
Strengthening the Law Applicable to Flags of Convenience States and Vessels against Overfishing on the High Seas

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This paper analyzes the need to strengthen the law applicable to Flag of Convenience (FoC) States and vessels with the goal of sustaining fish stocks and combatting overfishing on the high seas. FoC States and vessels can escape law enforcement conducted by the other flag states. Due to the lack of political will of FoC States to enforce the law and obligations imposed on FoC vessels to conduct conservation on the high seas, FoC vessels instead contribute significantly to the deterioration of fish stocks on the high seas. FoC vessels overexploit these resources and engage in illegal, unreported, and unregulated (IUU) fishing, which harms the fish stocks on the high seas. The results of the study indicate that there are some legal lacunas in international legal obligations for FoC States and vessels to conserve the fish stocks on the high seas. Existing international legal instruments are ineffective in combating over-exploitation of fish stocks on the high seas by FoC vessels. Hence, strengthen the laws applicable to the FoC States and FoC vessels is urgently needed.

Keywords

Flag of Convenience States, Flag of Convenience Vessels, Fish Stocks, High Seas, Overfishing

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I. Introduction

Marine biodiversity is comprised of myriad living creatures that need protection, because the existence of valuable fishes including straddling and highly migratory fish on the high seas are threatened by overfishing.¹ Much of the world's aquatic life, mainly fish and marine ecosystems, are being unsustainably over exploited, resulting in a serious decline in marine biodiversity.² Overfishing in coastal areas and rising international demand for highly migratory and valuable fish stocks such as tuna, toothfish, marlin, swordfish, etc.³ have caused fish stocks on the high seas decline considerably.⁴ It is worth mentioning that loss of biodiversity will inexorably lead to that of the human race. Hence, it is important to conserve fish stocks, along with other aquatic life, for the sake of the survival of present and future generations and the biodiversity in the areas beyond national jurisdiction.⁵

Today, the number of fishing companies and register vessels are increasing in the states offering flag of convenience registration, including Liberia, Mongolia, Panama, and the Bahamas,⁶ which commonly do not exercise effective control of vessels registered in their states.⁷ The Annual Report of the Regional MOU 2023 (Tokyo MOU) mentions that there were 892 detentions, 89 of which were Sierra Leone's vessels blacklisted.⁸

The vessels registered in those states are called "flag of convenience" (FoC) vessels. It is no wonder that certain companies prefer to register their vessels using FoC, attributable to the desire for avoiding strict regulations, taxation, and conservation obligations in their own states.⁹ FoC vessels commonly registered in the states have

¹ Waseem Qureshi, *Marine Biodiversity Conservation: The International Legal Framework and Challenges*, 40 Hous. J. Int'l L. 852-3 (2018).

² Robin Craig, *Avoiding Jellyfish Seas, Or What Do We Mean by "Sustainable Oceans," Anyway?* 31 UTAH ENV'T L. REV. 20-1 (2011).

³ UNCLOS annex I, https://www.un.org/depts/los/convention_agreements/texts/theUNCLOS/theUNCLOS_e.pdf.

⁴ Lace Curtis, *Catching Less Fish with More Honey: Introducing Incentives for Sustainable International Fishing Compliance*, 6 Vt. J. ENV'T L. 209-10 (2014).

⁵ Anna Aseeva, *Rethinking Conservation of Marine Biodiversity Beyond National Boundaries: Justice, Property, and The Commons*, 33 GEO. ENV'T L. REV. 478 (2021).

⁶ Carlos Negret, *Pretending to Be Liberian and Panamanian; Flags of Convenience and the Weakening of the Nation State on the High Seas*, 47 J. MAR. L. & COM. 5-6 (2016).

⁷ OECD, *Why Fish Piracy Persists: The Economics of Illegal, Unreported and Unregulated Fishing*, Coordinating Working Party on Fishery Statistics, at 30 (2010), http://www.fao.org/fi/static-media/MeetingDocuments/cwp/cwp_23/inf4e.pdf.

⁸ Tokyo MOU Asia-Pacific PSC, *Annual Report on Port State Control in The Asia-Pacific Region*, at 38 (2021), <https://www.tokyo-mou.org/doc/ANN21-web.pdf>. See also *id.*

⁹ Kaitlin O'Hara, *Accidents on The High Seas, and Flags of Convenience: Whether the BBNJ Draft Treaty Will Address*

straightforward requirements on safety standards, low taxation, and no conservation obligation.¹⁰ FoC vessels often carry out illegal, unreported, and unregulated (IUU) fishing, which is prohibited by national and international laws. IUU fishing poses a serious threat to the sustainability of the world's fish stocks.¹¹ In order to avoid stringent regulations and taxes from their own states, many in the fisheries industry register their vessels in FoC states.¹² Fishing industry vessels look for a legal lacuna in international legal instruments by using flags of convenience solely for the sake of economic benefit. The FoC states do not take any measures to enforce the law against FoC vessels flying their flags.¹³

According to the United Nations Convention on the Law of the Sea (UNCLOS), only the flag states have the jurisdiction to enforce laws upon the vessels registered in the flag state.¹⁴ For instance, if an FoC vessel is registered in Panama, only Panama has the authority to enforce its laws against the FoC vessel on the high seas.¹⁵ Hence, no legal basis is provided for other flag states to enforce their domestic or international laws on FoC vessels sailing under another state's flag in the high seas. However, if the FoC vessels which conducted illegal fishing come into the Port States, these Port States would have jurisdiction to investigate and prohibit them to land the fish.¹⁶ The absence of law enforcement from the FoC states has and will continue to cause over exploitation to the fish stock on the high seas.¹⁷ However, it is crucial to strengthen the rules applicable to the FoC states and vessels in order to mitigate and prevent further marine resources degradation on the high seas.

This research aims to critically examining how to strengthen the existing law applicable to FoC States and vessels in order to combat overfishing on the high seas, maintaining sustainability of marine biodiversity. It will analyze the law applicable to FoC States and vessels to stop the harmful practice of overfishing on the high seas. This paper will also examine and address the legal lacunae against the protection of

Insufficient Regulatory Compliance by Open Registry States, 50 GA. J. INT'L & COMP. L. 707 (2022).

¹⁰ NGO Shipbreaking Platform, Flag of Convenience, <https://shipbreakingplatform.org/issues-of-interest/focs>.

¹¹ Osvaldo Urrutia, *Combating Unregulated Fishing through Unilateral Trade Measures: A Time for Change in International Fisheries Law?*, 49 VICT. U. WELLINGTON L. REV. 673 (2018).

¹² Katherine Weber, *Can You Eat Your Fish & Save It Too? Improving The Protection of Pirated Marine Species Through International Trade Measures*, 25 J. LAND USE & ENV'T L. 300 (2010).

¹³ Alexander Marcopoulos, *Flags of Terror: An Argument for Rethinking Maritime Security Policy Regarding Flags of Convenience*, 32 TUL. MAR. L. J. 290-1 (2007).

¹⁴ UNCLOS art. 92(1).

¹⁵ Tamo Zwinge, *Duties of Flag States to Implement and Enforce International Standards and Regulations and Measures to Counter Their Failure to Do So*, 19(2) J. INT'L BUS. L. 299-300 (2011).

¹⁶ Port Measures Agreement art. 18(b).

¹⁷ O'Hara, *supra* note 9, at 706-7.

fish stocks on the high seas and looks for solutions to overcome the legal lacunae.

II. The Genesis of FoC States and FoC Vessels

There is no universally accepted definition of what constitutes an FoC fishing vessel. Originally, FoC vessel may be defined as: “[w]here beneficial ownership and control of a vessel is found to lie elsewhere than in the country of the flag the vessel is flying, the vessel is considered to be sailing under a flag of convenience.”¹⁸ This indicates that the beneficial ownership and control of a vessel is found to be elsewhere than in the state of registration. By using a flag of convenience, owners of vessels are able to gain many advantages, including minimal regulation, lower or no taxes, cheaper registration fees, and autonomy to employ cheaper human resources from the global labour market.¹⁹ FoC states’ registrations are open in the sense that they have simple requirements for ship registrations, ignoring the genuine link between the owner of the vessel and the state of registry.²⁰

Under the UNCLOS, flag states have an obligation to guarantee that the vessels using their flag to fish on the high seas perform conservation and other obligations as stipulated in Articles 193 and 194.²¹ However, most FoC vessels fail to carry out conservation efforts and use fishing devices that are not environmentally sound,²² thereby causing bycatch of sea turtles, seabirds, and sharks on longline fishing vessels.²³ Previously, starting in the 1920s in the United States, FoC vessels were very common in the shipping industry.²⁴ The modern practice of flagging ships in foreign states is due to vessel owners’ frustration with increased regulations and rising labor costs. Hence, the vessel industries began registering their vessels in other states.

¹⁸ The International Transport Workers Federation, *Flags of Convenience*, <https://www.itfglobal.org/en/sector/seafarers/flags-of-convenience>.

¹⁹ Barry Dubner and Loany Vargas, *On the Law of “Pirate” Fishing and Its Connection to Human Rights Violations and to Environmental Degradation—A Multi-National Disaster*, 48 J. MAR. L. & COM. 142 (2017).

²⁰ Shayna Frawley, *The Great Compromise: Labour Unions, Flags of Convenience, and the Rights of Seafarers*, 19 WINDSOR REV. LEGAL & SOC. ISSUES 87-8 (2005).

²¹ Zwinge, *supra* note 15, at 301-2.

²² Dubner & Vargas, *supra* note 19, at 130-1.

²³ Christoph Schwarte & Linda Siegele, *Marine Protected Areas on the High Seas? An Introductory Guide to the Legal Issues Surrounding the Establishment of Marine Protected Areas on The High Seas*, Foundation for International Environmental Law, and Development, at 4 (2008), <https://www.sprep.org/att/IRC/eCOPIES/Global/84.pdf>.

²⁴ Paul Hinckley, *Raising the Spector of Discrimination: The Case for Disregarding Flags of Convenience in The Application of U.S. Anti-Discrimination Laws to Cruise Ships*, 3 MOD. AM. 75 (2007).

These states that allow the registration of vessels owned by citizens of other states are known as open register states or FoC states. The FoC vessels are not only used for shipping activities, but also used in the fishing industry on the high seas called as “fishing vessels.”²⁵

According to Article 1(a) of the Compliance Agreement of 1993, “fishing vessel means any vessel used or intended for use for the purposes of the commercial exploitation of living marine resources, including mother ships and any other vessels directly engaged in such fishing operations.” FoC vessels in the fishing industry raises many issues. For example, many vessel owners are allowed to remain legally anonymous in open registry systems,²⁶ making it difficult to identify and take legal action against these individuals or entities. Some vessels with flags of convenience have been found engaging in criminal activity, offering substandard working conditions, polluting the environment, illegal fishing, or often all of the above.²⁷ The obligation to have a registered nationality for a fishing vessel falls under Article 91 of the UNCLOS, which states:

Every State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship.

Accordingly, vessels that fish on the high seas must be registered in a certain state to have a nationality. Vessel registration is compulsory to identify the vessels throughout their operating life, and it is necessary to demonstrate a genuine link between a vessel and the states that register it.²⁸ There is no uniform standard, however, for the requirements of a “genuine link.” Some FoC states oblige the vessel owner to establish a shell corporation in the territory of the registered states to establish a genuine link.²⁹

FoC vessels dominate the lists focusing on sub-standard shipping,³⁰ poor safety performance, maltreatment of crew, pollution of the marine environment, and

²⁵ Environmental Justice Foundation, *Lowering the Flag Ending the Use of Flags of Convenience by Pirate Fishing Vessels*, at 14 (2009), <https://ejfoundation.org/resources/downloads/Lowering-the-flag.pdf>.

²⁶ Craig Allen, *Revisiting the Thames Formula: The Evolving Role of The International Maritime Organization and Its Member States in Implementing The 1982 Law of the Sea Convention*, 10 SAN DIEGO INT’L L. J. 303-4 (2009).

²⁷ Negret, *supra* note 6, at 10-1.

²⁸ Zwinge, *supra* note 15, at 298.

²⁹ Anastasia Telesetsky, *Laundering Fish in The Global Undercurrents: Illegal, Unreported, And Unregulated Fishing and Transnational Organized Crime*, 41 ECOLOGY L. Q. 954-5 (2014).

³⁰ Negret, *supra* note 6, at 10.

conducting IUU fishing on the high seas.³¹ Some FoC states even use the promise of anonymity for the vessel's owners when advertising their services for vessel registration.³² The widespread use of FoC fishing vessels reduces the fish stocks on the high seas without monitoring and enforcement of obligations to the FoC vessels to carry out conservation.³³

Scholars debate what constitutes a “genuine link” and how it relates to open registration. It is hard to identify a “genuine link” in the uniform requirements since States are free to interpret what kind of requirements pertain to genuine links and for vessel registration in general.³⁴ Further, state practice has not established a commonly accepted rule of customary international law. Indeed, the term, “genuine link” was originally stipulated in Article 5(1) of the 1958 High Seas Convention, which states: “there must be a genuine link between the state and the ships.” The link was further enshrined in Article 91(1) of the UNCLOS, which states that “there must be a genuine link between the flag state and the ships.” Nevertheless, both of these United Nations treaties completely neglects the need to ascribe a precise meaning of the term “genuine link.”

III. Three Legal Instruments for the High Seas Conservation

Overfishing occurs on the high seas due to the freedom of fishing, as stipulated in Article 87 of the UNCLOS.³⁵ There are many fishing vessels which conduct fishing on the high seas, both coming from the UNCLOS member states and Regional Fisheries Management Organizations (RFMOs), as well as fishing vessels which come from FoC States as well as landlocked States.³⁶ Those fishing activities affect the sustainability of the fish stocks on the high seas. International legal instruments which regulate fishing on the high seas, however, have some loopholes in the fishery management³⁷ and law

³¹ Deirdre Warner-Kramer, *Control Begins at Home: Tackling Flags of Convenience and IUU Fishing*, 34 GOLDEN GATE U. L. REV. 500-1 (2004).

³² Allen, *supra* note 26, at 303.

³³ Ryan Cantrell, *Finding Nemo ... and Eating Him: The Failure of The United Nations to Force Internalization of the Negative Social Costs That Result from Overfishing*, 5 WASH. U. GLOBAL STUD. L. REV. 384 (2006).

³⁴ Francis Nolan, *The Last Half Century of Financing Vessels*, 91 TUL. L. REV. 938-9 (2017).

³⁵ Kristen Boon, *Overfishing of Bluefin Tuna: Incentivizing Inclusive Solutions*, 52 U. LOUISVILLE L. REV. 10-1 (2013).

³⁶ Jared Wigginton, *Governing A Global Commons: Sharks on the high Seas*, 25 VILL. ENV'T L. J. 437-8 (2014).

³⁷ Seth Korman, *International Management of a High Seas Fishery: Political and Property-Rights Solutions and the*

enforcement on the high seas especially for FoC fishing vessels.

In this paper, three international legal instruments will be analyzed, namely the UNCLOS,³⁸ the FAO Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (hereinafter Compliance Agreement of 1993),³⁹ and the United Nations Agreement for the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (hereinafter Fish Stocks Agreement of 1995).⁴⁰

A. The United Nations Convention on the Law of the Sea

The historic right of each state to sail vessels under its flag on the high seas was first regulated by the Geneva Convention on the High Seas in 1958.⁴¹ Thereunder, vessels on the high seas were subject to the exclusive jurisdiction of their respective flag states. Freedom of fishing, which was regulated in the Geneva Convention 1958 was also succeeded by the UNCLOS. Indeed, Article 91 of the UNCLOS is almost indistinguishable to Article 5 of the 1958 Convention on the High Seas.⁴² In some respects, the UNCLOS improved on many of the provisions of the 1958 High Seas Convention concerning flag states' rights and responsibilities on the high seas.⁴³

Freedom of navigation and freedom of fisheries on the high seas have built dominant legal framework governing the oceans and their natural resources, including fisheries.⁴⁴ No single State can claim ownership of the high seas' resources and sovereignty over the high seas itself. Hence, both coastal and landlocked have the right to fish on the high seas.⁴⁵ Overfishing has been conducted by many fishing vessels causing a massive decrease to the fish stocks, and it can be classified as

Atlantic Bluefin, 51 VA. J. INT'L L. 707-8 (2011).

³⁸ *Supra* note 3.

³⁹ FAO, Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, <https://www.fao.org/3/X3130M/x3130m.pdf>.

⁴⁰ United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks, U.N. Doc. A/CONF.164/37 (Sept. 8, 1995), https://www.un.org/ga/search/view_doc.asp?symbol=A/CONF.164/37.

⁴¹ Ashley Erickson, *Out of Stock: Strengthening International Fishery Regulations to Achieve A Healthier Ocean*, 34 N.C. J. INT'L L. & COM. REG. 292-3 (2008).

⁴² Montserrat Gorina-Ysern, *World Ocean Public Trust: High Seas Fisheries After Grotius - Towards A New Ocean Ethos?*, 34 GOLDEN GATE U. L. REV. 669 (2004).

⁴³ Jaye Ellis, *Fisheries Conservation in an Anarchical System: A Comparison of Rational Choice and Constructivist Perspectives*, 3 J. INT'L L. & INT'L REL. 6-7 (2007).

⁴⁴ Efthymios Papastavridis, *The Right of Visit on The High Seas in A Theoretical Perspective: Mare Liberum versus Mare Clausum Revisited*, 24(1) LEIDEN J. INT'L L. 61-2 (2011).

⁴⁵ Cassandra Brooks et al., *Challenging the 'Right to Fish' in a Fast-Changing Ocean*, 33 STAN. ENV'T L. J. 292 (2014).

“tragedy of the common”⁴⁶ due to the lack of cooperation among States that lead to overfishing and depleting the shared resources on the high seas.⁴⁷

Through its provisions, the UNCLOS creates obligations to ensure proper conservation and management measures in order to maintain the sustainability of the fish stocks on the high seas. Article 87 of the UNCLOS stipulates that “the high seas are open to all states, whether coastal or land-locked,” which requires that “freedom of the high seas be exercised according to the conditions laid down by this Convention and other rules of international law.”⁴⁸ Based on Article 87, the right to fish on the high seas is accompanied by a range of duties, including obligations to regulate and enforce the activities of their nationals for the conservation of the natural resources of the high seas, as well as those to cooperate with other states in the conservation and management of those resources.⁴⁹

Indeed, international law requires every fishing vessel to register in a State. Once registered, it will be the vessel’s flag state.⁵⁰ Thus, the flag state has the authority to control and enforce its laws on the vessels. Concerning the operation of FoC vessels that fish on the high seas, the FoC States shall require and encourage FoC vessels to comply with obligations such as conservation and the use of environmentally sound fishing mechanisms.⁵¹ Article 91(1)(2) of the UNCLOS provides that vessels fishing on the high seas are required to have a nationality and a State may grant nationality to each vessel registered in the State and to give the vessel the right to fly its flag.⁵²

The protection of vessels on the high seas is granted by the flag States. Thus, each vessel only has to be registered in one state. If a vessel is registered in two states, it will have double nationality which is prohibited under Article 92 of the UNCLOS. Double nationality is prohibited because it is related to the legal protection and jurisdiction of flag states that have to be exercised. Article 92 (1) the UNCLOS stipulates that a vessel only has the right to be registered in one state, which has exclusive jurisdiction over the vessel on the high seas. Hence, a vessel cannot change its flag during a voyage, transfer of ownership, or change of registry in a port state. Moreover, Article 92 (2)

⁴⁶ Boon, *supra* note 35, at 2.

⁴⁷ *Id.*

⁴⁸ UNCLOS art. 87(1).

⁴⁹ Elise Clark, *Strengthening Regional Fisheries Management-An Analysis of the Duty to Cooperate*, 9 N.Z. J. PUB. & INT’L L. 225 (2011).

⁵⁰ Barry Dubner & Mary Arias, *Under International Law, Must A Ship on The High Seas Fly the Flag of a State in Order to Avoid Being a Stateless Vessel? Is A Flag Painted on Either Side of The Ship Sufficient to Identify It?*, 29 U.S. F. MAR. L. J. 109 (2017).

⁵¹ Brooks, *supra* note 45, at 293.

⁵² Dubner & Arias, *supra* note 19, at 127-28.

lays down that a vessel which is registered in more than one state will cause the vessel to lose the nationality and protection from the flag states.

Moreover, Article 94 of the UNCLOS states that “every State shall effectively exercise its jurisdiction and control over ships flying its flag in administrative, technical, and social matters.” Thus, all the flag states including the FoC states are obligated to exercise their jurisdiction as regulated in Article 94. A vessel under any given flag state shall comply with that national regulations. As a result, the vessels obtain protection from the flag state, including diplomatic protection and all matters related to the interest of the vessels.⁵³ In this course, a flag state must guarantee that all vessels using its flag obey all the international standards and regulations, including the obligation to conduct conservation on the high seas. Unfortunately, most FoC fishing vessels registered in the FoC states use unsustainable fishing devices.⁵⁴

Consequently, to defend marine resources sustainably for present and future generations, conservation and sustainable use of the oceans and their resources become one of the 17 Sustainable Development Goals, namely Goal 14: “Life Below Water.”⁵⁵ It is agreed by the international community as part of the 2030 Sustainable Development Agenda in order to boost the sustainable use of marine resources.⁵⁶ In fact, cooperation among states in conducting conservation on the high seas has already been mandated in Article 117 of the UNCLOS which stipulates that: “All States have the duty to take, or to cooperate with other States in taking, such measures for their respective nationals as may be necessary for the conservation of the living resources of the high seas.” Thus, states have an obligation to enforce their laws on vessels having the nationality of the states.

Furthermore, Article 211 of the UNCLOS imposes obligation to the flag states to guarantee that vessels flying their flag have to adopt law and regulations to prevent, reduce and control pollution in the marine environment. Article 211 (2) states:

States shall adopt laws and regulations for the prevention, reduction and control of pollution of the marine environment from vessels flying their flag or of their registry. Such laws and regulations shall at least have the same effect as that of generally accepted international rules and standards established through the competent international organization or general diplomatic conference.

⁵³ *Id.* at 109.

⁵⁴ Wigginton, *supra* note 37, at 442-3.

⁵⁵ John Dernbach et al., *Making America a Better Place for All: Sustainable Development Recommendations for the Biden Administration*, 51 ENV'T L. REP. 10327 (2021).

⁵⁶ Edward Canuel, *Navigating the Blue Economy*, 45 WM. & MARY ENVTL. L. & POL'Y REV. 2 (2020).

As a result, flag states should guarantee that those vessels using their flag should comply with all the obligations stipulated in Article 211 (2). Also, Article 217 (1) provides that the flag states are obliged to investigate their vessels when they violated international law, such as conducting pollution to the marine environment. Article 217(1) provides:

States shall ensure compliance by vessels flying their flag or of their registry with applicable international rules and standards, established through the competent international organization or general diplomatic conference, and with their laws and regulations adopted in accordance with this Convention for the prevention, reduction and control of pollution of the marine environment from vessels and shall accordingly adopt laws and regulations and take other measures necessary for their implementation. Flag States shall provide for the effective enforcement of such rules, standards, laws and regulations, irrespective of where a violation occurs.

When referring to the standards established by REMO, the vessels have to comply with the conservation of highly migratory fish. Thus, the vessels not only prevent, reduce and control pollution, but also conduct conservation.

The fish on the high seas are a *res communis* or common property to protect and conserve by the international community as a whole.⁵⁷ This means no state has a right to claim sovereignty over it. In other words, each state has the right to utilize all the resources on the high seas, including the fish. Thus, it is crucial to establish subregional or regional fisheries organizations to manage and conserve the sustainable use of the fish stocks on the high seas, as mentioned in Article 118 of the UNCLOS. It stipulates:

States shall cooperate with each other in the conservation and management of living resources in the areas of the high seas. States whose nationals exploit identical living resources, or different living resources in the same area, shall enter into negotiations with a view to taking the measures necessary for the conservation of the living resources concerned. They shall as appropriate, cooperate to establish subregional or regional fisheries organizations to this end.

According to Article 118, states shall cooperate with each other in the conservation and management of living resources in the areas of the high seas. When their fishing vessels exploit the same fish stocks on the high seas, such as various kinds of tuna, they have to cooperate by establishing a regional fishery management organization

⁵⁷ Scott Shackelford, *Was Selden Right?: The Expansion of Closed Seas and Its Consequences*, 47 *STAN. J. INT'L L.* 10 (2009).

(RFMO).⁵⁸

In practice, some RFMOs have the mandate to carry out conservation efforts, but sustainable use of fish stock on the high seas is only focused on particular species, such as various tuna as a valuable, highly migratory species.⁵⁹ RFMOs would contribute to the conservation and sustainable use of highly migratory fish with massive demand in the international market, such as the southern tuna bluefin. Unfortunately, no FOC states are the members of RFMOs.

B. The FAO Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas

In November 1993, the FAO adopted an “Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas,”⁶⁰ which is commonly called a “Compliance Agreement.”⁶¹ The Compliance Agreement gives all member states the right to command all the vessels that use their flag to fish on the high seas in accordance with the relevant rules of international law. As a result, all states have a duty to work with other states to take any measures necessary to ensure the conservation of the fish stock on the high seas. The Compliance Agreement strengthens the control of the flag states over their fishing vessels and encourages transparency of fishing operations on the high seas.⁶²

Furthermore, the Compliance Agreement facilitates the implementation of the UNCLOS related to conservation on the high seas. Article 3 of the Compliance Agreement states that: “[e]ach party shall take such measures as may be necessary to ensure that fishing vessels entitled to fly its flag do not engage in any activity that undermines the effectiveness of international conservation and management measures.”

Consequently, each Member State has an obligation to guarantee that vessels which fly its flag do not jeopardize the conservation and environmentally sound

⁵⁸ Clark, *supra* note 49, at 28.

⁵⁹ Ilja Pavone, *Race to Extinction: Shark Conservation Under International and European Law and Its Limits*, 23 OCEAN & COASTAL L. J. 61 (2018).

⁶⁰ FAO, Agreement to Promote Compliance with International Conservation and Management Measures By Fishing Vessels on The High Seas, <https://treaties.un.org/pages/showDetails.aspx?objid=080000028007be1a>.

⁶¹ Ashley Erickson, *Out of Stock: Strengthening International Fishery Regulations to Achieve a Healthier Ocean*, 34 N.C. J. INT’L L. & COM. REG. 294 (2008).

⁶² Dustin Kuan-Hsiung Wang, *From Dangerous Ground to Safe Playground: A Revisit to Fishery Co-Operation in the South China Seas*, 34 CHINESE (TAIWAN) Y.B. INT’L L. & AFF. 28 (2016).

management of marine resources on the high seas. Unfortunately, the obligations are only applicable to the Member States,⁶³ while Non-Member States do not have any obligations unless those obligations have been accepted as customary international law. Also, flag states have the authority to withdraw the license of fishing vessels from the high seas when the fishing vessels under their flag violate conservation and sustainable management measures and other obligations.⁶⁴

Fishing vessels are obliged to make a report as mentioned in Article 4 of the Compliance Agreement, which stipulates that:

Each Party shall, for the purposes of this Agreement, maintain a record of fishing vessels entitled to fly its flag and authorized to be used for fishing on the high seas, and shall take such measures as may be necessary to ensure that all such fishing vessels are entered in that record.

The obligation aims to guarantee that the fishing vessels obey the quota that has been determined and to prevent the fishing vessels from conducting overfishing. Moreover, Article 5(8) of the Compliance Agreement guarantees that flag states should contribute to law enforcement of the fishing vessels entitled to fly their flag. It stipulates:

Each Party shall take enforcement measures in respect of fishing vessels entitled to fly its flag which act in contravention of the provisions of this Agreement, including, where appropriate, making the contravention of such provisions an offence under national legislation. Sanctions applicable in respect of such contraventions shall be of sufficient gravity as to be effective in securing compliance with the requirements of this Agreement and to deprive offenders of the benefits accruing from their illegal activities. Such sanctions shall, for serious offences, include refusal, suspension or withdrawal of the authorization to fish on the high seas.

According to Article 5(8), the Member States should perform an important role in the law enforcement of the vessels entitled to fly their flags while fishing on the high seas. The flag states have an obligation to regulate further in their national law. The flag states may give serious sanction to the vessels when they violate the law, or the obligations stipulated in this Agreement.

⁶³ Kristina Daugirdas, *How and Why International Law Binds International Organizations*, 57 HARV. INT'L L. J. 335 (2016).

⁶⁴ Marcopoulos, *supra* note 13, at 291.

C. The United Nations Agreement for the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks

The UNCLOS establishes an essential regulatory framework. Nonetheless, it lacks definite provisions related to the legal rights and duties of states that harvest fish on the high seas. Absence of detailed provisions, implementation and enforcement of conservation measures are obstructed for straddling and highly migratory fish stocks on the high seas.⁶⁵ This causes unavoidable conflicts between coastal and distant water states. Thus, an implementing agreement was needed to strengthen the general provisions of the UNCLOS in order to guarantee the sustainability of use and conservation of straddling and highly migratory fish stocks.⁶⁶

The United Nations Agreement for the Implementation of the Provisions of the UNCLOS Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks was adopted in 1995.⁶⁷ This is commonly called the United Nations Fish Stocks Agreement (UNFSA). The UNFSA was adopted to regulate the more comprehensive general provisions of the UNCLOS and to address the jurisdiction and management of straddling and highly migratory fish stocks by establishing RFMOs.⁶⁸ The UNFSA has established mechanisms for cooperation between coastal and distant-water states, especially by establishing RFMOs such as the Northwest Atlantic Fisheries Organization (NAFO), the International Commission for Conservation of Tunas (ICCAT), and the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR).⁶⁹ These RFMOs are authorized to set total allowable catch (TAC) and to determine the resource allocation among Member States.⁷⁰

The UNFSA sets up a general norm of ecosystem-based management of highly migratory and straddling fish stocks. The system is complemented by a requirement, as stipulated in Article 6 of UNFSA, that states have to implement a precautionary

⁶⁵ George Williamson, *Tail of Hope: Canada's North Atlantic Straddling and Highly Migratory Fish Stocks, and the Prince of Darkness*, 40 U. MIAMI INTER-AM. L. REV. 388 (2009).

⁶⁶ Stijn van Osch, *Save Our Sharks: Using International Fisheries Law Within Regional Fisheries Management Organizations to Improve Shark Conservation*, 33 MICH. J. INT'L L. 405-6 (2012).

⁶⁷ See Intergovernmental Conference on an International Legally Binding Instrument under the United Nations Convention on the Law of the Sea on The Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction, U.N. Doc. A/75/L.96 (June 9, 2021), <https://www.undocs.org/en/A/75/L.96>.

⁶⁸ Joanna Mossop, *Can We Make the Oceans Greener? The Successes and Failures of the UNCLOS as an Environmental Treaty*, 49 VICT. U. WELLINGTON L. REV. 584 (2018).

⁶⁹ Frederick Turner, *The Frontier of Fisheries Regulation*, 33 NAT. RESOURCES & ENV'T 49 (2019).

⁷⁰ Chris Wold, *Combatting IUU Fishing and Improving the Long-Term Conservation of Fish Stocks: Increasing Transparency in Regional Fisheries Management Organizations*, 44 FORDHAM INT'L L. J. 976-7 (2021).

approach.⁷¹ This approach is essential to establishing an international environmental policy tool, such as the Maximum Sustainable Yield (MSY) approach to prevent fisheries collapse. In this regard, the precautionary approach requires states to obtain and share the best scientific information available when making fishery management decisions, as well as to exercise caution when information is “uncertain, unreliable, or inadequate.”⁷² Thus, it needs a legal instrument to codify it. For example, RFMOs set quotas; impose conservation obligations on Member States; and prohibit the use of non-environmentally friendly devices to catch fish, such as driftnets.⁷³

Moreover, the UNFSA employs a species approach. It means that the rules are established only for specific groups of species, namely straddling fish stocks and highly migratory fish stocks.⁷⁴ Article 2 of the UNFSA stipulates the objective of this Agreement “to ensure the long-term conservation and sustainable use of straddling fish stocks and highly migratory fish stocks through effective implementation of the relevant provisions of the Convention.” For these objectives, the Member States have to implement the relevant provisions such as Articles 91 and 92 of the UNCLOS concerning the nationality of the vessels and the duty of Flag States to effectively exercise their jurisdiction upon the vessels flying their national flags.⁷⁵ In addition, it is relevant to justify the implementation of Articles 192 and 194(5) of the UNCLOS concerning the conservation of the marine environment and its resources.

The UNFSA stipulates the duties of the flag states should be compared to those set forth in the UNCLOS in a more detailed manner. The RFMOs were established based on the UNFSA and the UNCLOS which obligate states to ensure that vessels flying their flags on the high seas have to be in accordance with subregional and regional conservation and management measures⁷⁶ without engaging in activities that undermine the effectiveness of such measures. In this regard, flag states must take serious control of their vessels on the high seas in order to perform their obligations and take any necessary measures when their vessels violate the obligations outlined

71 Phillip Kannan, *Mitigating Global Climate Change: Designing a Dynamic Convention to Combat a Dynamic Risk*, 36 WM. & MARY ENVTL. L. & POL’Y REV. 509-10 (2012).

72 Christine Goepp Towberman, *Fishing for A Solution: The Role of the United States in Preventing Collapse of the Eastern Atlantic Bluefin Fishery*, 38 L. REP. NEWS & ANALYSIS 10110 (2008).

73 Holly Doremus, *Why International Catch Shares Won’t Save Ocean Biodiversity*, 2 MICH. J. ENV’T L. & ADMIN. L. 423 (2013).

74 Nicholas Assenmacher, *Management of the Atlantic Bluefin Tuna Fishery: An International Law Disaster*, 8 J. ANIMAL & NAT. RESOURCE L. 161 (2011).

75 Jancuo Qi & Pengfei Zhang, *Enforcement Failures and Remedies: Review on State Jurisdiction over Ships at Sea*, 14(1) J. EAST ASIA & INT’L L. 11 (2021).

76 Willa Kalaidjian, *Fishing for Solutions: The European Union’s Fisheries Partnership Agreements with West African Coastal States and the Call for Effective Regional Oversight in an Exploited Ocean*, 24 EMORY INT’L L. REV. 399 (2010).

in Article 18(2) of UNFSA. Indeed, the more specific obligations of the flag States to implement the conservation and sustainable use of the high seas fish stock are outlined in Article 18(3) of the UNFSA. Measures to be taken by a state in respect of vessels flying its flag shall include:

- (a) control of such vessels on the high seas by means of fishing licenses,
- (b) authorizations or permits, in accordance with any applicable procedures agreed at the subregional, regional, or global level;
- (c) establishment of regulations: (i) to apply terms and conditions to the license, authorization or permit sufficient to fulfil any subregional, regional, or global obligations of the flag State; (ii) to prohibit fishing on the high seas by vessels which are not duly licensed or authorized to fish, or fishing on the high seas by vessels otherwise than in accordance with the terms and conditions of a license, authorization, or permit;...⁷⁷

According to Article 18(3), all duties of the flag states reflect the binding rules that have to be applicable to fishing vessels. The Agreement's goal could be met if all fishing vessels were able to meet its requirements. Nevertheless, not all member states of the UNFSA are able to fulfill their obligations. The condition is even worsened by the practices of FoC states which are unwilling to enforce international obligations upon FoC vessels.⁷⁸

IV. Legal Lacuna to Mitigate over Exploitation on the High Seas by FoC Vessels

Fishing practices conducted by FoC vessels have already caused an extremely rapid decline in fish stocks on the high seas.⁷⁹ The FoC vessels thus used to evade the obligations excusing the loose regulations and weak law enforcement of their flag States.⁸⁰ Also in international law, there are some lacunas to protect fish stocks and

⁷⁷ UN Fish Stocks Agreement art. 18(3).

⁷⁸ Ishtiaque Ahmed, *Unmasking the Critical Participants in Shipbreaking Industry for Apportioning Their Role in Law and Policy Making: A Perspective from Bangladesh*, 47 *TRANSP. L. J.* 79 (2020).

⁷⁹ Jessica Ferrell, *Controlling Flags of Convenience: One Measure to Stop Overfishing of Collapsing Fish Stocks*, 35 *ENV'T L. L.* 331 (2005).

⁸⁰ The Environmental Justice Foundation, *Off the Hook: How Flags of Convenience Let Illegal Fishing Go Unpunished*, at

to force FoC vessels to mitigate the harmful impact of fishing on the high seas. For example, Article 87 (1) of the UNCLOS recognizes freedom of fishing on the high seas, which is not absolute, but accompanied by obligations to respect the rights of other states. Meanwhile, Article 90 of the UNCLOS states that “every State, whether coastal or landlocked, has the right to sail ships flying its flag on the high seas.” However, the wording of the two articles are general and create loopholes for FoC vessels to escape from the obligations. The following are legal lacunas to prevent the sustainable use of fish stocks and conservation on the high seas in the UNCLOS, the Compliance Agreement and the UNFSA.

First, the open registration conducted by the FoC States would violate the genuine link requirement between the vessel’s owners and the FoC States.⁸¹ Therefore, even Article 91 of the UNCLOS has failed to enforce genuine link in the vessel’s registration. Furthermore, the FoC States do not have to oblige the vessel’s owners to comply with international obligations, such as to carry out conservation measures, to comply with international standards, and to provide good facilities for the workers.⁸²

Second, fishing vessels registered in FoC States frequently seek to avoid strict regulations imposed by their home countries, such as to use eco-friendly fishing devices.⁸³ Those FoC vessels can easily change the flag of state. In this case, former flag State is unable to enforce obligations to the vessels.⁸⁴ Even if a fishing vessel has double nationalities,⁸⁵ its owner is not required to submit certificates of cancellation.⁸⁶ Thus, the practice of reflagging with the other states often occurs⁸⁷ and the FoC vessels exercise the lower labor standard without controlling and monitoring the FoC states.

⁸⁸ The flag on FoC vessels is sometimes used to hinder law enforcement.

16 (2020), <https://ejfoundation.org/resources/downloads/EJF-report-FoC-flags-of-convenience-2020.pdf>.

⁸¹ Marcopoulos, *supra* note 13, at 279.

⁸² 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. 486-8 (2022). See also Naomi Jiyoung Bang, *Casting A Wide Net to Catch the Big Fish: A Comprehensive Initiative to Reduce Human Trafficking in the Global Seafood Chain*, 17 U. PA. J. L. & SOC. 228-9 (2014).

⁸³ Wigginton, *supra* note 37 at 442. See also Andrew Serdy, *Accounting for Catch in Internationally Managed Fisheries: What Role for State Responsibility?*, 15 OCEAN & COASTAL L. J. 27-8 (2010).

⁸⁴ Austin Dieter, *From Harbor to High Seas: An Argument for Rethinking Fishery Management Systems and Multinational Fishing Treaties*, 32 WIS. INT’L L. J. 730 (2014).

⁸⁵ The Environmental Justice Foundation, *supra* note 81, at 20. See also Zaid Aladwan, *Dual Nationality of the Ships and Its Legal Impact*, 6(2) HASANUDDIN L. REV. 114-5 (2020), https://www.researchgate.net/publication/347412179_Dual_Nationality_of_the_Ships_and_its_Legal_Impact#fullTextFileContent.

⁸⁶ Nolan, *supra* note 34, at 945.

⁸⁷ Wyman, *Unilateral Steps to end High Seas Fishing*, 6 TEX. A&M L. REV. 279 (2018).

⁸⁸ Peter Link, *One Small Step for the United States, May Be One Giant Leap for Seafarers’ Rights*, 33 HOFSTRA LAB. & EMP. L. J. 178 (2015).

Third, Article 94(1) of the UNCLOS provides that: “Every State shall effectively exercise its jurisdiction and control in administrative, technical, and social matters over ships flying its flag.” However, Article 94(1) does not differentiate between FoCs states and non-FoC states in their obligation to be performed. In practice, the obligations stipulated in Article 94 (1) are often violated by FoC vessels because these states used to intentionally fail to enforce the obligations to FoC vessels, though they have jurisdiction over the FoC vessels. Even RFMOs does not cover the entire ocean or all fish stocks,⁸⁹ some parts of the high seas are unregulated.⁹⁰

Fourth, another legal lacunas for the protection and conservation of fish stocks on the high seas are found at the Compliance Agreement which lacks memberships. Actually, the Compliance Agreement came into force on April 24 ,2003,⁹¹ about a decade after its adoption.⁹² The Compliance Agreement is only legally binding the member States, unless the conservation of fish stocks on the high seas has been recognized as customary international law. Thus, the third parties are not obliged to conserve the fish on the high seas under this Agreement unless they agree to perform the obligations in accordance with *pacta tertiis* principle,⁹³ as stipulated in Article 34 of the Vienna Convention on the Law of Treaties 1969.

Fifth, most FoC states are not the members of RFMOs. Therefore, FoC states would not oblige FoC vessels to take conservation measures.⁹⁴ A FoC vessel is free to fish in an area subject to conservation measures when its state of registration is not a party. The FoC vessels registered in those states have thus insufficient flag state control. FoC States commonly do not take any measures against fishing vessels flying their flags even when their activities are clearly harmful to the fish stocks on the high seas. Even, there is no obligation for the owners of FoC vessels to disclose their identity.⁹⁵

Sixth, the UNFSA can be implemented mainly by RMFOs with the rules applicable to their member States. Unless a state is a party to the UNFSA, however, no obligation would be adhered to it. Actually, there is no obligation for a FoC State to join any RFMOs mandated in the UNFSA. With the membership of RFMOs, the vessels can

⁸⁹ Mossop, *supra* note 68, at 585.

⁹⁰ Charles Taylor, *Fishing with a Bulldozer: Options for Unilateral Action by the United States Under Domestic and International Law to Halt Destructive Bottom Trawling Practices on the High Seas*, 34 ENV'T L. & POL'Y J. 139-40 (2020).

⁹¹ Australian Government, FAO Compliance Agreement, (2019), <https://www.agriculture.gov.au/agriculture-land/fisheries/legal-arrangements/fao>.

⁹² Osch, *supra* note 66, at 420.

⁹³ Ellis, *supra* note 43, at 6.

⁹⁴ The UN Atlas of the Oceans, Flag of Convenience or Open Registry Fishing Vessels (2002-2016), <http://www.oceansatlas.org/subtopic/en/c/1477>.

⁹⁵ Negret, *supra* note 6, at 11-2.

be free riders and do not have to make conservation efforts conducted by RFMOs' member states.⁹⁶ Indeed, RFMOs cannot take any measures against the violators of RFMO rules if the FoC states are not members of the organizations.

V. How to Strengthen Laws Applicable to FoC States and Vessels against Overfishing on the High Seas?

Harmful impact of FoC vessels in conducting fishing on the high seas has already triggered the international community to reexamine the law applicable to FoC vessels. The negative impacts of these activities on the sustainability of fish stocks on the high seas cannot be ignored.⁹⁷ In order to solve the problems, solid cooperation is necessary among states, particularly the RFMOs' member states and port states to refuse the harvesting of fish that is not environmentally sound. The following are the suggestions to strengthen the law applicable to FoC States and vessels to prevent overfishing and maintain the sustainability of fish stocks on the high seas.

Firstly, the IMO legal framework such as the Cape Town Agreement can play a crucial role. If the Cape Town Agreement is effectively enforced, the international community can increase safety for FoC fishing vessels and exercise port state control. Therefore, the Cape Town Agreement should be ratified as early as possible, as it can enhance the regulation of FoC vessels and promote sustainability in fishing practices.⁹⁸

Secondly, the role of port state is important to control and enforce their jurisdiction when a FoC fishing vessel violated international laws and regulations on the high seas. The Port State Measures Agreement (PSMA) specifies the minimum controls that a state must implement when foreign fishing vessels enter one of its ports, as well as the verifies that all fish landed are legally caught. In this context, the "port State" shall specify which of its ports are open to foreign vessels and establish a set of procedures to decide whether the foreign fishing vessels are allowed to enter their ports, inspect the vessel, and report and share the inspection results with other port states. However, illegal operators can get around these prohibitions by transshipping their fish at sea and getting supplies from transport vessels. As a consequence, any

⁹⁶ Cayla Calderwood, *Climate-Driven Fishery Shifts: Framing the Problem & Proposing Solutions for Shifts Across Shared Borders*, 44 HARV. ENV'T'L L. REV. 564 (2020).

⁹⁷ Pavone, *supra* note 59, at 590.

⁹⁸ IMO Legal Framework in the Fishing Sector, <https://www.imo.org/en/OurWork/IIIS/Pages/IMO%20Legal%20Framework%20in%20the%20Fishing%20Sector.aspx>.

vessel identified as assisting illicit fishing vessels shall be refused to get access to the port.⁹⁹

Thirdly, flag states' responsibilities should be enhanced, as stipulated in Article 94 of the UNCLOS and Article 18 (1) and (2) of the UNFSA, since vessels were traditionally viewed as floating islands of state territory.¹⁰⁰ All flag states, including FoC states have to patrol and control their vessels as they do in their land territory to the vessels flying their flags.¹⁰¹ If an FoC vessel destroys the marine environment by conducting IUU fishing or do not perform conservation, FoC States must withdraw the nationality of the FoC vessel.¹⁰² If FoC States are unwilling to enforce the law on FoC vessels that have already violated the obligations, the RFMO or the UNCLOS member States should make an inquiry into the untrustworthy to FoC States and then ask to enforce compliance. When FoC States denies these measures, port states with the UNCLOS membership may refuse the fish from the vessels.

Fourthly, reflagging vessels should be stopped, because it is a triggering factor to overfishing on the high seas. These vessels are aimed to avoid obligations, such as conducting conservation and complying with the international standard of safety, as well as using environmentally friendly fishing devices.¹⁰³ However, the members of RFMOs and international organizations, including the World Trade Organization (WTO) as well as port states should make cooperation to take any measures to combat over-exploitation of fish stocks on the high seas. It can be implemented mainly by refusing the fish that comes from those FoC vessels violating the international obligations.¹⁰⁴ For this goal, port states should be empowered to investigate foreign vessels in accordance with the obligations of Article 23 of the UNFSA.¹⁰⁵

⁹⁹ Stop Illegal Fishing, Port State Measures to Stop Illegal Fishing, <https://stopillegalfishing.com/initiatives/implementing-port-state-measures>.

¹⁰⁰ James Black, *New Custom Thickens: Increased Coastal State Jurisdiction Within Sovereign Waters*, 37 B.U. INT'L L. J. 358 (2019).

¹⁰¹ Ishtiaque Ahmed, *Safe & Environmentally Sound Recycling of Ships: A Stocktaking of the Current State of International Law*, 31 FORDHAM ENV'T L. REV. 78-9 (2020).

¹⁰² Harry Scheiber et al., *Ocean Tuna Fisheries, East Asian Rivalries, and International Regulation: Japanese Policies and the Overcapacity/IUU Fishing Conundrum*, 30 U. HAW. L. REV. 104 (2007).

¹⁰³ Michael Sheng-ti Gau, *Asia Perspectives on Fishery Subsidy Issues and Linkages with Environment*, 1 ASIAN J. WTO & INT'L HEALTH L. & POL'Y 218 (2006).

¹⁰⁴ Juan He, *Imported Seafood Traceability Regulations: A Mishap for the WTO's Disregard for Non-Product Related Processes and Production Methods?*, 15 ASIAN J. WTO & INT'L HEALTH L. & POL'Y 182 (2020).

¹⁰⁵ U.N. Doc. A/CONF.164/37, (Sept. 8, 1995), https://www.un.org/ga/search/view_doc.asp?symbol=A/CONF.164/37&Lang=E. Article 23 (2) UNFSA states: "A port State may, inter alia, inspect documents, fishing gear and catch on board fishing vessels, when such vessels are voluntarily in its ports or at its offshore terminals." And Article 23 (3) UNFSA stipulates "States may adopt regulations empowering the relevant national authorities to prohibit landings and transshipments where it has been established that the catch has been taken in a manner which undermines the effectiveness of subregional, regional, or global conservation and management measures on the high seas."

Fifthly, port states can enforce sanctions to flag states whose vessels harvest fish on the high seas using devices that are not environmentally sound by refusing the FoC vessels to land the fish in their ports. If a flag state cannot monitor and enforce sanctions to its vessels which violate international obligations, it should relinquish its authority from the membership of RFMOs to other states to enforce the law. In this case, it would not be blacklisted as an Open Register State.¹⁰⁶ Therefore, the acknowledgement of the flag state can be a good attempt to fulfil its obligation in the absence of the capability to enforce the law to the FoC vessels registered in these FoC States.

Sixthly, the role of port states should be enhanced in exercising their jurisdiction. Under Article 218 of the UNCLOS, port states have the authority to investigate foreign ships in their ports when any violation of international laws and global standards are suspected. Article 218 may thus provide port states with greater power to enforce international laws and standards. In this sense, Article 218 is considered a groundbreaking provision beyond the traditional concept of territorial sovereignty. However, Article 218 only applies to the cases of discharge violation, tested by the “applicable international rules and standards” which is different from the generally accepted international and domestic laws.¹⁰⁷

Seventhly, all flag states, including FoC states, are required to use the Global Positioning System (GPS) to easily check whether they are in compliance with international standards and obligations.¹⁰⁸ Furthermore, a vessel monitoring system (VMS) should be applied as another option, which relies on satellite navigation systems and communication technology, in order to trace the location of vessels, to monitor, and to control “the surveillance programs of RFMOs.”¹⁰⁹ Indeed, the only way to encourage all flag states to participate in this system is to establish an international consultation body to ensure that fisheries protection, particularly on the high seas, is properly implemented.

Eighthly, blacklisting can be used by RFMOs and port states to identify FoC vessels that breach international obligations. RFMOs and port states can use blacklisting to

¹⁰⁶ Ahmed, *supra* note 103, at 79-80.

¹⁰⁷ Ho-Sam Bang, *Port State Jurisdiction and Article 218 of the UN Convention on the Law of Sea*, 40 J. MAR. L. & COM. 299 (2009).

¹⁰⁸ UNEP, *FAO Technical Guidelines for Responsible Fisheries: Fishing Operations – Vessel Monitoring Systems*, https://www.cms.int/sites/default/files/document/cms_cop13_inf.13a_fao-vessel-monitoring-systems_e.pdf.

¹⁰⁹ Chris Wold & Alfred Cook, *Shining a Light on High Seas Transshipment: The Need to Strengthen Observer Reporting of Transshipments in the Western and Central Pacific Fisheries Commission*, 26 HASTINGS ENV'T L. J. 198 (2020). See also Wold, *supra* note 70, at 995.

impose sanctions by refusing fish from FoC-IUU vessel owners.¹¹⁰ There are some FoC vessels that have been blacklisted by the member States of RFMOs. The identified FoC vessels are not authorized to sell their fish in the port states. Therefore, it will put FoC vessels at a disadvantage in the market. In order to effectively improve the monitoring system in high-seas fishing, flag states must facilitate an effective monitoring system and communication between the government, vessel registries, and other regulatory bodies.¹¹¹

Finally, port states should have the right to control all activities within their borders and ensure compliance with international instruments.¹¹² Controlling FoC fisheries is important to guarantee the sustainable use of fish stocks on the high seas. Thus, port states have to cooperate with the RFMOs to enforce the investigation Catch Documentation Scheme (CDS) in order to punish FoC vessels conducting IUU fishing or destroying fish stocks on the high seas because the CDS will verify the legality of the fish from the original catch on the high seas.¹¹³ By disseminating information to consumers, port states and RFMOs can take measures to combat IUU fishing conducted by FoC vessels, such as boycotting those harvesting fish.¹¹⁴ Also, the port states can encourage RFMOs to coordinate their efforts more and use their ports and trade measures to support law enforcement to combat overfishing and IUU fishing on the high seas.¹¹⁵

VI. Conclusion

The use of flags-of-convenience could render the owners of the FoC vessels liable for their activities such as overfishing and IUU fishing on the high seas. Indeed, FoC

¹¹⁰ Sean Hagan, *Too Big to Tackle? The Persistent Problem of Pirate Fishing and the New Focus on Port State Measures*, 37 SUFFOLK TRANSNAT'L L. REV. 131 (2014).

¹¹¹ Paul Graf, *Red Flags in The Morning, Directors Take Warning*, 6 BUS. L. BRIEF (Am. U.) 19-20 (2010). See also Jean-Baptiste Sanchez, *Port State Measures to combat IUU fishing: The Role of the FAO and the EU* (2017) (Master's Dissertation, Faculté de droit et de Criminologie, Université Catholique de Louvain), <https://dial.uclouvain.be/memoire/ucl/en/object/thesis%3A862>.

¹¹² Bevan Marten, *Port State Jurisdiction in New Zealand: The Problem with Sellers*, 44 VICT. U. WELLINGTON L. REV. 560-1 (2013). See also Sam Bang, *Recommendations for Policies on Port State Control and Port State Jurisdiction*, 44 J. MAR. L. & COM. 115-33 (2013).

¹¹³ Weber, *supra* note 12, at 273.

¹¹⁴ Scheiber et al, *supra* note 102, at 123-4.

¹¹⁵ HSTF, *Closing the Net: Stopping Illegal Fishing on The High Seas*, at 62 (2006), <https://www.oecd.org/sd-roundtable/papersandpublications/39375276.pdf>.

States are reluctant to enforce sanction on FoC vessels registered in their countries. To solve these problems, it is necessary for port states and RFMOs to work together with FoC states to improve law enforcement. This will certainly abate and control overfishing. Additionally, the FoC States should be encouraged to follow the legal requirements to prevent the FoC vessels registered in their states from overfishing and to conserve all marine biodiversity. Otherwise, sanctions should be imposed against FoC states to enforce the law to FoC vessels, which prohibit their vessels from entering into the port states and accessing to international market.

The UNCLOS and other relevant international agreements such as the UNFSA and the Compliance Agreement are still insufficient to completely stop the FoC vessels on the high seas conducting overfishing or using environmentally unsound measures which are harmful to conserve marine resources. Hence, the existing legal instruments governing the protection of fish stocks on the high seas have to be improved by new international agreements with novel norms to be enforced against the FoC States and vessels disobeying international law for conservation on the high seas. As a consequence, it is necessary to improve and strengthen the law applicable to FoC States and vessels by international cooperation among the members of the UNCLOS, RFMOs, the Compliance Agreement and the WTO. These member states should carry out high seas monitoring and control. Moreover, they can encourage the WTO and port states not to allow FoC vessels with the fish that have already violated international obligations to enter their port and to have access to international markets.

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