion USD per year.<sup>22</sup> The problem is not isolated to the Pacific region; European Union-flagged vessels engage in widespread IUU fishing in the waters of West African countries.<sup>23</sup>

Some coastal states, including Australia,<sup>24</sup> Indonesia,<sup>25</sup> and Palau,<sup>26</sup> have responded by blowing up, burning, and sinking vessels caught fishing illegally in their territorial seas<sup>27</sup> and exclusive economic zones (EEZs),<sup>28</sup> areas where they have sovereignty or sovereign rights and the authority to board, inspect, arrest, and initiate judicial proceedings

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21% of the global catch has come from IUU fishing); *Id.* at 4 (estimating illegal and unreported catch losses as being “between \$10 bn and \$23 bn annually”).

<sup>18</sup> See, e.g., N. ATL. FISHERIES INTEL. GRP. & INTERPOL, CHASING RED HERRINGS: FLAGS OF CONVENIENCE AND THE IMPACT ON FISHERIES CRIME LAW ENFORCEMENT 13 (2017) [hereinafter CHASING RED HERRINGS], <https://perma.cc/MH6N-XV9U>.

<sup>19</sup> U. Rashid Sumaila, et al., *Illicit Trade in Marine Fish Catch and Its Effects on Ecosystems and People Worldwide*, 6 SCI. ADVANCES (Feb. 26, 2020), at 2.

<sup>20</sup> *Id.*

<sup>21</sup> See MRAG ASIA PAC., TOWARDS THE QUANTIFICATION OF ILLEGAL, UNREPORTED AND UNREGULATED (IUU) FISHING IN THE PACIFIC ISLANDS REGION 36 (2016), <https://perma.cc/B78L-69TU> (estimating the total volume of IUU caught tuna in the Pacific region at 306,440t with an ex-vessel value of \$616.11 million).

<sup>22</sup> See Manaswita Konar et al., *The Scale of Illicit Trade in Pacific Ocean Marine Resources* 1 (World Res. Institute, Working Paper, 2019), <https://perma.cc/5FUB-NRZR>.

<sup>23</sup> See Ifesinachi Okafor-Yarwood & Dyhia Belhabib, *The Duplicity of the European Common Fisheries Policy in Third Countries: Evidence from the Gulf of Guinea*, 184 OCEAN & COASTAL MGMT. 2020, at 1 (explaining that West African countries such as Guinea Bissau and Liberia have been affected by IUU fishing and that vessels from foreign entities, such as the European Union, contribute to such harms).

<sup>24</sup> See, e.g., Paul Benecki, *Photos: Australian Border Force Burns Illegal Fishing Vessels*, MAR. EXEC. (Nov. 8, 2021), <https://perma.cc/L799-B6QJ> (Australian Border Force destroyed fifteen vessels).

<sup>25</sup> See, e.g., Basten Gokkon, *Indonesia's Crackdown on Illegal Fishing Is Paying Off, Study Finds*, MONGABAY (Apr. 23, 2018), <https://perma.cc/4R4P-HQ3A>.

<sup>26</sup> See, e.g., *Tiny Island Nation of Palau Very Publicly Burns Vietnamese Boats Caught Fishing Illegally*, NAT'L POST (June 16, 2015), <https://perma.cc/AG4P-22EQ>.

<sup>27</sup> Territorial seas extend up to 12 nautical miles from a state's coast. UNCLOS, *supra* note 2, art. 3.

<sup>28</sup> Exclusive economic zones extend up to 200 nautical miles from a state's coast. *Id.* art. 57.

against vessels that violate the coastal state's fishing laws.<sup>29</sup> 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 were \$35.4 billion USD in 2018—with more than \$22.2 billion USD (63%) classified as capacity-enhancing subsidies.<sup>30</sup> Subsidies are closely linked to overcapitalization,<sup>31</sup> meaning that too many boats continue to catch too few fish.<sup>32</sup> 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.<sup>33</sup>

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<sup>34</sup> and UNCLOS.<sup>35</sup>

<sup>29</sup> *Id.* arts. 2, 56, 73.

<sup>30</sup> U. Rashid Sumaila, et al., *Updated Estimates and Analysis of Global Fisheries Subsidies*, 109 MARINE POL'Y, Nov. 2019, No. 103695 at 2. China, the European Union, the United States, the Republic of Korea, and Japan account for \$20.5 billion (58%) of all fisheries subsidies. *Id.* at 1, 7.

<sup>31</sup> According to one study, as much as 54% 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.” Eric Sala et al., *The Economics of Fishing the High Seas*, 4 SCI. ADVANCES, June 6, 2018, No. 2405 at 2–3. The World Bank has reported that the global fleet must be reduced by 44% relative to the 2012 level to reach the sustainable optimal state. WORLD BANK, *THE SUNKEN BILLIONS REVISITED* 49 (2017).

<sup>32</sup> The FAO reports that, in 2017, 34.2% of the wild fish stocks that it regularly monitors are overfished, a percentage that has increased from 10% in 1974. FAO, *State of World Fisheries and Aquaculture* 7, 129 (2020), <https://perma.cc/W5AW-GDTN>. 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. *Id.* at 54. Another 59.6% are fished at full capacity, leaving just 6.2% fished below full capacity. *Id.* at 7.

<sup>33</sup> CHASING RED HERRINGS, *supra* note 18, at 4, 16. 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:

[K]ey 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), <https://perma.cc/4XCD-DQR6> [hereinafter IPOA-IUU].

<sup>34</sup> See Douglas Guilfoyle, *The High Seas*, in OXFORD HANDBOOK OF THE L. OF THE SEA 203, 207 (Donald R. Rothwell et al., eds. 2015) (explaining how under Article 118 of UNCLOS States have a “broad duty to cooperate in the ‘conservation and management of [high seas] living resources’”); S.S. Lotus (Fr. v. Turk.), Judgment No. 9, 1927 P.C.I.J. (ser. A) No. 10, at 25 (Sept. 7) (“It is certainly true that—apart from certain special cases which

These states do not impose—and are not required to impose—a “genuine link” between the state and the vessel, such as the crew or vessel owner having the same nationality as the flag state as a condition of flagging.<sup>36</sup> Instead, they pursue modest financial benefits gained from “open registers.”<sup>37</sup> 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, they are called flags of convenience.<sup>38</sup> 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.”<sup>39</sup> Thus, despite widespread international acceptance of UNCLOS and subsequent efforts to motivate flag states to fulfill their responsibilities to prevent, deter, and eliminate IUU fishing, many flag states fail to discharge their legal duties and instead facilitate IUU fishing.<sup>40</sup>

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are defined by international law—vessels on the high seas are subject to no authority except that of the State whose flag they fly.”).

<sup>35</sup> UNCLOS, *supra* note 2, art. 94; see *Taiwan, Internationally Combat “IUU” Fishing and Maintain Sustainable Development of Fishery Resources*, COUNCIL OF AGRIC. (May 20, 2015), <https://perma.cc/9X5K-BP53> (“The root cause of IUU fishing is a lack of effective flag State control.”); Rosemary Rayfuse, *Possible Actions Against Vessels Flying the Flag States Not Meeting the Criteria for Flag State Performance*, in FAO, *Rep. of the Expert Consultation on Flag State Performance*, 29 ¶ 5 FIEL/R19 (June 23–26, 2009) [hereinafter, Rayfuse, *Possible Actions*] (“[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.”).

<sup>36</sup> *But see* UNCLOS, *supra* note 2, art. 91, ¶ 1 (requiring a “genuine link” between the state and the ship). For more on this issue, see *infra* Part II(A).

<sup>37</sup> Judith Swan (Consultant, International Institutions and Liaison Service), *Fishing Vessels Operating under Open Registers and the Exercise of Flag State Responsibilities: Information and Options*, § III.2, FIPL/C980 (2002).

<sup>38</sup> *Id.* at 3; International Labour Organization [ILO], *Caught at Sea: Forced Labour and Trafficking in Fisheries*, 24–25 (2013), <https://perma.cc/RLT2-D26W> [hereinafter ILO, *Caught at Sea*]; Int’l Org. for Migration, *Report on Human Trafficking [IOM], Forced Labour and Fisheries Crime in the Indonesian Fishing Industry* (2016), <https://perma.cc/3UTX-7Z52>; 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 POL’Y 298, 299 (2019) (noting that “flags of convenience” is commonly used in place of “open registers” in the IUU context).

<sup>39</sup> Gohar A. Petrossian, et al., *Flags for Sale: An Empirical Assessment of Flag of Convenience Desirability to Foreign Vessels*, 116 MARINE POL’Y (June 2020), No. 103937 at 1.

<sup>40</sup> Rayfuse, *Possible Actions*, *supra* note 35, 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.”).

Because IUU fishing is a “high reward, low risk activity”<sup>41</sup> with vessels and vessel owners able to easily evade detection, states should pay non-complying flag states to close their vessel registry, impose countermeasures, or seek restitution through the compulsory dispute settlement provisions of UNCLOS against non-complying flag states. A state injured by another state’s violation of international law may respond with countermeasures, actions otherwise unlawful in international law, that are proportionate to the breach it suffered.<sup>42</sup> Countermeasures, though, must induce compliance rather than punish the wrongdoer,<sup>43</sup> thus limiting the options available to the non-flag state to obtain compensation for the full range of enforcement actions taken to prevent, deter, and eliminate IUU fishing.

Due to these limitations, non-flag states might prefer litigation at the International Court of Justice (ICJ) or through 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, particularly for states not party to relevant fisheries treaties.<sup>44</sup> 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.<sup>45</sup>

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<sup>41</sup> HIGH SEAS TASK FORCE, CLOSING THE NET: STOPPING ILLEGAL FISHING ON THE HIGH SEAS 25 (2006), <https://perma.cc/ZEE3-F8FC> [hereinafter HIGH SEAS TASK FORCE, CLOSING THE NET]. 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 8 (2003), <https://perma.cc/HMA3-MBC6>.

<sup>42</sup> *Gabčíkovo–Nagymoros Project* (Hung./Slovk.), Judgment, 1997 I.C.J. 7, ¶ 85 (Sept. 25); see also International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, Supplement No. 10, chap II, ¶ 1–2, U.N. Doc. A/56/10 (Nov. 2001) [hereinafter ARSIWA] (noting that conduct of even private actors “who have acted under the direction, instigation or control of” the organs of a state’s government may be attributed to that state).

<sup>43</sup> See *Gabčíkovo–Nagymoros Project*, Judgment, 1997 I.C.J. ¶ 87 (finding Czechoslovakia’s countermeasure was unlawful because it was “not proportionate”); ARSIWA, *supra* note 42, art. 49, ¶ 1 (“An injured State may only take countermeasures against a State which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations[.]”).

<sup>44</sup> 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 35, at 29.

<sup>45</sup> 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, 1242 (2022), <https://perma.cc/AF8A-7N83>; see also Commission Deci-



Moreover, whether the costs of apprehending, arresting, and prosecuting violators of IUU fishing fall within the scope of recoverable costs is questionable because international courts and tribunals have typically rejected compensation of employees performing their normal functions.<sup>46</sup>

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 these remedies against non-complying flag states. Part II begins by exploring the right of states to flag vessels based on criteria they alone establish. Part III describes the inadequacies of domestic and international laws designed to combat IUU fishing effectively. Part IV reviews a state's legal obligations to prevent, deter, and eliminate IUU fishing, including the duty to exercise effectively its jurisdiction over the vessels it flags. Part V begins the discussion of possible remedies against states that do not fulfill their international obligations by exploring the use of countermeasures. Part VI then assesses the utility of litigating claims using the compulsory dispute settlement provisions of UNCLOS, particularly to recover the costs of enforcing fisheries law and prosecuting IUU fishing vessels. Part 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,<sup>47</sup> which confers its nationality on that vessel.<sup>48</sup> 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

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sion of Oct. 1, 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 O.J. (C 324), 17 (EU) [hereinafter EU, Commission Decision of 1 October 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 . . .”).

<sup>46</sup> See discussion *infra* Section VI.B.

<sup>47</sup> UNCLOS, *supra* note 2, art. 90. See also Declaration Recognizing the Right to a Flag of States Having No Sea Coast, League of Nations No. 174, April 20, 1921, 7 L.N.T.S. 73 (“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.”).

<sup>48</sup> UNCLOS, *supra* note 2, art. 91, ¶ 1.

is entitled to fly; and the law of the flag State is the law that governs the ship.”<sup>49</sup> The flag state has the right to seek reparation for any loss and damage caused to the vessel<sup>50</sup> and the corresponding duty to exercise effectively its jurisdiction and control over the vessel.<sup>51</sup>

Although states have a right to flag vessels, questions persist as to whether any conditions must be met prior to flagging a vessel. The 1958 High Seas Convention, and later UNCLOS, provided that a state shall fix conditions for flagging vessels but that a “genuine link” must exist between the state and the ship.<sup>52</sup> Neither the High Seas Convention nor UNCLOS defines “genuine link,” and efforts to regulate the issuance of flags have failed.<sup>53</sup> For example, states negotiated the 1986 UN Convention on Conditions for Registration of Ships<sup>54</sup> (Registration Convention) “[f]or the purpose of ensuring or, as the case may be, strengthening the genuine link between a State and ships flying its flag.”<sup>55</sup> Yet, just fourteen states signed the Registration Convention and only fifteen ratified it.<sup>56</sup> Because the Registration Convention requires ratification by forty states representing 25% of relevant gross registered tonnage to enter into force,<sup>57</sup> it has no chance of entering into force.<sup>58</sup> Developing states, in particular, reject the notion of limiting the concept of “genuine link” because they hope to capture a greater share of international shipping.<sup>59</sup> No major maritime state other than Liberia, whether developing or developed, has ratified the convention.<sup>60</sup>

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<sup>49</sup> *Juno Trader* (St. Vincent v. Guinea-Bissau), Case No. 25, Judgment of Nov. 4, 2016, 2004 ITLOS 17, 60–61 (separate opinion of Mensah & Wolfrum, JJ.).

<sup>50</sup> *M/V ‘Norstar’* (Pan. V It.), Case No. 25, Judgment of Nov. 4, 2016, 2016 ITLOS 44, 95.

<sup>51</sup> UNCLOS, *supra* note 2, art. 94, ¶ 1; Convention on the High Seas art. 5, Apr. 29, 1958, 450 U.N.T.S. 11 (entered into force Sept. 30, 1962).

<sup>52</sup> UNCLOS, *supra* note 2, art. 91, ¶ 1.

<sup>53</sup> For a discussion of attempts to define “genuine link” during the UNCLOS negotiations, see 3 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY 107–08 (Satya N. Nandan & Shabtai Rosenne eds., 1995) [hereinafter UNCLOS 1982 COMMENTARY].

<sup>54</sup> U.N. Treaty Collection, U.N. Convention on Conditions for Registration of Ships, TD/RS/CONF/23 (Feb. 7, 1986) <https://perma.cc/JJ5J-GZTP> [hereinafter U.N. Convention on Conditions for Registration of Ships].

<sup>55</sup> *Id.* art. 1.

<sup>56</sup> U.N. Treaty Collection, Status of Treaties: U.N. Convention on Conditions for Registration of Ships, <https://perma.cc/K2FW-GM3V> (last visited Mar. 3, 2023). As one scholar writes, “[t]he Registration Convention stands as a salutary lesson about States’ resistance to limits on the exercise of sovereign powers.” Richard A. Barnes, *Flag States*, in OXFORD HANDBOOK OF THE LAW OF THE SEA 304, 307 (Donald R. Rothwell et al., eds. 2015) [hereinafter Barnes, *Flag States*].

<sup>57</sup> U.N. Convention on Conditions for Registration of Ships, *supra* note 54, art. 19, ¶ 1.

<sup>58</sup> Writing in 2006, one group of fisheries experts stated that the convention “must now be regarded as a dead letter.” HIGH SEAS TASK FORCE, CLOSING THE NET, *supra* note 41, at 53.

<sup>59</sup> 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,

In the early 1990s, FAO members began negotiating what is referred to as the FAO Compliance Agreement.<sup>61</sup> A draft of the agreement prohibited a party from flagging a fishing 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.<sup>62</sup> That draft provision was not included in the adopted agreement.<sup>63</sup>

Nonetheless, many states interpret “genuine link” as requiring the crew or vessel owner to have the same nationality as the flag state.<sup>64</sup> These states have taken guidance from the ICJ’s conclusion in the *Nottebohm* case,<sup>65</sup> 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 that state.<sup>66</sup> With respect to vessels, however, this approach never crystalized into customary international law.<sup>67</sup>

To the contrary, the International Tribunal of the Law of the Sea (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,”<sup>68</sup> and that other states do not have the right to challenge

543 (1989). This Article also provides an excellent history of the negotiating sessions leading up to adoption of the convention. *Id.* at 556–65.

<sup>60</sup> See U. N. Convention on Conditions for Registration of Ships, *supra* note 54; see also HIGH SEAS TASK FORCE, CLOSING THE NET, *supra* note 41 at 53 (noting that twenty years after the U.N. Convention on Conditions for Registration of Ships, “only 14 countries (none of them major maritime powers and only one, Liberia, a major flag state)” have ratified the Convention).

<sup>61</sup> FAO Compliance Agreement, *supra* note 3. *Illegal, Unreported and Unregulated (IUU) Fishing*, FAO, <https://perma.cc/W4NN-NPEP> (last visited May 29, 2023).

<sup>62</sup> FAO, Rep. of the Twentieth Session of the Committee on Fisheries, 60, Mar. 15–19, 1993, FIPL/R488 (1993), <https://perma.cc/KM8F-8872>.

<sup>63</sup> Compare *id.* (listing “Allocation of Flag” as Article IV, which contains “genuine link” language, and “Flag State Responsibility” as Article V), with FAO Compliance Agreement, *supra* note 3 (listing “Flag State Responsibility” as Article III and not listing “Allocation of Flag” as an article).

<sup>64</sup> See, e.g., 46 C.F.R. §§ 67.30–67.47 (2021) (United States requiring U.S. citizenship to register a vessel). In Australia, vessels must be “Australian-owned.” *Shipping Registration Act 1981* s 12 (Austl.). 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 *What is an Australian owned ship?*, AUSTL. MAR. SAFETY AUTH. (Feb. 12, 2020), <https://perma.cc/H764-4FND>.

<sup>65</sup> *Nottebohm* (Liech. v. Guat.), Second Phase Judgment 1955 I.C.J. 4 (Apr. 6).

<sup>66</sup> *Id.* at 23.

<sup>67</sup> Barnes, *Flag States*, *supra* note 56, at 308.

<sup>68</sup> *M/V Saiga* (St. Vincent v. Guinea), Case No. 2, Judgment of July 1, 1999, ITLOS Rep. 10, ¶ 65.

those criteria.<sup>69</sup> ITLOS found no parallels between the nationality of ships under UNCLOS and the nationality of individuals under *Nottebohm*.<sup>70</sup> In a subsequent case, it made this point abundantly clear, stating that the genuine link requirement of UNCLOS “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.”<sup>71</sup>

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.<sup>72</sup> 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 that 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.”<sup>73</sup>

Even if the unwillingness of ITLOS to rely on *Nottebohm* 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.”<sup>74</sup> 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.’”<sup>75</sup> By conflating “genuine link” with the exercise of effective jurisdiction, which is a distinct legal obligation, ITLOS rendered the genuine link requirement moot.<sup>76</sup> Without criteria to identify when a genuine link exists and without a means to challenge a state’s issuance of flags where

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<sup>69</sup> *Id.* ¶ 83.

<sup>70</sup> *See id.* ¶ 86 (rejecting Guinea’s right to refuse to recognize the *Saiga*’s flag rights solely because of the perceived lack of a genuine link between the ship and St. Vincent).

<sup>71</sup> *M/V Virginia G* (Pan./Guinea-Bissau), Case No. 19, Judgment of Apr. 14, 2014, ITLOS 4, ¶ 110.

<sup>72</sup> International Law Commission, Summary Records of the Eighth Session, YEARBOOK OF THE INT’L L. COMM’N, vol. II, at 15 (1956).

<sup>73</sup> Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization, Advisory Opinion, 1960 I.C.J. 150, 169 (June 8).

<sup>74</sup> *M/V Saiga*, Judgment, 1999 ITLOS Rep. ¶ 83; *M/V Virginia G*, Judgment, 2014 ITLOS ¶ 112.

<sup>75</sup> *M/V Virginia G*, Judgment, 2014 ITLOS ¶ 113.

<sup>76</sup> *Accord Barnes*, *Flag States*, *supra* note 56, at 309 (“Such an approach collapses the genuine link into the requirement that States exercise effective jurisdiction and control over their ships.”).

no genuine link exists, the genuine link “requirement” has no substantive content.<sup>77</sup>

*B. Open Registries, Flags of Convenience, and Flags of Non-Compliance*

A large number of states—roughly thirty<sup>78</sup>—have availed themselves of international law’s absence of flagging rules and do not require a genuine link as a flagging condition.<sup>79</sup> Instead, they operate open registries through which the state authorizes the use of its flag to any vessel willing to pay the required fees.<sup>80</sup> Many states with open registries do not manage the registry themselves.<sup>81</sup> Instead, they contract with private companies usually operating in another state; these companies typically manage flag issuance through a website.<sup>82</sup>

Unsurprisingly, a huge segment of the shipping and fishing industries flags with open registries. For example, Panama includes no nationality restrictions, no requirements 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.<sup>83</sup> Over the past fifty years, the percentage of the merchant and fishing fleet flagged through open registries has grown significantly, from 21.6% of vessels in 1970 to 71.3% in 2015.<sup>84</sup> Ships flagged through open registries represent approximately 70% of global deadweight tonnage of all vessels.<sup>85</sup> Panama, Liberia, and the Marshall Islands—the world’s top three flag states<sup>86</sup>—all operate open registries.<sup>87</sup>

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<sup>77</sup> Kasoulides, *supra* note 59, 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 (Øystein Jensen ed., 2020) [hereinafter *DEVELOPMENT OF THE LAW*].

<sup>78</sup> Christopher J. Watterson et al., *Open Registries as an Enabler of Maritime Sanctions Evasion*, 119 *MARINE POL’Y*, Sept. 2020, No. 104090 at 1.

<sup>79</sup> *Id.* at 1–2.

<sup>80</sup> See generally Swan, *supra* note 37, § III.2 (noting that approximately 29 states maintain open registers and a “compelling rationale” for these states operating open registers are the “economic benefits,” which may be realized through “tonnage taxes and registration fees”).

<sup>81</sup> CHASING RED HERRINGS, *supra* note 18, at 35–38.

<sup>82</sup> *Id.* at 35–37.

<sup>83</sup> Mata & Pitti, Attorneys at Law, *Panama Maritime Services*, MATAPITTI.COM (2023), <https://perma.cc/8HYS-6AXN>, (last visited Sept. 8, 2023).

<sup>84</sup> Ford & Wilcox, *supra* note 38, at 298. Others put the 1970 figure at 25.9%. Kasoulides, *supra* note 59, 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).

<sup>85</sup> Watterson et al., *supra* note 78, at 1.

<sup>86</sup> *Top 10 Flag States 2020*, LLOYD’S LIST (Dec. 2, 2020), <https://perma.cc/BY7X-QA3R>.

<sup>87</sup> See *supra* note 83 and accompanying text (explaining how Panama operates an open registry); *Vessel Registration Department*, LIBERIAN REGISTRY, <https://perma.cc/6MBV-94MJ> (last visited Mar. 23, 2023) (“The Liberian Registry is open to any shipowner in the

Open registries do not necessarily lead to poor ship conditions, inadequate labor standards, or IUU fishing,<sup>88</sup> but they are often linked to flags of convenience, which do.<sup>89</sup> In fact, vessels flying flags of convenience are known for their IUU fishing. In one study of IUU vessels, 57.9% of 197 vessels were flagged to Belize, Georgia, Panama, and Togo, states known for issuing flags of convenience, and 82.2% of these vessels were flagged to flags of convenience.<sup>90</sup> IUU vessels are also known to engage in human trafficking, human rights, and labor abuses<sup>91</sup> as well as drug trafficking<sup>92</sup> and other illegal activities.<sup>93</sup>

Although vessels have used flags of convenience for centuries,<sup>94</sup> no accepted definition of “flags of convenience” exists in international law.<sup>95</sup> The International Transport Workers’ Federation, which has done significant work to identify flags of convenience and document harm to workers associated with such flags, defines a flag of convenience ship as “one that flies the flag of a country other than the country of ownership.”<sup>96</sup> That definition, however, merely restates the definition of an open registry.

Others identify a flag of convenience by looking to the financial consequences of flagging with a particular state. One scholar, writing

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world.”); INT’L REGISTRIES INC., THE MARSHALL ISLANDS REGISTRY 8 (undated) <https://perma.cc/8UZL-SRBU>.

<sup>88</sup> Kasoulides, *supra* note 59, at 566 (“There are many OR [Open Register] states that operate under the higher standards of the best of the traditional maritime nations.”).

<sup>89</sup> 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://perma.cc/6449-456M> [hereinafter UNODC].

<sup>90</sup> CHASING RED HERRINGS, *supra* note 18, at 48, 54.

<sup>91</sup> UNODC, *supra* note 89, at 57.

<sup>92</sup> *Id.* at 93.

<sup>93</sup> *See id.* at 111 (describing the practice of re-flagging vessels to flags of convenience to engage in illegal activities in other waters while waiting for the next legal fishing season to begin); OECD, EVADING THE NET: TAX CRIME IN THE FISHERIES SECTOR 12, 31 (2013).

<sup>94</sup> 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 (Vaughn Lowe & Robin Churchill general eds., 60 Publications on Ocean Development, 2012) (tracing the use of flags of convenience to the slave trade in the 1800s but also reporting that they were used during the days of the Roman Empire); Jessica K. Ferrell, *Controlling Flags of Convenience: One Measure to Stop Overfishing of Collapsing Fish Stocks*, 35 ENV’T L. 323, 333 (“Despite the multiple problems [flags of convenience] engender, they have existed for centuries with little legal impediment.”).

<sup>95</sup> ROSEMARY GAIL RAYFUSE, NON-FLAG STATE ENFORCEMENT IN HIGH SEAS FISHERIES 7 n.20 (Vaughn Lowe & general ed., 46 Publications on Ocean Development, 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, 205 (2014) (noting differences in terms used).

<sup>96</sup> *Flags of Convenience*, INT’L TRANSPORT WORKERS FED’N, <https://perma.cc/593J-DLLG> (last visited Mar. 23, 2023).

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.<sup>97</sup>

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.<sup>98</sup>

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 effectively over the vessels it flags.<sup>99</sup> 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.<sup>100</sup> Some of these states are “professional non-joiners of RFMOs.”<sup>101</sup> The flag is convenient because the vessel is

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<sup>97</sup> B.N. Metaxas, *Some Thoughts on Flags of Convenience*, 1 MAR. STUD. & MGMT. 162, 165 (1974).

<sup>98</sup> CHASING RED HERRINGS, *supra* note 18, at 23.

<sup>99</sup> UNODC, *supra* note 89, at 57 (linking “a flag of convenience . . . [to] 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.” Kasoulides, *supra* note 59, at 546; *see also* RAYFUSE, *supra* note 95, at 7 n.20 (noting that flag of convenience refers to “any state which does not effectively exercise its flag state responsibilities in respect of fishing vessels flying its flag”).

<sup>100</sup> RAYFUSE, *supra* note 95, at 35 (“The flag of convenience phenomenon is especially problematic for [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.”).

<sup>101</sup> *See, e.g.*, HIGH SEAS TASK FORCE, *supra* note 41, at 36.

now subject to little, if any, regulation or enforcement. For this reason, many prefer the term “flag of non-compliance.”<sup>102</sup>

Vessel operators specifically register their vessels in states with open registries that do not comply with their obligation to exercise effectively their jurisdiction and control over vessels they flag.<sup>103</sup> Doing so, of course, would reduce the vessel’s profits. Likewise, open registries would undermine their competitiveness by causing shipowners to flag with another state by joining RFMOs and imposing other requirements for vessel flagging. Other vessel owners seek out registries in states with weak governance.<sup>104</sup> Many, in fact, flag down the governance index, flag hopping to states with weaker regulations and enforcement capacity.<sup>105</sup> Frequently, these two attributes—weak governance and an unwillingness to enforce law—converge.<sup>106</sup>

International organizations are keenly aware that vessel owners seek out flags of convenience because of the flag state’s unwillingness or inability to regulate and monitor vessel behavior.<sup>107</sup> As the Organisation for Economic Co-operation and Development (OECD) commented, “[o]wners may register vessels in open registries . . . to avoid compliance with more robust and heavily enforced regulation in their own country.”<sup>108</sup> The International Labour Organization noted that, through

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<sup>102</sup> RAYFUSE, *supra* note 95, at 35.

<sup>103</sup> 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 U.N. 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 89, at 19; *see also* Petrossian et al., *supra* note 39, 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.”).

<sup>104</sup> Henrik Österblom et al., *Adapting to Regional Enforcement: Fishing Down the Governance Index*, PLOS ONE (Sept. 17, 2010), at 5, <https://perma.cc/4SK3-G24Y>.

<sup>105</sup> *Id.*

<sup>106</sup> Ford & Wilcox, *supra* note 38, at 300–01 (linking flags of convenience to states with open registries, weak governance structures, and high levels of corruption); *see also* Petrossian et al., *supra* note 39, 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.”).

<sup>107</sup> *See* Barnes, *Flag States*, *supra* note 56, at 304–05 (“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.”).

<sup>108</sup> OECD, *supra* note 93, 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



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.”<sup>109</sup> ITLOS acknowledged that corporations are readily able to manipulate the registry process to avoid flag state control.<sup>110</sup> In one ITLOS dispute, apparently neither Belize nor France, the disputing parties, could identify the beneficial owners of a fishing vessel engaged in IUU fishing.<sup>111</sup> The UN Office on Drugs and Crime succinctly summarized the impacts of flag 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.”<sup>112</sup>

### 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 without a normative 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 causes annual losses of between \$25.5 billion USD and \$49.5 billion USD,<sup>113</sup> touching all species and all regions of the world.<sup>114</sup> IUU fishing destabilizes food security,<sup>115</sup> diminishes resources,<sup>116</sup> and

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engage in effective exchange of information, in order for the identity of owners to remain hidden.” *Id.*

<sup>109</sup> ILO, *Caught at Sea*, *supra* note 38, at 24.

<sup>110</sup> *Volga* (Russ. Fed. v. Austrl.), Case No. 11, Judgment of Dec. 23, 2002, ITLOS Rep. 10, 66 ¶ 19 (Shearer, J., dissenting) (“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.”).

<sup>111</sup> When the tribunal inquired about the “beneficial ownership of the vessel,” Belize responded with the name of corporate “owner,” and France said it could not identify the “actual owners.” *Grand Prince* (Belize v. Fr.), Case No. 8, Judgment of Apr. 20, 2001, ITLOS Rep. 17, ¶ 32. In a separate opinion, Judge Anderson stated that “the beneficial ownership of the vessel remains obscure, notwithstanding the answers to the Tribunal’s enquiry (recorded in paragraph 32 of the Judgment).” *Id.* at 54 (separate opinion of Anderson, J.).

<sup>112</sup> UNODC, *supra* note 89, 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 WIS. INT’L L.J. 485 (2022) [hereinafter Wold, *Slavery at Sea*].

<sup>113</sup> Sumaila et al., *supra* note 19, at 1.

<sup>114</sup> FAO, *Illegal, Unreported, and Unregulated (IUU) Fishing*, <https://perma.cc/B2DH-GCC7> (last visited Mar. 03, 2023) (“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. . .”).

<sup>115</sup> See FAO, *Illegal, Unreported, and Unregulated Fishing* 1 (2016), <https://perma.cc/6XRU-XZ5M> (“IUU fishing therefore threatens livelihoods, exacerbates poverty, and augments food insecurity.”).

undermines the monitoring, control, and surveillance (MCS) regimes of RFMOs.<sup>117</sup> 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.<sup>118</sup> 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.”<sup>119</sup>

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.<sup>120</sup> To address IUU fishing, fisheries managers devise new strategies and require new technologies that further increase costs for vessel operators to prove their catches are legal.<sup>121</sup> This creates even greater disparities in costs between legal fishing and IUU fishing, thus incentivizing additional IUU fishing.<sup>122</sup>

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 conservation and management measures (CMMs). At the domestic level, prosecutors often cannot sue the beneficial owners of the vessel—those that benefit financially from the vessel’s illegal activities—because the identity of the beneficial owners is hidden

<sup>116</sup> *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.”).

<sup>117</sup> See generally FAO Technical Guideline for Responsible Fisheries, *Implementation of the International Plan of Action to Deter, Prevent and Eliminate Illegal, Unreported and Unregulated Fishing* (No. 9) (2002), <https://perma.cc/Z4HW-A2J9> [hereinafter, FAO, *Implementation of IPOA-IUU*].

<sup>118</sup> *Id.* at 4–5.

<sup>119</sup> ENV’T JUST. FOUND. ET AL., ACHIEVING TRANSPARENCY AND COMBATING IUU FISHING IN RFMOs, REINFORCING THE EU’S MULTILATERAL ACTIONS TO PROMOTE BEST PRACTICES 3 (2019), <https://perma.cc/L5TM-GMJM>.

<sup>120</sup> RAYFUSE, *supra* note 95, at 25 (“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.”).

<sup>121</sup> See *id.* at 34 (“While nationals of member states limit their levels of exploitation, free riders can reap the excess benefit for immediate economic gain . . .”).

<sup>122</sup> FAO, *Implementation of IPOA-IUU*, *supra* note 117, 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, *supra* note 95, 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”).

behind a web of shell corporations.<sup>123</sup> Thus, prosecutors cannot punish, absent extraordinary efforts, the beneficiaries of 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.

### A. Domestic Law Constraints

States with open registries often attract vessel owners by establishing minimal registration requirements, including registration without identifying the beneficial owners.<sup>124</sup> As the International Criminal Police Organization (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.”<sup>125</sup>

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<sup>123</sup> See UNODC, *supra* note 89, at 4 (noting one vulnerability of the fishing industry to organized crime 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, *supra* note 93, 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* 105 (2010), <https://perma.cc/77GH-3W6C> (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.”).

<sup>124</sup> CHASING RED HERRINGS, *supra* note 18, at 23–24. 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.* 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 legal persons in whose name the vessel is registered and the nationality of the natural or legal persons with beneficial ownership of the vessel. See IPOA-IUU, *supra* note 33, ¶ 42.

<sup>125</sup> CHASING RED HERRINGS, *supra* note 18, at 4; see also OECD, *Evading the Net*, *supra* note 93, 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

In fact, the registered shell company—a non-operational company that does not carry out significant economic activity and may not have financial assets<sup>126</sup>—might be part of an ownership labyrinth in which that shell company is owned by one or more additional shell companies in multiple jurisdictions, with those companies owned by other shell companies.<sup>127</sup> This ownership labyrinth is “typical” for an IUU fishing vessel.<sup>128</sup> As the North Atlantic Fisheries Intelligence Group and Interpol report, “[b]y establishing a byzantine web of legal entities across the globe, beneficial owners of fishing 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.”<sup>129</sup>

Indeed, more than sixty years ago in proceedings before the Court, a representative of Panama stated, “[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.”<sup>130</sup> 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.”<sup>131</sup> A representative of the United Kingdom said that “the web of ownership is one which cannot, in all cases, easily be untangled.”<sup>132</sup> While this

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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.”).

<sup>126</sup> CHASING RED HERRINGS, *supra* note 18, at 24; Jaeyoon Park et al., *Tracking Elusive and Shifting Identities of the Global Fishing Fleet*, SCI. ADVANCES (Jan. 18, 2023), No. 8200, at 6.

<sup>127</sup> TRYGG MAT TRACKING, SPOTLIGHT ON THE EXPLOITATION OF COMPANY STRUCTURES BY ILLEGAL FISHING OPERATIONS 5 (Dec. 2020), <https://perma.cc/3YLV-9T5J>.

<sup>128</sup> See Griggs & Lugten, *supra* note 103, at 160, 162 (describing “typical IUU fishing operations” as consisting of buying, repairing, and registering vessels in flags of convenience states; beneficial owners then incorporate a “front” company which other shell companies then hold shares of).

<sup>129</sup> CHASING RED HERRINGS, *supra* note 18, at 4; see also Griggs & Lugten, *supra* note 103, at 160 (“The term ‘hidden beneficial owners’ refers to the fact that IUU fishing vessels are traditionally owned by ‘front companies’ which are themselves registered in international tax havens. These ‘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.”).

<sup>130</sup> Public Hearing Oral Statements, Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization, Advisory Opinion, 1960 I.C.J. 262, at 316 (Apr. 26–May 4, June 8, 1960) (oral statement of Dr. Fábrega (Panama)), <https://perma.cc/7XT3-2WGH>.

<sup>131</sup> *Id.* at 397 (statement of Mr. Weeks (Liberia)).

<sup>132</sup> *Id.* at 372 (statement of Mr. Vallat (United Kingdom)).

discussion concerned the question of assigning “nationality” to a vessel, these observations illustrate the challenges of identifying who is ultimately responsible for and benefiting from IUU fishing, and then prosecuting those responsible for violations of fisheries law.<sup>133</sup>

Many registries not-so-subtly indicate that they will shield vessel owners from liability. The Liberian Registry for example, operated by a third party, “recognizes the need and 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.”<sup>134</sup> One Panamanian law firm reports that “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.”<sup>135</sup>

By chasing registration fees with laws lacking transparency, open registries and flags of convenience create legal frameworks under which the beneficial owners “are basically unknown [even] to the governments of their own countries.”<sup>136</sup> 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.<sup>137</sup>

Similarly, the vessel registries of RFMOs, including the Inter-American Tropical Tuna Commission (IATTC), International Commission for the Conservation of Atlantic Tuna (ICCAT), North Pacific Fisheries Commission (NPFCC), and Western and Central Pacific Fisheries Commission (WCPFC), require members to submit the name and address of the owner or owners, but not the names and addresses of

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<sup>133</sup> 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.

*Id.* at 316 (statement of Dr. Fábrega (Panama)).

<sup>134</sup> *About the Liberian Registry*, LIBERIAN REGISTRY, <https://www.lisr.com/about-liberian-registry> (last visited Mar. 20, 2023); *Unique Advantages*, LIBERIAN REGISTRY, <https://perma.cc/G9KJ-Z7YH> (last visited March 20, 2023).

<sup>135</sup> Ana Lorena Morales, *Ship Registry in Panama*, FABREGA MOLINO, <https://perma.cc/ZPE6-5W8T> (last visited Mar. 20, 2023).

<sup>136</sup> Kasoulides, *supra* note 59, at 565.

<sup>137</sup> CHASING RED HERRINGS, *supra* note 18, at 16.

beneficial owners.<sup>138</sup> 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 listed vessel owners are corporations. In the WCPFC, for example, only longline vessels from Taiwan appear to name individuals as the vessel owners.<sup>139</sup> In ICCAT<sup>140</sup> and IATTC<sup>141</sup> records, this author found no records listing an individual as the owner of a vessel authorized to fish in ICCAT or IATTC waters—all records listed corporations as registered owners. In the NPFC, the publicly available vessel register does not record the owner of the vessel.<sup>142</sup>

In a comprehensive analysis of how flags of convenience impact 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.<sup>143</sup>

They also identified several 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, investigating, and prosecuting fisheries crime and tax evasion.”<sup>144</sup>

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<sup>138</sup> See *infra* notes 139–41 and accompanying text.

<sup>139</sup> See, e.g., *WCPFC Record of Fishing Vessels: Dong Sheng JYI No. 16*, W. & CENT. PAC. COMM’N, <https://perma.cc/3SE4-G8NW>.

<sup>140</sup> See, e.g., *ICCAT Record of Vessels*, INT’L COMM’N FOR THE CONSERVATION OF ATLANTIC TUNA, <https://perma.cc/5N2H-E4AW> (last visited Mar. 10, 2023) (recording the name and address of the owner of the Korean-flagged *No.211 DongWon* as Dongwon Industries and recording the name and address of the owner of the Chinese Taipei-flagged *Chun Fa No. 999* as Chen Feng Fishery Co., Ltd).

<sup>141</sup> See, e.g., *IATTC Vessel Record*, INTER-AM. TROPICAL TUNA COMM’N, <https://perma.cc/C5YU-GNHY> (last visited Mar. 10, 2023) (recording the name and address of the owner of the Korean-flagged *Oryong No. 315* as Sajo Industries Company, Ltd.); see also *id.* (recording the name and address of the owner of the Chinese Taipei-flagged *Da Sheng* as Bai Li Fishery Ltd).

<sup>142</sup> See, e.g., *101 Haerang*, N. PAC. FISHERIES COMM’N, <https://perma.cc/496K-GPJD> (last visited Mar. 10, 2023) (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*, N. PAC. FISHERIES COMM’N, <https://perma.cc/X9Y5-QKNM> (last visited July 31, 2023) (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).

<sup>143</sup> CHASING RED HERRINGS, *supra* note 18, at 4.

<sup>144</sup> *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—

Without being able to identify the beneficial owners, law enforcement grinds to a halt.<sup>145</sup> Even if the beneficial owners can be tracked through the layers of shell corporations,<sup>146</sup> states lack authority to bring foreign beneficial owners to court, and extradition treaties may not exist.

Non-flag states can, of course, prosecute vessel captains and crew. The crew, however, may simply take orders from the captain who, in turn, may take orders from the beneficial owner or his agent.<sup>147</sup> Moreover, crews frequently lack financial resources because they receive compensation at the end of a voyage or, too frequently, are victims of forced labor and other human rights abuses.<sup>148</sup>

When non-flag states pursue cases, they face significant obstacles. First, due process requires credible evidence to support criminal allegations,<sup>149</sup> and IUU fishers “destroy[ ] evidence, even to the extent of throwing logbooks, computers, papers and navigation equipment overboard prior to being boarded.”<sup>150</sup> In the case of the *Thunder*, a

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[I]t 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.

<sup>145</sup> *See id.* at 31.

<sup>146</sup> 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*, *MARINE POL’Y* July 30, 2022, No. 105212, at 7–8.

<sup>147</sup> Engdal and Sæter, for example, document communications of the owner of the *Thunder* directing the captain to take specific actions. ENGDAL & SÆTER, *supra* note 146, at 88–89.

<sup>148</sup> U.S. DEP’T OF STATE, *CHINA 2020 HUMAN RIGHTS REP.* 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”); *see* U.S. DEP’T OF LABOR, *2022 LIST OF GOODS PRODUCED BY CHILD LABOR OR FORCED LABOR* 24–26, 29 (2022) (listing China, Cambodia, and Indonesia among the countries with reported child and forced labor in the fishing industry. The fish product industry has eleven countries with child labor listings and five countries with forced labor listings); INT’L ORG. FOR MIGRATION, *supra* note 38, at 41, 43 (stating motivations for workers to move to Indonesia for work, lead to them becoming victims of human trafficking). For an assessment of the role of forced labor in fisheries, *see* Wold, *Slavery at Sea*, *supra* note 112.

<sup>149</sup> Cristian DeFrancia, *Due Process in International Criminal Courts: Why Procedure Matters*, 87 VA. L. REV. 1381, 1399 (2001).

<sup>150</sup> High Seas Task Force, *Closing the Net*, *supra* note 41, at 32; *see also* Anastasia Telesetsky, *Laundering Fish in the Global Undercurrents: Illegal, Unreported, and Unregulated Fishing and Transnational Organized Crime*, 41 *ECOLOGY L.Q.* 939, 980 (2014).

notorious toothfish poacher, the crew sank the vessel.<sup>151</sup> Even when evidence is not destroyed, cases can be lost because the coastal state cannot positively prove that the IUU vessel was 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.<sup>152</sup> 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.<sup>153</sup> 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.<sup>154</sup> At trial, however, a jury acquitted the crew apparently because Australia provided only circumstantial evidence that the vessel was fishing in Australia's EEZ.<sup>155</sup> 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.<sup>156</sup>

### B. International Law Constraints

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" under UNCLOS.<sup>157</sup> But it also has "the primary responsibility for taking the necessary measures to prevent, deter and eliminate IUU fishing" within its EEZ.<sup>158</sup> 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.<sup>159</sup> Nevertheless, UNCLOS imposes

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<sup>151</sup> ENGDAL & SÆTER, *supra* note 146, at 209–49; *see also* Ian Urbina, *A Renegade Trawler, Hunted for 10,000 Miles by Vigilantes*, N.Y. TIMES (July 28, 2015), <https://perma.cc/LHE6-RV7H>.

<sup>152</sup> Ribot-Cabrera & Ors v. The Queen, [2004] WASCA 101 ¶ 35 (Austl.).

<sup>153</sup> *Id.* ¶ 35–6.

<sup>154</sup> *Id.* ¶ 38.

<sup>155</sup> *Acquitted "Viarsa 1": Australia Faces Huge Damage Claims*, MERCOPRESS (Nov. 7, 2005), <https://perma.cc/EU9Q-JGAY> (noting that "[d]efence 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").

<sup>156</sup> Owners themselves typically do not hire crew. Instead, they task a recruiting agency with finding crew for a vessel. *See, e.g., Welcome to Molajaya Fishingwork*, RECRUITMENT AGENCY, <https://perma.cc/WLN3-J2JU> (last visited Mar. 4, 2023).

<sup>157</sup> UNCLOS, *supra* note 2, art. 56(1).

<sup>158</sup> Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC) (*SRFC Advisory Opinion*), Case No. 21, Advisory Opinion of Apr. 2, 2015, ITLOS Rep. 4, ¶ 106.

<sup>159</sup> UNCLOS, *supra* note 2, art. 73(1).



significant constraints on the coastal state's ability to deter future IUU fishing violations. For example, UNCLOS prohibits a coastal state from imprisoning crew for fisheries violations<sup>160</sup> and a coastal state must promptly release the vessel upon posting of "reasonable bond or other security."<sup>161</sup>

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,<sup>162</sup> non-flag states can do little to prosecute IUU fishing vessels operating on the high seas.

### 1. Limits on Enforcement Measures and Penalties

UNCLOS precludes coastal states from imprisoning crew for fishing violations, even for criminal violations of fisheries law.<sup>163</sup> Prison terms could keep the most valuable crew—masters, captains, and engineers—out of the water for extended periods of time.

ITLOS, however, 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 *M/V "Virginia G,"*<sup>164</sup> for example, Guinea-Bissau confiscated the tanker *Virginia G* and its fuel because the vessel violated Guinea-Bissau's laws by failing to obtain written authorization to bunker and pay prescribed fees.<sup>165</sup> ITLOS acknowledged that "many coastal States provide for measure of confiscation" as a sanction for violating fisheries laws,<sup>166</sup> but that "[w]hether or not confiscation is justified in a given case depends on the facts and circumstances."<sup>167</sup> While agreeing that the *Virginia G's* breaches were "serious,"<sup>168</sup> ITLOS concluded that mitigating factors existed and that confiscation was not necessary.<sup>169</sup> In this case, ITLOS noted that the involved fishing vessels were not confiscated and that *Virginia G's* failure to obtain written authorization was not intentional.<sup>170</sup> 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

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<sup>160</sup> *Id.* art. 73(3).

<sup>161</sup> *Id.* art. 73(2).

<sup>162</sup> *Id.* art. 92.

<sup>163</sup> *Id.* art. 73(3).

<sup>164</sup> *M/V Virginia G (Panama/Guinea-Bissau)*, Case No. 19, Judgment of Apr. 14, 2014, ITLOS Rep. 4.

<sup>165</sup> *Id.* ¶ 70.

<sup>166</sup> *Id.* ¶ 253.

<sup>167</sup> *Id.* ¶ 257.

<sup>168</sup> *Id.* ¶ 267.

<sup>169</sup> *Id.* ¶¶ 268–69.

<sup>170</sup> *Id.*

generally to enforcement measures under Article 73 of the Convention.”<sup>171</sup>

While the concept of reasonableness or proportionality pervades international law, tribunals usually defer to the 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.”<sup>172</sup> 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 the normative system, to decide whether confiscation, or a less severe penalty, is called for.”<sup>173</sup> 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.<sup>174</sup>

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.”<sup>175</sup> Yet, ITLOS converts “measures

<sup>171</sup> *Id.* ¶ 270.

<sup>172</sup> *Id.* at 214, ¶ 53 (joint dissenting opinion of Vice-President Hoffmann and Marotta Rangel, Chandrasekhara Rao, Kateka, Gao, and Bouguetaia, JJ.). 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.* ¶ 47.

<sup>173</sup> *Id.* at 359, ¶ 19 (dissenting opinion of Sérvulo Correia, J. ad hoc). 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.* ¶ 15. So, too, did those joining in the joint dissent, who asked, “[h]ow 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.” *Id.* at 214, ¶ 43 (joint dissenting opinion of Vice-President Hoffmann and Marotta Rangel, Chandrasekhara Rao, Kateka, Gao, and Bouguetaia, JJ).

<sup>174</sup> *Id.* at 359, ¶ 21 (dissenting opinion of Sérvulo Correia, J. ad hoc).

<sup>175</sup> FAO, *Code of Conduct*, *supra* note 5, art. 7.7.2; IPOA-IUU, *supra* note 33, ¶ 21 (“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 IPOA-IUU*, *supra* note 117, ¶ 5.1 (“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

necessary to ensure compliance” into “reasonable sanctions.” In doing so, ITLOS not only misinterprets UNCLOS, but it also deprives coastal states of the necessary tools to ensure compliance with laws designed to prevent IUU fishing.<sup>176</sup> This misinterpretation may create a chilling effect if coastal states fear that successful challenges of their enforcement actions will result in damages owed to the owners of IUU fishing vessels.<sup>177</sup>

## 2. Prompt Release

Article 73 of UNCLOS provides that “[a]rrested vessels and their crews shall be promptly released upon the posting of a reasonable bond or security.”<sup>178</sup> ITLOS suggests that this prompt release obligation “includes elementary considerations of humanity and due process of law” and that requirement of a reasonable bond or other security embodies fairness concerns.<sup>179</sup> ITLOS has declared that Article 73—by granting coastal states authority to ensure compliance with their laws and requiring prompt release of vessels flagged to other states—“strikes a fair balance” between coastal state and flag state interests.<sup>180</sup> Nevertheless, ITLOS has interpreted these obligations in ways that hamper coastal state efforts to prevent and deter IUU fishing in their EEZs.

For example, in *Volga*,<sup>181</sup> the Royal Australian Navy frigate *HMAS Canberra* spotted the Russian-flagged *Volga* fishing within the Australian Fishing Zone (AFZ).<sup>182</sup> The *Volga* fled to the high seas to avoid capture, but the *Canberra* eventually caught it.<sup>183</sup> Australian

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and to discourage violations wherever they occur and shall deprive offenders of the benefits accruing from their illegal activities.”) [hereinafter WCPF Convention].

<sup>176</sup> 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*, Case No. 19, Judgment of Apr. 14, 2014, ITLOS Rep. at 338, ¶ 19 (dissenting opinion of Jesus, J.).

<sup>177</sup> 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.* ¶ 20.

<sup>178</sup> UNCLOS, *supra* note 2, art. 73(2).

<sup>179</sup> *Juno Trader* (St. Vincent v. Guinea-Bissau), Case No. 13, Judgment of Dec. 18, 2004, ITLOS Rep. 17, ¶ 77.

<sup>180</sup> *Monte Confurco* (Sey. v. Fr.), Case No. 6, Judgment of Dec. 18, 2000, ITLOS Rep. 86, ¶¶ 70–72.

<sup>181</sup> *Volga* (Russian Fed. v. Austl.), Case No. 11, Judgment of Dec. 23, 2002, ITLOS Rep. 10.

<sup>182</sup> *Id.* ¶ 32.

<sup>183</sup> *Id.* ¶ 33.

military personnel boarded the *Volga* and found 131,422 metric tons of Patagonian toothfish (*Dissostichus eleginoides*) but no authorization to fish in Australian waters.<sup>184</sup> The ship's computers showed that the *Volga* spent significant amounts of time fishing in the AFZ. Australia escorted the *Volga* to the Western Australian port of Fremantle and detained the captain and crew.<sup>185</sup> Australia set bail amounts for the crew at less than \$100,000 AU<sup>186</sup> but set the *Volga's* bond at \$3,332,500 AU based on the value of the vessel and its equipment; potential fines owed; and the cost of operating a vessel monitoring system (VMS) to track the vessel's movements, which is a requirement of the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR), the RFMO managing toothfish stocks.<sup>187</sup> 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.<sup>188</sup>

ITLOS tribunals have ruled that the reasonableness of a 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, [and] the amount of the bond imposed by the detaining State and its form."<sup>189</sup> In *Monte Confurco*,<sup>190</sup> the ITLOS tribunal expanded the range of conditions that may be included in 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]."<sup>191</sup> 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."<sup>192</sup>

In the case of the *Volga*, Australia supported its bond amount and non-financial conditions as reasonable, noting the serious and ongoing IUU fishing for toothfish and the continuing efforts of CCAMLR to prevent it.<sup>193</sup> The tribunal, however, interpreted the phrase "bond or

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<sup>184</sup> *Id.* ¶¶ 32, 36–38, 51.

<sup>185</sup> *Id.* ¶ 35.

<sup>186</sup> *Id.* ¶ 46.

<sup>187</sup> *Id.* ¶ 53.

<sup>188</sup> *Id.*

<sup>189</sup> *Camouco (Fr. v. Pan.)*, Case No. 5, Judgment of Feb. 7, 2000, ITLOS Rep. 10, ¶ 67; *Monte Confurco (Sey. v. Fr.)*, Case No. 6, Judgment of Dec. 18, 2000, ITLOS Rep. 86, ¶ 76. The Tribunal's ruling essentially invites coastal states and others to increase penalties so they can issue a higher bond.

<sup>190</sup> *Monte Confurco*, Case No. 6, Judgment of Dec. 18, 2000, ITLOS Rep. at 86.

<sup>191</sup> *Id.* ¶ 76.

<sup>192</sup> *Volga*, 2002 ITLOS Rep. ¶ 65.

<sup>193</sup> *Id.* ¶ 67.

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.<sup>194</sup> As such, the tribunal ruled that Article 73 precluded any non-financial conditions for release of the vessel.<sup>195</sup> It also reduced the financial value of the bond by more than \$1.41 million AU, rejecting the portion of the bond related to future compliance with Australian law and CCAMLR CMMs.<sup>196</sup> The tribunal preserved only the bond amount related to the value of the vessel, its fuel, and its equipment.<sup>197</sup> Thus, while noting that the bond amount can consider the gravity of the offence, the tribunal rejected all bond amounts and conditions related to the gravity of the offences and efforts to prevent future IUU fishing.

Although the tribunal indicated that it understood the international concerns about IUU fishing,<sup>198</sup> scholars disagreed, stating that the tribunal “appears to have accorded little weight to the serious 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.”<sup>199</sup> They criticized the tribunal’s exclusion of non-financial factors as “particularly narrow,”<sup>200</sup> “strictly legalistic,”<sup>201</sup> “not persuasive,”<sup>202</sup> and reflecting an “outdated view of how international fishing activities operate.”<sup>203</sup> Judges Anderson and Shearer, dissenting in the *Volga* case, agreed with these scholars. Judge Anderson stated that the ordinary meaning of the term “bond” refers to either financial or non-financial concerns and, in the context of Article 73, it refers to non-financial concerns.<sup>204</sup> As such, Article 73 imposes no limits on the conditions composing the bond; it requires,

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<sup>194</sup> *Id.* ¶ 77; UNCLOS, *supra* note 2, art. 292, ¶¶ 1, 4.

<sup>195</sup> *Volga*, 2002 ITLOS Rep. ¶¶ 75, 77, 80.

<sup>196</sup> *Id.* ¶¶ 72, 73, 80.

<sup>197</sup> *Id.* ¶ 90.

<sup>198</sup> *Id.* ¶ 68.

<sup>199</sup> Tim Stephens & Donald Rothwell, *Case Note: Law of the Sea*, 35 J. MAR. L. & COM. 283, 288 (2004).

<sup>200</sup> *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 DEVELOPMENT OF THE LAW, *supra* note 77, at 73, 100–01.

<sup>201</sup> Griggs & Lugten, *supra* note 103, 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”).

<sup>202</sup> 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).

<sup>203</sup> Barnes, *Flag States*, *supra* note 56, at 318.

<sup>204</sup> *Volga* (Russian Fed. v. Austl.), Case No. 11, Judgment of Dec. 23, 2002, ITLOS Rep. 57, ¶¶ 9–13 (dissenting opinion of Anderson, J.).

based on the circumstances of the case, that the bond be “reasonable.”<sup>205</sup> He concluded that the tribunal’s interpretation was “not well-founded” and “based on an overly narrow, even legalistic, interpretation” of UNCLOS Article 73.<sup>206</sup> Judge Shearer found that the tribunal failed to interpret the words “bond” and “financial security” with the “liberal and purposive interpretation” needed to deter future offences and address the gravity of the offences and seriousness of IUU fishing generally.<sup>207</sup>

Despite these criticisms and the tribunal’s stated recognition that bond amounts can take account of the gravity of the offence, the tribunal’s conclusions are clear: coastal states may not impose non-financial bond measures to deter future IUU fishing violations.<sup>208</sup> 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 identification of 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*

Absent a bilateral or other agreement, a coastal state’s jurisdiction and its ability to enforce its fisheries laws ends at the seaward edge of its EEZ.<sup>209</sup> In areas beyond national jurisdiction, the high seas,<sup>210</sup> the flag state has exclusive jurisdiction over the vessels it flags.<sup>211</sup> The laws of the flag state, including any regional and international agreements that it has ratified, apply to such vessels; only the flag state may take

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<sup>205</sup> *Id.* ¶ 13–14 (“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*.”).

<sup>206</sup> *Id.* ¶ 24.

<sup>207</sup> *Id.* at 66, ¶ 17 (dissenting opinion of Shearer, J.) 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.* ¶ 14.

<sup>208</sup> *Id.* at 10, ¶ 69 (majority opinion).

<sup>209</sup> 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. States are free, of course, to negotiate agreements that allow one state to enforce fisheries laws inside the jurisdictional waters of another state. *See, e.g.*, Maritime Interdiction Agreement between the United States of America and Palau, Aug. 15, 2013, arts. 3, 4 (authorizing U.S. vessels to board and inspect vessels in Palau’s jurisdictional waters).

<sup>210</sup> *Id.* 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”).

<sup>211</sup> *Id.* 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.”).

enforcement action against its vessels for violations of law.<sup>212</sup> As described in more detail in Part IV, the flag state must “effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.”<sup>213</sup>

Considering the failure of some flag states to exercise effective jurisdiction and control over the vessels they flag,<sup>214</sup> international law has attempted to move beyond exclusive flag state jurisdiction. Parties to the UN Fish Stocks Agreement (UNFSA) that are also party to a relevant RFMO,<sup>215</sup> for example, have the right to board and inspect vessels on the high seas that are suspected of violating rules of that RFMO, provided that the inspected vessels are flagged to a UNFSA party but regardless of whether the flag state also belongs to the relevant RFMO.<sup>216</sup> 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 that the inspecting state notify the flag state, at which time the flag state can assume responsibility for the investigation.<sup>217</sup> Even if the flag state authorizes the inspecting state to investigate the alleged violation, the flag state may assume responsibility for the investigation “if evidence so warrants.”<sup>218</sup> Another provision specifies that the flag state may “at any time” assume responsibility for the investigation and any enforcement action.<sup>219</sup> In other words, exclusive flag state jurisdiction remains a potent concept, hindering the ability of non-flag states to prevent, deter, and eliminate IUU fishing on the high seas.

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<sup>212</sup> 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 Arron N. Honniball, *The Exclusive Jurisdiction of Flag States: A Limitation on Pro-active Port States?*, 31 INT’L J. MARINE & COASTAL L. 499 (2016), and 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://perma.cc/LL2A-NURL>. In addition, UNCLOS specifies some exceptions to the rule for piracy, unauthorized broadcasting, slave and drug trafficking, and others. UNCLOS, *supra* note 2, arts. 99, 100, 110, 221.

<sup>213</sup> UNCLOS, *supra* note 2, art. 94, ¶ 1; *see also* S.S. *Lotus (Fr. v. Turk.)*, Judgment, 1927 P.C.I.J. (ser. A) No. 10, ¶ 64 (Sept. 7) (“[A]part 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.”).

<sup>214</sup> RAYFUSE, *supra* note 95, at 34.

<sup>215</sup> UNFSA, *supra* note 7, art. 18.

<sup>216</sup> *Id.* art. 21, ¶ 1.

<sup>217</sup> *Id.* art. 21, ¶ 6.

<sup>218</sup> *Id.* art. 21, ¶ 7.

<sup>219</sup> *Id.* art. 21, ¶ 12.

#### 4. IUU Black Lists and Landing Bans

Some RFMOs allow members to deny port privileges and ban transshipments and landing of fish, but these typically relate only to vessels included on an IUU list.<sup>220</sup> To the extent that IUU vessel lists are effective,<sup>221</sup> their nature limits them to listing specific vessels rather than the flag states that may be facilitating IUU fishing behavior. In addition, some RFMOs appear very reluctant to add vessels to their lists. For example, although the area managed by the WCPFC covers roughly 20% of Earth,<sup>222</sup> its IUU list only includes three vessels.<sup>223</sup> The IUU vessel list of the IATTC<sup>224</sup> includes just thirteen vessels.<sup>225</sup> Other

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<sup>220</sup> 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 WCPFC*, ¶ 22, CMM 2019-07 (Dec. 2019), <https://perma.cc/D58D-UKLL> (stating that 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*, ¶ 20, FAOLEX No. LEX-FAOC180722 (Jan. 1, 2018), <https://perma.cc/93S2-SQYA>.

<sup>221</sup> 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.” *Are RFMO IUU Vessel Lists Useful?*, TRYGG MAT TRACKING (July 2021), at 1, <https://perma.cc/3YT8-UXKE>.

<sup>222</sup> *Frequently Asked Questions and Brochures*, W. & CENT. PAC. FISHERIES COMM’N, <https://perma.cc/H9ZG-V6EU> (last updated Mar. 3, 2010). It ranges from Australia and the East Asian seaboard—excluding the South China Sea—in the west, to east of Hawaii in the east. *Id.* 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. *Id.* For a map of the convention area, see *Convention Area Map*, W. & CENT. PAC. FISHERIES COMM’N, <https://perma.cc/H258-YPF8> (last updated Apr. 28, 2015). 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.

WCPF Convention, *supra* note 175, art. 3, ¶ 1.

<sup>223</sup> *WCPFC IUU Vessel List for 2023*, W. & CENT. PAC. FISHERIES COMM’N (Feb. 2, 2023), <https://perma.cc/FN2E-BK99>.

<sup>224</sup> Inter-American Tropical Tuna Convention, May 31, 1949, U.S.T. 230, 80 U.N.T.S. 3 (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



lists are more expansive; the IUU vessel list of the ICCAT,<sup>226</sup> whose area of competence includes the Atlantic Ocean and the Mediterranean Sea,<sup>227</sup> includes more than 200 vessels.<sup>228</sup>

Black lists may be effective against single vessels, but even then it may take years to add a vessel to the list.<sup>229</sup> Moreover, 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.<sup>230</sup> Due to this resistance, states have now emphasized diplomatic efforts to encourage compliance rather than blacklisting and other measures that are likely to meaningfully deter future activities.<sup>231</sup> Due to the constraints related 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 about the vessel is known.<sup>232</sup> While some of these vessels may be stateless at the time they are identified, sometimes a flag state simply deregisters the vessel without taking appropriate enforcement action against it to avoid any association with it.<sup>233</sup>

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Tuna Convention, June 27, 2003 (entered into force on Aug. 27, 2010), <https://perma.cc/X69V-MTFJ>.

<sup>225</sup> IATTC, *Annual IUU Vessel List* (Oct. 22, 2021), <https://perma.cc/B3DQ-H7AX>.

<sup>226</sup> ICCAT was established by the International Convention for the Conservation of Atlantic Tunas, art. III, May 14, 1966, 20 U.S.T. 2887, 673 U.N.T.S. 63 (entered into force Mar. 21, 1969) [hereinafter ICCAT Convention].

<sup>227</sup> *Id.* art. I. A visual depiction of the convention area can be found at *Convention Area, INT’L CONVENTION FOR THE CONSERVATION ATLANTIC TUNAS*, <https://perma.cc/R238-3QWV> (last visited Mar. 24, 2023).

<sup>228</sup> *List of IUU Vessels, INT’L CONVENTION FOR THE CONSERVATION ATLANTIC TUNAS*, <https://perma.cc/R6R3-FQP9> (last visited Mar. 25, 2023).

<sup>229</sup> 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).

<sup>230</sup> E-mail from Duncan Currie, Globelaw, to author (Jan. 27, 2023, 16:01 PST) (on file with author).

<sup>231</sup> *Id.*

<sup>232</sup> See *Vessel Register, INTER-AM. TROPICAL TUNA COMM’N*, <https://perma.cc/Z22N-QBGZ> (last visited Mar. 25, 2023) (posting the combined IUU vessel list).

<sup>233</sup> 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 vessels 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

Such action is, of course, an abandonment of flag state responsibility. 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 effectively exercise their jurisdiction and control over the vessels they flag.<sup>234</sup> 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.<sup>235</sup> Breach of these obligations by a flag state can trigger international responsibility. As the U.N. Secretary-General remarked in 2008, "[t]here 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."<sup>236</sup>

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 the flag state. 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, thereby fulfilling its flag state responsibilities in that specific circumstance.<sup>237</sup> But when does a violation by a vessel transform into a violation by a state? This question concerns both the nature of the obligation and the conduct of the state. For instance, states may need to ensure that vessels they flag use vessel monitoring systems (VMS), but the state itself is not required to use VMS.<sup>238</sup> If a vessel fails to use VMS despite a legal requirement to use it, the state may not have breached

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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.

E-mail from Brad Wiley, Policy Officer and Field Offices Coordinator, Inter-Am. Tropical Tuna Comm'n to author (Jan. 31, 2023, 00:48 PST) (on file with author).

<sup>234</sup> UNCLOS, *supra* note 2, art. 94, ¶ 1.

<sup>235</sup> *Id.* arts. 100, 118, 145.

<sup>236</sup> Report of the Secretary-General, *Oceans and the Law of the Sea*, A/63/63, ¶ 249 (Mar. 10, 2008), <https://perma.cc/R3WY-WUX5>.

<sup>237</sup> Griggs & Lugten, *supra* note 103, at 160. *See also* CALLEY, *supra* note 94, at 21 (identifying Cambodia as being a "flag of convenience" which is referring to its attractive nature for vessels looking to operate in shady manners).

<sup>238</sup> UNFSA, *supra* note 7, art. 18(3)(g)(iii).

its obligation to implement and enforce relevant law against its vessels if the state exercised “due diligence.”<sup>239</sup> The question is whether the flag state used its best efforts to ensure that the vessels it flags operate and maintain their VMS.

This Part 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. This Part also describes how flag states can breach their duty to cooperate and the duty not to cause environmental harm. Recognizing these as obligations of conduct, this Part explores the meaning of due diligence.

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

UNCLOS specifies that a flag state must “effectively exercise its jurisdiction and control” over the vessels it flags in “administrative, technical and social matters,”<sup>240</sup> a phrase that should be construed broadly to include “any matters affecting vessel operations in order to avoid regulatory lacunae.”<sup>241</sup> More specifically, a state must maintain a register of the names and particulars of the vessels it flags<sup>242</sup> 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 the ship.”<sup>243</sup> 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.”<sup>244</sup>

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

For example, the FAO Compliance Agreement imposes obligations on states prior to flagging vessels designed to strengthen their control over the vessels they flag.<sup>245</sup> To strengthen flag state control over

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<sup>239</sup> *Infra* Part IV(D).

<sup>240</sup> UNCLOS, *supra* note 2, art. 94, ¶ 1.

<sup>241</sup> Barnes, *Flag States*, *supra* note 56, at 314.

<sup>242</sup> UNCLOS, *supra* note 2, art. 94, ¶ 1.

<sup>243</sup> *Id.* art. 94, ¶ 2.

<sup>244</sup> *Id.* art. 94, ¶ 3.

<sup>245</sup> FAO Compliance Agreement, *supra* note 3, art. V; *see also id.* pmb. (“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*, *supra* note 4 (the Agreement “aims to enhance the role of flag

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.”<sup>246</sup> 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.<sup>247</sup> Some RFMOs embrace the connection between authorizing a vessel to fish and the flag state’s ability to exercise effective jurisdiction over the vessel, including the IATTC,<sup>248</sup> Northwest Atlantic Fisheries Organization (NAFO),<sup>249</sup> South East Atlantic Fisheries Organisation (SEAFO),<sup>250</sup> Southern Indian Ocean Fisheries Agreement (SIOFA),<sup>251</sup> and WCPFC.<sup>252</sup> This connection is also found in the FAO Code of Conduct for Responsible Fisheries,<sup>253</sup> International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (IPOA-IUU),<sup>254</sup> and Flag State Performance Guidelines.<sup>255</sup>

Legal instruments adopted after UNCLOS broaden the duty to effectively exercise jurisdiction over vessels by directing flag states to take such measures, as described in the FAO Compliance Agreement, that 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.”<sup>256</sup> This provision, also included in the UNFSA,<sup>257</sup> NAFO,<sup>258</sup> SEAFO,<sup>259</sup> SIOFA,<sup>260</sup> WCPFC,<sup>261</sup> the FAO Code of Conduct,<sup>262</sup> and IPOA-IUU,<sup>263</sup>

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States and ensure that a State strengthens its control over its vessels to ensure compliance with international conservation and management measures”).

<sup>246</sup> FAO Compliance Agreement, *supra* note 3, art. 3, ¶ 3.

<sup>247</sup> UNFSA, *supra* note 7, art. 18, ¶ 2.

<sup>248</sup> See IATTC Convention, *supra* note 224 (demonstrating that all but one of the IATTC’s IUU vessels were sailing without identifying themselves under a flag).

<sup>249</sup> Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries, Oct. 24, 1978, 1135 U.N.T.S. 369 (entered into force Jan. 1, 1979) [hereinafter NAFO Convention].

<sup>250</sup> 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) [hereinafter SEAFO].

<sup>251</sup> Southern Indian Ocean Fisheries Agreement (SIOFA), art. 11, ¶ 3(a), July 7, 2006 (entered into force June 21, 2012) [hereinafter SIOFA].

<sup>252</sup> WCPF Convention, *supra* note 175, art. 24, ¶ 2.

<sup>253</sup> FAO, *Code of Conduct*, *supra* note 5, ¶ 7.6.2.

<sup>254</sup> IPOA-IUU, *supra* note 33, ¶ 35.

<sup>255</sup> FAO, *Voluntary Guidelines for Flag State Performance*, ¶ 29 (2015), <https://perma.cc/K9YZ-ZB3R> [hereinafter FAO, *Flag State Performance Guidelines*].

<sup>256</sup> FAO Compliance Agreement, *supra* note 3, art. 3, ¶ 1(a) (emphasis added).

<sup>257</sup> UNFSA, *supra* note 7, art. 18, ¶ 1.

<sup>258</sup> NAFO Convention, *supra* note 249, art. 11, ¶ 1(a).

<sup>259</sup> SEAFO, *supra* note 250, art. 14, ¶ 1.

<sup>260</sup> SIOFA, *supra* note 251, art. 11, ¶ 1(a).

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.

Post-UNCLOS legal instruments also elaborate on UNCLOS’s duty to maintain a register of the names and particulars of the vessels it flags.<sup>264</sup> The FAO Compliance Agreement restates the UNCLOS requirement for the fisheries context, but also 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.<sup>265</sup> The UNFSA goes further, requiring parties to maintain a record of vessels and ensure that vessels are registered and authorized to fish.<sup>266</sup> These same requirements are found in RFMOs, typically with very detailed vessel information requirements.<sup>267</sup> IPOA-IUU,<sup>268</sup> FAO Code of Conduct,<sup>269</sup> and the Voluntary Guidelines for Flag State Performance include similar provisions.<sup>270</sup>

To exercise effectively their jurisdiction and control over their vessels, flag states must also collect, verify, and share fisheries data, as required by the UNFSA,<sup>271</sup> FAO Compliance Agreement,<sup>272</sup> and RFMOs.<sup>273</sup> The FAO Code of Conduct,<sup>274</sup> IPOA-IUU,<sup>275</sup> and the Flag

<sup>261</sup> WCPF Convention, *supra* note 175, art. 24, ¶ 1(a).

<sup>262</sup> FAO, *Code of Conduct*, *supra* note 5, ¶ 7.7.5.

<sup>263</sup> IPOA-IUU, *supra* note 33, ¶ 68.

<sup>264</sup> UNCLOS, *supra* note 2, art. 94(1).

<sup>265</sup> FAO Compliance Agreement, *supra* note 3, arts. 3, 4, 6; UNFSA, *supra* note 7, art. 18, ¶ 3(c), Annex I, art. 4.

<sup>266</sup> UNFSA, *supra* note 7, art. 18, ¶¶ 2, 3(a), 3(b)(ii), 3(c).

<sup>267</sup> IATTC, *Regional Vessel Register*, Resolution C-18-06 (2018), <https://perma.cc/G7ZA-XM3L>; ICCAT, *Multi-annual Conservation and Management Programme for Tropical Tunas* ¶ 31, Recommendation 16-01, <https://perma.cc/NU5W-3ND5>; Convention on the Conservation and Management of High Seas Fisheries Resources in the North Pacific Ocean, art. 13, ¶ 8, Feb. 24, 2012, (entered into force July 19, 2015), <https://perma.cc/DJ22-4DRL> [hereinafter NPFC Convention]; NPFC, *Conservation and Management Measure on Information Requirements for Vessel Registration*, CMM 2019-01 (2019), <https://perma.cc/LF24-HFQR>; SIOFA, *supra* note 251, art. 11, ¶ 3(b); WCPF Convention, *supra* note 175, art. 24, ¶¶ 4–5, Annex IV; WCPFC, *Record of Fishing Vessels and Authorization to Fish*, CMM 2018-06 (2018), <https://perma.cc/JDS9-7TRH>.

<sup>268</sup> IPOA-IUU, *supra* note 33, ¶ 35.

<sup>269</sup> FAO, *Code of Conduct*, *supra* note 5, art. 8, ¶¶ 1.2, 2.1–2.

<sup>270</sup> FAO, *Flag State Performance Guidelines*, *supra* note 255, ¶¶ 14–28.

<sup>271</sup> UNFSA, *supra* note 7, art. 5, ¶ j; *id.* art. 17, ¶ 4; *id.* art. 18, ¶ 3(f).

<sup>272</sup> FAO Compliance Agreement, *supra* note 3, art. 3, ¶ 7.

<sup>273</sup> 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), <https://perma.cc/G264-ZKQN> [hereinafter CCAMLR]; IATTC, *Resolution on Data Provision*, Resolution C-03-05, ¶ 2 (2003) <https://perma.cc/68BZ-4MEY>; ICCAT Convention, *supra* note 226, art. IX(2)(a); ICCAT, *Collection of Statistics on the Atlantic Tuna Fisheries*, Resolution 66-01 (1966),

State Performance Guidelines<sup>276</sup> include similar conditions. As part of verifying catches and ensuring compliance with other laws, flag states must also implement national inspection schemes as required by the UNFSA<sup>277</sup> and RFMOs<sup>278</sup> and recommended by the FAO Code of Conduct,<sup>279</sup> IPOA-IUU,<sup>280</sup> and the Flag State Performance Guidelines.<sup>281</sup>

The UNFSA and RFMOs also require flag states to record and timely report vessel position and other fisheries data, including by using vessel monitoring systems that record vessel position in real time.<sup>282</sup> The FAO Code of Conduct,<sup>283</sup> IPOA-IUU,<sup>284</sup> and the Flag State Performance Guidelines<sup>285</sup> recommend the same.

The UNFSA and RFMOs also require that flag states implement national observer programs,<sup>286</sup> although the scope of RFMO observer programs vary.<sup>287</sup> The FAO Code of Conduct promotes effective observer programs as critical components of efforts to ensure responsible

<https://perma.cc/W5DD-TK9H>; NPFC Convention, *supra* note 267, art. 13(11); NPFC, *Chub Mackerel*, CMM 2019-07, ¶ 6 (2019), <https://perma.cc/ZV8H-ZLHP>; SIOFA, *supra* note 251, art. 11(3)(d); WCPF Convention, *supra* note 175, art. 5(i); WCPFC, *Scientific Data to be Provided to the Commission*, WCPFC13 § 1 (2016), <https://perma.cc/NBR3-T8DT>.

<sup>274</sup> FAO, *Code of Conduct*, *supra* note 5, art. 6, ¶¶ 4, 11; *id.* art. 7, ¶ 4.4; *id.* art. 8, ¶ 4.3.

<sup>275</sup> IPOA-IUU, *supra* note 33, ¶ 28.3.

<sup>276</sup> FAO, *Flag State Performance Guidelines*, *supra* note 255, ¶ 31(d).

<sup>277</sup> UNFSA, *supra* note 7, art. 18, ¶ 3(g)(i).

<sup>278</sup> See, e.g., WCPFC, *Conservation and Management Measure for the Regional Observer Programme*, CMM 2018-05 (2018).

<sup>279</sup> FAO, *Code of Conduct*, *supra* note 5, art. 7, ¶ 7.3; *id.* art. 8, ¶ 4.3.

<sup>280</sup> IPOA-IUU, *supra* note 33, ¶ 24.10.

<sup>281</sup> FAO, *Flag State Performance Guidelines*, *supra* note 255, ¶ 31(e).

<sup>282</sup> UNFSA, *supra* note 7, art. 18, ¶ 3(e), (g)(iii); see, e.g., IATTC, *Establishment of a Vessel Monitoring System*, Resolution C-14-02 (2014), <https://perma.cc/TRE9-L7XM>; ICCAT, *Minimum Standards for Vessel Monitoring Systems in the ICCAT Convention Area*, Recommendation 18-10, ¶ 1 (2019), <https://perma.cc/496Y-VBBF>; SIOFA, *supra* note 251, art. 11, ¶ 1(a); WCPF Convention, *supra* note 175, art. 24, ¶¶ 8-9; WCPFC, *Commission Vessel Monitoring System*, CMM 2014-02 (2014), <https://perma.cc/ZF7E-WQ73>. For more information about the management of VMS by the WCPFC, see *Vessel Monitoring System*, *supra* note 10.

<sup>283</sup> FAO, *Code of Conduct*, *supra* note 5, art. 7, ¶ 7.3.

<sup>284</sup> IPOA-IUU, *supra* note 33, ¶¶ 24.3, 47.1, 80.7.

<sup>285</sup> FAO, *Flag State Performance Guidelines*, *supra* note 255, ¶ 31(c).

<sup>286</sup> UNFSA, *supra* note 7, art. 18, ¶ 3(g)(ii).

<sup>287</sup> FAO, *Code of Conduct*, *supra* note 5, art. 7, ¶ 7.3 (explaining that the scope of RFMO observer programs varies because the promulgation and implementation of such programs is based on procedures agreed to by specific organizations and arrangements). The FAO Conference adopted the Code of Conduct on Oct. 31, 1995. *Id.* 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 33, at iii, art. 24, § 4. 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).

fishing,<sup>288</sup> as do IPOA-IUU<sup>289</sup> and the Flag State Performance Guidelines.<sup>290</sup>

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, UNFSA exemplifies these flag state responsibilities.<sup>291</sup> It directs flag states to “enforce measures irrespective of where violations occur.”<sup>292</sup> It further directs them to “investigate immediately and fully” any alleged violation of a CMM.<sup>293</sup> Where a violation is found, 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 offenders of the benefits accruing from their illegal activities.”<sup>294</sup> Sanctions may include refusal, withdrawal or suspension of the authorization to fish.<sup>295</sup>

Although the FAO Code of Conduct,<sup>296</sup> Flag State Performance Guidelines, and IPOA-IUU are all non-binding,<sup>297</sup> 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,”<sup>298</sup>

<sup>288</sup> 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, art. 7, ¶ 7.3.

<sup>289</sup> IPOA-IUU, *supra* note 33, ¶ 28.3.

<sup>290</sup> FAO, *Flag State Performance Guidelines*, *supra* note 255, ¶ 31(c).

<sup>291</sup> UNFSA, *supra* note 7, art. 19.

<sup>292</sup> *Id.* art. 19, ¶ 1(a); *see also* WCPF Convention, *supra* note 175, 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 33, ¶ 78 (when bound by the rules of an RFMO); FAO, *Flag State Performance Guidelines*, *supra* note 255, ¶ 32.

<sup>293</sup> UNFSA, *supra* note 7, art. 19, ¶ 1(b); WCPF Convention, *supra* note 175, art. 25, ¶¶ 2, 6; FAO, *Flag State Performance Guidelines*, *supra* note 255, ¶ 36.

<sup>294</sup> UNFSA, *supra* note 7, art. 19, ¶ 2; *see also* WCPF Convention, *supra* note 175, art. 25, ¶ 7; FAO, *Code of Conduct*, *supra* note 5, art. 8, ¶ 2.7; IPOA-IUU, *supra* note 33, ¶ 21; FAO, *Flag State Performance Guidelines*, *supra* note 255, ¶¶ 32(d), 38.

<sup>295</sup> UNFSA, *supra* note 7, art. 19, ¶ 2; *see also* WCPF Convention, *supra* note 175, art. 25, ¶ 7; FAO, *Code of Conduct*, *supra* note 5, art. 8, ¶ 2.7; FAO, *Flag State Performance Guidelines*, *supra* note 255, ¶¶ 32(f), 38.

<sup>296</sup> FAO, *Code of Conduct*, *supra* note 5, art. 1, ¶ 1.

<sup>297</sup> *Id.*; FAO, *Flag State Performance Guidelines*, *supra* note 255, ¶ 1; IPOA-IUU, *supra* note 33, ¶ 4.

<sup>298</sup> FAO, *Flag State Performance Guidelines*, *supra* note 255, ¶ 1; IPOA-IUU, *supra* note 33, ¶ 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, at v.

but FAO also expressly recognized the failures of flag states and the problems of open registries and flags of convenience.<sup>299</sup> Moreover, they were adopted with full participation of the entire international community<sup>300</sup> as a means to discharge its duty to cooperate.<sup>301</sup>

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

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.”<sup>302</sup> As the U.N. Declaration of Principles on International Law states:

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.<sup>303</sup>

Due to its importance in avoiding and resolving international problems, the duty to cooperate finds expression in all spheres of international law<sup>304</sup> as well as “virtually all” international environmental agreements.<sup>305</sup> Consequently, the ICJ, ITLOS, and other

<sup>299</sup> IPOA-IUU, *supra* note 33, ¶ 2; FAO, *Flag State Performance Guidelines*, *supra* note 255, 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.

<sup>300</sup> FAO includes 195 members—194 states plus the European Union. *Membership of the FAO*, FOOD & AGRIC. ORG. OF THE U.N. (May 1, 2020), <https://perma.cc/3P2M-XGUA>.

<sup>301</sup> FAO, *Flag State Performance Guidelines*, *supra* note 255, ¶ 2; FAO, *Code of Conduct*, *supra* note 5, art. 6, ¶ 12; *id.* art. 7, ¶¶ 1.3–1.5; IPOA-IUU, *supra* note 33, ¶¶ 9.3, 18, 28, 31.

<sup>302</sup> Patricia Wouters, “Dynamic Cooperation” in *International Law and the Shadow of State Sovereignty in the Context of Transboundary Waters*, 3 ENV’T LIAB. 88, 88 (2013).

<sup>303</sup> 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, at 123 (Oct. 24, 1970).

<sup>304</sup> *See, e.g., id.* (“States have the duty to cooperate with one another . . . to promote international economic stability and progress.”).

<sup>305</sup> 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 (1987) (entered into force Jan. 1, 1989), <https://perma.cc/ZGL8-H4CR>; Stockholm Declaration of the United Conference on the Human Environment, June 16, 1972, Principle 24 (1972), <https://perma.cc/7YA4-NVH8> [hereinafter Stockholm Declaration]; Rio Declaration on Environment and Development, U.N. Doc. A/CONF.151/5/26 (vol. I), (June 14, 1992),



international tribunals have recognized the duty to cooperate as customary international law.<sup>306</sup>

The duty to cooperate is fundamental to UNCLOS and its regime to conserve fish stocks and other marine resources. Within its EEZ, an area up to 200 nautical miles from a state's coastline,<sup>307</sup> a coastal state has sovereign rights to exploit, conserve, and manage living resources, including fish.<sup>308</sup> 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."<sup>309</sup>

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 EEZ and the high seas.<sup>310</sup> 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."<sup>311</sup> States must also cooperate to conserve and manage anadromous<sup>312</sup> and catadromous species,<sup>313</sup> and marine mammals,<sup>314</sup> as well as to protect the marine

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<https://perma.cc/A3KP-9KD9> [hereinafter Rio Declaration]; Convention on International Trade in Endangered Species of Fauna and Flora, Mar. 3, 1973, 993 U.N.T.S. 243, at 245 (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://perma.cc/3GJJ-VEUM>.

<sup>306</sup> See, e.g., Lac Lanoux Arbitration (Fr. v. Spain) 12 R.I.A.A. 281, 296 (Perm. Ct. Arb. 1957); Gabčíkovo–Nagymaros Project (Hung./Slovk.), Judgment, 1997 I.C.J. Rep. 7, ¶ 17 (Sept. 25) ("Only by international co-operation could action be taken to alleviate these problems."); SANDS ET AL., *supra* note 305, at 213, 215.

<sup>307</sup> UNCLOS, *supra* note 2, art. 57.

<sup>308</sup> *Id.* art. 56.

<sup>309</sup> *Id.* art. 56, ¶ 2.

<sup>310</sup> *Id.* art. 63.

<sup>311</sup> *Id.* art. 64, ¶ 1.

<sup>312</sup> *Id.* art. 66. Anadromous species are those, like salmon, that spawn in freshwater and spend the majority of their lives in the marine environment. *Marine Fish and How They Live*, NAT'L OCEANIC & ATMOSPHERIC ADMIN., Apr. 1973, at 32 [hereinafter NOAA].

<sup>313</sup> 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. NOAA, *supra* note 312, at 32.

<sup>314</sup> 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").

environment.<sup>315</sup> Concerning high seas fisheries 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.”<sup>316</sup> Moreover, with respect to all their activities on the high seas, including fishing, states must have “due regard for the rights” of other states.<sup>317</sup> The UNCLOS negotiating history indicates 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.”<sup>318</sup>

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 *Fisheries Jurisdiction*,<sup>319</sup> 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.”<sup>320</sup> While this dispute arose prior to the adoption of UNCLOS, it did occur during negotiations of a new Law of the Sea regime.<sup>321</sup> 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.”<sup>322</sup> Consequently, the disputing states were required to share information and take into account relevant international agreements.<sup>323</sup>

ITLOS and other international tribunals have reached similar conclusions when interpreting UNCLOS. In *Chagos Arbitration*,<sup>324</sup> the

<sup>315</sup> 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.”).

<sup>316</sup> *Id.* arts. 117, 118.

<sup>317</sup> *Id.* art. 87, ¶ 2.

<sup>318</sup> UNCLOS 1982 COMMENTARY, *supra* note 53, at 86.

<sup>319</sup> *Fisheries Jurisdiction (U.K. v. Ice.)*, Merits, 1974 I.C.J. Rep. 3 (July 25).

<sup>320</sup> *Id.* ¶ 72; *see also Fisheries Jurisdiction (Ger. v. Ice.)*, Merits, 1974 I.C.J. Rep. 175, ¶ 64 (July 25).

<sup>321</sup> The *Fisheries Jurisdiction* cases took place during the early 1970s, with the ICJ’s opinion published in 1974. *See Fisheries Jurisdiction (U.K. v. Ice.)*, 1974 I.C.J. Rep. at 3; *Fisheries Jurisdiction (Ger. v. Ice.)*, 1974 I.C.J. Rep. at 175. Meanwhile, the UNCLOS negotiations began in 1973 and ended in 1982. *The United Nations Convention on the Law of the Sea: A Historical Perspective*, U.N. OCEANS & L. OF THE SEA (1998), <https://perma.cc/KK94-S776>.

<sup>322</sup> *Fisheries Jurisdiction (U.K. v. Ice.)*, 1974 I.C.J. Rep. ¶ 72; *Fisheries Jurisdiction (Ger. v. Ice.)*, 1974 I.C.J. Rep. ¶ 64.

<sup>323</sup> *Fisheries Jurisdiction (U.K. v. Ice.)*, 1974 I.C.J. Rep. ¶ 79; *Fisheries Jurisdiction (Ger. v. Ice.)*, 1974 I.C.J. Rep. ¶ 77.

<sup>324</sup> *See, e.g., Chagos Arbitration, Mauritius v. U.K.*, 2011-03, ¶ 519 (Perm. Ct. Arb. 2015).

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.”<sup>325</sup> In *Land Reclamation by Singapore in and around the Straits of Johor*<sup>326</sup> (*Land Reclamation by Singapore*), 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.”<sup>327</sup>

In *Request for Advisory Opinion Submitted by the Sub-Regional Fisheries Commission*<sup>328</sup> (*SRFC Advisory Opinion*), ITLOS specifically discussed the nature and scope of the duty to cooperate in the context of fisheries resources.<sup>329</sup> 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 economic zones.”<sup>330</sup> Coastal states, thus, have “primary responsibility for taking the necessary measures to prevent, deter and eliminate IUU fishing.”<sup>331</sup>

Importantly, ITLOS emphasized that flag states also have obligations to prevent, deter, and eliminate IUU fishing.<sup>332</sup> 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.<sup>333</sup> 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.<sup>334</sup> In particular, a flag state has a

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<sup>325</sup> *Id.*; see also *MOX Plant (Ir. v. U.K.)*, Case No. 10, Order of Dec. 3, 2001, 10 ITLOS Rep. 95, 110 (“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].”).

<sup>326</sup> *Land Reclamation by Singapore In and Around the Straits of Johor (Malay. v. Sing.)*, Case No. 12, Order of Oct. 8, 2003, 12 ITLOS Rep. 10.

<sup>327</sup> *Id.* at 34 (Hossain, J. & Oxman, J., ad hoc opinion).

<sup>328</sup> *SRFC Advisory Opinion*, Case No. 21, Advisory Opinion of Apr. 2, 2015, 21 ITLOS 4.

<sup>329</sup> *Id.* ¶ 207.

<sup>330</sup> *Id.*

<sup>331</sup> *Id.* ¶ 106.

<sup>332</sup> *Id.* ¶ 108.

<sup>333</sup> *Id.* ¶ 111.

<sup>334</sup> *Id.* ¶ 124.

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.<sup>335</sup>

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”<sup>336</sup> and that this duty applies irrespective of the right, found in Article 56, of a coastal state to exploit natural resources in its EEZ.<sup>337</sup> 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.’”<sup>338</sup>

In the pollution context, the ICJ and international tribunals have interpreted the duty to cooperate as including obligations to negotiate, consult, share information, monitor impacts of activities, and conduct environmental impact assessments.<sup>339</sup> 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.<sup>340</sup> 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.<sup>341</sup>

The international community has made the duty to cooperate more specific in the context of both straddling fish stocks and highly migratory fish stocks. While UNCLOS directs those states whose nationals fish for such stocks to cooperate,<sup>342</sup> the UNFSA reaffirms that obligation but limits access to straddling fish stocks and highly migratory fish stocks managed by RFMOs to RFMO members and

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<sup>335</sup> *Id.* ¶¶ 119, 139.

<sup>336</sup> *Id.* ¶ 215.

<sup>337</sup> *Id.* ¶ 216.

<sup>338</sup> *Id.* ¶ 218.

<sup>339</sup> *MOX Plant (Ir. v. U.K.)*, Case No. 10, Order of Dec. 3, 2001, 10 ITLOS Rep. 95, ¶ 89; *Land Reclamation by Singapore (Malay. v. Sing.)*, Case No. 12, Order of Oct. 8, 2003, 12 ITLOS Rep. 10, ¶ 106(1); *Chagos Arbitration, Mauritius v. U.K.*, 2011-03, ¶¶ 521–22 (Perm. Ct. Arb. 2015). 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 305, at 215–16.

<sup>340</sup> See discussion *supra* Section IV.A.

<sup>341</sup> See discussion *supra* Section IV.B.

<sup>342</sup> UNCLOS, *supra* note 2, arts. 63, 64.

participants.<sup>343</sup> If a state does not become a member of the relevant RFMO, it “is not discharged from the obligation to cooperate.”<sup>344</sup> In these circumstances, it shall not authorize the vessels it flags to fish for straddling and highly migratory fish stocks managed by that RFMO.<sup>345</sup> Thus, if a party to the UNFSA fails to join the relevant RFMO and authorizes its vessels to fish for stocks managed by that RFMO, it violates its duty to cooperate.

In addition, the UNFSA imposes many 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 effectively exercise its responsibilities over those vessels.<sup>346</sup> Among those responsibilities are the establishment of a national record of fishing vessels,<sup>347</sup> requirements for recording and timely reporting of vessel position and catch data,<sup>348</sup> and requirements to verify catch of target species and bycatch.<sup>349</sup> In addition, flag states must adopt “monitoring, control and surveillance” of its vessels and their fishing operations,<sup>350</sup> including the implementation of national inspection schemes,<sup>351</sup> observer programs,<sup>352</sup> and VMS.<sup>353</sup> 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 failing to establish or enforce such measures violate their obligation to exercise effective jurisdiction and control over their vessels and, consequently, also violate UNCLOS Article 117, which requires states to adopt measures “as may be necessary for the conservation of the living resources of the high seas.”<sup>354</sup> With ninety-two UNFSA parties and 168 UNCLOS parties, the vast majority of flag states are bound by these responsibilities.<sup>355</sup>

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<sup>343</sup> UNFSA, *supra* note 7, art. 8, ¶¶ 3–4. RFMOs typically refer to “participants” as “cooperating non-members.” These cooperating non-members, even without formal membership, these states agree to abide by the conservation and management rules of the RFMO.

<sup>344</sup> *Id.* art. 17, ¶ 1.

<sup>345</sup> *Id.* art. 17, ¶ 2.

<sup>346</sup> *Id.* art. 18, ¶ 2.

<sup>347</sup> *Id.* art. 18, ¶ 3(c).

<sup>348</sup> *Id.* art. 18, ¶ 3(e).

<sup>349</sup> *Id.* art. 18, ¶ 3(f).

<sup>350</sup> *Id.* art. 18, ¶ 3(g).

<sup>351</sup> *Id.* art. 18, ¶ 3(g)(i).

<sup>352</sup> *Id.* art. 18, ¶ 3(g)(ii).

<sup>353</sup> *Id.* art. 18, ¶ 3(g)(iii).

<sup>354</sup> UNCLOS, *supra* note 2, art. 117; RAYFUSE, *supra* note 95, at 46–47.

<sup>355</sup> *Chronological Lists of Ratifications of Accessions and Successions to the Convention and the Related Agreements*, U.N. DIV. FOR OCEAN AFFS. & L. OF THE SEA (May 13, 2022), <https://perma.cc/W74C-VM6F>.

*C. The Duty Not to Cause Environmental Harm*

In addition to specific flag state responsibilities, all states have a duty not to cause transboundary environmental harm, which derives from the general obligation of states to ensure that activities within their jurisdiction and control do not harm other states and areas not under the jurisdiction of any state.<sup>356</sup> In the environmental context, this duty found specific expression in *Trail Smelter*,<sup>357</sup> in which an arbitral tribunal ordered Canada to pay damages and abate pollution from a smelter causing serious environmental harm to the United States.<sup>358</sup> The duty has been enshrined in the 1972 Stockholm Declaration<sup>359</sup> and the 1992 Rio Declaration on Environment and Development.<sup>360</sup>

In *Pulp Mills on the River Uruguay (Pulp Mills)*,<sup>361</sup> 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.”<sup>362</sup>

In these two sentences, the ICJ clarified three aspects of the duty to not cause environmental harm. First, the duty is binding international law.<sup>363</sup> Second, although neither the Stockholm Declaration nor the Rio

<sup>356</sup> 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 (U.K. v. Alb.)*, Merits, 1949 I.C.J. Rep. 4, 22 (Apr. 9, 1949).

<sup>357</sup> *Trail Smelter (U.S. v. Can.)*, Arbitral Tribunal, 3 R.I.A.A. 1905 (1938).

<sup>358</sup> *Id.* at 1963, 1965–66.

<sup>359</sup> Stockholm Declaration, *supra* note 305, princ. 21.

<sup>360</sup> Rio Declaration, *supra* note 305, princ. 2.

<sup>361</sup> *Pulp Mills on the River Uruguay (Arg. v. Uru.) (Pulp Mills)*, Judgment, 2010 I.C.J. Rep. 14 (Apr. 20).

<sup>362</sup> *Id.* ¶ 101 (quoting *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, ¶ 29 (July 8)); *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.”); SANDS ET AL., *supra* note 305, at 206 (“[T]here can be no question that Principle 21 reflects a rule of customary international law . . .”).

<sup>363</sup> *Pulp Mills*, 2010 I.C.J. ¶ 101; *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) (Certain Activities)*, Judgment, 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*, Judgment, 1997 I.C.J. ¶¶ 51–53 (Sept. 25) (quoting *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. ¶ 29, as part of its discussion of necessity). In 2013, an arbitral

Declaration set a threshold for environmental damage,<sup>364</sup> the ICJ declared that any actions must cause “significant” harm to the environment.<sup>365</sup> 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.<sup>366</sup> 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.<sup>367</sup>

Moreover, “[t]he obligation is a continuing one.”<sup>368</sup> 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.<sup>369</sup> 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 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

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tribunal called the obligation a “foundation principle of customary international environmental law.” In *re Indus Waters Kishenganga Arbitration (India v. Pak.)*, Partial Award, 31 R.I.A.A. 1, ¶¶ 448–49 (2013).

<sup>364</sup> Stockholm Declaration, *supra* note 305, princ. 21; Rio Declaration, *supra* note 305, princ. 2. Principle 2 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.

*Id.*

<sup>365</sup> *Pulp Mills*, 2010 I.C.J. ¶ 101; *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 601(1)(b) (A.L.I. 1986) (stating that 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 et al., eds. 2010); BIRNIE ET AL., *supra* note 362, at 143 (“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 ET AL., *supra* note 362, at 743. In *Trail Smelter*, the tribunal placed the threshold at pollution of “serious consequence.” 3 R.I.A.A. 1905, 1965 (1938).

<sup>366</sup> *Pulp Mills*, 2010 I.C.J. ¶ 101 (emphasis added).

<sup>367</sup> BIRNIE ET AL., *supra* note 362, at 143.

<sup>368</sup> *Id.*

<sup>369</sup> *Pulp Mills*, 2010 I.C.J. Rep. ¶ 205.

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.”<sup>370</sup>

#### *D. Due Diligence*

In international law, obligations can be classified as obligations of result and obligations of conduct.<sup>371</sup> Obligations of result require a state to guarantee a specific outcome, such as prohibiting torture.<sup>372</sup> In contrast, obligations of conduct—also called due diligence obligations—require a state to do the best it can to achieve a specific goal, not a specific result.<sup>373</sup> While obligations of result are “strict and rigid,” obligations of conduct “are less burdensome and easier to execute.”<sup>374</sup>

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.<sup>375</sup>

A state could be held responsible in international law if it “failed to act diligently and thus take all appropriate measures to enforce its relevant regulations on a public or private operator under its jurisdiction.”<sup>376</sup> Thus, while the concept of “due diligence” is variable

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<sup>370</sup> *Id.*

<sup>371</sup> *SRFC Advisory Opinion*, Case No. 21, Advisory Opinion of Apr. 2, 2015, 2015 ITLOS Rep. 4, ¶ 128; ARSIWA, *supra* note 42, art. 12, cmt. 11. Obligations can be classified by other means, as well, including, for example, as conventional, customary, or general principle.

<sup>372</sup> 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, *Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-T, Judgement, ¶ 144 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998), a state could not claim a defense of necessity.

<sup>373</sup> Constantin P. Economides, *Content of the Obligation: Obligations of Means and Obligations of Result*, in *THE LAW OF INTERNATIONAL RESPONSIBILITY*, *supra* note 365, at 371, 372; Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC) (*SRFC Advisory Opinion*), Case No. 21, Advisory Opinion of Apr. 2, 2015, 2015 ITLOS Rep. 4, ¶ 128.

<sup>374</sup> *Id.* at 375.

<sup>375</sup> *Pulp Mills*, 2010 I.C.J. ¶ 197.

<sup>376</sup> *Id.*



and dependent on the circumstances, “[t]he standard of due diligence has to be more severe for the riskier activities.”<sup>377</sup>

ITLOS 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.<sup>378</sup>

ITLOS made this conclusion in the context of the duty to cooperate, holding that the duty to cooperate “extends . . . to cases of alleged IUU fishing activities.”<sup>379</sup> 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.”<sup>380</sup> 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.<sup>381</sup> That is, a flag state will not necessarily be held liable for all violations committed by persons (and vessels) under its jurisdiction. Instead, the question is whether a flag state used “adequate means, to exercise best possible efforts, to do the utmost” to prevent IUU fishing by ships flying its flag.<sup>382</sup> 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.”<sup>383</sup>

Against this standard, a flag state may violate its responsibility to exercise effectively its jurisdiction and control over its vessels in numerous ways.<sup>384</sup> These include the following:

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<sup>377</sup> Responsibilities and Obligations of States with Respect to Activities in the Area, Advisory Opinion of Feb. 1, 2011, ITLOS Rep. 2011, ¶ 117.

<sup>378</sup> *SRFC Advisory Opinion*, Case No. 21, Advisory Opinion of Apr. 2, 2015, 21 ITLOS 4, ¶ 139.

<sup>379</sup> *Id.* ¶ 140.

<sup>380</sup> UNCLOS, *supra* note 2, art. 300; *see also* Whaling in the Antarctic (Austl. v. Japan: N.Z. Intervening), Judgment, 2014 I.C.J. Rep. 226, ¶ 83 (Mar. 31) (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).

<sup>381</sup> *SRFC Advisory Opinion*, 21 ITLOS ¶ 128.

<sup>382</sup> *Id.* ¶ 129.

<sup>383</sup> *Id.*

<sup>384</sup> 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

- Failing to maintain a vessel registry;
- Failing to require vessels to report fish catches;
- Failing to implement national inspection schemes;
- Failing to investigate allegations of IUU fishing by vessels it flags;
- Failing to impose sanctions sufficient to deter violations and deprive IUU fishers of the benefits of their illegal activities;
- Authorizing vessels to fish in waters managed by an RFMO, provided that the state is a party to the UNFSA and not implementing the rules of the RFMO;
- Failing to require vessels to use VMS, provided that the state is a party to the UNFSA.
- Failing to adopt legislation or regulations in regard to any of the issues raised above.<sup>385</sup>

In addition, each of these violations separately violates the flag state's duty to cooperate to conserve and manage fish stocks, particularly but not exclusively with respect to straddling and highly migratory fish stocks.

To address these violations, states could incentivize or disincentivize non-complying flag states. They could, for example, pay non-complying flag states to close their registries and cease flagging vessels.<sup>386</sup> With the exception of a few of the largest flag states, such as Panama, Liberia, and the Marshall Islands, this is unlikely to be very expensive. While dated considering the growth of open registries over the past two decades, a 2002 report estimated revenue from twenty-one open registries at less than 3.1 million USD.<sup>387</sup>

If financial incentives are unsuccessful, states can unilaterally apply countermeasures or bring a claim to the ICJ or pursuant to the compulsory dispute settlement provisions of UNCLOS.<sup>388</sup> As described in the next sections, the use of countermeasures provides an effective method for disincentivizing rogue flag state behavior.<sup>389</sup> A claim brought to the ICJ or through UNCLOS might result in a definitive statement

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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 45, ¶ 7.

<sup>385</sup> *SRFC Advisory Opinion*, 21 ITLOS ¶¶ 98, 99, 113, 114, 116, 118, 138.

<sup>386</sup> The author thanks Anastasia Telesetsky, Professor, California Polytechnic State University–San Luis Obispo, for the suggestion.

<sup>387</sup> Swan, *supra* note 37, § III.1 (citing information from Lloyd's Maritime Information Services).

<sup>388</sup> ARSIWA, *supra* note 42, art. 22; see UNCLOS, *supra* note 2, arts. 279–299 (detailing process for dispute settlement).

<sup>389</sup> See discussion *infra* Section V.C.

on the scope of flag state obligations, but decisions of the ICJ and other international tribunals cast doubt on whether non-flag states can recover compensation from flag states for costs incurred to prevent, deter, and eliminate IUU fishing.

#### V. USING COUNTERMEASURES TO PREVENT, DETER, AND ELIMINATE 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.<sup>390</sup> Countermeasures are unilaterally adopted self-help measures allowing injured states “to vindicate their rights and to restore the legal relationship with the responsible state.”<sup>391</sup>

Although unilateral in nature, both the ICJ and the International Law Commission have identified several conditions that a state must satisfy when adopting countermeasures. Countermeasures must be directed only at the state in breach of its international obligations<sup>392</sup> and imposed only after that state has failed to discontinue the wrongful act or make reparation for it.<sup>393</sup> They must also be temporary, reversible actions designed to induce compliance with or make reparation for the internationally wrongful act.<sup>394</sup> In addition, they must also be proportionate to the violations<sup>395</sup> and not involve violations of peremptory norms or human rights,<sup>396</sup> or the use of force.<sup>397</sup> None of these requirements pose 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.

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<sup>390</sup> *Gabčíkovo–Nagymoros Project*, Judgment, 1997 I.C.J. 7, ¶¶ 83–87 (Sept. 25); ARSIWA, *supra* note 42, 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. *Id.* art. 49, cmts. 1–2; Rosemary Rayfuse, *Countermeasures and High Seas Fisheries Enforcement*, 51 NETH. INT’L. L. REV. 41, 44 (2004) [hereinafter Rayfuse, *Countermeasures*].

<sup>391</sup> ARSIWA, *supra* note 42, chp. II, cmt. 1.

<sup>392</sup> *Gabčíkovo–Nagymoros Project*, Judgment, 1997 I.C.J. ¶ 83; ARSIWA, *supra* note 42, art. 49(1)–(2).

<sup>393</sup> *Gabčíkovo–Nagymoros Project*, Judgment, 1997 I.C.J. ¶ 84.

<sup>394</sup> *Id.* ¶ 87; ARSIWA, *supra* note 42, arts. 49(2), 53.

<sup>395</sup> *Gabčíkovo–Nagymoros Project*, Judgment, 1997 I.C.J. ¶ 85; ARSIWA, *supra* note 42, art. 51.

<sup>396</sup> ARSIWA, *supra* note 42, art. 50(1).

<sup>397</sup> *Id.*

### A. Injured States

“Injured states” are authorized to adopt countermeasures for another state’s wrongful conduct.<sup>398</sup> 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.<sup>399</sup>

Second, if a vessel fishes illegally for a stock managed by an RFMO, all of those RFMO members should be considered injured states because the breach “specially affects”<sup>400</sup> each of those states due to their active cooperation to conserve that stock or because “any state” has the right to impose countermeasures.<sup>401</sup> Coastal states 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.<sup>402</sup>

Third, those states without a direct stake in the fishery but which are UNCLOS parties are also injured states or have rights to enforce against non-complying flag states that violate international agreements and may adopt countermeasures. Whether or not any party to a treaty is considered “injured” by another state’s breach of a treaty obligation, the ICJ, international tribunals, and scholars have concluded that parties to an international agreement with treaty obligations can bring actions even if they are not directly injured. For example, the ICJ allowed Belgium to bring claims against Senegal under the Convention against

<sup>398</sup> *Gabčíkovo-Nagymoros Project*, 1997 I.C.J. ¶ 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 42, art. 49(1).

<sup>399</sup> The ILC’s provisions on countermeasures specifically refers to “injured state.” ARSIWA, *supra* note 42, 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*, *supra* note 365, at 1137, 1138–40. 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 42, art. 22, cmt. 6.

<sup>400</sup> ARSIWA, *supra* note 42, art. 42.

<sup>401</sup> *Id.* art. 54. Rayfuse, *Countermeasures*, *supra* note 390, 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.”).

<sup>402</sup> ARSIWA, *supra* note 42, art. 42, cmt. 12. 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).

Torture even though no Belgian had been tortured.<sup>403</sup> The ICJ concluded that the common interest in preventing and prosecuting torture gave all parties to the Convention against Torture a legal interest to bring claims; these obligations are known as obligations *erga omnes partes*.<sup>404</sup> In the context of UNCLOS, ITLOS remarked that “Each State Party may also be entitled to claim compensation in light of the *erga omnes* character of the obligations relating to preservation of the environment of the high seas and in the Area.”<sup>405</sup> Courts, tribunals, and scholars have also concluded that certain obligations—obligations *erga omnes*—may be enforced by any state regardless of whether they are a party to the relevant convention.<sup>406</sup>

State practice supports these concepts of obligations *erga omnes*, with states frequently imposing countermeasures against other states for violations of human rights.<sup>407</sup> In addition, in the context of defining an injured state entitled to react to a breach, the International Law

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<sup>403</sup> Questions Relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.), Judgment, 2012 I.C.J. 423, ¶¶ 68–69 (July 20). The International Law Commission did not directly answer whether any party to a treaty should be considered an “injured state.” ARSIWA, *supra* note 42, art. 22, cmt. 6.

<sup>404</sup> As the ICJ explained in full:

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.

*Id.* ¶ 68.

<sup>405</sup> Responsibilities and Obligations of States Sponsoring Persons and Entities with respect to Activities in the Area, Advisory Opinion, 2011 ITLOS 10, ¶ 180 (Feb. 1, 2011).

<sup>406</sup> See also Prosecutor v. Furundžija, Case IT-95-17/1-T, ¶ 151, Appeals Chamber, (Int’l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998) (stating, “the prohibition against torture imposes upon States obligations *erga omnes*, that is, obligations owed towards all the other members of the international community. In addition, the violation of such an obligation simultaneously constitutes a breach of the correlative right of all members of the international community and gives rise to a claim for compliance accruing to each and every member, which then has the right to insist on fulfilment of the obligation or in any case to call for the breach to be discontinued.”); Barcelona Traction, Light and Power Company, Limited (Belg. v. Spain), Second Phase, Judgment, 1970 I.C.J. 3, ¶ 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*.”). See also Sicilianos, *supra* note 399, at 1144–48 (noting scholarly support); A.L.L., RESTATEMENT OF THE LAW THIRD: FOREIGN RELATIONS LAW OF THE UNITED STATES § 902 (2018). In addition, The ILC further provides that “[a]ny State other than an injured State is entitled to invoke the responsibility of another State . . . if:

- (a) the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or
- (b) the obligation breached is owed to the international community as a whole.”

ARSIWA, *supra* note 42, art. 48.

<sup>407</sup> MARTIN DAWIDOWICZ, THIRD-PARTY COUNTERMEASURES IN INTERNATIONAL LAW 111–238 (2017) (describing the range of countermeasures taken by third-party states).

Commission noted that some states may not have suffered any quantifiable damage.<sup>408</sup> It used as an example a state's claim to sovereignty over an unclaimed area of Antarctica contrary to article 4 of the 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."<sup>409</sup>

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.<sup>410</sup> It directs states to exercise their jurisdiction effectively over the vessels they flag.<sup>411</sup> 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 by limiting the availability of resources available to them and by forcing them to engage in enforcement activities, adopt other monitoring, control, and surveillance mechanisms to prevent IUU fishing, and ensure that their markets include legally caught fish.

### B. Proportionate Countermeasures

An injured state, may only adopt countermeasures "commensurate with the injury suffered, taking account of the gravity of the internationally wrongful act and the rights in question."<sup>412</sup> Stated this way, the requirement of proportionality includes both quantitative and qualitative elements.<sup>413</sup> 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 *Air Services Agreement Arbitration*,<sup>414</sup>

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

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<sup>408</sup> ARSIWA, *supra* note 42, at 119.

<sup>409</sup> *Id.* at 119.

<sup>410</sup> *See supra* Section IV(B).

<sup>411</sup> *See supra* Section IV(D).

<sup>412</sup> ARSIWA, *supra* note 42, at 134. *See also Gabčíkovo-Nagymoros Project*, Judgment, 1997 I.C.J. 7, ¶ 85 (Sept. 25) ("[C]ountermeasure[s] must be commensurate with the injury suffered, taking into account the rights in question."); *Air Services Agreement Arbitration (U.S. v. Fr.) (Air Services Agreement)*, 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.").

<sup>413</sup> DAWIDOWICZ, *supra* note 407, at 347 ("Quantitative factors must be weighed against qualitative ones.").

<sup>414</sup> *See generally Air Services Agreement*, XVIII R.I.A.A. 417.

States, to take into account not only the injuries suffered . . . but also the importance of the questions of principle arising from the alleged breach.<sup>415</sup>

In that dispute, the United States prohibited French flights from landing in Los Angeles as a response to France refusing to allow a U.S. airline, Pan Am, to fly from the west coast of the United States using a 747 but switch to a 727 in London before completing the route to Paris.<sup>416</sup> 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” of the respective airlines due to the importance of legal obligations to promote air travel.<sup>417</sup> As such, it concluded that the countermeasures adopted by the United States were not “clearly disproportionate.”<sup>418</sup>

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.<sup>419</sup> 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 effectively exercise 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 consider the rights in question, which may expand or contract the range of available countermeasures. In *Gabčíkovo–Nagymoros Project*,<sup>420</sup> 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, denying Hungary its right to an equitable and reasonable portion of the river’s water, a shared resource.<sup>421</sup> Because of the shared nature of the resource, irrespective of the agreement to construct the water works, the ICJ concluded that Czechoslovakia had “failed to respect proportionality.”<sup>422</sup>

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 Czechoslovakia’s use of a shared resource as part of its countermeasure, here the failure of

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<sup>415</sup> *Id.* ¶ 83.

<sup>416</sup> *Id.* ¶¶ 1–8.

<sup>417</sup> *Id.* ¶ 83 (“If the importance of the issue is viewed within the framework of the general air transport policy adopted by the United States Government and implemented by the conclusion of a large number of international agreements with countries other than France, the measures taken by the United States do not appear to be clearly disproportionate when compared to those taken by France.”).

<sup>418</sup> *Id.*

<sup>419</sup> ARSIWA, *supra* note 42, at 129 (“There is no requirement that States taking countermeasures should be limited to suspension of performance of the same or closely related obligation.”).

<sup>420</sup> *Gabčíkovo–Nagymoros Project*, Judgment, 1997 I.C.J. 7, ¶ 85 (Sept. 25).

<sup>421</sup> *Id.* ¶¶ 85–86.

<sup>422</sup> *Id.* ¶ 85.

flags of non-compliance to comply with their international obligations facilitates the decline of shared fish stocks that the international community has a duty to cooperate to conserve and manage. This failure imposes significant costs on flag states and their vessels complying with relevant law. As such, states adopting countermeasures for flag state failures may have greater latitude to adopt countermeasures, as the United States did in *Air Services Agreement Arbitration*.

Similarly, the gravity of the offence 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” to include various aspects of IUU fishing: fishing in closed areas; using prohibited gear; falsifying or concealing markings, identity or the registration of the fishing vessel; misreporting of catches; among other things.<sup>423</sup> As noted earlier, IUU fishing destabilizes food security,<sup>424</sup> diminishes fisheries resources,<sup>425</sup> and undermines monitoring, control, and surveillance regimes of RFMOs,<sup>426</sup> which “adds pressure to already overexploited fish stocks” and “compromise[s] efforts to rebuild them.”<sup>427</sup> Moreover, the failure to exercise jurisdiction over vessels leads to gross violation of human rights, including indentured servitude and other forms of modern slavery.<sup>428</sup>

While these factors allow injured states to increase the value of countermeasures, the countermeasures must still be designed to compel compliance rather than be punitive.<sup>429</sup> Nevertheless, non-flag states have numerous options that likely fall within the range of proportionate countermeasures. For example, they may terminate access to their EEZ, deny port privileges, or 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

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<sup>423</sup> UNFSA, *supra* note 7, art. 21(11). *See also* WCPF Convention, *supra* note 175, art. 25(4) (incorporating by reference the definition of “serious violation” in the UNFSA).

<sup>424</sup> *See* FAO, *Implementation of IPOA-IUU*, *supra* note 117 (“IUU fishing therefore threatens livelihoods, exacerbates poverty, and augments food insecurity.”).

<sup>425</sup> *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.”).

<sup>426</sup> *See generally* FAO, *Implementation of IPOA-IUU*, *supra* note 117 §§ 7–8.

<sup>427</sup> Env'tl. Just. 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://perma.cc/FE5C-P63U>.

<sup>428</sup> *See generally* Wold, *Slavery at Sea*, *supra* note 112, at 486–87.

<sup>429</sup> ARSIWA, *supra* note 42, 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.”).



of the General Agreement on Tariffs and Trade (GATT).<sup>430</sup> States could also undertake high seas boarding and inspection of vessels flagged to non-complying 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. They could do so without 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 that benefits fisheries.<sup>431</sup> 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.<sup>432</sup> It could also challenge trade suspensions and landing bans as inconsistent with GATT obligations.<sup>433</sup> Nonetheless, the opportunity to act without recourse to international dispute settlement allows states to quickly 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 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.<sup>434</sup> When ICCAT members banned the import of bluefin tuna products from Belize,<sup>435</sup> Belize responded by joining ICCAT and other RFMOs, as well as adopting measures to strengthen its control over the vessels it flags.<sup>436</sup> It also partnered with Global Fishing Watch, an NGO that tracks

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<sup>430</sup> 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. General Agreement on Tariffs and Trade, arts. I, II, VII, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194.

<sup>431</sup> For an excellent discussion of the arguments for and against countermeasures generally, see DAWIDOWICZ, *supra* note 407, at 8–12, 109–10.

<sup>432</sup> UNCLOS, *supra* note 2, arts. 110, 279–99.

<sup>433</sup> Understanding on Rules and Procedures Governing the Settlement of Disputes art. 1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401, <https://perma.cc/M6CW-TY55>.

<sup>434</sup> CALLEY, *supra* note 94, at 30.

<sup>435</sup> 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://perma.cc/6TJG-57VB>.

<sup>436</sup> CALLEY, *supra* note 94, at 31–35.

fishing vessels through various electronic means, to publicly share data on the movements of its fishing vessels.<sup>437</sup>

Similar import bans might be equally effective against other flags of non-compliance. Panama, for example, has long been considered a flag of convenience.<sup>438</sup> The EU has issued Panama a second “yellow card” because Panama failed to discharge its flag state responsibilities, but the EU has not issued a red card that would trigger trade bans with Panama.<sup>439</sup> States could start by banning imports of fish products, which represent Panama’s fifth most valuable export.<sup>440</sup> Fish exports, while providing Panama with a \$172.6 million USD trade surplus,<sup>441</sup> still pales in comparison to the \$500 million USD generated by Panama’s vessel registry.<sup>442</sup> Thus, states may wish to extend their countermeasures to ban imports of Panamanian ores, boats, and pharmaceuticals, products composing more than 56% of Panama’s exports in 2021.<sup>443</sup> 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.

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.<sup>444</sup> These vessel registries are much smaller (although growing fast) and, consequently, these flag states might be more willing to forego the relatively small

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<sup>437</sup> Global Fishing Watch, Belize, Promoting Ocean Transparency Together, <https://perma.cc/2VLD-AH6E> (last visited Mar. 6, 2023).

<sup>438</sup> Mary Triny Zea & Michelle Carrere, *Panama: A “Flag of Convenience” for Illegal Fishing and Lack of Control at Sea*, MONGABAY (Oct. 13, 2022), <https://perma.cc/HHL9-6RKY>.

<sup>439</sup> European Commission, 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 O.J. (C 13) 11–29. A “yellow card” triggers consultations with the European Union. See European Commission, *Questions and Answers: 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://perma.cc/77S8-H5FF> [hereinafter EC Questions and answers].

<sup>440</sup> Daniel Workman, *Panama’s Top 10 Exports*, WORLD’S TOP EXPORTS, <https://perma.cc/FL4K-ARGH> (last visited Mar. 6, 2023).

<sup>441</sup> *Id.*

<sup>442</sup> Emily Benson & Catherine Puga, *Flagging the Issues: Maritime Governance, Forced Labor, and Illegal Fishing*, CTR. FOR STRATEGIC & INT’L STUDIES (Aug. 9, 2021), <https://perma.cc/83CX-J7HU>.

<sup>443</sup> Workman, *supra* note 440.

<sup>444</sup> See, e.g., Indian Ocean Tuna Commission: IOTC List of IUU Vessels (May 26, 2022), <https://perma.cc/HV55-QP9Q>.

revenue generated by their registries to avoid strategically targeted countermeasures.<sup>445</sup>

## 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<sup>446</sup>, litigation at the ICJ<sup>447</sup>, or through other arbitral procedures.<sup>448</sup> 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 typically provide compensation for “extraordinary” costs only, and whether costs incurred in enforcing fisheries rules qualify as extraordinary is not clear.<sup>449</sup>

### A. Choice of Forum

The ICJ provides a forum for dispute settlement that can entertain claims addressing any aspect of international law.<sup>450</sup> Although some fisheries agreements, such as the IOTC, specifically provide that disputes be submitted to the ICJ unless the disputing parties otherwise agree,<sup>451</sup> the ICJ is not likely to be a viable forum in most cases because very few states operating open registries and considered flags of convenience have consented to ICJ jurisdiction.<sup>452</sup> Of the forty-two states and overseas territories considered flags of convenience by the International Transport Workers Federation (ITF),<sup>453</sup> only thirteen have

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<sup>445</sup> 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) . . .” EC Questions and answers, *supra* note 439.

<sup>446</sup> UNCLOS, *supra* note 2, arts. 279–99.

<sup>447</sup> Statute of the International Court of Justice, art. 36, June 26, 1945, 33 U.S.T.S. 993.

<sup>448</sup> Disputing parties may, for example, choose binding arbitration through the Permanent Court of Arbitration. *United Nations Convention on the Law of the Sea*, PERMANENT COURT OF ARBITRATION, <https://perma.cc/Z5Y2-U3NG> (last visited Mar. 6, 2023). As those procedures can be tailored to specific disputes, they are not covered in this Article.

<sup>449</sup> See *infra* note 547 and accompanying text.

<sup>450</sup> Statute of the International Court of Justice, *supra* note 447, art. 38.

<sup>451</sup> 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).

<sup>452</sup> Statute of the International Court of Justice, *supra* note 447, art. 36.

<sup>453</sup> *Flags of Convenience*, INT’L TRANSP. WORKERS’ FED’N, <https://perma.cc/E98X-T4UW> (last visited Mar. 6, 2023).

consented to the jurisdiction of the Court.<sup>454</sup> Of these, several exclude from the Court's jurisdiction disputes that may involve failures of a flag state to exercise its jurisdiction and control. For example, Malta excludes disputes arising under a multilateral treaty unless all parties to the treaty are party to the dispute.<sup>455</sup> Barbados excludes disputes involving conservation, management or exploitation of the living resources.<sup>456</sup> Cambodia, Liberia, and Mauritius, as well as Barbados, exclude disputes arising under treaties with other dispute settlement provisions.<sup>457</sup> From the ITF's list, only six—Cameroon, Cyprus, Equatorial Guinea, Republic of the Marshall Islands, Panama, and Togo—have consented to ICJ jurisdiction in ways that do not automatically exclude ICJ jurisdiction for disputes related to flag state non-compliance.<sup>458</sup> Even then, the challenging state must also consent to ICJ jurisdiction for disputes that may involve flag state non-compliance.<sup>459</sup> Because many states have the same exclusions as the flags of non-compliance,<sup>460</sup> disputes are unlikely to arise under the ICJ.

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<sup>454</sup> Barbados, Cambodia, Cameroon, Cyprus, Equatorial Guinea, Georgia, Honduras, Liberia, Malta, the Republic of the Marshall Islands, Mauritius, Panama, and Togo. *Declarations Recognizing the Jurisdiction of the Court as Compulsory*, INT'L CT. OF JUST., <https://perma.cc/YD2C-A75H>. *Sustainable Fisheries & Coastal Zoning in Curacao*, ENV'T L. INST., 12 (2016), <https://perma.cc/9TAG-EHMK> (showing that UNCLOS is implemented in Curacao through Maritime Ordinance 2007).

<sup>455</sup> I.C.J., *Declarations Recognizing the Jurisdiction of the Court as Compulsory, Malta*, ¶ i (Sept. 2, 1983), <https://perma.cc/CJ74-P5L6>.

<sup>456</sup> INT'L CT. OF JUST., *Declarations Recognizing the Jurisdiction of the Court as Compulsory, Barbados*, ¶ c (July 24, 1980), <https://perma.cc/KTJ7-F6AD>.

<sup>457</sup> INT'L CT. OF JUST., *Declarations Recognizing the Jurisdiction of the Court as Compulsory, Cambodia*, ¶ 1 (Sept. 9, 1957), <https://perma.cc/3SDQ-GFZV>; INT'L CT. OF JUST., *Declarations Recognizing the Jurisdiction of the Court as Compulsory, Declaration of Liberia* (Mar. 20, 1952), <https://perma.cc/F6AK-NKDM>; INT'L CT. OF JUST., *Declarations Recognizing the Jurisdiction of the Court as Compulsory, Mauritius*, ¶ i (Sept. 23, 1968), <https://perma.cc/WNM3-QNXZ>; INT'L CT. OF JUST., *Declarations Recognizing the Jurisdiction of the Court as Compulsory, Barbados*, ¶ a (July 24, 1980), <https://perma.cc/27PT-6GGA>.

<sup>458</sup> See the declarations submitted by these countries: INT'L CT. OF JUST., *Declarations Recognizing the Jurisdiction of the Court as Compulsory, Cameroon* (Mar. 3, 1994), <https://perma.cc/VW78-DVUA>; INT'L CT. OF JUST., *Declarations Recognizing the Jurisdiction of the Court as Compulsory, Cyprus* (Sept. 3, 2002), <https://perma.cc/3ZE3-L6UU>; INT'L CT. OF JUST., *Declarations Recognizing the Jurisdiction of the Court as Compulsory, Equatorial Guinea* (Aug. 11, 2017), <https://perma.cc/P42F-B24E>; INT'L CT. OF JUST., *Declarations Recognizing the Jurisdiction of the Court as Compulsory, Marshall Islands* (Apr. 24, 2013), <https://perma.cc/4UMJ-XLUT>; INT'L CT. OF JUST., *Declarations Recognizing the Jurisdiction of the Court as Compulsory, Panama* (Oct. 25, 1921), <https://perma.cc/H8Z4-94PK>; INT'L CT. OF JUST., *Declarations Recognizing the Jurisdiction of the Court as Compulsory, Togo* (Oct. 25, 1979), <https://perma.cc/9HTW-N5HX>.

<sup>459</sup> Statute of the International Court of Justice, *supra* note 447, art. 36.

<sup>460</sup> 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. INT'L COURT OF JUST., *Declarations Recognizing the Jurisdiction of the Court as Compulsory, Australia*, ¶¶ a, c (Mar. 22, 2002), <https://perma.cc/26LL-VD6P>.

As such, the most attractive means for challenging flag state non-compliance are the compulsory dispute settlement provisions of UNCLOS.<sup>461</sup> Those provisions apply to disputes concerning the interpretation or application of UNCLOS.<sup>462</sup> Consequently, disputes related to failures to exercise jurisdiction effectively, to cooperate, and to conserve fish stocks, all requirements of UNCLOS, could be brought against any UNCLOS party. Among non-complying flag states, all except North Korea are party to UNCLOS.<sup>463</sup> The United Kingdom ratified on behalf of its overseas territories, including those included on the ITF's flag of convenience list (Bermuda, Cayman Islands, and Gibraltar),<sup>464</sup> and Portugal's accession implicitly applies to Madeira.<sup>465</sup> Denmark specifically noted that its accession does not extend to the Faroe Islands.<sup>466</sup>

UNCLOS's dispute settlement provisions also apply to treaties that adopt them, such as UNFSA,<sup>467</sup> the WCPF Convention,<sup>468</sup> SEAFO,<sup>469</sup> and SIOFA.<sup>470</sup> These treaties may expand the claims available against non-complying flag states to include, for example, failures to require or

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<sup>461</sup> Parties are allowed to choose among four options. UNCLOS, *supra* note 2, arts. 279–99. 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. Vinai Kumar Singh, *Advantages and Disadvantages of Forums Prescribed Under the UNCLOS and State Practice: The Way Ahead for India*, 13 BRAZILIAN J. OF INT'L LAW 319, 334 (2016). 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. UNCLOS, *supra* note 2, Annex VII, art. 3.

<sup>462</sup> UNCLOS, *supra* note 2, art. 279.

<sup>463</sup> UNITED NATIONS TREATY COLLECTION, *Chapter XXI: Law of the Sea*, <https://perma.cc/B3EX-MRH2>.

<sup>464</sup> *Id.*

<sup>465</sup> *Id.* Article 29 of the Vienna Convention on the Law of Treaties provides, “[u]nless 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, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980).

<sup>466</sup> UNITED NATIONS TREATY COLLECTION, *Law of the Sea*, *supra* note 463.

<sup>467</sup> UNFSA, *supra* note 7, art. 30.

<sup>468</sup> WCPF Convention, *supra* note 175, 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.

<sup>469</sup> SEAFO, *supra* note 250, art. 24.

<sup>470</sup> SIOFA, *supra* note 251, art. 20.

monitor VMS consistent with the conservation and management measure adopted by the RFMO.<sup>471</sup>

UNCLOS's dispute settlement provisions first demand that parties settle their dispute concerning the interpretation or application of UNCLOS by peaceful means.<sup>472</sup> UNCLOS makes clear that parties to a dispute have freedom to choose the means of settlement of their preference,<sup>473</sup> including binding dispute settlement.<sup>474</sup> However, if the parties do not reach a final negotiated settlement using their chosen procedures, the parties may return to UNCLOS's basic procedures.<sup>475</sup> Under those procedures, the disputing parties must first exchange views.<sup>476</sup> They may then opt to settle the dispute by conciliation, although they are under no obligation to do so.<sup>477</sup> If these procedures do not result in a satisfactory resolution, then one of the disputing parties may initiate a dispute under UNCLOS's compulsory procedures for binding decisions.<sup>478</sup>

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.<sup>479</sup> 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 declarations at the time of ratification limiting the jurisdiction of the courts and tribunals; however, it allows such declarations for only a narrow set of disputes, all unrelated to the duty to cooperate or the failure to exercise effective jurisdiction over

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<sup>471</sup> Other RFMOs, including the CCSBT, IATTC, ICCAT, and NAFO have alternative procedures for resolving disputes that do not include binding dispute settlement. Convention for the Conservation of Southern Bluefin Tuna, art. 16, Oct. 5, 1993, 1819 U.N.T.S. 31155; Convention for the Establishment of an Inter-American Tropical Tuna Commission, art. 25, May 31, 1949, 80 U.N.T.C. 1041; International Convention for the Conservation of Atlantic Tunas, art. 23, May 14, 1966, 673 U.N.T.C. 9587; Convention on Future Multilateral Co-operation in the North-West Atlantic Fisheries, art. 29, Oct. 24, 1978, 1135 U.N.T.C. 17799. To the extent that any disputes arise under those treaties, the dispute settlement provisions of UNCLOS may not apply. See *Southern Bluefin Tuna* (N.Z. v. Japan, Austl. v. Japan), Award on Jurisdiction and Admissibility, 23 R.I.A.A. 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, 281–82 (2001) (critiquing the *Southern Bluefin Tuna* award).

<sup>472</sup> UNCLOS, *supra* note 2, art. 279.

<sup>473</sup> *Id.* art. 280.

<sup>474</sup> *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).

<sup>475</sup> *Id.* art. 281.

<sup>476</sup> *Id.* art. 283.

<sup>477</sup> *Id.* art. 284.

<sup>478</sup> *Id.* art. 286.

<sup>479</sup> *Id.* art. 287.

vessels.<sup>480</sup> UNCLOS also provides exceptions that a party may invoke in specific disputes but, again, not to issues related to a non-complying flag state.<sup>481</sup>

### B. Redress

When a state commits an internationally wrongful act against another state, international responsibility is established “immediately as between the two States.”<sup>482</sup> A state’s internationally wrongful act gives rise to the obligation “to make reparation in an adequate form” to the injured state or states.<sup>483</sup> 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 been committed.”<sup>484</sup> 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, if the conduct is ongoing, the state must cease its wrongful conduct and provide assurances and guarantees of non-repetition of the unlawful conduct.<sup>485</sup> 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.<sup>486</sup>

#### 1. Cessation and Assurances and Guarantees of Non-Repetition

In addition to reparations for injury, the non-compliant state must cease its wrongful conduct.<sup>487</sup> As the International Law Commission

<sup>480</sup> 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.

<sup>481</sup> *Id.* art. 297.

<sup>482</sup> *Phosphates in Morocco (It. v. Fr.)*, Judgment, 1938 P.C.I.J. (ser. A/B) No. 74, 10, at 28 (June 14). *See also* *Factory at Chorzów (Ger. v. Pol.)*, Jurisdiction, Judgment, 1927 P.C.I.J. (ser. A) No. 9, at 21 (July 26); *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 Rep. 14, ¶¶ 292 (June 27); *Gabčíkovo–Nagyoros Project*, Judgment, 1997 I.C.J. 7, ¶ 47 (Sept. 25); *Corfu Channel*, Merits, 1949 I.C.J. Rep. 4, 22–23 (Apr. 9, 1949).

<sup>483</sup> *Factory at Chorzów*, Jurisdiction, Judgment, 1927 P.C.I.J. (ser. A) No. 9, at 21.

<sup>484</sup> *Factory at Chorzów (Ger. v. Pol.)*, Merits, Judgment, 1928 P.C.I.J. (ser. A) No. 13, at 47 (Sept. 13).

<sup>485</sup> ARSIWA, *supra* note 42, art. 30.

<sup>486</sup> *Id.* arts. 31, 34.

<sup>487</sup> *Id.* 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.’”).

noted, “cessation . . . is the first requirement in eliminating the consequences of wrongful conduct.”<sup>488</sup> While scholars disagree about whether cessation represents a remedy different from restitution and satisfaction,<sup>489</sup> the Court has clearly identified cessation as a form of reparation<sup>490</sup> and has expressly ordered cessation, calling on states to immediately “cease” and “refrain” from ongoing wrongful conduct.<sup>491</sup>

To ensure permanent cessation, a non-compliant state must also “offer appropriate assurances and guarantees of non-repetition, if circumstances so require.”<sup>492</sup> 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.<sup>493</sup> Together, they are intended to rebuild trust between the disputing states.<sup>494</sup> 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.<sup>495</sup>

The concept of “assurances and guarantees of non-repetition” has been used to prevent wrongful extradition that results in violations of human rights. In *Israel v. Kazakhstan*,<sup>496</sup> the Human Rights Committee concluded that Kazakhstan unlawfully detained a Chinese national of Uighur ethnicity and unlawfully extradited him to China where he faced

<sup>488</sup> ARSIWA, *supra* note 42, at 89.

<sup>489</sup> 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).

<sup>490</sup> Dispute regarding Navigational and Related Rights (Costa Rica v. Nicar.), Judgment, 2009 I.C.J. 213, ¶ 149 (July 13) (“[T]he 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*, 2015 I.C.J. 665, ¶ 138 (Dec. 16) (declining to order cessation because Nicaragua either did not breach an obligation owed to Costa Rica or because there was no ongoing violation).

<sup>491</sup> See, e.g., *Military and Paramilitary Activities in and Against Nicaragua*, 1986 I.C.J. Rep. 14, ¶ 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.”).

<sup>492</sup> ARSIWA, *supra* note 42, art. 30(b).

<sup>493</sup> STOICA, *supra* note 489, at 69.

<sup>494</sup> STOICA, *supra* note 489, at 70.

<sup>495</sup> *Navigational and Related Rights*, Judgment, 2009 I.C.J. ¶ 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*, Judgment, 2015 I.C.J. ¶ 141 (confirming the statement made in *Navigational and Related Rights*).

<sup>496</sup> Human Rights Comm. Dec. 2024/2011, U.N. Doc. CCPR/C/103/D/2024/2011 (Dec. 1, 2011).



a real risk of torture.<sup>497</sup> It thus requested Kazakhstan “to put in place effective measures for the monitoring of the situation [of the unlawfully detained person] in cooperation with [China].”<sup>498</sup> In two other decisions—*Kalinichenko v. Morocco*<sup>499</sup> and *Ng v. Canada*<sup>500</sup>—the Committee against Torture and the Human Rights Committee, respectively, requested that those states violating human rights norms make representations or establish an “effective follow-up mechanism” to ensure subsequent violations do not occur.<sup>501</sup>

*LaGrand*<sup>502</sup> 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.”<sup>503</sup> The ICJ rejected that argument.<sup>504</sup> In this case, the United States failed to notify German defendants of their right to contact a German consulate office, in violation of Article 36 of the Vienna Convention on Consular Relations.<sup>505</sup> 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.”<sup>506</sup>

The ICJ also rejected the U.S. apology as insufficient because future foreign nationals in custody could face the same unlawful treatment.<sup>507</sup> The ICJ concluded 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.<sup>508</sup> However, Germany wanted more. While Germany did not request that the United States never violate the notification requirements of Article 36, it did ask for a guarantee that the United States “provide effective review of and remedies for criminal convictions

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<sup>497</sup> *Id.* ¶¶ 9.1–9.6.

<sup>498</sup> *Id.* ¶ 11.

<sup>499</sup> Comm. against Torture Dec. 428/2010, U.N. Doc. CAT/C/47/D/428/2010, ¶ 17 (Nov. 25, 2011).

<sup>500</sup> Human Rights Comm. Dec. 469/1991, U.N. Doc. CCPR/C/49/D/469/1991, ¶ 18 (Sept. 25, 1991).

<sup>501</sup> 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).

<sup>502</sup> *LaGrand* (Ger. v. U.S.), Judgment, 2001 I.C.J. 466 (June 27).

<sup>503</sup> *Id.* ¶ 46.

<sup>504</sup> *Id.* ¶ 48.

<sup>505</sup> Article 36 requires authorities to inform foreign nationals in custody without delay of their right to consular notification. Vienna Convention on Consular Relations, art. 36(1)(b), Apr. 24, 1963, 596 U.N.T.S. 262, (entered into force Mar. 19, 1967).

<sup>506</sup> *LaGrand*, Judgment, 2001 I.C.J. ¶ 118.

<sup>507</sup> *Id.* ¶ 123.

<sup>508</sup> *Id.* ¶ 124.

impaired by a violation of the rights under Article 36.”<sup>509</sup> 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.<sup>510</sup>

The manifest need for proper assurances and guarantees of non-repetition are highlighted by the actions of Japan after the ICJ ruled against it in *Whaling in the Antarctic*.<sup>511</sup> In that 2014 decision, the ICJ ruled that Japan’s whaling in the Southern Ocean was not authorized for “purposes of scientific research” under the International Convention for the Regulation of Whaling.<sup>512</sup> The ICJ concluded that Japan violated the moratorium on commercial whaling and ordered Japan to revoke any extant whaling permits and refrain from issuing any new permits until it complied with the ICJ’s decision.<sup>513</sup> 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,<sup>514</sup> but the Scientific Committee of the International Whaling Commission (IWC), two IWC expert panels, and the IWC itself determined that Japan provided insufficient information in its whaling plans to assess Japan’s new programs.<sup>515</sup>

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<sup>509</sup> *Id.* ¶ 120.

<sup>510</sup> *Id.* ¶ 125.

<sup>511</sup> *Whaling in the Antarctic* (Austl. v. Japan: N.Z. Intervening), Judgment, 2014 I.C.J. 226 (Mar. 31).

<sup>512</sup> *Id.* ¶¶ 244, 247. Article VIII 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. VIII, Dec. 2, 1946, 62 Stat. 1716, 161 U.N.T.S. 72 (entered into force Nov. 10, 1948) [hereinafter ICRW].

<sup>513</sup> *Whaling in the Antarctic*, Judgment, 2014 I.C.J. Rep. 226, ¶ 245, 247(3) (Mar. 31). 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. International Convention for the Regulation of Whaling, 1946 Schedule, ¶ 10(e), Dec. 2, 1946, 62 Stat. 1716, 161 U.N.T.S. 72. The IWC last amended the Schedule at the 68th Annual Meeting of the International Whaling Commission in October 2022. *Id.* The Schedule is an integral part of the ICRW. *ICRW*, *supra* note 512, art. I(1).

<sup>514</sup> See, e.g., Martin Fackler, *Japan Plans to Resume Whaling Program, With Changes to Address Court Concerns*, N.Y. TIMES (Apr. 18, 2014), <https://perma.cc/A9JU-PXSN> (summarizing Japan’s Minister of Agriculture Yoshimasa Hayashi as saying “Japan was being careful to honor the court’s ruling and international law”).

<sup>515</sup> *Summary of Main Outcomes, Decisions and Required Actions from the 67<sup>th</sup> Meeting of the IWC, Appendix 3*, INT’L. WHALING COMM., <https://perma.cc/CA45-TTK8> (last visited

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 effectively exercise its jurisdiction and control does not agree to remedy its violations, the problem will not be solved. Vessels flagged to the state will continue IUU fishing, continue devaluing fish stocks, and continue undermining efforts by RFMOs and compliant flag states to conserve fish stocks. States harmed by non-complying flag states could be discouraged by the lack of an effective resolution, and further litigation against the non-complying flag state may be required.

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?<sup>516</sup> In *LaGrand*, the United States distributed 60,000 copies of a brochure as well as over 400,000 copies of the pocket card to U.S. federal, state and local law enforcement and judicial officials educating them concerning U.S. responsibilities under the Vienna Convention on Consular Relations.<sup>517</sup> 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 investigate and prosecute or adopt adequate legislation, or ensure vessels follow requirements to use VMS.<sup>518</sup> The flag state must provide relevant assurances and guarantees that it will exercise its jurisdiction and control effectively.

To do so, the non-complying flag state could refuse to flag vessels entirely or it could replace its open registry with one requiring a 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 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 exercise its jurisdiction and control over the vessels it flags. This seems like the

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Mar. 4, 2023) (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 COMM’N, § 14 (2018).

<sup>516</sup> *LaGrand*, *supra* note 502, ¶ 83 (“Germany states that it seeks ‘[nothing . . . 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.]”).

<sup>517</sup> *Id.* ¶ 121.

<sup>518</sup> *SRFC Advisory Opinion*, Case No. 21, Advisory Opinion of Apr. 2, 2015, ITLOS Rep. 4, ¶ 129 (the “due diligence obligation” requires a flag State “to take all necessary measures to ensure compliance”).

least likely outcome, however, since these states have started their registries for financial benefit.

## 2. Reparations

In addition to ceasing 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 the consequences of the illegal act and restores the situation to its pre-violation condition.<sup>519</sup> Restitution—materially restoring the situation to its pre-violation condition—is the preferred form of reparation.<sup>520</sup> Where, for example, a state should return illegally acquired or occupied territory of another state.<sup>521</sup>

If material restoration is not possible, a tribunal should award compensation “corresponding to the value which a restitution in kind would bear.”<sup>522</sup> As stated by the Permanent Court of International Justice (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.”<sup>523</sup> 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.<sup>524</sup> 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

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<sup>519</sup> ARSIWA, *supra* note 42, at 91.

<sup>520</sup> *Id.*

<sup>521</sup> *See, e.g.*, Case Concerning the Temple of Preah Vihear (Cambodia v. Thai.), Merits, 1962 I.C.J. 6, 37 (June 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 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.”).

<sup>522</sup> *Factory at Chorzów*, Merits, Judgment, 1928 P.C.I.J. (ser. A) No. 13, at 47 (Sept. 13). *See also Gabčíkovo–Nagymoros Project*, Judgment, 1997 I.C.J. 7, ¶ 152 (Sept. 25) (“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.”).

<sup>523</sup> *Factory at Chorzów*, Merits, Judgment, 1928 P.C.I.J. (ser. A) No. 13, at 48.

<sup>524</sup> *Trail Smelter* 3 R.I.A.A. 1905 (1938, 1941). *See also* Stockholm Declaration, *supra* note 305, at Principle 21; Rio Declaration on Environment and Development, *supra* note 305, at Principle 2.

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.<sup>525</sup> 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 prosecuting offending states, injured states will most likely request compensation to recoup these costs. In any event, restitution is “exceptional”; states rarely seek it, and the Court rarely grants it.<sup>526</sup> Thus, compensation may be the more frequent remedy although it, too, is infrequently granted.<sup>527</sup>

According to a comprehensive review of international remedies, tribunals have sought to award “full compensation” to the injured state or individual<sup>528</sup> provided that the damage is “financially assessable”<sup>529</sup> and substantiated.<sup>530</sup> 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.”<sup>531</sup> 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

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<sup>525</sup> ARSIWA, *supra* note 42, art. 43; STOICA, *supra* note 489, at 86 (stating that “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”).

<sup>526</sup> STOICA, *supra* note 489, at 82, 85.

<sup>527</sup> *Id.* at 108–09.

<sup>528</sup> JUSTINE C. GRAY, JUDICIAL REMEDIES IN INTERNATIONAL LAW 18 (1990); ARSIWA, *supra* note 42, 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 528, at 19.

<sup>529</sup> ARSIWA, *supra* note 42, art. 36(2).

<sup>530</sup> *Compare Corfu Channel*, 1949 I.C.J. Rep. 4, 249–50 (Apr. 9, 1949) (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 *Ahmadou Sadio Diallo* (Guinea v. Dem. Rep. Congo) (*Diallo*), Compensation, Judgment, 2012 I.C.J. 324, ¶¶ 36, 46, 49, 50, 54 (June 19) (rejecting most of Guinea’s claims for compensation for allegedly stolen property, bank account assets, lost income, and potential earnings as unsubstantiated).

<sup>531</sup> *Certain Activities Carried Out by Nicaragua in the Border Area* (Costa Rica v. Nic. ar.) (*Certain Activities*), Compensation, 2018 I.C.J. 15, ¶ 35 (Feb. 2).

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.<sup>532</sup>

Although the *Trail Smelter* tribunal reduced the evidentiary burden on injured states, questions remain as to how to assess the loss suffered. When the damage is the entire or partial loss of a ship, as in *Corfu Channel*,<sup>533</sup> monetizing the loss is straightforward: the replacement cost or the costs of repairs.<sup>534</sup> 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<sup>535</sup>—are compensable but more difficult to quantify.<sup>536</sup> 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.”<sup>537</sup> While some argue that compensation for non-material damage is a form of satisfaction rather

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<sup>532</sup> *Trail Smelter*, 3 R.I.A.A. 1905, 1920 (1938) (quoting *Story Parchment Company v. Paterson Parchment Paper Company*, 282 U.S. 555, 563 (1931)).

<sup>533</sup> *Corfu Channel*, 1949 I.C.J. Rep. 4, 249 & Annex 2 (Apr. 9, 1949).

<sup>534</sup> *Id.* at 258–60. See also STOICA, *supra* note 489, at 117–18 (describing assessment of destroyed or damaged airplanes, as well as physical injuries to individuals, as “easily identifiable”).

<sup>535</sup> *Diallo*, Judgment, 2012 I.C.J. ¶¶ 21–23, 40; Opinion in the *Lusitania Cases* (U.S. v. Ger.), 7 R.I.A.A. 40 (1923); *Gutiérrez-Soler v. Colombia*, Inter-Am. Ct. H.R. Rep. (ser. C) No. 132, ¶ 82 (Sept. 12, 2005).

<sup>536</sup> *Opinion in the Lusitania Cases*, 7 R.I.A.A. 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*, Compensation, 2018 I.C.J. 15, ¶ 44 (Feb. 2) (“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.”).

<sup>537</sup> *Diallo*, Judgment, 2012 I.C.J. ¶ 24 (quoting with approval, *Al-Jedda v. United Kingdom*, Judgment, App. No. 27021/08 Eur. Ct. H.R. ¶ 114 (July 7, 2011)).

than compensation,<sup>538</sup> such damages, however categorized, are compensable.<sup>539</sup>

Yet only injuries “caused by the internationally wrongful act” are compensable. As the ICJ has said,

The question is whether there is a sufficiently direct and certain causal nexus between the wrongful act, the Respondent’s breach of the obligation . . . , and the injury suffered by the Applicant, consisting of all damage of any type, material or moral, caused by the [wrongful acts].<sup>540</sup>

In other words, the injury must result from and be ascribable to the wrongful act “rather than any and all consequences flowing from an internationally wrongful act.”<sup>541</sup> The ICJ determines whether the relevant state has provided evidence establishing a sufficient causal nexus between the wrongful act and the injury suffered.<sup>542</sup> The ICJ and tribunals have found a wide range of injuries caused by internationally

<sup>538</sup> 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 42, at 99. Stoica distinguishes non-material damage to states (satisfaction) from non-material damage to individuals (compensation). STOICA, *supra* note 489, at 130.

<sup>539</sup> See, e.g., *Diallo*, Compensation, 2012 I.C.J. ¶ 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 535, ¶ 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 which, though difficult to measure by pecuniary standards, are, nevertheless, universally considered in awarding compensatory damages.

*Opinion in the Lusitania Cases*, 7 R.I.A.A. 40 (1923) (emphasis in original).

<sup>540</sup> Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosn. and Herz. v. Serb. and Montenegro*), Judgment, 2007 I.C.J. 43, ¶ 462 (Feb. 26).

<sup>541</sup> ARSIWA, *supra* note 42, at 92.

<sup>542</sup> *Certain Activities*, Compensation, 2015 I.C.J. ¶ 34. Notably, the Court said that it is not always the applicant that bears the burden to prove causation; while that is the general rule, “the Court has recognized that this general rule may be applied flexibly in certain circumstances, where, for example, the respondent may be in a better position to establish certain facts.” *Id.* ¶ 33. On the merits, the Court determined that Costa Rica had not proved that Nicaragua’s dredging activities caused harm to Costa Rica or that Costa Rica’s road construction caused harm to Nicaragua. *Certain Activities*, Judgment, 2015 I.C.J. 665, ¶¶ 119, 196 (Dec. 16).

wrongful acts, including damage to vessels and the environment, lost profits, personal injury, mental suffering, loss of life, loss of property, loss of remuneration, deprivation of liberty, and for costs of pensions, administration, and medical treatment.<sup>543</sup>

In *Certain Activities Carried Out by Nicaragua in the Border Area*<sup>544</sup> (*Certain Activities*), Costa Rica claimed fuel, personnel, and other costs associated with monitoring Nicaragua's unlawful military presence in Costa Rican territory.<sup>545</sup> The ICJ concluded that "some of these flights were undertaken in order to ensure effective inspection of the northern part of Isla Portillos, and thus considers that these ancillary costs are directly connected to the monitoring of that area that was made necessary as a result of Nicaragua's wrongful conduct."<sup>546</sup> The ICJ also granted Costa Rica compensation for preparing an assessment of the damage caused by Nicaragua, stating that, because the "report is directly relevant to Nicaragua's unlawful activities, the Court considers that there is a sufficiently direct and certain causal nexus between those activities and the cost of commissioning the report."<sup>547</sup> Similarly, the ICJ held that the cost of two satellite images to verify Nicaragua's presence and activities would have been compensable, but Costa Rica failed to provide sufficient evidence that the images covered the area occupied by Nicaragua.<sup>548</sup>

The ICJ, however, categorically rejected compensation for "salaries of government officials dealing with a situation resulting from an internationally wrongful act" unless those salaries were:

temporary and extraordinary in nature. In other words, a State is not, in general, entitled to compensation for the regular salaries of its officials. It may, however, be entitled to compensation for salaries in certain cases, for example, where it has been obliged to pay its officials over the regular wage or where it has had to hire supplementary personnel, whose wages were not originally envisaged in its budget.<sup>549</sup>

As the ICJ indicated, this practice is consistent with that of the UN Compensation Commission (UNCC) concerning expenses resulting from Iraq's unlawful invasion of Kuwait.<sup>550</sup> One UNCC Panel concluded that "incremental salary and overtime costs incurred in assisting refugees

<sup>543</sup> See ARSIWA, *supra* note 42, at 91–94 (summarizing cases).

<sup>544</sup> *Certain Activities*, Judgment, 2015 I.C.J. 665 (Dec. 16).

<sup>545</sup> *Certain Activities*, Compensation, 2018 I.C.J. 15, ¶ 90 (Feb. 2).

<sup>546</sup> *Id.* ¶ 93.

<sup>547</sup> *Id.* ¶ 99.

<sup>548</sup> *Id.* ¶ 105.

<sup>549</sup> *Id.* ¶ 101.

<sup>550</sup> U.N. Comp. Comm'n Governing Council (UNCC), *Report and Recommendations Made by the Panel of Commissioners Concerning the First Instalment of "F2" Claims*, ¶ 101, U.N. Doc. S/AC.26/1999/23 (Dec. 9, 1999) ("With respect to the costs of salaries and equipment for the aforesaid 1,700 regular officers, the evidence does not demonstrate that they were temporary and extraordinary in nature.")



during the period of Iraq's invasion and occupation of Kuwait are, in principle, compensable"<sup>551</sup> if they are reasonable.<sup>552</sup> The panel defined "incremental salary and overtime payments" to include "payments made over and above normal salary and overtime payments made to regular staff as a direct result of Iraq's invasion and occupation of Kuwait, as well as [all] salary and overtime payments to staff specifically recruited as a result of Iraq's invasion and occupation of Kuwait."<sup>553</sup> Thus, panels have denied compensation for salaries that would have been paid regardless of any response to another state's illegal conduct.<sup>554</sup> Similarly, an ITLOS tribunal in *M/V Saiga*<sup>555</sup> denied recovery to Saint Vincent and the Grenadines for its expenses because they were incurred in the normal functions of a flag state.<sup>556</sup>

In contrast, the tribunal in *Differences Between New Zealand and France Arising from the Rainbow Warrior Affair (Rainbow Warrior Affair)*<sup>557</sup>—an arbitration related to the French bombing of the Greenpeace vessel, *Rainbow Warrior*—appeared to allow New Zealand to recover expenses arising from the police enquiry, the trial of the two defendants, and their detention.<sup>558</sup> Although the tribunal did not explain its decision to award compensation for these costs, the decision was consistent with the ICJ's conclusions in *Certain Activities* because

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<sup>551</sup> U.N. Comp. Comm'n Governing Council (UNCC), *Report and Recommendations Made by the Panel of Commissioners Concerning the Second Instalment of "F2" Claims*, ¶ 52, U.N. Doc. S/AC.26/2000/26 (Dec. 7, 2000).

<sup>552</sup> *Id.* ¶ 53.

<sup>553</sup> *Id.*

<sup>554</sup> *Id.* ¶ 101; U.N. Comp. Comm'n Governing Council (UNCC), *Report and Recommendations Made by the Panel of Commissioners Appointed to Review the Well Blowout Control Claim (The "WBC Claim")*, ¶ 162, U.N. Doc. S/AC.26/1996/5/Annex (Dec. 18, 1996) [hereinafter *WBC Claim*] (denying compensation to government firefighting personnel because they were "regular staff members" of the Kuwaiti government who would have been paid even if Iraq had not invaded Kuwait).

<sup>555</sup> *M/V "Saiga" (No. 2) (St. Vincent v. Guinea)*, Case No. 2, Judgment of July 1, 1999, ITLOS Rep. 10.

<sup>556</sup> *Id.* ¶ 177.

<sup>557</sup> 19 R.I.A.A. 199 (1986).

<sup>558</sup> New Zealand requested compensation of \$9 million USD, which included the costs of the police investigation; the U.N. Secretary-General, who was arbitrating the case, granted New Zealand \$7 million USD "for all the damage" suffered by New Zealand. *Id.* at 199–200, 202, 213. A subsequent tribunal interpreting the award stated that "the compensation constituted a reparation not just for material damage—such as the cost of the police investigation—but for non-material damage as well, regardless of material injury and independent therefrom." *Difference Between New Zealand and France Concerning the Interpretation or Application of Two Agreements, Concluded on 9 July 1986 Between the Two States and Which Related to the Problems Arising from the Rainbow Warrior Affair*, 20 R.I.A.A. 215, ¶ 115 (1990). Because the Secretary-General did not explain his decision, "it is impossible to determine the real nature of the award." Stephan Wittich, *Punitive Damages*, in *THE LAW OF INTERNATIONAL RESPONSIBILITY*, 667, 672 (Crawford et al. eds, 2010).

the activities and associated expenses had a sufficient direct causal link to the wrongful conduct.<sup>559</sup>

*b. Recoverable Costs Against Flags of Non-Compliance*

The costs to non-flag states associated with preventing and deterring IUU fishing are significant. By one rough estimate, the costs can be \$10 million USD per incident.<sup>560</sup> This includes the costs of chasing, boarding, and inspecting the IUU fishing vessel as well as the costs of detention and prosecution of the vessel crew and owners.<sup>561</sup>

Beyond these single event costs to prevent and deter IUU fishing, coastal states spend considerable sums as part of their larger efforts to combat IUU fishing. For example, the wide variety of monitoring, control, and surveillance strategies discussed earlier in this article, including VMS, observer monitoring, and electronic monitoring, all have start-up and recurring costs. The 2020 cost of the United States' observer program, designed to verify catches and ensure compliance with conservation and management measures, was \$79.8 million USD.<sup>562</sup> These costs are typically passed onto fishers; in the herring fishery in the northeast Atlantic, an observer program could cost fishers about \$710 USD per day, reducing their annual returns by approximately 20%.<sup>563</sup> Australia estimated the costs of deploying electronic monitoring on just forty vessels at more than \$387,000 AU annually plus additional start-up costs of nearly \$1.18 million AU.<sup>564</sup> The government of Western Australia spent nearly \$11.5 million AU on a new fisheries patrol vessel in 2022.<sup>565</sup> Fisheries patrol vessels can cost \$30 million USD or more.<sup>566</sup> Australia commissioned the construction of nineteen patrol boats worth \$280 million AU to help twelve Pacific Islands states patrol their waters for fisheries and other crime.<sup>567</sup>

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<sup>559</sup> See *supra* notes 544–45 and accompanying text.

<sup>560</sup> See Ford et al., *supra* note 45, at 1244 (identifying a rough estimate of AUD\$15 million which is the proximate equivalent of US\$10 million).

<sup>561</sup> *Id.*

<sup>562</sup> NAT'L MARINE FISHERIES SERV., NATIONAL OBSERVER PROGRAM FY 2020 ANNUAL REPORT 3, 5 (Lee R. Benaka, ed. 2022), <https://perma.cc/6CFU-7KQZ>.

<sup>563</sup> Implementation of New England Fishery Management Council's Industry-Funded Monitoring Amendment, 85 Fed. Reg. 7,414, 7,418 (Feb. 7, 2020) (to be codified at 50 C.F.R. pt. 648); *Loper Bright Enter. v. Raimondo*, 544 F. Supp. 3d 82, 97 (D.D.C. 2021).

<sup>564</sup> MATTHEW PIASENTE ET AL., ELECTRONIC ONBOARD MONITORING PILOT PROJECT FOR THE EASTERN TUNA AND BILLFISH FISHERY 72, tbl.27 (Australia Fisheries Management Authority, 2012), <https://perma.cc/E8AL-BSA9>.

<sup>565</sup> New Fisheries Patrol Vessel for Northern WA Waters, GOV'T OF W. AUSTL.: MEDIA STATEMENTS (Aug. 12, 2022), <https://perma.cc/8YW3-46UV>.

<sup>566</sup> *New Patrol Boat Arrives in Samoa*, RADIO NEW ZEALAND: PACIFIC (Oct. 7, 2019), <https://perma.cc/G5FG-4PUY>.

<sup>567</sup> See Joe Yaya, *Australia Provides 19 New Patrol Boats to Pacific Island Region to Help Combat Transnational Crimes*, ABC NEWS (Aug. 12, 2017), <https://perma.cc/Y4W9->

The ICJ and tribunals appear to recognize many of these costs as compensable. Any satellite and imaging for purposes of tracking a vessel and verifying a vessel's location are compensable, as they were in the *Certain Activities* case.<sup>568</sup> Fuel and operational costs associated with chasing a vessel should be considered compensable as "extraordinary" expenses distinct from routine patrolling. Any overtime associated with properly monitoring and tracking an IUU vessel are also compensable.<sup>569</sup>

However, the conclusions of the ICJ and tribunals suggest that many of these costs are non-compensable, "regular," costs. As stated above, the salaries of government officials responding to another state's conduct are not compensable if those salaries would have been paid regardless of the wrongful conduct.<sup>570</sup>

Under this narrow compensation rule, a state is required to respond to unlawful activities but not obtain compensation for those costs. As Iraq withdrew from Kuwait, it set Kuwaiti oil wells on fire.<sup>571</sup> The ICJ indicated that the costs of responding to this unprecedented, extraordinary violation of international law are only compensable if they are not "regular."<sup>572</sup> Such a rule does not make the responsible state pay full compensation to "wipe out all consequences of the illegal act."<sup>573</sup> Similarly, a state cannot obtain compensation for minesweeping operations to safely locate and defuse the mines laid by another state. Perversely, if the state hires contractors to perform these services, the state will be compensated. For example, a panel awarded Kuwait compensation for the costs of hiring Bechtel and other contractors to fight fires while denying compensation to Kuwait's own firefighters who performed the same work.<sup>574</sup>

In the fisheries context, states actively pursue IUU fishers for obvious reasons. Building and operating patrol vessels is expensive, EEZs for even the smallest countries are vast, and successfully litigating claims against beneficial owners is difficult.<sup>575</sup> Global management costs, which include administration and management (i.e., licensing, setting catch limits), research, and surveillance and

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JK5A; *Pacific Patrol Boat 40*, AUSTAL, <https://perma.cc/PS59-ZCXF> (last visited Mar. 11, 2023).

<sup>568</sup> See *supra* note 544 and accompanying text.

<sup>569</sup> *Id.*

<sup>570</sup> See *supra* notes 549–556 and accompanying text.

<sup>571</sup> *Landsat Top Ten—Kuwait Oil Fires*, NASA (July 23, 2012), <https://perma.cc/55TN-HG24>.

<sup>572</sup> See *supra* notes 550–557 and accompanying text.

<sup>573</sup> *Factory at Chorzów*, Merits, Judgment, 1928 P.C.I.J. (ser. A) No. 13, at 47 (Sept. 13).

<sup>574</sup> WBC Claim, *supra* note 554, at 44–45, 48.

<sup>575</sup> *Supra* Part III(A).

enforcement, reached \$7.6 billion USD in 2012,<sup>576</sup> with most of those costs associated with enforcement for some states.<sup>577</sup>

Because states have been unwilling to incur these costs, certain non-governmental organizations have stepped in to fill the void. Sea Shepherd, for example, has actively pursued IUU fishers with its own boats.<sup>578</sup> Its 2015 chase of the *Thunder*, a notorious IUU fishing vessel, cost \$1.5 million USD.<sup>579</sup> Precluding compensation for so-called regular costs actively disincentivizes states from engaging in preventing and deterring IUU fishing within their own waters and on the high seas. In the case of the *Thunder*, several flag states failed to fulfill their flag state obligations as a result of this practice. The United Kingdom, Faroe Islands, Seychelles, Belize, Togo, Mongolia, and Nigeria all flagged the *Thunder* directly, or under one of its several prior names (*Vesturvón*, *Arctic Ranger*, *Rubin*, *Typhoon I*, *Kuko*, and *Wuhan N4*), without taking any action against it.<sup>580</sup>

Some state practice suggests that mitigation costs are compensable even if the Court would describe such costs as regular. As noted above, the UN Secretary General granted New Zealand \$7 million USD in compensation for the police investigation and other injuries caused by France's bombing of the *Rainbow Warrior* and killing of a person aboard the vessel.<sup>581</sup>

Similarly, when the Soviet Union's nuclear-powered satellite *Cosmos 954* fell out of orbit and landed in Canada's territory, Canada argued that it was entitled to a "full and equitable measure of compensation"<sup>582</sup> including compensation for "operations directed at locating, recovering, removing and testing the debris and cleaning up the affected areas."<sup>583</sup> As Canada explained:

[t]he purpose of these operations was to identify the nature and extent of the damage caused by the debris, to limit the existing damage and to minimize the risk of further damage and to restore to the extent possible the affected areas to the condition that would have existed if the intrusion of the satellite and the deposit of the debris had not occurred.<sup>584</sup>

Moreover, Canada continued, these activities:

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<sup>576</sup> Tracey Mangin et al., *Are Fishery Management Upgrades Worth the Cost?*, PLOS ONE, (Sept. 20, 2018), at 16.

<sup>577</sup> *Id.* at 6.

<sup>578</sup> Sea Shepherd, *Sea Shepherd is Taking the Fight to Illegal Fishing*, FRONT LINES, <https://perma.cc/V84P-63ZT> (last visited Mar. 5, 2023).

<sup>579</sup> Urbina, *supra* note 151.

<sup>580</sup> *Id.*

<sup>581</sup> *Supra* note 558 and accompanying text.

<sup>582</sup> Claim against the Union of Soviet Socialist Republics for Damage Caused by the Soviet *Cosmos 954 (Canada Claim)*, 18 I.L.M. 899, 906 (1979).

<sup>583</sup> *Id.* at 903–04.

<sup>584</sup> *Id.* at 904.

would not have been necessary and would not have been undertaken had it not been for the damage caused by the hazardous radioactive debris from the Cosmos 954 satellite on Canadian territory and the reasonable apprehension of further damage in view of the nature of nuclear contamination . . . . The costs included by Canada in this claim were incurred solely as a consequence of the intrusion of the satellite into Canadian air space and the deposit on Canadian territory of hazardous radioactive debris from the satellite.<sup>585</sup>

To cover the costs of these activities, Canada claimed compensation of \$6.04 million CAN.<sup>586</sup> The amount was based on Canada's full cost (\$14 million CAN) of responding to and cleaning up radioactive debris from the satellite.<sup>587</sup> Canada settled on the \$6.04 million CAN request believing that the U.S.S.R. would not pay the full costs; indeed, the U.S.S.R. believed international law required it to pay only the incremental costs.<sup>588</sup> In its statement of claim, Canada argued that its claim "includes only those costs which were incurred in order to restore Canada to the condition which would have existed if the damage inflicted by the Cosmos 954 satellite had not occurred."<sup>589</sup>

Canada settled for compensation of \$3 million CAN to cover "all matters."<sup>590</sup> Given the disparities between the actual costs, the requested compensation, and the accepted compensation, it is difficult to determine whether Canada received compensation only for incremental costs or at least some portion of the "regular" salaries of Canadian government employees.<sup>591</sup>

Nonetheless, Canada's claim puts in perspective the "foreseeability" and "reasonableness" of coastal states receiving compensation for the costs of pursuing, arresting, detaining, and prosecuting IUU fishing vessels and crew when flag states fail to effectively exercise their jurisdiction and control over the vessels they flag. Such costs are both foreseeable and reasonable. In fact, the failure of certain flag states to exercise their jurisdiction effectively over the vessels they flag, as well

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<sup>585</sup> *Id.* at 906.

<sup>586</sup> *Id.* at 908.

<sup>587</sup> Alexander F. Cohen, *Cosmos 954 and the International Law of Satellite Accidents*, 10 *YALE J. INT'L L.* 78, 85 (1984).

<sup>588</sup> *Id.* at 85–86.

<sup>589</sup> *Canada Claim*, 18 *I.L.M.* 899, 906 (1979).

<sup>590</sup> Protocol on Settlement of Canada's Claim for Damages Caused by Cosmos 954, 20 *I.L.M.* 689, 689 (1981).

<sup>591</sup> One account interprets the outcome "would appear" to support compensation only for incremental costs. Cohen, *supra* note 587, at 88. Another states that "Canada claimed only the incremental costs—those over and above what it would have had to pay for personnel and equipment used in the operation in any event." Bryan Schwartz & Mark L. Berlin, *After the Fall: An Analysis of Canadian Legal Claims for Damage Caused by Cosmos 954*, 27 *MCGILL L. J.* 676, 678 (1982). Yet, it simply is not clear what the CAN \$3 million represents.

as the serious problems associated with IUU fishing, have been on the international agenda for more than thirty years.

Moreover, the costs imposed on coastal states to monitor vessels have been incurred as a direct result of IUU fishing and the failures of flag states to exercise their jurisdiction over the vessels they flag. The international community has increasingly given non-flag states and port states greater authority to take action against non-complying vessels. RFMOs and coastal states use VMS specifically to focus their enforcement efforts on vessels and areas known for significant violations.<sup>592</sup> RFMOs and coastal states now require electronic monitoring of catches to combat IUU fishing.<sup>593</sup> The United States has begun using uncrewed aircraft systems to combat IUU fishing.<sup>594</sup>

Such costs also constitute “expenditures reasonably incurred to remedy or mitigate damage flowing from an internationally wrongful act.”<sup>595</sup> Just as one does not watch their house burn to the ground without acting<sup>596</sup> so, too, coastal states and other interested states should not wait until all stocks are imperiled by IUU vessels flagged before taking action against non-complying flag states. These costs should be considered compensable.

Nonetheless, what *should* be compensable may not be, just as the salaries of Kuwait’s firefighters to extinguish fires set by Iraq were not compensable.<sup>597</sup> As such, patrolling expenses could not be charged to a flag state. In fact, the Court specifically denied Costa Rica’s claims for the cost of flights to transport cargo and press to locations other than the area in dispute.<sup>598</sup> The specific charges associated with chasing

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<sup>592</sup> See, e.g., WCPFC, SUMMARY REPORT OF THE THIRD REGULAR SESSION, 19 (2007), <https://perma.cc/SJ38-7599> (VMS is “needed to address problems associated with illegal, unreported and unregulated (IUU) fishing in the Convention Area, both within and beyond areas under national jurisdiction.”); John M. Davis, *Monitoring Control Surveillance and Vessel Monitoring System Requirements to Combat IUU Fishing* (2000), <https://perma.cc/SEU4-7MJ7> (“VMS technology is then used to target aerial and at sea surveillance assets to ensure compliance but above all VMS acts as a significant deterrent to illegal operations.”); *What is the Vessel Monitoring System?*, NOAA FISHERIES, <https://perma.cc/445R-5F4U> (last visited Mar. 6, 2023) (“VMS also helps enforcement personnel focus their time on areas with the highest potential for significant violations.”).

<sup>593</sup> See KIM STOBBERUP, ET AL., ELECTRONIC MONITORING IN TUNA FISHERIES: STRENGTHENING MONITORING AND COMPLIANCE IN THE CONTEXT OF TWO DEVELOPING STATES, 2, 6, 10–11, 18 (2021) (describing use of electronic monitoring to combat IUU fishing).

<sup>594</sup> DEP’T HOMELAND SEC., ILLEGAL, UNREPORTED, AND UNREGULATED FISHING PILOT PROGRAM, 2 (2019), <https://perma.cc/HF8F-9HV4>.

<sup>595</sup> ARSIWA, *supra* note 42, at 99.

<sup>596</sup> Schwartz, *supra* note 591, at 696.

<sup>597</sup> WBC Claim, *supra* note 554, at 44–45, 48.

<sup>598</sup> *Certain Activities*, 2018 I.C.J., at 42 (Feb. 2). Similarly, the Court refused to compensate Costa Rica for equipment and cooperation of two police stations and a biological station “because the purpose of the said stations was to provide security in the border area, and not in particular to monitor Nicaragua’s unlawful activities in the northern part of

vessels, boarding and inspection, and any other related costs should be covered.

## VII. CONCLUSION

For at least fifty years, the international community has decried the use of flags of convenience and the failure of flag states to effectively exercise their jurisdiction and control over the vessels they flag.<sup>599</sup> As one scholar remarked, “there has been a notorious failure” by many flag states to implement their international responsibilities.<sup>600</sup> Despite global campaigns, new international treaties, extensive media coverage, expert working groups, and public outrage, certain flag states continue allowing their flagged vessels to engage in IUU fishing. Both the IUU fishing and the flag state failure to exercise jurisdiction over their vessels goes largely unpunished. The result has been declining fish stocks, the development of numerous and expensive monitoring, control, and surveillance systems by coastal states and RFMOs, and the deployment of expensive gear by vessels seeking to fish legally. Even with the development of new treaties to combat IUU fishing, it persists, accounting for roughly 20% of the global fish catch.<sup>601</sup>

Clearly, the current strategies are insufficient. Vessel operators have responded to new treaties, laws, and strategies with great resilience, adaptability, and resourcefulness.<sup>602</sup> Vessels merely turn off their VMS to avoid being tracked. The beneficial owners of vessels hide behind impenetrable corporate structures to hide their identities. They easily change the name of their vessel and flag to disguise the identity of their vessels that engage in IUU fishing. Actions against vessels simply have not been effective at combatting IUU fishing.

As such, strategies must change. Because the root cause of IUU fishing is the failure of certain flag states to exercise their jurisdiction and control over the vessels they flag, non-flag states should pursue actions against non-compliant flag states rather than the vessel crews and owners.<sup>603</sup> While international law makes clear that states have the

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Isla Portillos.” *Id.* at 40. That is, Costa Rica failed to demonstrate “the requisite causal nexus” between the stations and Nicaragua’s wrongful conduct. *Id.* at 42.

<sup>599</sup> See UNCLOS 1982 COMMENTARY, *supra* note 53, at 433–34 (describing at the time of the UNCLOS negotiations in the 1970s the problems associated with flags of convenience and the lack of a “genuine link”).

<sup>600</sup> RAYFUSE, NON-FLAG STATE ENFORCEMENT, *supra* note 95, at 34.

<sup>601</sup> *Four Reasons Illegal, Unreported and Unregulated (IUU) Fishing Affects Us and What We Can Do About It*, FAO (Apr. 6, 2021), <https://perma.cc/2MC3-ZY5C>.

<sup>602</sup> Ferrell, *supra* note 94, at 365 (“vessel operators have responded with characteristic resourcefulness”).

<sup>603</sup> As others have commented, “countermeasures are the only lawful means of enforcing international environmental law.” Mary Ellen O’Connell, *Using Trade to Enforce International Environmental Law: Implications for United States Law*, 1 IND. J. GLOB. LEGAL STUD., 273, 291 (1994).

right to flag vessels, it also makes clear that they have a corresponding duty to effectively exercise their jurisdiction and control over the vessels they flag. Moreover, flag states have a duty to cooperate to manage fish stocks:

Thus, only those States which effectively control their vessels enjoy the freedom to fish. Where a flag State is unable or unwilling to effectively control its vessels it should decline to grant its flag. Grant of flag followed by a failure of effective control means the flag State has failed in its duty to exercise its responsibility and jurisdiction effectively, and the flag State will be internationally responsible to other States which then acquire a reciprocal right to take action.<sup>604</sup>

States have incentives and disincentives to remedy these concerns. States could, for example, simply pay non-complying flag states to close their registries and cease flagging vessels. If that approach does not succeed, then states could hold flags of non-compliance responsible for their failure to effectively exercise their jurisdiction over the vessels they flag by suing non-complying flag states pursuant to the compulsory dispute settlement provisions of UNCLOS. Through litigation, non-flag states could recover their costs of monitoring, control, and surveillance. However, this approach carries risk because international courts and tribunals have, to date, only allowed compensation for “extraordinary costs,” such as the use of contractors to perform particular tasks. The regular salaries of governmental employees have not been considered extraordinary, even when they perform the same tasks as the contractors. The risks of this approach are considerable; after years of expensive litigation, the non-flag state may not obtain reasonable compensation for costs.

Adopting countermeasures is likely to be the most effective option. With countermeasures, non-flag states are legally authorized to act against flags of non-compliance with methods that would otherwise be illegal. Accordingly, non-flag states could adopt import bans on key export goods of flags of non-compliance even if those trade bans violate the General Agreement on Tariffs and Trade. In doing so, non-flag states would create a financial disincentive that outweighs the financial incentive of flagging IUU fishing vessels. Assuming that these non-compliant flag states are rational economic actors, they will either begin effectively exercising jurisdiction over their vessels, or deregistering those vessels and closing their registry. Vessels that have sheltered under flags of non-compliance will lose access as non-flag states target non-compliant states with countermeasures. Rather than risk statelessness and exposure to the jurisdiction of any state, they should be forced to find a flag state that does effectively exercise its jurisdiction

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<sup>604</sup> Rayfuse, *Possible Actions*, *supra* note 35, at 29.



over the vessel. Only then will our fisheries resources be adequately protected.