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Combating Illegal Fishing in the Exclusive Economic Zone – Flag State Obligations in the Context of the Primary Responsibility of the Coastal State

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Abstract

Illegal fishing in the Exclusive Economic Zones [EEZs] of developing coastal States is an urgent problem for the marine environment, global food security, and local economies. While past academic debate has predominantly focused on obligations of flag States to tackle so called IUU-fishing in the High Seas, the recent request for an advisory opinion submitted by the Sub-Regional Fisheries Commission to the International Tribunal for the Law of the Sea (ITLOS, *Case No. 21*) has drawn attention to the fisheries regime of the EEZ. This article argues that the primary responsibility for fisheries management in the EEZ rests on the coastal State and that, so far, flag States have no obligation under customary international law to exercise their jurisdiction and control over vessels flying their flag which fish in the EEZ of other States. The article first gives an account of coastal State regulatory and enforcement jurisdiction. It outlines recent developments of the law by drawing on the jurisprudence of the ITLOS, particularly the recent *M/V "Virginia G" Case*. Further, the article undertakes to identify potential flag State obligations to combat illegal fishing in the EEZ. To that end, it provides an in-depth analysis of relevant binding and non-binding legal instruments such as the 1982 *UN Convention on the Law of the Sea*, other multilateral treaties, bilateral fisheries treaties, and relevant soft-law instruments of the Food and Agriculture Organization. The article also discusses the relevance of principles of international environmental law. Next, the article analyzes the nature and scope of potential flag State obligations, qualifying them as obligations of due diligence. Finally, the article concludes that, *de lege lata*, no persuasive evidence of established flag State obligations exists. The author suggests that the situation should be remedied by a new, fully binding legal instrument.

A. Introduction

The state of global fish stocks is alarming. According to the annual report of the Food and Agriculture Organization of the United Nations [FAO], global catches peaked at 86.4 million tonnes in 1996 and have generally been decreasing since.[1] While the size of the global fishing fleet has remained stable

[1] FAO, The State of World Fisheries and Aquaculture (2014), available at http://www.fao.org/3/a-i3720e.pdf (last visited 10 March 2015), 37 [FAO, State of World Fisheries].

at 4.72 million vessels,[2] only 79.7 million tonnes of fish were caught in 2012.[3] At the same time, only 9.9% of fish stocks still showed potential for an increase of catches in 2011.[4] About 61.3% of commercially exploited marine fish stocks were fully fished and 28.8% were found to be overfished.[5] These statistics prove the 1995 Kyoto Declaration right, which estimated that from 2010 fish stocks would not be able to satisfy the growing demand for fish products.[6] One of the main causes for the worldwide decline in fish stocks is the so-called "illegal, unreported and unregulated fishing" [IUU-fishing].[7] According to recent studies, IUU-fishing generates between USD 4 and 9 billion in revenues annually.[8] While the international community's main focus was on IUU-fishing in the High Seas during the past two decades, the bulk of global IUU-fishing (or simply "illegal fishing" for the present purposes[9]) actually took place in the EEZs of coastal

2 *Ibid.*, 32-33. The Asian fleet alone accounts for as much as 3.23 million vessels.

3 FAO, *Fishery and Aquaculture Statistics*, Yearbook 2012 (published in 2014), available at http://www.fao.org/3/a-i3740t.pdf (last visited 10 March 2015), 7.

4 FAO, *State of World Fisheries*, *supra* note 1, 37.

5 *Ibid.*, 347.

6 International Conference on the Sustainable Contribution of Fisheries to Food Security, *Kyoto Declaration and Plan of Action on the Sustainable Contribution of Fisheries to Food* (1995), available at http://www.un.org/esa/documents/ecosoc/cn17/1996/ecn171996-29.htm (last visited 19 January 2015), Art. 3.

7 The term was first defined in para. 3 of the FAO's *International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing* (2001) [IPOA-IUU], available at ftp://ftp.fao.org/docrep/fao/012/y1224e/y1224e00.pdf (last visited 30 March 2015).

8 High Seas Task Force, *Closing the Net: Stopping Illegal Fishing on the High Seas* (2006), available at http://www.oecd.org/sd-roundtable/papersandpublications/39375276.pdf (last visited 30 March 2015), 3.

9 Whether the term "IUU-fishing" has led to more clarity in the context of EEZ fisheries can be doubted. Foreign fishing in the EEZ is "illegal" (para. 3.1 IPOA-IUU) when conducted "without the permission of [the coastal State], or in contravention of its laws and regulations". Consequently, "unreported" (para. 3.2 IPOA-IUU) fishing activities, which "have not been reported, or have been misreported, to the relevant national authority, in contravention of national laws and regulations" are simply a form of "illegal" fishing. Relevant ITLOS cases are *The "Hoshinmaru" Case (Japan v. Russian Federation),* ITLOS, *Case No. 14, Prompt Release*, Judgment, 6 August 2007; *The "Tomimaru" Case (Japan v. Russian Federation)*, ITLOS, *Case No. 15, Prompt Release*, Judgment, 6 August 2007. The relevance of „unregulated" (paras. 3.3.1, 3.3.2 IPOA-IUU) fishing is limited to situations in the High Seas, as fishing in the EEZ will hardly ever be entirely "unregulated" due to the fishing laws and regulations of the coastal State. In conclusion, two of three components of the term IUU-fishing are redundant in the EEZ. It suffices to refer to them as "illegal fishing", especially as the definition is expressly not binding (para. 4 IPOA-IUU). See D. M. Sodik, 'Non-Legally Binding International Fisheries Instruments and Measures to Combat Illegal, Unreported and Unregulated Fishing', 15 *Australian International Law Journal* (2008) 1, 129, 134.

States.[10] Due to their extensive EEZs, which are rich in fisheries,[11] and their lack of resources for purposes of monitoring and enforcement,[12] West African States are particularly vulnerable to illegal fishing.[13] On 27 March 2013, the Sub-Regional Fisheries Commission [SRFC],[14] a Regional Fisheries Organization [RFMO] of West African States, submitted a request for an advisory opinion to the International Tribunal for the Law of the Sea [ITLOS] in Hamburg. The first of the four questions submitted by the SRFC reads: "What are the obligations of the flag State in cases where illegal, unreported and unregulated [IUU] fishing activities are conducted within the Exclusive Economic Zones of third party States?"[15] With its request, the SRFC seems to have followed recent calls for an advisory opinion to clarify flag State responsibilities.[16]

10 About USD 1.25 billion of the USD 4 to 9 billion in revenues from illegal fishing originate from the High Seas and the remaining part (USD 2,75 to 7,75 billion) from the EEZs of coastal States.

11 About 90% of global fish stocks are located in the EEZs of coastal States. See J. Gulland, 'Developing Countries and the New Law of the Sea', 22 *Oceanus Magazine* (1979) 1, 36. The area above the continental shelves down to the 200m isobath is estimated to cover about 87% of commercially exploited fish stocks. See R. Dupuy, *L' océan partagé - analyse d'une négociation (Troisième Conférence des Nations Unies sur le Droit de la mer)*, 1st ed. (1979), 87.

12 Two main drivers of IUU-fishing are the low demonstration effect due to insufficient monitoring, control and surveillance, and the low deterrence effect due to inadequate enforcement and sanctions. See C. Schmidt, 'Economic Drivers of Illegal, Unreported and Unregulated (IUU) Fishing', 20 *International Journal of Marine and Coastal Law.* (2005), 479, 485-487. Even developed coastal States such as the United States are struggling to eradicate illegal fishing in their EEZs. C. H. Allen, 'Doctrine of Hot Pursuit: A Functional Interpretation Adaptable to Emerging Maritime Law Enforcement Technologies and Practices', 20 *Ocean Development and International Law* (1989), 309, 311.

13 West African States incur losses of an estimated USD 1 billion due to illegal fishing annually. As a result, conservation measures of coastal States are undermined and fish stocks collapse, negatively affecting the livelihood of local fishing communities and the profitability of the local fishing industry. See High Seas Task Force, *supra* note 8,16.

14 The seven member States are: Republic of Cabo Verde, Republic of the Gambia, Republic of Guinea, Republic of Guinea-Bissau, Islamic Republic of Mauritania, Republic of Senegal, Republic of Sierra Leone. See http://www.spcsrp.org/ (French only, last visited 30 March 2015).

15 Request for Advisory Opinion, ITLOS, *Case No. 21* (27 March 2013). All documents relating to the written proceedings and the verbatim records of the oral hearings in ITLOS, *Case No. 21* are available at http://www.itlos.org/index.php?id=252 (last visited 30 March 2015).

16 T. M. Ndiaye, 'Illegal, Unreported and Unregulated Fishing: Responses in General and in West Africa', 10 *Chinese Journal of International Law* (2011) 2, 373, 395-396; For calls for a "model case", see also Department of Fisheries and Oceans of Canada, *Expert Workshop on Flag State Responsibilities: Assessing Performance and Taking Action* (2008),

This article aims to contribute to that clarification,[17] and includes both an analysis of the written and oral submissions of States, international organizations and NGOs during the proceedings and is restricted to illegal fishing in the EEZ.[18] It will first analyze the regulatory and enforcement jurisdiction of the coastal State to draw a sufficiently clear picture of coastal State responsibilities underlying the regime of the EEZ (section B.). In order to identify and define potential flag State obligations to combat illegal fishing, it will then analyze the relevant provisions of the 1982 *United Nations Convention on the Law of the Sea* [UNCLOS][19] and other multilateral conventions, soft-law instruments, as well as bilateral treaty practice and principles of international environmental law (section C.). This analysis will be followed by a conclusion (section D.).

B. Regulatory and Enforcement Jurisdiction of the Coastal State in its EEZ

Considering how the zonal system of *UNCLOS* adopts the perspective of the coastal State, potential flag State obligations in the EEZ cannot be analyzed without first taking a look at coastal State's jurisdiction and competences. It is now generally accepted that most of the EEZ regime of Part V of *UNCLOS* represents customary international law.[20] The EEZ is a maritime zone *sui generis*,[21] which combines fundamental freedoms of the High Seas (in particular

available at http://www.dfo-mpo.gc.ca/international/documents/flag-state-eng.htm (last visited 30 March 2015), 11.

17 Note also G. Handl, 'Flag State Responsibility for Illegal, Unreported and Unregulated Fishing in Foreign EEZs', 44 *Environmental Policy and Law* (2014) 1-2, 158.

18 The legal implications of fishing activities in the Territorial Sea, Archipelagic Waters and Internal Waters of coastal States will not be analyzed. Sedentary species, which are defined by Art. 77 (4) *UNCLOS* as "organisms which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil" are covered by the regime of the Continental Shelf and not that of the EEZ. See Art. 68 *UNCLOS*. See also D. Harris, *Cases and Materials on International Law*, 7th ed. (2010), 396, para 4.

19 *United Nations Convention on the Law of the Sea*, 10 December 1982, 1833 UNTS 3 [UNCLOS].

20 *Continental Shelf (Libyan Arab Jamahiriya v. Malta)*, Judgment, ICJ Reports 1985, 13, 33; *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States of America)*, Judgment, ICJ Reports 1984, 246, 294; *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)*, Judgment, ICJ Reports 1993, 38, 59.

21 D. Nelson, 'Exclusive Economic Zone', in R. Wolfrum (ed), *Max Planck Encyclopedia of Public International Law*, Vol III (2008), 1035, 1038 para. 14. Views that the EEZ remains part of the High Seas are difficult to uphold in light of the wording of Art. 55

the freedom of navigation, Art. 58 (1) *UNCLOS*) with certain sovereign rights of coastal States, thereby creating considerable tension between the two.[22] As stated by Art. 56 (1) (a) *UNCLOS* the coastal State has, *inter alia*, sovereign rights for the purpose of exploring and exploiting, conserving, and managing the living natural resources in its EEZ. Those sovereign rights must be distinguished from the coastal State's full sovereignty over the Territorial Sea, as they are limited *ratione materiae* to the resources of the EEZ.[23] Thus, the EEZ succeeds earlier concepts of preferential fishing rights in an area beyond the Territorial Sea.[24] In order to exercise its sovereign rights, the coastal State may regulate EEZ fisheries in accordance with Arts. 61, 62 *UNCLOS* and enforce its fisheries laws pursuant to Art. 73 *UNCLOS*.

I. Regulatory Jurisdiction of the Coastal State

The coastal State determines the allowable catch pursuant to Art. 61 (1) *UNCLOS* and must take proper conservation and management measures in order to ensure that the maintenance of the living resources in the EEZ is not endangered by over-exploitation pursuant to Art. 61 (2) *UNCLOS*. As stated by Art. 62 *UNCLOS* the coastal State must at the same time promote the objective of optimum utilization of the living resources. It has an obligation to give other States access to any possible surplus of the allowable catch that it cannot harvest itself.[25] Nationals of other States must comply with the fishing laws and regulations of the coastal State in its EEZ pursuant to Art. 56 (1) (a), 62 (4) *UNCLOS*,[26] which involve, *inter alia*, licensing schemes, catch quotas, reporting duties, monitoring, landing of catches, and enforcement procedures.[27]

UNCLOS ("The exclusive economic zone is [...] subject to [a] specific legal regime".) and Art. 86 *UNCLOS* ("The provisions [on the High Seas] apply to all parts of the sea that are not included in the exclusive economic zone".).

22 A. J. Hoffmann, 'Freedom of Navigation', in R. Wolfrum (ed), *Max Planck Encyclopedia of Public International Law*, Vol VII (2011), 568, 571-572, para. 19.

23 Y. Tanaka, *The International Law of the Sea*, 1st ed. (2012), 127.

24 See *Fisheries Jurisdiction (United Kingdom of Great Britain and Northern Ireland v. Iceland)*, Judgment, ICJ Reports 1974, 3, paras. 55-60; *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland)*, Judgment, ICJ Reports 1974, 175, paras. 47-52.

25 For details, see *infra*, section C.III.

26 It should be noted that Art. 62 (4) *UNCLOS* is not a separate basis for jurisdiction, but merely concretizes Art. 56 (1) (a) *UNCLOS*.

27 The list in Art. 62 (4) *UNCLOS* is not exhaustive, see M. H. Nordquist *et al.* (eds), *United Nations Convention on the Law of the Sea 1982: A Commentary*, Volume II, Art. 1 to 85, Annexes I and II, Final Act, Annex II (1993), para. 62.16 (j) [Nordquist, Virginia Commentary Vol. II].

Technological progress and an increasingly global economy have changed modern fishing practices. Many activities which are today a common feature of international fisheries, are not expressly mentioned in Art. 62 (4) *UNCLOS*. Large industrial fishing vessels can now stay at sea for long periods of time as they are accompanied by factory and refrigerator vessels on which they transship their catches, by tankers which supply them with oil and gas as fuel (so-called "bunkering"), and by other support vessels which deliver supplies and workers.[28] For the purposes of this article, those recent practices can roughly be pooled into two main categories: (1) handling of catches such as transshipment, processing, refrigerating and transport of caught fish, (2) support of fishing vessels such as bunkering and supply with provisions and personnel. Those activities are arguably not essential elements of (and do not exclusively apply to) fishing, but are nonetheless characteristic of contemporary fishing practices. The question of whether they can be regulated by the coastal State is of utmost importance for combating illegal fishing in the EEZ. Where the coastal State has no jurisdiction, any legislative or enforcement measures will constitute an infringement of the flag State's freedom of navigation in the EEZ pursuant to Art. 58 (1) *UNCLOS*.[29]

With respect to category (1), the arbitral tribunal in the *Case concerning filleting within the Gulf of St. Lawrence*, adopting a narrow interpretation of Art. 56 (1) (a) *UNCLOS*, held that the coastal State's sovereign right to manage the living resources of the EEZ do not extend to the processing of fish caught in the EEZ.[30] It considered that Art. 62 (4) *UNCLOS* did not cover activities substantially different from those listed.[31] In the *"Juno Trader" Case*, the ITLOS was confronted with the issues of transshipment and transport of catch in the EEZ, but did not expressly address coastal State competences.[32] It did, however, take into account Guinea-Bissau's transshipment legislation for the purposes of calculating the "[...] reasonable bond [...]" pursuant to Art. 73 (2) *UNCLOS*,[33] which can be read as an implicit acknowledgment of its conformity with *UNCLOS*.[34] Thus, the ITLOS disagreed with the arbitral tribunal in the

28 See Ndiaye, *supra* note 16, 376.

29 See *The M/V "Virginia G" Case (Panama v. Guinea-Bissau)*, ITLOS, *Case No. 19*, Merits, Judgment, 14 April 2014, para. 222. The ITLOS also notes that Art. 58 *UNCLOS* must generally be read in conjunction with Art. 56 *UNCLOS*.

30 *Case concerning filleting within the Gulf of St. Lawrence between Canada and France*, 19 Reports of International Arbitral Awards (1986), 225, para. 50.

31 *Ibid*., para. 52.

32 *The "Juno Trader" Case (Saint Vincent and the Grenadines v. Guinea-Bissau)*, ITLOS, *Case No. 13*, Judgment, 18 December 2004, paras. 86-91.

33 *Ibid*., paras. 90, 95.

34 See also Ndiaye, *supra* note 16, 393.

Gulf of St. Lawrence Case.[35] However, it is often difficult to distinguish fishing activities and transport of catch in the EEZ from mere transport of catch of different origin through an EEZ.[36] The ITLOS touched upon this issue in the "*Monte Confurco*" *Case* and implicitly acknowledged the coastal State's competence to oblige transiting fishing vessels to notify their entry into the EEZ.[37] Arguably, the coastal State may also adopt legislation providing for inspection of transiting fishing and transport vessels.[38] However, as mere transit as such is protected by the freedom of navigation, the coastal State may not interfere by, for example, denying certain fishing or transport vessels entry into its EEZ.[39] As for category (2), the question of the coastal State's competence to regulate support activities came up in the *M/V "SAIGA" Case*, where Guinea had arrested a vessel for a breach of customs laws which regulated bunkering in Guinea's EEZ.[40] While the ITLOS did not expressly state whether bunkering falls into the scope of coastal State jurisdiction,[41] dissenting opinions of the minority show that the judgment can be read as implicitly deciding in favor of broad coastal State jurisdiction.[42]

The recent judgment of the ITLOS in the *M/V "Virginia G" Case*[43] provides clarification of the majority of the issues mentioned above. The *M/V "Virginia G",*

35 The decision in the *Gulf of St. Lawrence Case* was also subject to heavy criticism by scholars as the interpretation of Arts. 56 (1) (a), 62 (4) *UNCLOS* was perceived as unnecessarily narrow. See Ndiaye, *supra* note 16, 388, with further references.

36 *Ibid*., 393.

37 *The "Monte Confurco" Case (Seychelles v. France)*, ITLOS, *Case No. 6, Prompt Release*, Judgment, 18 December 2000, paras. 81-83. For a similar case, see *The "Grand Prince" Case (Belize v. France)*, ITLOS, *Case No. 8, Prompt Release*, Judgment, 20 April 2000. See also Nordquist, *Virginia Commentary Vol. II*, *supra* note 27, para. 58.10 (c).

38 M. Barrett, 'Illegal Fishing in Zones Subject to National Jurisdiction', 5 *James Cook University Law Review* (1998), 1, 22.

39 Ndiaye, *supra* note 16, 393.

40 *The M/V "SAIGA" Case (Saint Vincent and the Grenadines v. Guinea)*, ITLOS, *Case No. 1, Prompt Release*, Judgment, 4 December 1997.

41 *Ibid*., para 59.

42 *Ibid*., Dissenting Opinion of President Mensah, paras. 19-23; Dissenting Opinion of Vice-President Wolfrum and Judge Yamamoto, paras. 21-25. In the decision on the merits, the ITLOS did not elaborate further on the issue, but held that bunkering may at least not be regulated through customs laws. See *The M/V "SAIGA" (No. 2) Case (Saint Vincent and the Grenadines v. Guinea)*, ITLOS, *Case No. 2*, Merits, Judgment, 1 July 1999, para. 127, 138. Indeed, customs laws are restricted to the Territorial Sea and artificial islands, installations and structures (Art. 60 (2) *UNCLOS*). As far as the Contiguous Zone is concerned, Art. 33 (1) *UNCLOS* provides that the coastal State may apply customs laws only for purposes of prevention or enforcement of violations in the Territorial Sea or Internal Waters. See Tanaka, *supra* note 23, 122.

43 ITLOS, *The M/V "Virginia G" Case*, *supra* note 29.

an oil tanker flying the flag of Panama, was supplying fuel to commercial fishing vessels in the EEZ of Guinea-Bissau.[44] On 21 August 2009 the *M/V "Virginia G"* was arrested by the authorities of Guinea-Bissau[45] for violation of fisheries laws by carrying out "fishing related activities in the form of "unauthorized sale of fuel to ships fishing in [Guinea-Bissau's] EEZ"[46]. Panama disputed the legality of Guinea-Bissau's measures and submitted the case to the ITLOS. One core question was whether Art. 56 (1) (a) *UNCLOS* provided Guinea-Bissau with jurisdiction to regulate the bunkering of foreign fishing vessels in its EEZ.[47] Surprisingly,[48] the ITLOS *unanimously* found that bunkering of fishing vessels falls indeed into the scope of Art. 56 (1) (a) *UNCLOS*.[49] The ITLOS reaffirmed that the list in Art. 62 (4) *UNCLOS* is not exhaustive, but required a "direct connection" of any regulated activity to fishing.[50] The bunkering of fishing vessels fulfills that criterion as it enables them to continue their fishing activities at sea without interruption.[51] This finding, however, only applies to bunkering of vessels "engaged in fishing" and not bunkering in general.[52] This leaves open whether there is a sufficiently close connection of bunkering of other associated vessels with fishing. In support of its conclusion, the ITLOS made reference to definitions of "fisheries related activities" in multiple international agreements,[53] including the 2009 FAO Agreement on Port State Measures [PSMA],[54] which provides in Art. 1 (d):

> "'[F]ishing related activities' means any operation in support of, or in preparation for, fishing, including the landing, packaging,

44 *Ibid*., paras. 55, 61-62.
45 *Ibid*., paras. 61-62.
46 *Ibid*., para. 64.
47 *Ibid*., para. 161.
48 The voting on the same issue in the *M/V "SAIGA" Case* was as close as 12/9. See ITLOS, *The M/V "SAIGA" Case*, *supra* note 40, para. 86.
49 ITLOS, *The M/V "Virginia G" Case*, *supra* note 29, para. 452.
50 *Ibid*., para. 215.
51 *Ibid*.
52 *Ibid*., para. 223. The judgment did not address the question of whether the coastal State has jurisdiction to regulate bunkering in general. *Ibid*., para. 224. One declaration, however, concludes that the coastal State has such regulatory jurisdiction, referring to Arts. 56 (1) (b) (iii), 211 (5), 220 *UNCLOS*. *Ibid.,* Joint Declaration of Judges Kelly and Attard, 1.
53 ITLOS, *The M/V "Virginia G" Case*, *supra* note 29, para. 216.
54 *Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing* (22 November 2009), available at http://www.fao.org/fileadmin/user_upload/legal/docs/1_037t-e.pdf (last visited 24 March 2015), not yet in force.

> processing, transshipping or transporting of fish that have not been previously landed at a port, as well as the provisioning of personnel, fuel, gear and other supplies at sea."

It seems that the ITLOS considers all activities mentioned in that definition to fall into the scope of Arts. 56 (1) (a), 62 (4) *UNCLOS*,[55] and rightly so. As the provisioning of personnel, gear and other supplies is just as related to fishing activities as bunkering, all category (2) activities are surely included. Category (1) activities such as the "[...] landing, packaging, processing, transshipping or transporting of fish that have not been previously landed at a port [...]" are even more closely related to fishing than support activities. Therefore, it is only logical to apply the reasoning of the judgment *a fortiori* to such activities and to consider the award in the *Gulf of St. Lawrence Case*[56] overruled. However, the transport and on-board processing of catch that has previously been landed at port will generally be considered as mere transit and are, therefore, protected by the flag State's freedom of navigation, with the limitations described above (i.e. notification of entry into the EEZ, inspection of catches and secure stowing of fishing gear during transit[57]).

II. Enforcement Jurisdiction of the Coastal State

In order to deter illegal fishing in its EEZ, the coastal State must be able to effectively enforce its fisheries laws. Today, effective enforcement is even more important to further legislative action. The lack of coastal State enforcement capacity is at the core of the call for flag State obligations. The basic enforcement measures available to the coastal State to ensure compliance with its fisheries laws and regulations in accordance with Arts. 56 (1) (a), 73 (1) *UNCLOS*[58] include boarding, inspection, arrest and judicial proceedings.[59] In order to arrest foreign

55 As the PSMA has not yet entered into force, the ITLOS certainly does not consider it to be binding as such, but rather as a definition that best reflects State practice regarding Arts. 56 (1) (a), 62 (4) *UNCLOS*.

56 See *supra* note 26.

57 T. Aqorau, 'Illegal Fishing and Fisheries Law Enforcement in Small Island Developing States: The Pacific Islands Experience', 15 *International Journal of Marine and Coastal Law* (2000) 1, 37, 46.

58 Similar to Art. 62 (4) *UNCLOS*, Art. 73 *UNCLOS* is a concretization of Art. 56 (1) (a) *UNCLOS*.

59 The coastal State has a broad discretion with regard to enforcement measures. See Ndiaye, *supra* note 16, 380. Accordingly, the list of measures is not exhaustive. See M. Dahmani, *The Fisheries Regime of the Exclusive Economic Zone* (1987), 82.

vessels suspected of fishing law violations, the coastal State can also carry out hot pursuit from the EEZ into the High Seas pursuant to Art. 111 (2) *UNCLOS*.[60] Art. 73 (2) *UNCLOS* provides, however, that arrested vessels and crews must be promptly released upon posting of a reasonable bond or other security.[61] The ITLOS' approach to the reasonableness of the bond has proven to be a significant hurdle for effective and deterring enforcement measures. It considers that the bond must be of a financial nature, thereby excluding non-financial securities, *e.g.* "good-behavior bonds" such as conditions to carry a Vessel Monitoring System [VMS].[62] Further concerns are the limitation on the amount that can reasonably be claimed as bond and the vague criteria the ITLOS uses to determine the amount, which lead to legal uncertainty.[63]

As for sanctions under coastal State law, such as the recurring issue of confiscation (or forfeiture) of violating vessels and cargo, the *M/V "Virginia G" Case* provides some further insights.[64] The ITLOS interpreted Art. 73 (1) *UNCLOS* in light of coastal State practice and held that it permits, in principle, confiscation laws and enforcement measures as long as they are "necessary to ensure compliance with the laws and regulations" of the coastal State.[65] As far as the legal basis for confiscation is concerned, it must both afford the coastal State's authorities with flexibility in the sanctioning of violations and offer sufficient possibilities to challenge the confiscation before national courts.[66] The ITLOS also indicates

60 Today, the strict procedural requirements have become a hurdle to the effective use of modern technology for the purposes of hot pursuit. For details, see Allen, *supra* note 12, 311. The author suggests a functional interpretation of the procedural requirements that allows the use of modern technology. But note that the ITLOS rejected such this approach with regard to the "signal to stop" requirement. See ITLOS, *The M/V "SAIGA" (No. 2) Case*, *supra* note 42, para. 148.

61 See generally J. Gao, 'Reasonableness of the Bond under Article 292 of the LOS Convention: Practice of the ITLOS', 7 *Chinese Journal of International Law* (2008) 1, 115, 115-142. To ensure compliance with Art. 73 (2) *UNCLOS*, Art. 292 *UNCLOS* contains a special prompt release procedure which has so far served as basis for nine out of twenty contentious cases before the ITLOS.

62 *The "Volga" Case (Russian Federation v. Australia)*, ITLOS, *Case No. 11, Prompt Release*, Judgment, 23 December 2002, para. 77; this narrow interpretation has attracted criticism by scholars. See *e.g.* S. Karim, 'Conflicts over Protection of Marine Living Resources: The 'Volga Case' Revisited', 3 *Goettingen Journal of International Law* (2011) 1, 101, 110-113.

63 For an overview over the criteria, see D. H. Anderson, 'Prompt Release of Vessels and Crews', in R. Wolfrum (ed), *Max Planck Encyclopedia of Public International Law*, Vol. VIII (2008), 499, 504-505, paras. 21-33.

64 The issue was already touched upon in ITLOS, *The "Tomimaru" Case, supra* note 9, paras. 75-76.

65 ITLOS, *The M/V "Virginia G" Case*, *supra* note 29, paras. 256-257.

66 *Ibid*., 256-257.

that automatic forfeitures are illegal, because they are not "necessary".[67] In order for enforcement measures pursuant to Art. 73 *UNCLOS in general* (including confiscation) to be necessary, they must satisfy a principle of reasonableness that demands due regard "[...] to be paid to the particular circumstances of the case and the gravity of the violation."[68] This is in conformity with the ITLOS' additional finding that Art. 225 *UNCLOS*, which is found in Part XII of *UNCLOS* on the protection and preservation of the marine environment, equally applies to enforcement measures pursuant to Art. 73 *UNCLOS*.[69] Thus, fisheries enforcement measures may not "endanger the safety of navigation or otherwise create any hazard to a vessel, or bring a vessel to an unsafe port or anchorage, or expose the marine environment to an unreasonable risk". The establishment of such a broad and imprecise principle that allows the ITLOS to interfere with individual enforcement measures leaves coastal States with great legal uncertainty. Finally, as stated by Art. 73 (3) *UNCLOS*, penalties for violations of fisheries legislation may, in the absence of a specific agreement between the coastal State and the flag State, not include imprisonment or any other form of corporal punishment.[70] Art. 73 (4) *UNCLOS* also obliges the coastal State to promptly notify the flag State in case of any arrest or detention and possible penalties imposed.[71]

In conclusion, the EEZ regime of *UNCLOS* displays a clear primary responsibility of the coastal State for the management and conservation of the living resources. To this end, the coastal State has extensive legislative and enforcement jurisdiction. The recent jurisprudence of the ITLOS has further

67 *Ibid*., 256-257. It follows that enforcement laws like the automatic forfeiture procedure (without court order) introduced by Australia in 1999 would probably be considered illegal. See R. Baird, 'Australia's Response to Illegal Foreign Fishing: A Case of winning the Battle but losing the Law?', 23 *International Journal of Marine and Coastal Law* (2008) 1, 95, 95-124.

68 ITLOS, *The M/V "Virginia G" Case*, *supra* note 29, para. 270.

69 *Ibid*., para. 343.

70 As the coastal State does not enjoy substantial criminal jurisdiction in the EEZ, this restriction leads to legal problems whenever illegal fishermen use force to evade arrest by the coastal State's authorities. See e.g. S. K. Kim, 'Illegal Chinese Fishing in the Yellow Sea: A Korean Officer's Perspective', 5 *Journal of East Asia and International Law* (2012) 2, 455, 469-471.

71 These provisions reflect the aim of *UNCLOS* to establish a balance between the interests of coastal States and flag States. See ITLOS, *The "Monte Confurco" Case*, *supra* note 37, paras. 70-72. However, this balance has deteriorated. Today's commercial fishing fleets are controlled by private investors, whose identity is often concealed by a complex corporate web and many flag States are neither willing nor able to effectively exercise their control over them. See ITLOS, *The "Volga" Case, supra* note 62, Dissenting Opinion of Judge *ad hoc* Shearer, para. 19.

strengthened the regulatory competences of the coastal State, but has also set problematic limits with regard to enforcement measures. None of those developments suggest a normative shift away from coastal State responsibility. We shall keep this *status quo* in mind when analyzing the role of the flag State in this system in the next chapter.

C. Flag State Obligations to Combat Illegal Fishing in the EEZ of Other States

One of the most fundamental principles of the international law of the sea, now laid down in Art. 91 (1) *UNCLOS*, is the right of all States to grant their nationality to ships.[72] Flag States can define requirements for the granting of their nationality in their domestic law.[73] They enjoy parallel jurisdiction over their vessels in the EEZ pursuant to Arts. 58 (2), 92 (1) *UNCLOS*.[74] In theory, flag States can therefore adopt, apply, and enforce strict laws governing activities of fishing vessels flying their flag in the EEZ of other States. Whether they have an obligation to do so first of all depends on whether they have concluded any agreements containing relevant duties. As many flag States (so-called "Flags of Non-Compliance")[75] avoid such treaty obligations, fishing vessels flying their flags do not have to fear strict regulation, monitoring and sanctions.[76] This underscores the potential importance of customary international law obligations of flag States, which the ITLOS may apply when interpreting *UNCLOS* in

72 This right was already well established in the early 20th century, as witnessed by Art. 4-5 of the *Convention on the High Seas*, 29 April 1958, 450 UNTS 11 [HSC].

73 ITLOS, *The M/V "SAIGA" (No. 2) Case*, *supra* note 42, para. 63; See also C. Goodman, 'Flag State Responsibility in International Fisheries Law - Effective Fact, Creative Fiction, or further work required?', 23 *Australian & New Zealand Maritime Law Journal* (2009) 2, 157, 161.

74 Art. 92 (1) *UNCLOS* provides for exclusive flag State jurisdiction in the High Seas. Art. 58 (2) *UNCLOS* transfers this jurisdiction into the EEZ, where it is no longer exclusive with respect to activities which fall under coastal State jurisdiction. M. H. Nordquist *et al.* (eds), *United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol. III, Art. 86-132 & Documentary Annexes (1995), para. 92.6 (c) [Nordquist, Virginia Commentary Vol. III].

75 In the fisheries context, the term "Flag of Non-Compliance" is preferable as some of the most notorious distant water fleets fly the flag of States which would not qualify as "Flags of Convenience" within the traditional meaning, as they do not maintain open registries. See D. König, 'Flags of Convenience', in R. Wolfrum (ed), *Max Planck Encyclopedia of Public International Law*, Volume IV (2008), 118, 122-123, para. 13.

76 *Ibid.*; see also J. K. Ferrell, 'Controlling Flags of Convenience: One Measure to Stop Overfishing of Collapsing Fish Stocks', 35 *Environmental Law* (2005) 2, 323, 333-337.

accordance with Art. 293 (1) *UNCLOS*.[77] In order to identify and discuss potential obligations of customary international law, this section will provide an overview of the relevant provisions of *UNCLOS*, the most important other multilateral treaties and soft-law instruments, as well as bilateral treaty practice and relevant principles of international environmental law. Interestingly, nearly all statements touching upon the substance of the SRFC's questions submitted by States,[78] international organizations,[79] and NGOs[80] during the proceedings of ITLOS, *Case No. 21* conclude that flag States have an obligation to exercise effective jurisdiction and control over fishing activities of vessels flying their flag in the EEZ of other States.

I. United Nations Convention on the Law of the Sea 1982

Pursuant to Art. 58 (2), 94 (1) *UNCLOS*, the flag State has a general duty to effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag in the EEZ.[81] This is an expression of the "genuine link" between flag State and vessel as required by Art. 91 (1) *UNCLOS*.[82]

77 See J. L. Jesus, 'Statement given to the Informal Meeting of Legal Advisers of Ministries of Foreign Affairs', New York (25 October 2010), available at http://www.itlos.org/fileadmin/itlos/documents/statements_of_president/jesus/legal_advisors_251010_eng.pdf (last visited 24 March 2015), 8.

78 Written submissions, ITLOS, *Case No. 21*: First Written Statement of New Zealand (27 November 2013), paras. 26-31; Second Written Statement of New Zealand (13 March 2014), paras. 3-8; Written Statement of the Federal Republic of Somalia (27 November 2013), paras. II(1)-(11); Written Statement of the Federated States of Micronesia (29 November 2013), paras. 37 & 46; Written Statement of the Kingdom of the Netherlands (14 March 2013), paras. 2.1-2.8; Written Statement of Japan (29 November 2013), paras. 30-34 & 37-38; Written Statement of the Republic of Chile (29 November 2013), 7-13; Written Statement of the European Commission on behalf of the European Union (29 November 2013), paras. 30-48; Written Statement of the Democratic Socialist Republic of Sri Lanka (18 December 2013), paras. 10-17.

79 Written submissions, ITLOS, *Case No. 21*: Written Statement of the International Union for Conservation of Nature and Natural Resources [IUCN] (25 November 2013), paras. 26-38; Written Statement of the Caribbean Regional Fisheries Mechanism [CRFM] (27 November 2013), paras. 83-167; Written Statement of the Central American Fisheries and Aquaculture Organization (16 December 2013), para. 1; Written Statement of the Sub-Regional Fisheries Commission [SRFC] (November 2013), 12.

80 *Amicus Curiae* brief from WWF International (29 November 2013), paras. 20-32, available at https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.21/written_statements_round2/21_II_WWF_amicus_brief.pdf (last visited 24. March 2015).

81 See also Art. 5 (1) *HSC*. The duties of the flag State are stated in great detail in Art. 94 (2) - (7) *UNCLOS*.

82 The ITLOS has held that the purpose of the "genuine link" concept is to ensure that flag States properly discharge their duties. Nonetheless, States which discover evidence

The duties laid down in Art. 94 *UNCLOS* aim to ensure safety at sea.[83] There is no mention of duties regarding fishing activities.[84] It should be noted in particular that the wording "generally accepted international regulations, procedures and practices" in Art. 94 (5) *UNCLOS* refers to rules of navigation introduced under the auspices of the International Maritime Organization [IMO],[85] and not fisheries agreements.[86] Thus, Art. 94 *UNCLOS* does not contain any flag State obligations related to fishing. Nonetheless the obligation laid down in Art. 94 (1) *UNCLOS* is the prototype of a flag State obligation, as most of the other flag State duties can only be discharged by the exercise of effective jurisdiction and control over the relevant vessels.[87] Flag States must, for example, adopt and enforce laws and regulations for the prevention, reduction and control of pollution of the marine environment from vessels flying their flag pursuant to Arts. 211 (2), 217 *UNCLOS*.

Several statements submitted in ITLOS, *Case No. 21* claim that an obligation of flag States to ensure that vessels flying their flag comply with the coastal State's fishing laws and regulations in the EEZ can be read into

indicating the absence of proper jurisdiction and control by a flag State over a vessel have to recognize the right of the ship to fly the flag of the flag State. See ITLOS, *The M/V "SAIGA" (No. 2) Case*, *supra* note 42, paras. 82-83; *The M/V "Virginia G" Case*, *supra* note 29, paras. 109-113. This interpretation renders the concept largely meaningless. For an in-depth discussion of the term, see A. D'Andrea, 'The "Genuine Link" Concept in Responsible Fisheries: Legal Aspects and Recent Development', 61 *FAO Legal Papers Online* (2006), available at http://www.fao.org/fileadmin/user_upload/legal/docs/lpo61.pdf (last visited at 24 March 2015).

83 In so far they are complementing the exclusive flag State jurisdiction in the High Seas laid down in Art. 92 (1) *UNCLOS*, which aims to protect the freedom of navigation. See *ILC Commentary to the Articles Concerning the Law of the Sea*, Yearbook of the International Law Commission (1956), Vol. II, 254, Commentary on Art. 29, para. 3; Commentary on Art. 30, para. 1.

84 See A. Van Houtte, 'Flag State Responsibility and the Contribution of Recent International Instruments in Preventing, Deterring and Eliminating IUU Fishing', in FAO, *Report of the Expert Consultation on Fishing Vessels Operating under Open Registries and their Impact on Illegal, Unreported and Unregulated Fishing* (2003), FAO Fisheries Report No. 722 (2004), available at ftp://ftp.fao.org/docrep/fao/006/y5244e/y5244e00.pdf (last visited 23 March 2015), 47, 51.

85 See e.g. the *International Convention for the Safety of Life at Sea*, 01 November 1974, 1184 UNTS 278 [SOLAS].

86 See T. Zwinge, 'Duties of Flag States to Implement and Enforce International Standards and Regulations - And Measures to Counter their Failure to Do So', 10 *Journal International Business & Law* (2011) 2, 297, 302-305; see also Goodman, *supra* note 73, 161.

87 Nordquist, *Virginia Commentary Vol. III*, *supra* note 74, para. 94.8 (a).

Art. 58 (3) *UNCLOS*.[88] However, Art. 58 (3) *UNCLOS* applies only to situations in which flag States are "exercising their rights and performing their duties under [*UNCLOS*] in the [EEZ]". Those rights and duties are clearly defined in the first two paragraphs of Art. 58 *UNCLOS*, which provide for the application of Arts. 87-115 *UNCLOS* in the EEZ.[89] Those provisions do not deal with fishing.[90] At the same time, the provisions governing fisheries in the EEZ have their own separate place in Arts. 61-73 *UNCLOS*.[91] Thus, Art. 58 (3) *UNCLOS* is not a suitable basis for flag State obligations concerning fishing activities.

Also Art. 62 (4) *UNCLOS*[92] is frequently cited as a possible basis for such an obligation.[93] While *UNCLOS* does not provide a definition of the term "national", it certainly refers to private vessels flying the flag of the relevant State.[94] However, flag State obligations in *UNCLOS*, like Arts. 58 (3), 217 *UNCLOS* are generally phrased in a way that directly addresses the flag State, and not the

88 See *e.g.* Statement of Chile, *supra* note 78, 13; Statement of Sri Lanka, *supra* note 78, paras. 14-15; First Statement of New Zealand, *supra* note 78, para. 28; Statement of Japan, *supra* note 78, para. 31; Statement of Micronesia, *supra* note 78, para. 29; Statement of Somalia, *supra* note 78, 6; Statement of the WWF, *supra* note 80, paras. 23-32; Statement of the SRFC, *supra* note 79, 12; Art. 58 (3) *UNCLOS* states: "In exercising their rights and performing their duties under this Convention in the [EEZ], States shall have due regard to the rights and duties of the coastal State and shall comply with the laws and regulations adopted by the coastal State [...]".

89 Tanaka, *supra* note 23, 131. Any other interpretation would depart from the ordinary meaning of the wording in its context and in the light of its object and purpose. See Art. 31 (1) of the *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331 [VCLT]. See also M. Fitzmaurice, 'The Practical Working of the Law of Treaties', in M. D. Evans (ed), *International Law*, 3rd ed. (2010), 172, 183-184.

90 The freedom of fishing in the High Seas (Art. 87 (1) (e) *UNCLOS*) was not included in Art. 58 (1) *UNCLOS*, and the High Seas fishing provisions of Arts. 116-120 *UNCLOS* were left out of Art. 58 (2) *UNCLOS*.

91 See also Nordquist, *Virginia Commentary Vol. II*, *supra* note 27, para. 58.10 (a).

92 In relevant part, Art. 62 (4) *UNCLOS* states: "Nationals of other States fishing in the [EEZ] shall comply with the conservation measures and with the other terms and conditions established in the laws and regulations of the coastal State".

93 See *e.g.* Statement of Chile, *supra* note 78, 8; Statement of the WWF, *supra* note 80, paras. 22-32. One statement even goes so far to claim that States have a duty to exercise their effective jurisdiction and control over persons of their nationality. See further *Amicus Curiae* brief on behalf of WWF International (14 March 2014), available at https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.21/written_statements_round2/21_II_WWF_amicus_brief.pdf (last visited 24 March 2015), paras. 25-29.

94 See Art. 91 (1) *UNCLOS*, which is entitled "Nationality of ships". An older definition of "nationals" which expressly includes "fishing boats or craft" can be found in Art. 14 of the *Convention on Fishing and Conservation of the Living Resources of the High Seas,* 29 April 1958, 559 UNTS 285.

nationals on whom it has to exercise effective control over.[95] The first sentence of Art. 62 (4) *UNCLOS* therefore only addresses nationals of other States, not the flag State itself as their supervisor.[96]

For these reasons, most scholars consider that, *de lege lata*, no flag State obligations to combat illegal fishing in the EEZs of other States can be read into any provisions of *UNCLOS*.[97] This conclusion is consistent with the system of coastal State responsibility in the EEZ explained in section B. above. The lack of ability of developing coastal States to appropriately discharge their responsibility was apparently not foreseen by the drafters of *UNCLOS*. This deficiency cannot convincingly be remedied by means of interpretation.

II. Other Multilateral Treaties and Soft-Law

There have been various attempts to fill the gaps in the fisheries regime of *UNCLOS* with the conclusion of new multilateral treaties. It is beyond the scope of this article to provide more than a broad overview of the existing instruments and their relevance for fishing in the EEZ. The 1993 *FAO Compliance Agreement*[98] is the starting point of the legislative process to introduce flag State obligations and forms the basis for several other treaties and soft-law instruments.[99] It does,

95 But note the flawed interpretation of the CJEU in *European Parliament and European Commission v. Council of the European Union*, Joined Cases No. C-103/12 and No. C-165/12, Judgment of the Grand Chamber of 26 November 2014, 58 *Official Journal of the European Union* (2015) C 026/2, paras. 62-65.

96 Y. Takei, 'Assessing Flag State Performance in Legal Terms: Clarifications of the Margin of Discretion', 28 *The International Journal of Marine and Coastal Law* (2013) 1, 97, 108.

97 *Ibid*.; Handl, *supra* note 17, 159; implicitly also Ndiaye, *supra* note 16, 378-382; R. Wolfrum, 'The potential of the International Tribunal for the Law of the Sea in the management and conservation of marine living resources', Presentation given by the President of the International Tribunal for the Law of the Sea to the Meeting of the Friends of the Tribunal at the Permanent Mission of Germany to the United Nations, New York (21 June 2007), available at http://www.itlos.org/fileadmin/itlos/documents/statements_of_president/wolfrum/friends_tribunal_210607_eng.pdf (last visited 26 March 2015), 4; for reservations of a more general nature, see also Goodman, *supra* note 73, 169; Zwinge, *supra* note 86, 322; for an opinion in favour of an obligation under *UNCLOS*, see Barret, *supra* note 38, 24-25.

98 FAO, *Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas,* 24 November 1993, 2221 UNTS 91 [Compliance Agreement].

99 See in particular Art. III *Compliance Agreement*, which obliges the flag State to exercise its jurisdiction and control over vessels flying its flag and provides a detailed list of individual duties.

however, only apply to the High Seas[100] and has gained little support.[101] The 1995 *UN Straddling Fishstocks Agreement*[102] was the most successful multilateral agreement since *UNCLOS*.[103] It contains comprehensive flag State obligations to combat IUU-fishing, particularly through cooperation with RFMOs.[104] With the notable exception of Art. 18 (3) (b) (iv) UNFSA, which obliges the flag State to ensure that vessels flying its flag do not conduct unauthorized fishing within areas under the national jurisdiction of other States, those duties apply to the High Seas.[105] Under Art. 19 UNFSA, which also applies to Art. 18 (3) (b) (iv) UNFSA, the flag State has a duty to take effective enforcement measures. Another treaty, the PSMA, adopts an entirely new approach by requiring port states to use their strategic importance to combat illegal fishing.[106] Notably, Art. 20 PSMA also contains obligations of flag States to cooperate with port States.[107] So far, the PSMA has not entered into force.[108] As this overview shows, the existing

100 See Art. II (1) *Compliance Agreement*.

101 Even 20 years after its conclusion, the *Compliance Agreement* only had 39 State parties. This level of participation is insufficient to deal with the problem, in particular because important fishing nations such as the People's Republic of China, the Kingdom of Thailand, and the Republic of India did not ratify the *Compliance Agreement*. See G. Hosch, 'Analysis of the Implementation and Impact of the FAO Code of Conduct for Responsible Fisheries since 1959', *FAO Fisheries and Aquaculture Circular No. 1038* (2009), 1, 28.

102 *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*, 4 December 1995, 2167 UNTS 3 [UNFSA].

103 After the ratification of the Republic of the Philippines on 24 September 2014, the *UNFSA* now has 82 State parties. However, it did not reach the same level of participation as *UNCLOS*, particularly with respect to big fishing nations. See J. Friedrich, 'Legal Challenges of Nonbinding Instruments: The Case of the FAO Code of Conduct for Responsible Fisheries', 9 *German Law Journal* (2008) 11, 1539, 1547 footnote 27.

104 Pursuant to Art. 18, 19 *UNFSA* the flag State has to exercise its jurisdiction and control over vessels flying its flag in the High Seas to ensure compliance with the rules of the competent RFMOs.

105 See Art. 3 (1) UNFSA.

106 This approach is not completely new, as Art. 23 UNFSA already provided for certain port state obligations. See T. L. McDorman, 'A Note on the May 2009 FAO Draft Agreement on Port State Measures to Prevent, Deter and Eliminate IUU Fishing', 27 *Chinese (Taiwan) Yearbook of International Law & Affairs* (2009), 131, 134.

107 These obligations do also apply to the EEZs of States which are not parties to the PSMA. See Arts. 3 (3), 1 (e) PSMA.

108 The PSMA has only 10 of the 25 State parties necessary for its entry into force. Thus, it is of little normative relevance and also has not generated significant State practice.

multilateral conventions generally apply to the High Seas and most of them lack ratifications. Thus, their normative relevance for the EEZ is limited.[109]

For nearly 20 years the FAO has attempted to remedy the lack of participation in binding treaties by adopting soft-law instruments.[110] Those soft-law instruments include the 1995 FAO Code of Conduct for Responsible Fisheries [CCRF],[111] the 2001 IPOA-IUU,[112] and, most recently, the 2014 FAO Voluntary Guidelines for Flag State Performance [Voluntary Guidelines].[113] For the purposes of this article, it suffices to acknowledge that these instruments consistently call on flag States to exercise their jurisdiction and control over fishing vessels flying their flag in the EEZ (not just the High Seas)[114] to ensure compliance with the laws and regulations of coastal States. The fact that the majority of those instruments has been created by, or in the framework of, the FAO, casts some doubt on their normative value.[115] It speaks for itself that new soft-law instruments, which were agreed upon with broad support, often call on States to ratify the binding treaty instruments[116] – with little success.[117] Although many States are willing to support non-binding instruments calling for binding rules, they are unwilling to ratify the relevant binding treaties. Furthermore, the level of implementation by States is generally insufficient.[118] Thus, for purposes of establishing *opinio iuris*, the FAO instruments seem to be little more than diplomatic a fig leaf for non-complying States.[119]

109 A. Boyle, 'Soft-Law in International Law Making', in Evans (ed), *supra* note 89, 122, 137; Handl, *supra* note 17, 159.

110 Friedrich, *supra* note 103. Soft-law is not binding under public international law, but it can codify pre-existing law and can be proof of *opinio iuris* and State practice. See Boyle, *supra* note 109, 134-137.

111 FAO, *Code of Conduct for Responsible Fisheries* (31 October 1995), available at http://www.fao.org/docrep/005/v9878e/v9878e00.htm (last visited 27 March 2015). See in particular Art. 6.11, 8.2 CCRF.

112 See *supra* note 7. See in particular paras. 34-50 IPOA-IUU.

113 FAO, *Voluntary Guidelines for Flag State Performance* (08 February 2013, endorsed by FAO Committee on Fisheries on 11 June 2014), available at ftp://ftp.fao.org/FI/DOCUMENT/tc-fsp/2013/VolGuidelines_adopted.pdf (last visited 27 March 2015). See in particular paras. 2, 6, 8 & 39-43 of the Voluntary Guidelines. For further details, see Handl, *supra* note 17, 161.

114 See Art. 1.2 CCRF; para. 3.1 IPOA-IUU; para. 3 of the Voluntary Guidelines.

115 See also Van Houtte, *supra* note 84, 59.

116 See e.g. Art. 8.2.6 CCRF; para. 11 IPOA-IUU; GA Res. 67/79, UN Doc A/RES/67/79, 11 December 2012, 12.

117 The low number of ratifications of the *Compliance Agreement* illustrates this dilemma.

118 See e.g. Friedrich, *supra* note 103, 1561.

119 Nonetheless some authors seem to attach great weight to soft-law instruments in the fisheries context. See e.g. Handl, *supra* note 17, 162.

III. Bilateral Fisheries Treaties

The lack of binding rules for flag States has, at least in part, been substituted by coastal States on a bilateral level. As already mentioned above, the coastal State has an obligation pursuant to Art. 62 (2) *UNCLOS* to grant other States access to any potential surplus of allowable catch that it cannot harvest itself, which is usually done by means of bilateral fisheries treaties (BFTs, or EEZ access agreements).[120] However, as the coastal State has great discretion in determining the allowable catch, it can effectively circumvent this obligation.[121] Furthermore, Art. 62 (3) *UNCLOS* empowers coastal States to carefully weigh their own interests against that of flag States. Thus, the selection of suitable partners for BFTs is in the discretion of the coastal State.[122] In the absence of a BFT or other agreements, fishing vessels may not engage in any fishing activities in the EEZ unless they have acquired a permit outside of a treaty framework. This favorable negotiating position allows coastal States to tie EEZ access to treaty clauses which oblige flag States to ensure compliance of their fishing vessels with the coastal State's fisheries laws and regulations.[123] Such "vessel compliance clauses" [VCCs][124] have been a prominent feature in BFTs for the past three decades.[125] The member States of the SRFC are also engaged in this practice.[126] VCCs take

120 These are the agreements mentioned in Art. 62 (2) *UNCLOS*. See Dahmani, *supra* note 59, 77-78. As the concept of the EEZ evolved before *UNCLOS* was finally agreed, the practice of concluding BFTs already began in the late 1970s and early 1980s between developing coastal States and developed fishing nations. See Van Houtte, *supra* note 84, 49.

121 Y. Tanaka, 'The Changing Approaches to Conservation of Marine Living Resources in International Law', 71 *Heidelberg Journal International Law* (ZaöRV) (2011) 2, 291, 298-299; R. R. Churchill & A. V. Lowe, *The Law of the Sea*, 3rd ed. (1999), 289.

122 Ndiaye, *supra* note 16, 379; Dahmani, *supra* note 59, 77-78; See also Nordquist, *Virginia Commentary Vol. II*, *supra* note 27, paras. 62.16 (d)-62.16 (h).

123 B. Kwiatkowska, *The 200 Mile Exclusive Economic Zone in the New Law of the Sea* (1989), 87-88. However, it should also be noted that developing coastal States often depend on payments received by flag States and fishing corporations in return for EEZ access, which substantially weakens their negotiation position.

124 Term used in the Statement of the IUCN, *supra* note 79, para. 28.

125 It was not uncommon to include such clauses into BFTs even before *UNCLOS* entered into force in 1994. See Dahmani, *supra* note 59, 78-81. The FAO recommended the inclusion of VCCs as early as 1984. See *Report of the FAO World Conference on Fisheries Management and Development* (1984), 18. The first known VCC was laid down in Art. 4 of the *Treaty on Fisheries between Governments of certain Pacific Island States and the Government of the United States of America* (02 April 1984), 26 ILM 1053. See Van Houtte, *supra* note 84, 49.

126 Ndiaye, *supra* note 16, 400-401.

very different forms, and both their wording and content varies substantially. While an in-depth analysis of varieties of VCCs would be highly desirable, it is beyond the scope of this article. A modern, fully reciprocal example of a VCC can be found in Art. 8 (1) of the 2009 EU-Russia BFT:[127]

> "Each Party shall, in accordance with its own laws, regulations and administrative rules, take the necessary steps to ensure the observance by their fishing vessels of rules and regulations established in law by the other Party for the exploitation of fishery resources in the Exclusive Economic Zone of that other Party in the Baltic Sea."

Coastal States have also developed a variety of instruments to foster the inclusion of VCCs into BFTs. On a regional level, some multilateral fisheries management treaties require States parties to include VCCs into their BFTs. An example of such a "VCC-harmonization-clause" is Art. 2 (c) (iv) of the *Nauru Agreement*,[128] which was concluded within the framework of the Pacific Islands Forum Fisheries Agency [FFA].[129] Considering that the FFA has 17 Pacific Island member States, such regional treaties have the potential to significantly increase the abundance and acceptance of VCCs. In order to prevent the conclusion of BFTs without the additional safeguard of a VCC, coastal States have also started to incorporate domestic legislation, which prohibits their governments to sign or ratify BFTs without such a clause.[130] Of course, such national legislation will generally remain ineffective on the public international

127 *Agreement between the European Community and the Government of the Russian Federation on cooperation in fisheries and the conservation of the living marine resources in the Baltic Sea* (28 May 2009), available at http://faolex.fao.org/docs/pdf/bi-87793.pdf (last visited 29 March 2015).

128 *Nauru Agreement Concerning Cooperation in the Management of Fisheries of Common Interest* (11 February 1982), available at http://faolex.fao.org/docs/pdf/mul5181.pdf (last visited 01 April 2015). Another prominent example is Art. IV (5) of the *Niue Treaty on Cooperation in Fisheries Surveillance and Law Enforcement in the South Pacific Region*, 09 July 1992, available at http://www.ffa.int/niue_treaty (last visited 29 March 2015). It requires State parties to "ensure that foreign fishing agreements with flag States require the flag State to take responsibility for the compliance by its flag vessels with the terms of any agreement and applicable laws". See Van Houtte, *supra* note 84, 49.

129 The FFA was founded in 1979 to promote sustainable EEZ management in the region. See http://www.ffa.int/ (last visited 29 March 2015).

130 See *e.g.* para. 38 (4) (a) of the 2007 *Gambian Fisheries Act*, available at http://faolex.fao.org/docs/pdf/gam77403.pdf (last visited 29 March 2015). For a non-exhaustive list with 17 examples, see Statement of the IUCN, *supra* note 79, 68-69, Annex A.

law level.[131] It is, however, proof of growing State practice on behalf of the coastal States. Another special example is the Common Fisheries Policy of the European Union, which today involves the conclusion of EU-BFTs only with VCCs.[132]

Research by the IUCN shows that more than 80 of the nearly 150 coastal States worldwide are now engaged in this practice.[133] Thus, most BFTs now contain a VCC. The majority of those which lack a VCC predate *UNCLOS* and their numbers are in steady decline. From the perspective of coastal States, there is therefore widespread and consistent practice. There also seems to be little opposition from flag States. To conclude that this practice is clear evidence of customary international law may, however, be too generous.[134] First, there still seems to be a fairly widespread practice of issuing private licenses outside of, or parallel to, BFT regimes.[135] Flag States will hardly be willing to accept responsibility under such circumstances. Second, every BFT is an individual bargain, which may take a significant amount of time and effort to negotiate. Such agreements are based on access to fisheries (granted by the coastal State) on the one hand and some form of consideration (promised by the flag State) on the other. Often, the consideration consists of substantial amounts of money and acceptance of a set of additional rules that apply to the EEZ fisheries regime, including VCCs. Agreements between two coastal States with substantial fishing fleets may contain fully reciprocal obligations.[136] Depending on the circumstances, BFTs therefore contain varying arrangements and conditions.

131 See Art. 27 (1) *VCLT*. See also *Certain German Interests in Polish Upper Silesia*, PCIJ Series A, No. 7 (1926), 19. Interesting questions may however arise with respect to the exception of Arts. 46, 27 (3) *VCLT*. If the national legislation was properly published, a violation by conclusion of a BFT would probably be manifest within the meaning of Art. 46 (2) VCLT. However, it seems doubtful whether such prohibitions could be classified as fundamental constitutional norms determining the competence to conclude treaties as required by Art. 46 (1) VCLT. For a detailed discussion of the two requirements, see *e.g.* M. Bothe, 'Article 46: Provisions of internal law regarding competence to conclude treaties', in O. Corten & P. Klein (eds), *The Vienna Conventions on the Law of Treaties: A Commentary*, Vol. II (2011), 1090, 1094-1097.

132 See Statement of the EU, *supra* note 78, para. 44. See also Council Regulation (EC) No 1005/2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing (29 September 2008).

133 For a non-exhaustive list with 91 examples of BFTs with VCC, see Statement of the IUCN, *supra* note 79, 66-75, Annex B. Although not all of these agreements are still in force and some have yet to enter into force, they are evidence of significant State practice.

134 Aqorau, *supra* note 57, 50; another author reaches this conclusion by way of an overall assessment of BFT practice, multilateral treaties, and soft-law instruments. See Handl, *supra* note 17, 162. A similar line of argument can be found in the Statement of the IUCN, *supra* note 79, paras. 26-29.

135 R. Churchill & D. Owen, *The EC Common Fisheries Policy* (2010), 351-359.

136 For a fully reciprocal BFT, see e.g. the 2009 EU-Russia BFT, *supra* note 127.

A BFT (at least if it does not contain fully reciprocal obligations) is therefore essentially a contractual treaty (*traité-contrat*), and not a legislative treaty (*traité-loi*). But even if one considers BFTs to be lawmaking treaties (and VCCs to possess "fundamentally norm-creating character"[137]), they only cover situations in which the coastal State *has granted* EEZ access. The flag State accepts the obligation arising out of a VCC *on the condition* that its vessels may fish in the EEZ. Therefore, it cannot be inferred from the practice of concluding BFTs that, in absence of a BFT, flag States in general also accept *a fortiori* (i.e. without consideration) an obligation analogous to a VCC covering situations in which the coastal State *has not granted* EEZ access.[138] Any customary international law derived from BFTs would have to reflect this separation, leaving another (albeit smaller) lacuna in the EEZ regime.

IV. Obligations Derived From International Environmental Law

It is well established that States have an obligation to ensure that activities within their jurisdiction do not harm the environment within the jurisdiction of other States, or within areas beyond national jurisdiction.[139] This obligation was first described by the arbitral tribunal in the *Trail Smelter Case*[140], and can be based on the principles of sovereign equality of States,[141] and of mutual

137 *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark and The Netherlands)*, Judgment, ICJ Reports 1969, 3, 41-42 para. 72.

138 There is also too little practice of flag States effectively exercising (enforcement) jurisdiction over vessels flying their flag in the EEZ of other States in absence of a BFT. Even where VCCs are in place, flag State enforcement is not guaranteed. See generally E. R. Fidell *et al.*, 'Flag state measures to ensure compliance with coastal state fisheries regulations: the United States, Japanese and Spanish experience', 6 *Fisheries Law Advisory Programme - EEZ, Circular* (1986); see also G. Moore, 'Enforcement Without Force: New Techniques in Compliance Control for Foreign Fishing Operations Based on Regional Co-operation', 24 *Ocean Development and International Law* (1993) 2, 197, 201.

139 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, 226, 241-242, para. 29; *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, Judgment, ICJ Reports 1997, 7, 41, para. 53; *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)*, Judgment, ICJ Reports 1949, 4, 22; see also *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Provisional Measures, Order of 13 December 2013, available at http://www.icj-cij.org/docket/files/152/17838.pdf (last visited 29 March 2015), 398, 403, para. 19 & 408, para. 37; P. Sands *et al.* (eds), *Principles of International Environmental Law*, 3rd ed. (2003), 196.

140 *Trail Smelter Arbitration (United States v. Canada)*, Arbitral Award of the Arbitral Tribunal, 16 April & 11 March 1941, 3 Reports of International Arbitral Awards (1941), 1907, 1965.

141 Today, this fundamental principle of international law is codified in Art. 2 (1) of the *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI.

respect.[142] It has also been laid down in Principle 21 of the 1972 Stockholm Declaration[143] and repeated in various other important soft-law instruments.[144] Furthermore, it has been included in a number of binding agreements,[145] and in Art. 3 of the 2001 Articles on Prevention of Transboundary Harm from Hazardous Activities.[146] The obligation encompasses a "negative" prohibition of transboundary harm (the no harm principle), and a "positive" obligation to take steps to prevent transboundary harm (the preventive principle).[147] The preventive principle has, for example, been included in Art. 194 (1) *UNCLOS* with respect to marine pollution,[148] and indirectly in Art. 193 *UNCLOS* with respect to the marine environment.[149] Several statements submitted in ITLOS, *Case No. 21* claim that the preventive principle applies to fishing in the EEZ,[150] citing former ITLOS president Wolfrum.[151]

While the living resources of the EEZ are undoubtedly part of the marine environment,[152] it is less clear whether foreign fishing in the EEZ is an activity of a transboundary nature as envisaged by the preventive principle. The *ratio legis* of the preventive principle is that, under public international law, States cannot lawfully exercise jurisdiction in the territory of other States to prevent transboundary harm originating therein, and therefore a rule guaranteeing protection is needed. This *ratio* equally applies to other situations in which one State has exclusive jurisdiction over the source of harm, such as flag State

142 Wolfrum, *supra* note 97, 4.

143 *Declaration of the United Nations Conference on the Human Environment* (1972), UN Doc. A/CONF.48/14/Rev.1.

144 See *e.g.* Principle 21 (d) of the *World Charter for Nature*, GA RES/37/7, UN Doc A/RES/37/7, 28 October 1982; Principle 2 of the *Rio Declaration on Environment and Development* (1992), UN Doc. A/CONF.151/26; para. 8 of the *Johannesburg Declaration on Sustainable Development*, UN Doc. A/CONF.199/20, 4 September 2002.

145 See *e.g.* Art. 3 of the *Convention on Biological Diversity,* 5 June 1992, 1760 UNTS 79.

146 *ILC Articles on Prevention of Transboundary Harm from Hazardous Activities* (2001), available at http://legal.un.org/ilc/texts/instruments/english/draft%20articles/9_7_2001.pdf (last visited 28 March 2015).

147 G. Handl, in D. Bodansky *et al.* (eds), *The Oxford Handbook of International Environmental Law*, 1st ed. (2007), 531, 538-544.

148 *ILC Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, with commentaries*, Yearbook of the International Law Commission (2001), Vol. II (2), 144-170, Commentary on Art. 3, para. 8, footnote 880, 154 [Draft Articles on Prevention of Harm].

149 Sands, *supra* note 139, 198-199.

150 See Statement of the IUCN, *supra* note 79, paras. 30-31; Statement of the CRFM, *supra* note 79, paras. 155-157; Statement of the WWF, *supra* note 80, paras. 35-38.

151 Wolfrum, *supra* note 97, 4.

152 *Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan)*, ITLOS, *Case No. 3 & 4*, Provisional Measures, Order of 27 August 1999, para. 70.

jurisdiction on the High Seas. In the EEZ, however, the coastal State is not only *able* to exercise its prescriptive and enforcement jurisdiction over foreign fishing vessels – it has the *primary responsibility* to do so. It is true that, as Handl points out, the flag State *can* exercise its parallel prescriptive and enforcement jurisdiction over fishing vessels flying its flag in the EEZ of other States as long as those actions are compatible with the coastal State's rights under Arts. 56 (1) (a), 73 *UNCLOS*.[153] This situation, however, has no influence on the extent of the coastal State's jurisdiction and responsibility. Thus, illegal fishing in the EEZ is not a situation analogous to those in which the International Court of Justice [ICJ] or the ITLOS have held the preventive principle to apply. As a result, an application of the preventive principle is not warranted.

V. Nature and Scope of Potential Flag State Obligation

If, however, the ITLOS should decide in favor of the existence of relevant customary law, it becomes necessary to analyze the nature of such obligations. First, the ITLOS could support a customary obligation based on treaty practice and soft-law (as discussed in section C.II. above) obligating flag States to ensure that vessels flying their flag comply with the applicable laws of the coastal State. This, of course, equally applies to the content of VVC obligations. Such obligations are similar to, and perhaps based on, the flag State's general duty of control pursuant to Art. 94 (1) *UNCLOS*, which aims at supervisory conduct of the flag State.[154] A potential customary rule based on the application of the preventive principle (as discussed in section IV. above) would contain similar duties.[155] Both obligations would be "obligations 'of conduct'", requiring the adoption of legislative and administrative measures. Contrary to "obligations 'of result'", they would not determine a breach on the basis of an outcome, but on the basis of a State's failure to act diligently.[156] As a result, not every single harmful act causing damage would lead to a breach.[157] Such obligations, which require States to exercise due diligence with respect to the prescribed conduct,

153 Handl, *supra* note 17, 159 (particularly endnote 27).
154 Takei, *supra* note 96, 124-126.
155 *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area (Advisory Opinion of the Seabed Disputes Chamber)*, ITLOS, *Case No. 17*, Advisory Opinion, 1 February 2011, para. 184 [ITLOS, Case No. 17, Advisory Opinion].
156 *Ibid.*, para. 110.
157 *Ibid.*, para. 112.

are commonly referred to as due diligence obligations.[158] They are usually incorporated into treaties as "obligations 'to ensure'"[159] in order to attribute the conduct of non-State actors to the State which has jurisdiction over them.[160] Such an attribution of private acts is an exception to the general rules of public international law on State responsibility.[161]

The determination of the threshold that must be met in order to comply with such obligations is often an intricate issue. So far, due diligence obligations of flag States are considered to be objective and to require the same efforts of industrial and developing nations.[162] As due diligence is an imprecise and relative term, the threshold for diligent conduct depends on the nature of the supervised activity, and is higher for riskier activities.[163] For the obligations described above, "risk"[164] means not only risk of environmental damage, but also risk of violations of coastal State legislation aimed at conservation. As stated by the ICJ in the *Pulp Mills Case*, the exercise of due diligence "[…] entails not only the adoption of appropriate rules and measures, but also a certain level of vigilance in their enforcement […]".[165] The rules applicable to private fishing vessels adopted under the domestic law of the flag State must therefore also be made enforceable and subject to sufficiently severe sanctions.[166]

Depending on factors such as coastal State regulatory and enforcement efforts and abilities, both the risk of damage to the marine environment and the risk of breaches of coastal State legislation can be very high. However, insufficient exercise of coastal State responsibility, particularly a failure to take sufficiently effective conservation and management measures to ensure that the maintenance of the living resources in the EEZ is not endangered by over-exploitation in accordance with Art. 61 (2) *UNCLOS*, should in general be without effect on the flag State's threshold for due diligence.[167] Otherwise, there would be an undue shift in responsibility towards the flag State in cases

158 *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, ICJ Reports 2010, 14, 67 para. 187 [ICJ, Pulp Mills Case].

159 Examples from UNCLOS are Arts. 94 (3), 115 & 139 (1). See also ITLOS, *Case No 17*, Advisory Opinion, *supra* note 155, para. 112.

160 *Ibid*.

161 See generally O. de Frouville, 'Private Individuals', in J. Crawford *et al.* (eds), *The Law of International Responsibility* (2010), 257, 261-263.

162 Handl, *supra* note 17, 162-163; See also Takei, *supra* note 96, 128-129.

163 ITLOS, *Case No. 17*, Advisory Opinion, *supra* note 155, para. 117.

164 See ILC, *Draft Articles on Prevention of Harm*, *supra* note 148, Article 1 and paras. 13-14 of its commentary.

165 ICJ, *Pulp Mills Case*, *supra* note 158, 79, para. 197.

166 *ITLOS Case No. 17*, Advisory Opinion, *supra* note 155, para. 239.

167 Statement of the WWF, *supra* note 80, paras. 23-32

of improperly regulated fisheries: It would effectively be obliged to review the often insufficiently transparent coastal State efforts and legislation despite legal uncertainty and coastal State discretion.[168] The flag State would then have to create own *extraterritorial* legislation (and take corresponding enforcement measures) either aimed at replacing ineffective coastal State legislation and enforcement with respect to its own nationals or at least aimed at prohibiting them to fish even where the coastal State has issued a license. Even in the face of environmental concerns such an approach would seem incompatible with the coastal State's rights under *UNCLOS*, except in cases of a grave and evident breach by the coastal State.[169]

With regard to the requirements of a breach, not every single violation suffices. Instead, a pattern of repeated violations of coastal State laws will generally be required to warrant the presumption that the flag State is not exercising due diligence.[170] Thus, a violation of national fisheries laws attributable to a systematic failure to exercise legislative and enforcement duties, as is commonly the case for FoCs, would constitute a clear breach. Unfortunately, as Allen points out, the ITLOS' lax approach to assessing whether Panama complied with its general obligation to exercise effective jurisdiction and control under Art. 94 (1) *UNCLOS* in the *M/V "Virginia G" Case* provides no reason for optimism.[171]

D. Conclusion

Even though a number of States have questioned the ITLOS' jurisdiction to render a full bench advisory opinion,[172] it is likely that the ITLOS will find

168 For a discussion of the shortcomings of Art. 61 (2) *UNCLOS*, see Tanaka, *supra* note 121, 297-300.

169 For a different opinion, see Statement of the WWF, *supra* note 80, paras. 39-51.

170 Takei, *supra* note 96, 131.

171 ITLOS, *The M/V "Virginia G" Case*, *supra* note 29, paras. 113-118; see also C. H. Allen, 'Law Of The Sea Tribunal Implies A Principle Of Reasonableness In UNCLOS Article 73' (2014), available at http://opiniojuris.org/2014/04/17/guest-post-law-sea-tribunal-implies-principle-reasonableness-unclos-article-73/ (last visited 27 March 2015).

172 While only a relatively small number of States has made comments on the substantive issues raised by SRFC's questions, four of five permanent members of the Security Council of the United Nations [UNSC] have contested the jurisdiction of the ITLOS to render full bench advisory opinions. See Written submissions, ITLOS, *Case No. 21*: Written Statement of the French Republic (29 November 2013), 2-3; Written Statement of the United Kingdom (28 November 2013), paras. 4-58; Written Statement of the People's Republic of China (26 November 2013), paras. 5-94; Written Statement of the United States of America (27 November 2013), paras. 7-39; The Russian Federation has not submitted a Statement.

that it has jurisdiction and renders the advisory opinion requested by the SRFC.[173] Setting aside the political ramifications of a finding of jurisdiction, the advisory opinion will be an excellent opportunity to clarify the role of the flag State with respect to illegal fishing in the EEZ. The ITLOS will be confronted with a lacuna of a fundamental nature that is deeply rooted in the EEZ regime established by *UNCLOS*. To effectively combat illegal fishing in the EEZ, the primary responsibility of the coastal State must be complemented with strong flag State obligations. So far, it has proven difficult to close normative gaps in *UNCLOS* on a multilateral level by the adoption of comprehensive and legally binding rules. This is only in part remedied on a bilateral level by the inclusion of VVCs in BFTs. However, neither this bilateral treaty practice, nor a potential application of the preventive principle seem to point to the development of a customary international law obligation of all flag States to exercise their jurisdiction and control over fishing vessels flying their flag in the EEZ of other States.[174] If, however, the ITLOS should find that such a customary rule exists, it would qualify as a due diligence obligation, requiring flag States to adopt effective legislative and enforcement measures to prevent violations by its fishing vessels. No matter how the ITLOS ultimately decides the issue, a sustainable long-term solution for the problem cannot lie in a vague customary obligation, but must be developed in the context of a new and comprehensive multilateral treaty. ITLOS, *Case No. 21* provides an invaluable chance to trigger further debate and negotiations.

173 Which is likely given the position taken by several judges in academic writings. See *e.g.* T. M. Ndiaye, 'The Advisory Function of the International Tribunal for the Law of the Sea', 9 *Chinese Journal of International Law* (2010) 3, 565, 580-587; 'Commentary on Article 138 Rules', in P. Gautier & P. Chandrasekhara Rao (eds), *The Rules of the International Tribunal for the Law of the Sea: A Commentary* (2006), 393-394.

174 It seems that this concern is, at least implicitly, shared by Goodman, *supra* note 73, 169; Zwinge, *supra* note 86, 322; Takei, *supra* note 96, 108.