

**CATCHING LESS FISH WITH MORE HONEY: INTRODUCING
INCENTIVES FOR SUSTAINABLE INTERNATIONAL FISHING
COMPLIANCE**

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INTRODUCTION

Two-thousand twelve marked the 20th anniversary of the Newfoundland cod fishery collapse,¹ the most well-known fishery disaster in the past century. The Newfoundland cod fishery collapse refers to the fishing moratorium that the Canadian government placed on the North Atlantic cod in 1992.² Beginning in the 1950s, new fishing technology allowed both Canadian and foreign vessels to harvest unprecedented amounts of cod from the Newfoundland stock.³ The capacity to harvest increased exponentially in the 1970s and 1980s with the introduction of instruments like sonar detection and trawlers, which “vacuumed” cod from the sea.⁴ Despite increased international fishing regulation in the 1980s, member states could defect from the fishing quotas set by regional management bodies, further exacerbating the problem.⁵ By 1992, the catch had collapsed and the Canadian government placed a moratorium on the stock.⁶ Some 35,000 fishers and other workers were out of a job overnight.⁷ Despite initial hopes that the stock would rebound after a couple years, the moratorium remains in place more than 20 years later.⁸

Even after two decades of increased attention and louder environmentalist voices, the world’s fisheries remain in peril.⁹ The

1. BONNIE J. MCCAY & ALAN CHRISTOPHER FINLAYSON, *THE POLITICAL ECOLOGY OF CRISIS AND INSTITUTIONAL CHANGE: THE CASE OF THE NORTHERN COD* (1995), *available at* <http://arcticcircle.uconn.edu/NatResources/cod/mckay.html>.

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. Janet Thomson & Manmeet Ahluwalia, *Remembering the Mighty Cod Fishery 20 years After Moratorium*, CBC News (June 29, 2012), <http://www.cbc.ca/news/canada/remembering-the-mighty-cod-fishery-20-years-after-moratorium-1.1214172>.

9. FOOD & AGRIC. ORG. OF THE UNITED NATIONS, *STATE OF THE WORLD FISHERIES AND AQUACULTURE 58* (2012), *available at* <http://www.fao.org/docrep/016/i2727e/i2727e01.pdf> [hereinafter FOA STATE OF THE WORLD].

Food and Agriculture Organization of the United Nations estimates that 57.4% of fisheries are fully exploited and 29.9% of stocks are over exploited.¹⁰ Recent closures, like the Japanese anchovy stock in the Bay of Biscay,¹¹ demonstrate that under the current international regime, we are still in danger of repeating the mistakes that led to the 1992 collapse.

Rather than following the current ineffective paradigm of enforcement, the international community needs to start providing incentives to enforce sustainable fishing quotas and practices; this method will allow states to overcome political and economic obstacles and make a rational decision in favor of sustainable fishing compliance.

Part I of this article begins with a brief overview of the status of the world's fisheries. Part II then summarizes the current regime that regulates and enforces international fishing standards. This includes major conventions and treaties, international governmental organizations, and regional management bodies. Next, Part III analyzes why the current regime is ineffective, focusing on its inability to successfully enforce penalty provisions, the economic and political disincentives of member states to practice and enforce sustainable fishing practices, and the negative effect of domestic policies that undermine international regulatory efforts. These issues are identified in the context of domestic fishing subsidies; illegal, unreported, and unregulated fishing; and reliance on flag state enforcement. Finally, Part IV proposes an alternative enforcement strategy, which introduces incentives for states to comply with and create sustainable fishing practices. It demonstrates this strategy with a case study where the United States provides deforestation program

10. Fully exploited stocks refer to those that produce at or close to the maximum sustainable production. There is no room for further expansion, and if further exploited they are at risk of decline. *Id.* at 53. Over exploited stocks refer to those that are fished beyond their ecological and biological potential. *Id.* They must be carefully managed to rebuild stock supplies. *Id.*

11. The Bay of Biscay Japanese anchovy stock was closed from 2005 to 2009 after the stock experienced a collapse. *Bay of Biscay Anchovy Quota Reduce by 17%*, UNDERCURRENT NEWS (July 9, 2013), <http://www.undercurrentnews.com/2013/07/09/bay-of-biscay-anchovy-quota-reduced-by-17/>.

support to Panama in exchange for greater international fisheries regulation compliance.

I. STATE OF THE WORLD'S FISHERIES

In 2013, the United States became the top importer of fish and fishery products, valued at \$19 billion.¹² This is just a portion of the preliminary estimates of the value of fish imports in 2013, which is around \$137 billion.¹³ Indeed, the fisheries sector is the fastest growing employer in agriculture.¹⁴ The primary sector provides income and livelihoods to some 54.8 million people, while an additional 660–820 million (including dependents) rely on ancillary activities like boat construction and processing for jobs.¹⁵ In total, 10–12% of the world's population relies on the fisheries sector for work.¹⁶ Over 100 million of these individuals are among the world's poorest people.¹⁷

Not only does the fishery industry represent a major economic endeavor, fish also provide more than half the world's population with 15% of its animal protein intake.¹⁸ Four of the 30 countries most dependent on fish as a source of protein are developing nations.¹⁹ As consumption of fish increases, harvested fish are now smaller and more difficult to find and catch.²⁰

Since the first Food and Agriculture Organization (“FAO”) assessment, the proportion of non-fully exploited stocks has consistently decreased.²¹ About one-third of the top ten capture fishery stocks are over exploited, with the rest fully exploited.²² The

12. FOOD & AGRIC. ORG. OF THE UNITED NATIONS, FACT SHEET: INTERNATIONAL TRADE AND WORLD FISHERIES 1 (2014).

13. *Id.*

14. FAO STATE OF THE WORLD, *supra* note 9, at 41.

15. *Id.*

16. *Id.*

17. DAVID HUNTER ET AL., INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 762 (Robert C. Clark et al. eds., 4th ed. 2011).

18. FOOD & AGRIC. ORG. OF THE UNITED NATIONS, *supra* note 12.

19. HUNTER, *supra* note 17, at 762.

20. *Id.* at 761.

21. FAO STATE OF THE WORLD, *supra* note 9, at 11.

22. *Id.* at 12.

same holds true for the seven principal tuna species, with one-third over exploited and over one-third fully exploited.²³ In its most recent report, the FAO expressed concern that the situation for tuna may deteriorate further unless there are significant improvements in management because of substantial demand and the overcapacity of nations' fishing fleets.²⁴

To illustrate the impact that technology, demand, and overcapacity have on the globe's fisheries, consider the anecdote that trawlers near British Columbia recently fished their annual quota of 847 tons of herring after only eight minutes.²⁵ Between 1970 and 1990, the global fishing fleet doubled in size, excluding the millions of small fishing boats not measured in official sources.²⁶ The FAO estimates that the fishing fleet has more than doubled the capacity to harvest at maximum sustainable yield levels.²⁷ Were Iceland and the European Union to cut their fleets by 40%, they could still harvest the same number of fish.²⁸

As the FAO writes:

The declining global catch over the last few years together with the increased percentage of over-exploited fish stocks and the decreased proportion of non-fully exploited species around the world convey a strong message—the state of world marine fisheries is worsening and has had a negative impact on fishery production.²⁹

The FAO goes on to note that the situation is more concerning for fishery resources on the high seas that are governed by international law.³⁰ Despite oversight by international organizations like the FAO and strong warnings from conservation failures like the North Atlantic cod moratorium, international law has failed to remedy the

23. *Id.*

24. *Id.*

25. HUNTER, *supra* note 17, at 763.

26. *Id.*

27. *Id.*

28. *Id.* at 763–64.

29. FOA STATE OF THE WORLD, *supra* note 9, at 59.

30. *Id.*

precarious situation of the world's fisheries. To understand why the current legal regime is ineffective in this purpose, a brief overview of the international fisheries legal framework is required.

II. INTERNATIONAL FISHERIES LEGAL FRAMEWORK

For much of recorded history, freedom of capture or freedom of the seas was the dominant legal framework that governed the oceans and its natural resources, such as fisheries.³¹ Grotius' natural law theory advocated a "global commons" idea, where no one nation could claim ownership of the high seas' resources.³² Fish belonged to whichever nation caught them first. This concept of rights prevailed until the 1958 Law of the Sea Conventions.³³

The advent of new technology in the 1950s, combined with a freedom of capture mentality, began to strain the oceans' natural resources like never before.³⁴ Concerns about over exploitation during this decade culminated in the 1958 Convention on Fishing and Conservation of the Living Resources of the High Seas.³⁵ The Convention established general conservation duties such as interstate

31. Emily Larocque, *The Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean: Can Tuna Promote Development of Pacific Island Nations?*, 4 ASIAN-PAC. L. & POL'Y J. 82, 90 (2003).

32. HUGO GROTIUS, *THE FREEDOM OF THE SEAS* 77 (James Brown Scott ed., Ralph van Deman Magoffin trans., 1916), available at http://foll.s3.amazonaws.com/titles/552/Grotius_0049_EBk_v6.0.pdf.

33. 1958 Geneva Conventions on the Law of the Sea include the Convention on Fishing and Conservation of the Living Resources of the High Seas, Convention on the Territorial Sea and Contiguous Zone, Convention on the High Seas, Convention on the Continental Shelf, and the Optional Protocol of Signature concerning the Compulsory Settlement of Disputes. Tullio Treves, *Audiovisual Library of International Law: 1958 Geneva Conventions on the Law of the Sea*, UNITED NATIONS, <http://legal.un.org/avl/ha/gclos/gclos.html> (last visited Nov. 9, 2014).

34. Larocque, *supra* note 31, at 90; D.H. Steele et al., *The Managed Commercial Annihilation of Northern Cod*, 8 Nfld. STUDIES 34, 38 (1992).

35. Christopher J. Carr & Harry N. Scheiber, *Dealing with a Resource Crisis: Regulatory Regimes for Managing the World's Marine Fisheries*, 21 STAN. ENVTL. L.J. 45, 51 (2002).

cooperation³⁶ to achieve the optimum sustainable yield.³⁷ Yet, it was not until the passage of the 1982 United Nations Convention on the Law of the Sea (“UNCLOS”) that a comprehensive international regulatory scheme for fisheries was established.³⁸

A. United Nations Convention on the Law of the Sea

UNCLOS revolutionized states’ claims to the oceans’ resources. By establishing an Exclusive Economic Zone (“EEZ”) of 200 nautical miles,³⁹ UNCLOS placed up to 90% of the oceans’ fish resources within the jurisdiction of coastal states.⁴⁰ UNCLOS Articles 61 through 73 deal with living natural resources, including conservation and exploitation of fish species.⁴¹

Articles 61 and 62 direct nations to determine catches based on maximum sustainable yield and optimum utilization.⁴² However, these terms are not explicitly defined and, in some instances, have been used by nations to justify controversial activities like commercial whaling.⁴³ In addition, the Convention exhibits a bias in favor of economic exploitation rather than non-consumptive management objectives.⁴⁴ However, UNCLOS does place an obligation “to ensure through proper conservation and management measures that the maintenance of the living resources in the exclusive economic zone is not endangered by over-exploitation.”⁴⁵

36. Convention on Fishing and Conservation of the Living Resources of the High Seas art. 1, para. 2, April 29, 1958, 559 U.N.T.S. 285.

37. *Id.* at art. 2.

38. Zachary Tyler, *Saving Fisheries on the High Seas: The Use of Trade Sanctions to Force Compliance with Multilateral Fisheries Agreements*, 20 TUL. ENVTL. L.J. 43, 52 (2006).

39. United Nations Convention on the Law of the Sea art. 57, (Dec. 10, 1982) 1833 U.N.T.S. 397 [hereinafter UNCLOS].

40. Carr & Scheiber, *supra* note 35, at 52.

41. UNCLOS, *supra* note 39, at arts. 61–73.

42. *Id.* at arts. 61–62.

43. EUGENE H. BUCK, CONG. RESEARCH SERV., RL32185, U.N. CONVENTION ON THE LAW OF THE SEA: LIVING RESOURCES PROVISION 3 (2011).

44. *Id.*

45. UNCLOS, *supra* note 39, at art. 61, para. 2.

Conservation decisions within an EEZ are not subject to compulsory dispute settlement,⁴⁶ but UNCLOS provides for mandatory dispute resolution in a tribunal or other approved forum for other conflicts under the Convention.⁴⁷

While UNCLOS briefly deals with migratory or straddling stocks, gaps in coverage of these special stocks were dealt with in the 1995 Agreement for the Implementation of the Provisions of the United Nations Convention of the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (“Fish Stocks Agreement”).⁴⁸

B. UN Fish Stocks Agreement

As identified in Agenda 21 of the UN Conference on Environment and Development, the gaps left in migratory fisheries regulation under UNCLOS required state action.⁴⁹ Among those gaps, Agenda 21 recognized that “there are problems of unregulated fishing, over-capitalization, excessive fleet size, vessel reflagging to escape controls, insufficiently selective gear, unreliable databases, and lack of sufficient cooperation among countries.”⁵⁰ The Fish Stocks Agreement entered into force in 2001 and regulates highly migratory fish stocks, meaning those that travel between the high seas and areas subject to national jurisdictions.⁵¹ As of early 2014, 81

46. UNCLOS, *supra* note 39, at art. 297, para. 3, sub. a.

47. Tyler, *supra* note 38, at 54.

48. Jacqueline Peel, *A Paper Umbrella Which Dissolves in the Rain? The Future for Resolving Fisheries Disputes Under UNCLOS in the Aftermath of the Southern Bluefin Tuna Arbitration*, 3 MELB. J. INT’L L. 53, 54 (2002) (also known as the “Straddling Stocks Agreement”).

49. United Nations Resumed Review Conference on the Agreement Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, New York City, U.S.A., May 24–28, 2010, *Fish Stocks Agreement: Overview of what the Agreement Says and its Impact*, 1, U.N. Doc. DPI/2556 B, available at http://www.un.org/depts/los/convention_agreements/reviewconf/FishStocks_EN_B.pdf.

50. *Id.*

51. *Id.*

nations have ratified the Fish Stocks Agreement.⁵² This includes nearly all the major fishing nations such as the United States, Japan, Russia, and the European Union.⁵³ Most of all, the Fish Stocks Agreement hoped to create a framework for state cooperation between coastal states and high seas fishing states in migratory stock conservation.⁵⁴

Signatories to the Fish Stocks Agreement agree to a variety of conservation-based obligations for migratory species.⁵⁵ Notably, the treaty adopts the precautionary approach in the context of conservation and exploitation of fish resources.⁵⁶ The precautionary approach is the idea that in the face of scientific uncertainty, measures exercising caution in favor of environmental protection should be applied.⁵⁷ States should promote long-term sustainability in utilization decisions, use the best scientific evidence available, and adopt an ecosystem approach to conservation.⁵⁸

In addition, the Fish Stocks Agreement designates Regional Fishery Management Organizations (“RFMOs”) as implementing

52. Division for Ocean Affairs and the Law of the Sea, United Nations, Chronological Lists of Ratifications of, Accessions and Successions to the Convention and the Related Agreements as at 29 October 2013 (2013), http://www.un.org/depts/los/reference_files/chronological_lists_of_ratifications.htm#.

53. *Id.* One notable exception is China, which has not ratified the Agreement.

54. *See generally id.*

55. Migratory species are those in areas “beyond those of national jurisdiction.” United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks, New York City, U.S.A., July 24–Aug. 4, 1995, *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*, U.N. Doc A/CONF.164/37, art. 3, para. 1 (Sept. 8, 1995), available at http://www.un.org/depts/los/convention_agreements/texts/fish_stocks_agreement/CONF164_37.htm [hereinafter *Fish Stocks Agreement*].

56. *Id.* at art. 6.

57. Meinhard Schroder, *Precautionary Approach/Principle*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (Rudiger Wolfrum ed., 2009), <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1603?rskey=TMSyTO&result=1&prd=EPIL>.

58. *Fish Stocks Agreement*, *supra* note 55, at art. 5.

bodies.⁵⁹ These Organizations have the ability to enforce conservation measures on the high seas by excluding non-member states from exploiting fishing stocks.⁶⁰ This is a major departure from the high seas freedom of fishing paradigm; it requires states to cooperate through international organizations for shared resources.⁶¹ Finally, the Agreement enables non-flag states to board and inspect vessels for compliance with RFMO measures.⁶²

C. Regional Fisheries Management Organizations

There are two main categories of RFMOs: those established under the Food and Agriculture Organization of the United Nations (“FAO”) and those created outside the FAO framework by international treaty.⁶³ All RFMOs have the authority to implement the Fish Stock Agreement provisions.⁶⁴ These bodies can implement further regulations pursuant to their founding authority and documents.⁶⁵

Those established by the FAO framework fall under authority of either Article 6 or Article 24 of the FAO Constitution.⁶⁶ Article 6 organizations are purely advisory bodies.⁶⁷ Examples include organizations like the West Central Atlantic Fishery Commission and the Fishery Committee for the Eastern Central Atlantic.⁶⁸ The West

59. *Id.* at art. 8, para. 1.

60. *Id.* at art. 8, para. 4.

61. *See* Tyler, *supra* note 38, at 55 (stating that the duty to cooperate runs throughout the Fish Stocks Agreement).

62. *Fish Stocks Agreement*, *supra* note 55, at art. 21.

63. *See* *FAO and Regional Fishery Bodies*, Food & Agric. Org. of the United Nations, <http://www.fao.org/fishery/topic/16918/en> (last visited Nov. 24, 2014) (listing RFMOs established under and outside the FAO framework).

64. *See* *Fish Stocks Agreement*, *supra* note 55, at art. 21, para. 2 (stating that RFMOs can implement procedures to enforce the Fish Stocks Agreement).

65. *Id.* at art. 21, para. 15.

66. FOOD & AGRIC. ORG., CONSTITUTION arts. VI, XXIV (1945).

67. *Id.* at art. VI.

68. United Nations Committee on Fisheries, Rome, Italy, June 9–13, 2014, *Regional Fishery Bodies Established Within the FAO Framework*, U.N. Doc COFI/2014/Inf.11, para. 2 (May 2014), available at <http://www.fao.org/3/a-mk346e.pdf> [hereinafter *RFMOs Report*].

Central Atlantic Fishery Commission's main role is to aid in international cooperation efforts for the conservation and use of fishery resources.⁶⁹ Its activities include promotion of sustainable fishing practices.⁷⁰ It does not attempt to regulate or enforce provisions against states fishing in the West Central Atlantic.⁷¹

In contrast, FAO Article 24 bodies are normally created by treaties, and parties can choose to commit to binding conservation measures.⁷² Examples include the Indian Ocean Tuna Commission, Asia-Pacific Fisheries Commission, and General Fisheries Commission for the Mediterranean.⁷³ The General Fisheries Commission for the Mediterranean has authority to adopt binding quota recommendations for fishery management in its jurisdiction,⁷⁴ while the Indian Ocean Tuna Commission may only provide non-binding quota recommendations.⁷⁵ Member states choose whether to include in these bodies the authority to create binding provisions.⁷⁶

Other regional fishing bodies are established outside the FAO framework by international treaty.⁷⁷ Some well-known examples include the Northwest Atlantic Fisheries Organization ("NAFO"), International Commission for Conservation of Tunas ("ICCAT"), and Commission for the Conservation of Antarctic Marine Living Resources ("CCAMLR"). These bodies are tasked with responsibilities such as setting Total Allowable Catches ("TACs")⁷⁸

69. *Western Central Atlantic Fishery Commission (WECAFC)*, FOOD & AGRIC. ORG. OF THE UNITED NATIONS, <http://www.irc.fao.org/en/about-fao/statutory-bodies/wecafc/>.

70. *Id.*

71. *Id.*

72. *RFMOs Report*, *supra* note 68, at para. 4.

73. *Id.* at para. 3.

74. *About GFCM GEN. FISHERIES COMM'N FOR THE MEDITERRANEAN*, <http://www.gfcm.org/gfcm/about/en#Org-LegalFoundation> (last visited Oct. 31 2014).

75. *Conservation and Management Measures (CMMS)*, INDIAN OCEAN TUNA COMM'N, <http://www.iotc.org/cmms> (last visited Oct. 31, 2014).

76. *RFMOs Report*, *supra* note 68, at para. 4.

77. *Fish Stocks Agreement*, *supra* note 55, at art. 8, para. 1.

78. TACs are catch limits set for fishery stocks. *TACs and Quotas*, EUROPEAN COMM'N, http://ec.europa.eu/fisheries/cfp/fishing_rules/tacs/index_en.htm (last visited Nov.

and allocating resources among member states.⁷⁹ Many RFMOs have scientific bodies tasked with providing information relating to conservation efforts.⁸⁰ Despite the revolutionary nature of RFMOs, their effectiveness in sustainable fishery conservation has been controversial.⁸¹

One anecdote of common criticism refers to ICCAT as “the International Conspiracy to Catch All Tunas.”⁸² RFMO problems range from inability to create binding provisions to non-enforcement by member states.⁸³ As a result, the FAO attempted to fill gaps in domestic non-compliance through a recommended Code of Conduct.⁸⁴

D. FAO Code of Conduct

The FAO Code of Conduct for Responsible Fisheries and Technical Guidelines (“FAO Code of Conduct”) is a voluntary document, which sets forth standards for sustainable fishing practices.⁸⁵ The Code is consistent with international law.⁸⁶ Some of

8, 2014). Most often TACs are set based on advice from scientific advisory bodies. *Id.* Limits may be annual or biennial. *Id.* Whether TACs are binding upon RFMO member states depends on the regional body’s charter and enforcement authority. *Id.*

79. See *RFMOs Report*, *supra* note 68, at para. 4 (explaining that Article XIV bodies enjoy a certain level of autonomy from the FAO).

80. Comm’n for the Conservation of Antarctic Marine Living Resources, Convention for the Conservation of Antarctic Marine Living Resources pmbl., May 20, 1980, available at <https://www.ccamlr.org/en/organisation/camlr-convention-text>.

81. See Deep Sea Conservation Coal., *A Net with Holes: The Regional Fisheries Management System*, available at <http://www.savethehighseas.org/publicdocs/rfmo.pdf> (last visited Nov. 24, 2014) (asserting that RFMOs set ineffective quotas).

82. Alex Renton, *How the World’s Oceans Are Running out of Fish*, THE GUARDIAN (May 10, 2008), <http://www.theguardian.com/environment/2008/may/11/fishing.food>.

83. See *id.* (explaining that EU ministers promise action to stop illegal fishing, but no action is actually taken).

84. FOOD & AGRIC. ORG. OF THE UNITED NATIONS, CODE OF CONDUCT FOR RESPONSIBLE FISHERIES *Introduction* (1995).

85. *Id.* at art. 1.1.

the notable goals of the Code include a multi-dimensional approach to conservation, promotion of food security in developing nations, and ecosystem research.⁸⁷ Increasingly, nations like the United States, Canada, and Australia have incorporated elements of the FAO Code into domestic fishing regulations.⁸⁸

E. International Fisheries Litigation

Another available option for international fisheries law enforcement involves litigation. Under UNCLOS, high seas fisheries disputes are subject to compulsory dispute resolution.⁸⁹ However, UNCLOS only requires non-binding conciliation for disputes over conservation decisions in a state's EEZ.⁹⁰ The UN Fish Stocks Agreement extended the UNCLOS compulsory dispute procedure to disputes arising under the Agreement or regional fishery treaties.⁹¹ The *Southern Bluefin Tunas Case* was the first arbitral tribunal created to hear a dispute under part XV of UNCLOS, per authorization of the Fish Stocks Agreement.⁹²

In that case, the tribunal decided, contrary to prior interpretations of the Fish Stocks Agreement, that a regional fishing treaty deprived the tribunal of jurisdiction under UNCLOS to decide a high seas fishery dispute.⁹³ However, despite initial concerns over this controversial ruling, later inconsistent decisions, like the *MOX Plant Case*, indicate that the *Southern Bluefin Tunas Case* tribunal is unlikely to be followed on this jurisdictional issue.⁹⁴ Therefore, most

86. *Id.*

87. *Id.* at art. 1.3.

88. Tracy Cooper, *Picture This: Promoting Sustainable Fisheries Through Eco-Labeling and Production Certification*, 10 OCEAN & COASTAL L.J. 1, 10 (2004–2005).

89. UNCLOS, *supra* note 39, at art. 297, para. 3, sub. a.

90. *Id.*

91. *Fish Stocks Agreement*, *supra* note 55, at art. 3, para. 1.

92. Peel, *supra* note 48, at 53.

93. Alan Boyle, *Environmental Dispute Settlement*, in MAX PLANCK ENCYCLOPEDIA OF PUB. INT'L LAW (Rudiger Wolfrum ed., 2009), <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1949?rskey=0DrDA5&result=1&prd=EPIL>.

94. *Id.*

disputes arising under regional fishing treaties will be subject to compulsory dispute resolution under UNCLOS.⁹⁵

The International Tribunal for the Law of the Sea (“ITLOS”) also provides a forum for states to bring their international fisheries disputes.⁹⁶ ITLOS is a permanent judicial body established to hear disputes relating to UNCLOS.⁹⁷ ITLOS has the power to proscribe provisional measures to protect international fish stocks.⁹⁸

Prior to UNCLOS and the establishment of the specialty ITLOS court, a few fishery disputes were heard by the International Court of Justice (“ICJ”).⁹⁹ Some states continue to use the ICJ as a forum to bring issues related to fisheries.¹⁰⁰

Hopes to use the World Trade Organization (“WTO”) as an alternative forum to adjudicate environmental issues have grown over the past two decades.¹⁰¹ However, recent cases demonstrate that this endeavor will be difficult at best.¹⁰² Though Article XX of the

95. *Id.*

96. HUNTER, *supra* note 17, at 773.

97. UNCLOS, *supra* note 39, at art. 287, para. 1, sub. a.

98. *Id.* at art. 290; *Fish Stocks Agreement*, *supra* note 48, at art. 31; *see* Southern Bluefin Tuna (N. Z. v. Japan; Austl. v. Japan), Case Nos. 3 & 4, Order of Aug. 27, 1999, <http://www.itlos.org/index.php?id=62#c596> (proscribing measures to conserve southern bluefin tuna stocks).

99. *See* Fisheries Jurisdiction (Ger. v. Ice.), 1973 I.C.J. 49, 50 (Feb. 2) (deciding a dispute over Iceland extending its fisheries jurisdiction); *see* Fisheries Jurisdiction (U.K. v. Nor.), 1951 I.C.J. 116, 118 (Dec. 18) (discussing the validity of the Norwegian fisheries zone); *see* Fisheries Jurisdiction (U. K. v. Ice.), 1973 I.C.J. 3 (Feb. 2) (adjudicating a dispute between the U.K. and Iceland over Iceland’s proposed extension of its exclusive fisheries jurisdiction); *see* Fisheries Jurisdiction (Spain v. Can.), 1998 I.C.J. 432, 435 (Dec. 4) (deliberating a dispute between Spain and Canada over a Canadian Fisheries Protection Act).

100. *See* Whaling in the Antarctic (Austl. v. Japan: N.Z. intervening), 2014 I.C.J. 18–22 (Mar. 31) (adjudicating a dispute over Japan’s obligations under the International Convention for the Regulation of Whaling).

101. *See* HUNTER, *supra* note 17, at 1226 (stating that because of a case heard by the WTO, the issue of “like products” was brought to the public’s attention).

102. *See* Panel Report, *United States—Restrictions on Imports of Tuna*, WT/DS21/R (Sept. 3, 1991) (discussing restrictions on tuna imports to the United States) [hereinafter *WTO Restrictions on Tuna Imports*]; *see* Panel Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/R

General Agreement on Tariffs and Trade (“GATT”) seemingly allow states to create trade restrictions based on environmental considerations,¹⁰³ the standard has proven an elusive one to meet.¹⁰⁴ Yet, application of approved RFMO trade sanctions, such as those passed by ICCAT in 1994,¹⁰⁵ may survive GATT scrutiny because of their multilateral nature.¹⁰⁶

Ultimately, litigation relating to enforcement of fisheries is infrequent.¹⁰⁷ And the peril of fisheries remains, despite the plethora of legal enforcement options available to the international community.¹⁰⁸

In summary, states have several international fisheries enforcement options through UNCLOS, the Fish Stocks Agreement, RFMOs, the FAO Code of Conduct, and litigation. However, the FAO continues to publish warnings about the perilous situation of the world’s fisheries.¹⁰⁹ Despite the conservation goals and cooperative framework that have been established, many stocks are over-exploited and nearly all the rest are fully exploited.¹¹⁰ An inquiry into the failures and weaknesses of the current legal system explains why the danger to the world’s fisheries remains.

(May 15, 1998) (discussing a ban in the U.S. on certain imported shrimp) [hereinafter *WTO Panel Report on Shrimp Ban*].

103. General Agreement on Tariffs and Trade art. XX, para. g, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT].

104. See *WTO Restrictions on Tuna Imports*, *supra* note 102 (holding that the Pelly Amendment may violate GATT Article XX); see *WTO Panel Report on Shrimp Ban*, *supra* note 102 (holding that the U.S. restrictions did not meet the requirements under GATT Article XX *chapeau*).

105. Carr & Scheiber, *supra* note 35, at 73.

106. See Tyler, *supra* note 38, at 87–90 (explaining that trade sanctions and other RFMOs probably do not “run afoul” of Article XX of GATT, due in part to their requirement to make good faith efforts to negotiate multilateral agreements).

107. See HUNTER, *supra* note 17, at 775 (stating that the Tribunal has only heard 15 cases since 2009).

108. See FAO STATE OF THE WORLD, *supra* note 9, at 59 (concluding that the state of world marine fisheries is worsening).

109. *Id.*

110. *Id.* at 53.

III. WEAKNESSES AND FAILURES OF THE CURRENT LEGAL REGIME

Before UNCLOS, no state had an incentive to limit their fleet's catch to a sustainable level.¹¹¹ While it may be in the common interest of each state to conserve fishery captures to a sustainable limit, it is in each state's immediate interest to capture as many fish as possible.¹¹² This freedom of catch approach represents a classic case of the tragedy of the commons.¹¹³ In this situation, each fisher catches as many fish as possible because "if one person does not capture it, another person will."¹¹⁴

A frequent solution to this commons problem is to allocate property rights to the resource, thereby providing a direct incentive for a party to conserve the resource.¹¹⁵ In the context of fisheries, a state "owner" has the right to exclude other states' fishers from the stock, and the absence of competition creates an incentive for sustainable conservation.¹¹⁶ Therefore, when UNCLOS created EEZs, most assumed that putting 90% of the world's fisheries under national jurisdiction would encourage conservation and sustainable practices through strict national oversight.¹¹⁷ However, the exact opposite occurred.¹¹⁸

Two of the biggest problems resulting from this regulatory change in fishing resources include subsidies and illegal, unreported,

111. Andrew Fagenholz, *A Fish in Water: Sustainable Canadian Atlantic Fisheries Management and International Law*, 25 U. PA. J. INT'L ECON. L. 639, 643 (2004).

112. HUNTER, *supra* note 17, at 763.

113. Many environmental resources, such as fish, are "public goods," meaning that everyone shares the benefits but no one owns the resource. There are no market signals, like price, to signal scarcity. While each individual's decision to use as many resources as possible is rational in the short term, it ultimately leads to the exhaustion of the resource in the long term. If the primary objective of fishing states is to maximize individual wealth, the market failure to place sustainable limits on fish stocks will ultimately result in the exhaustion of the ocean's resources. *Id.* at 104–05.

114. Fagenholz, *supra* note 111, at 643.

115. HUNTER, *supra* note 17, at 763.

116. Fagenholz, *supra* note 111, at 644.

117. HUNTER, *supra* note 17, at 763.

118. *Id.*

and unregulated fishing.¹¹⁹ Both represent significant problems that the current international regulatory framework is inadequate to control. This inability results in over-exploitation of stocks and enforcement difficulties.¹²⁰ An analysis of these two issues illustrates the weaknesses and failures of the current international framework.

A. Subsidies

After the creation of EEZs and the resultant eagerness to exploit their new national resources, states began to subsidize their national fishing industries.¹²¹ National fishing subsidies include low-cost government loans, tax breaks, guarantees against defaults, funding of new technology and boat construction, and other services like harbor improvement.¹²² Subsidies distort traditional markets by investing and hiding losses in sectors that competition would otherwise prevent.¹²³ Fishing subsidies amount to a loss of \$16 billion per year,¹²⁴ or about 25% of the value of the world's fish catch.¹²⁵ Additionally, Oceana estimates that American fishing subsidies cost taxpayers nearly \$520 million per year.¹²⁶

Ultimately, subsidies combine to encourage the overcapacity of national fishing fleets,¹²⁷ which exploit high seas fisheries once

119. Tim Eichenberg & Mitchell Shapson, *The Promise of Johannesburg: Fisheries and the World Summit on Sustainable Development*, 34 GOLDEN GATE U. L. REV. 587, 597 (2004); see also Tyler, *supra* note 38, at 51 (explaining that illegal, unreported and unregulated fishing continues to be a major problem, despite regulatory efforts).

120. See HUNTER, *supra* note 17, at 764 (referring to fact that coastal states, under UNCLOS, bear the primary responsibility to conserve fish stocks).

121. *Id.*

122. Eichenberg, *supra* note 119, at 597; Fagenholz, *supra* note 111, at 644.

123. Fagenholz, *supra* note 111, at 644.

124. U. Rashid Sumaila et al., *A Bottom-up Re-Estimation of Global Fisheries Subsidies*, 12 J. BIOECON 201, 201 (2010).

125. *More on Fisheries Subsidies*, OCEANA, <http://oceana.org/en/our-work/promote-responsible-fishing/fishing-subsidies/learn-act/more-on-fisheries-subsidies> (last visited Oct. 25, 2014).

126. HUNTER, *supra* note 17, at 764.

127. Eichenberg, *supra* note 122, at 597.

national EEZ stocks are depleted.¹²⁸ Subsidies may also place downward pressure on global fish prices, further exacerbating overexploitation.¹²⁹ With a global fishing fleet estimated to be 250% larger than necessary to catch sustainable amounts of fish, governments face internal economic and political pressures to support overfishing practices.¹³⁰ The FAO recognizes that eliminating national fishing subsidies lies outside the scope of the current international legal regime: “[F]isheries reform would ‘require broad-based political will founded on a social consensus’ with a ‘common vision that endures changes of governments,’ which would take time to build.”¹³¹ The problem is further exacerbated in regionally shared waters managed by multiple states in RFMOs.¹³² Subsidies represent a significant problem that the international fishing legal regime currently cannot effectively manage.¹³³

B. Illegal, Unreported, and Unregulated Fishing and Flag State Enforcement

Subsidies also support another weakness within the current legal regime known as illegal, unreported, and unregulated (“IUU”) fishing, sometimes called pirate fishing.¹³⁴ IUU fishing is any fishing that does not comport with national, regional, or global fisheries obligations.¹³⁵ Estimates consider IUU fishing to be responsible for up to \$25 billion of the fish catch each year.¹³⁶ In addition, developing countries suffer the brunt of this practice.¹³⁷ While countries are able to pursue IUU vessels operating in their EEZs,

128. See HUNTER, *supra* note 17, at 764 (explaining that developing nations will sell their EEZ fishing rights to foreign vessels to fish in their waters).

129. *Id.*

130. Eichenberg, *supra* note 119, at 597.

131. FAO STATE OF THE WORLD, *supra* note 9, at 200.

132. *Id.* at 201.

133. Sumalia, *supra* note 124, at 204–06, 217.

134. FAO STATE OF THE WORLD, *supra* note 9, at 201.

135. NAT’L OCEANIC AND ATMOSPHERIC ADMIN., IMPROVING INTERNATIONAL FISHERIES MANAGEMENT 8 (2013) [hereinafter IMPROVING FISHERIES MANAGEMENT].

136. *Id.* at 9.

137. FAO STATE OF THE WORLD, *supra* note 9, at 17.

enforcement on the high seas remains within the exclusive control of the flag state, pursuant to UNCLOS.¹³⁸ Although UNCLOS requires a genuine link between a state and a ship registered there, this standard is open to exploitation by states that permit vessel registration without strict requirements for nationality, safety, or fishing practices.¹³⁹ Thus, ships fly flags of convenience and engage in IUU, knowing that their flag states will not enforce international standards against them.¹⁴⁰

IUU fishing is one manifestation of the deeper problem—that the organizations responsible for enforcing international sustainable fishing practices must rely on flag state enforcement.¹⁴¹ The Fish Stocks Agreement attempted to solve this problem by granting RFMO member states the authority to inspect non-flag states.¹⁴² However, inspecting states have little enforcement authority, which is always subject to the intervention of a flag state.¹⁴³

Dependence on flag states for the primary authority in investigation and sanctioning international violations means “the success of the [Fish Stocks] Agreement will depend on the willingness of flag states to contribute equitably to the required reduction in excessive fishing effort which characterizes many high seas fisheries.”¹⁴⁴ In addition, “there will always be a risk that investigations will not be thorough or that penalties will not be strong enough” to deter violation.¹⁴⁵ Thus, much like subsidies, flag states

138. UNCLOS, *supra* note 39, arts. 21, 94, & 111.

139. Jessica K. Ferrell, *Controlling Flags of Convenience: One Measure to Stop Overfishing of Collapsing Fish Stocks*, 35 ENVTL. L. 323, 328–29 (2005).

140. HUNTER, *supra* note 17, at 766.

141. Ferrell, *supra* note 139, at 356.

142. *Id.* at 355.

143. On clear grounds of a serious violation, an inspecting state may board a ship. It must notify the flag state and secure evidence of any violations. Inspecting states may take a ship to the nearest port and impose sanctions, subject to the permission or failure of a flag state to respond to a report. Flag states may assert supervening jurisdiction over the vessel at any time. All actions taken by inspecting states must be proportionate. *Id.* at 355–57.

144. Eichenberg, *supra* note 119, at 610–11.

145. *Id.* at 610.

must overcome significant political and economic obstacles to pursue greater enforcement objectives.¹⁴⁶

Flag states face strong domestic opposition from subsidized fishing industries,¹⁴⁷ making enforcement decisions politically and economically difficult. Furthermore, states permitting flag of convenience registration exist for the exact opposite purpose—to encourage lax enforcement for economic gain.¹⁴⁸ Even more, punishing IUU vessels fails to reach the states, those responsible for ensuring actual compliance and enforcement.¹⁴⁹ Just as convicting pirates of high seas violations fails to solve the broader issue of piracy, convicting IUU vessels and crew fails to solve the broader issue of lack of enforcement by flag states.¹⁵⁰

In conclusion, both IUU fishing and subsidies illustrate the failures of the current international fishing regime. Each supports practices of over-fishing and incentivizes economic and political behavior that discounts sustainability.¹⁵¹ Countries must overcome these obstacles if they wish to change their laws and behavior in favor of sustainable quotas and fishing practices. Thus, if the global community wishes to solve the fisheries problems, these weaknesses and failures of the current system demand a new approach.

IV. ALTERNATIVE ENFORCEMENT STRATEGY: THE INTRODUCTION OF INCENTIVES TO INDUCE COMPLIANCE

Despite the common adage that “you catch more flies with honey than vinegar,” the majority of international law scholarship focuses on the imposition of sanctions rather than the provision of incentives to engender compliance with international law.¹⁵² Notable theories argue that: states comply with international law because compliance

146. Ferrell, *supra* note 139, at 368.

147. HUNTER, *supra* note 17, at 764.

148. Ferrell, *supra* note 139, at 361.

149. *Id.* at 364.

150. *Id.* at 365.

151. HUNTER, *supra* note 17, at 764.

152. Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CAL. L. REV. 1823, 1825 (2002).

is efficient;¹⁵³ consent generates a legal obligation that leads to compliance;¹⁵⁴ obligations generated through a legitimate process, such as a democratic mechanism, encourage states to comply;¹⁵⁵ certain patterns or norms of international behavior are incorporated within states' domestic legal institutions, leading to compliance;¹⁵⁶ or compliance is due to states' concerns about their reputation and fear of direct sanctions for law violations.¹⁵⁷ Neorealist theorists posit that compliance with international law is merely a coincidence, a matter of course when national self-interest and international law overlap.¹⁵⁸ In contrast, others argue that institutions reduce the transaction costs of punishing violators and increase the occurrence of state interaction, making cooperation between states more likely than with the imposition of sanctions.¹⁵⁹

While the idea of rational, self-interested state actors has great explanatory power, the confinement of the model to the imposition of sanctions or transaction costs is limiting. For example, when using the popular game theory of the "prisoner's dilemma" to explain two countries' rational decision-making in the context of an arms control treaty, the equilibrium is for both states to violate their obligations under international law.¹⁶⁰ The common solution to this problem is to create a law that increases the cost of violation to make the rational decision tip in favor of compliance rather than defection.¹⁶¹ Of course, this method is only an effective model of international law compliance if there is some mechanism by which violators of the law

153. *Id.* at 1831–33.

154. *Id.* at 1833.

155. *Id.* at 1834.

156. *Id.* at 1835.

157. *Id.* at 1827.

158. *Id.* at 1836–37.

159. *Id.* at 1840.

160. *Id.* at 1842–43. The default model is one where countries decide in a single instance whether to comply with the arms control treaty. In a basic prisoner's dilemma model, each country is better off if it violates the treaty and the other country complies. In contrast, both are better off if they both comply compared with when both violate the treaty. The equilibrium in this scenario is for the states to violate the arms control treaty seeking to improve their position.

161. *Id.* at 1844.

may be sanctioned.¹⁶² Critics of international law and its effectiveness claim that the sanctioning mechanisms of the international law system are never sufficient for states to tip the balance in favor of compliance.¹⁶³

It is simple to perceive this situation in the current international legal framework for fisheries. While there is a comprehensive system of international fishery regulations and obligations, there are weak enforcement strategies that are never able to tip the balance away from the economic and political costs states must overcome to comply with fishery obligations. Instead, states overfish and deplete stocks in favor of the short-term economic and political gains that accompany unsustainable fishing practices. To deal with this problem, scholarship calls for stronger enforcement mechanisms such as trade sanctions,¹⁶⁴ stricter technology and monitoring regulations,¹⁶⁵ and legal proceedings.¹⁶⁶ Absent from these writings is the idea that states should introduce incentives to induce compliance rather than increase the strength of punishment to prevent violation.

By introducing incentives, states will be able to tip the balance of a rational, self-interested state's decision in favor of compliance. Unlike the difficulties that the international fishery law system faces to strengthen enforcement mechanisms, which must overcome political and economic obstacles, incentives allow states to overcome these obstacles by generating the necessary capital to implement compliance measures. Similar to sanctions, bilateral incentives (meaning those provided country-to-country) will be most effective because the incentive-providing country enjoys the benefits of the potential violator's compliance.¹⁶⁷ Multilateral incentives, on the other hand, open up the potential for free-riding states to enjoy the benefits of other states' efforts,¹⁶⁸ reducing the benefit for a state that

162. *Id.* at 1845.

163. *Id.*

164. Tyler, *supra* note 38, at 82; Carr & Scheiber, *supra* note 35, at 50.

165. Nicola Kieves, *Crisis at Sea: Strengthening Government Regulation to Save Marine Fisheries*, 89 MINN. L. REV. 1876, 1912 (2005).

166. Peel, *supra* note 48, at 53.

167. Guzman, *supra* note 152, at 1869.

168. *Id.*

expends the resources to provide incentives for compliance. Therefore, the most suitable strategy to create greater compliance with sustainable fishing quotas and practices is to introduce bilateral incentives into the existing system of international regulation, enabling states to generate the necessary capital to make a rational decision in favor of compliance. Indeed, there is historical precedent establishing the effectiveness of introducing incentives to get states to comply with international law—the peace agreement between Israel and Egypt in 1979.

A. *Israel–Egypt Peace Treaty of 1979*

A 1985 *New York Times* poll indicated that the American public considered the Camp David Accords (which produced the Israel–Egypt Peace Treaty) the most successful American foreign policy initiative to date.¹⁶⁹ Despite criticisms that the peace negotiation failed to find an effective solution to the Palestine question or solve the tensions between Israel and other Arab nations, the agreement did bring peace to Egypt and Israel, an outcome impossible to imagine a decade earlier.¹⁷⁰ It resulted in Israel’s withdrawal from Sinai, the dismantling of civilian settlements located there, and the establishment of diplomatic relations between Israel and Egypt.¹⁷¹ What made the Camp David negotiations unique was that threats were rarely uttered and the United States did not use heavy-handed pressure with either side.¹⁷² Instead, the United States was able to offer incentives to both Israel and Egypt that induced compliance with the peace agreement. This tactic ultimately changed each state’s decision-making calculation in favor of compliance rather than violation of international law. To understand the difference that the provision of incentives made in the Israeli–Egyptian case, an

169. William B. Quandt, *Camp David and Peacemaking in the Middle East*, 101 POL. SCI. Q. 357, 358 n.1 (1986).

170. *Id.* at 359; John B. Quigley, *Camp David Accords (1978)*, in MAX PLANCK ENCYCLOPEDIA OF PUB. INT’L LAW (Rudiger Wolfrum ed., 2009), <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1264?rskey=6jOPt4&result=1&prd=EPIL>.

171. Quigley, *supra* note 170.

172. Quandt, *supra* note 169, at 360.

overview of the states' obligations and incentives that the United States offered is necessary.

The Israel–Egypt Peace Treaty certainly created international obligations for both states. Article I stated that each state would “refrain from the threat or use of force, directly or indirectly, against each other and will settle all disputes between them by peaceful means.”¹⁷³ It also required Egypt to establish diplomatic relations with Israel, while Israel agreed to withdraw its troops from the Sinai.¹⁷⁴ Both states would have faced international sanctions for failure to comply with these obligations.¹⁷⁵ However, the United States offered additional incentives to both states for complying with their obligations.

This unique approach proved to be a breakthrough in securing both states' cooperation. Up until that point, the mere reciprocity of obligations between Israel and Egypt did not produce a peace agreement. Indeed, of the four agreements between Israel and Egypt between 1974 and 1979, each one featured heavy participation from the United States.¹⁷⁶ The introduction of incentives tipped the balance of the obligations for peace in favor of compliance. The United States committed significant financial resources to both Egypt and Israel, in addition to military support and oil supplies for Israel.¹⁷⁷ Egypt not only received its territory back, but the introduction of United States financial aid would allow it to turn its attention to domestic development, reducing the need for Egypt to rely on the political capital of a broader pan-Arab movement.¹⁷⁸ Similarly, Israel, with the promise of American military support, in addition to an Egyptian promise of peace, could focus its attention on

173. Peace Treaty Between Israel and Egypt, Isr.-Egypt, art. III, Mar. 26, 1979, 18 I.L.M. 362.

174. *Id.* at arts. 1, 3.

175. International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts* art. 2 (November 2001), available at <http://www.ilsa.org/jessup/jessup06/basicmats2/DASR.pdf>.

176. Quandt, *supra* note 169, at 359.

177. Quigley, *supra* note 170.

178. See Quandt, *supra* note 169, at 357 (stating that Egypt resumed diplomatic relations with other Arab countries without renouncing its peace with Israel).

other threats without fear of Egyptian military aggression.¹⁷⁹ For both states, incentives provided by the United States allowed each to make a rational decision in favor of peace treaty compliance. This same model can work in the international fisheries context.

B. The United States and Panama: A Case Study of Possible Incentives for International Fisheries

The United States is Panama's largest trading partner, accounting for approximately 23% of all of its two-way trade.¹⁸⁰ In 2013, United States exports to Panama totaled \$10.5 billion, and its imports from Panama totaled \$448 million.¹⁸¹ The US–Panama Trade Promotion Agreement indicates that United States and Panama trade relations will continue to grow.¹⁸² In recent trade between the two countries, fish and seafood was the second largest import category.¹⁸³ Unfortunately for Panama, its status as one of the largest sources of flags of convenience vessels complicates this relationship.¹⁸⁴

As discussed above, flags of convenience vessels are a major source of IUU fishing.¹⁸⁵ Of Panama's vessel registrations, 80.4% of vessels are foreign-owned.¹⁸⁶ The United States department responsible for fishery oversight identified Panama as one of six

179. *Id.*

180. *Fact Sheet: U.S.-Panama Relations*, WHITE HOUSE OFFICE OF THE PRESS SEC'Y (Nov. 19, 2013), <http://www.whitehouse.gov/the-press-office/2013/11/19/fact-sheet-us-panama-relations> [hereinafter *Panama Relations Fact Sheet*].

181. U.S. CENSUS BUREAU, FOREIGN TRADE: TRADE IN GOODS WITH PANAMA, available at <http://www.census.gov/foreign-trade/balance/c2250.html> (last visited Nov. 8, 2014).

182. *Panama Relations Fact Sheet*, *supra* note 180.

183. *Panama*, OFFICE OF THE U.S. TRADE REPRESENTATIVE, <http://www.ustr.gov/countries-regions/americas/panama> (last visited Oct. 31, 2014).

184. *Flags of Convenience*, INT'L TRANSP. WORKERS' FED'N, <https://www.itfglobal.org/flags-convenience/flags-convenience-183.cfm> (last visited Nov. 16, 2014) [hereinafter *Flags of Convenience*].

185. Ferrell, *supra* note 139, at 329.

186. CIA WORLD FACTBOOK: PANAMA, <https://www.cia.gov/library/publications/the-world-factbook/geos/pm.html> (last visited Nov. 8, 2014).

nations engaging in IUU fishing during 2012 and 2013, and one of ten nations engaged in IUU fishing based on violations of international conservation and management measures during 2011 and 2012.¹⁸⁷ Several Panamanian-flagged vessels have been documented violating Inter-American Tropical Tuna Commission (“IATTC”) resolutions.¹⁸⁸ These violations include illegal tuna discarding, violating the purse seine net closure period,¹⁸⁹ and fishing without registering with the IATTC.¹⁹⁰

While the National Marine Fisheries Service (“NMFS”) determined that the government of Panama took appropriate action to address IUU fishing practices during 2009 and 2010, Panamanian-flagged vessels continued to violate international fisheries law during 2011 and 2012.¹⁹¹ Therefore, it appears that the current enforcement strategy, where the Panamanian government fines individual vessels and crew, is doing little to prevent IUU fishing.¹⁹² Prosecution of criminal vessels and crews does not result in the Panamanian registry changing its standards—the true source of IUU problems.¹⁹³ Indeed, vessels and crew remain undeterred by judicial prosecution and

187. IMPROVING FISHERIES MANAGEMENT, *supra* note 135, at 3.

188. *Id.* at 28.

189. A purse seine is a vertical net. It encircles a school of tuna and entraps the school by connecting back up with a smaller ship. Large-scale tropical tuna purse seine vessels have the capacity to hold 637,000 tons of fish at once. Purse Seine, INT’L SEAFOOD SUSTAINABILITY FOUND., <http://iss-foundation.org/purse-seine/> (last visited Oct. 31, 2014). The practice is not without controversy however. The capacity and process have the potential of causing large by-catch and putting unsustainable pressure on stock populations. Willie Mackenzie, *When Purse-seining Goes Bad*, GREENPEACE INT’L BLOG (May 18, 2010, 7:32 PM), <http://www.greenpeace.org/international/en/news/Blogs/makingwaves/when-purse-seining-goes-bad/blog/11803/> (last visited Oct. 31 2014). Out of concern, IATTC limits the period when purse seine tuna vessels may operate. Inter-American Tropical Tuna Commission [IATTC], *Recommendation on a Multiannual Program for the Conservation of Tuna in the Eastern Pacific Ocean in 2011-2013* para. 3, C-10-01 (Oct. 1, 2010).

190. IMPROVING FISHERIES MANAGEMENT, *supra* note 135, at 28, 46.

191. *Id.* at 49.

192. *Id.*

193. Ferrell, *supra* note 139, at 364.

simply evade responsibility by re-registering.¹⁹⁴ Therefore, the enforcement strategy must reach the flag state itself to encourage it to change its approach towards sustainable fishery management practices.

The United States has two possible options to engender greater compliance from Panama. First, it may impose sanctions on Panama to force compliance, or second, it may offer incentives to Panama in exchange for compliance. Part 1 analyzes why imposing sanctions in this context would be ineffective to produce greater compliance from Panama. In contrast, Part 2 demonstrates why introducing incentives will result in greater compliance by Panama.

1. The United States and Panama: Sanctions

One possible sanction that the United States could pursue against Panama to force fisheries compliance is a process of “naming and shaming.” The idea is that the threat of a negative reputation encourages a state to comply with international law.¹⁹⁵ In fact, the United States already pursues this option by publishing an annual IUU report that identifies countries that do not comply with their international fishing obligations.¹⁹⁶ Panama is a frequent fixture in those reports.¹⁹⁷ Indeed, Panama’s reputation for registering flags of convenience that result in IUU violations is well known.¹⁹⁸ Panama’s repeated IUU violations are evidence that Panama does not care about its reputation in the context of fishing. Panama simply does not care about its fishing compliance reputation on the international stage, at least not enough to change its compliance behavior. Instead, the only way to incentivize Panama to change its behavior in favor of compliance is to entice it with the opportunity to improve its reputation. Further reputation deterioration will not affect Panama in a significant way because it faces no additional punishments as a

194. *Id.* at 365; IMPROVING FISHERIES MANAGEMENT, *supra* note 135, at 48.

195. Guzman, *supra* note 152, at 1827.

196. IMPROVING FISHERIES MANAGEMENT, *supra* note 135, at 3.

197. *Id.*

198. *Flags of Convenience*, *supra* note 184.

result, leaving intact the political and economic incentives for its non-compliance.

Instead of trying to shame Panama's reputation, the United States may pursue sanctions against specific Panamanian vessels violating international fishing regulations. Authority granted under the Fish Stocks Agreement and IATTC regulations permit the United States to board, inspect, and impose sanctions on violators if it has sufficient evidence.¹⁹⁹ However, this authority is contingent upon Panama's permission.²⁰⁰ As the flag state, Panama has the purview to intervene at any time and usurp prosecutorial action that the United States may wish to take against a Panamanian-flagged ship.²⁰¹ Indeed, the United States' prosecution of vessels likely will not be permitted by Panama due to political and economic obstacles. Since Panama's economy relies heavily on foreign vessel registration,²⁰² it may worry that an increased threat of United States prosecution will drive foreign vessels to competitor registrars, such as El Salvador. In addition, Panama has a record of pursuing sanctions against identified vessel violators in its own domestic courts,²⁰³ further bolstering the chance that Panama will choose to intervene and prosecute vessels itself rather than allowing the United States the right of prosecution.

Moreover, the endeavor of monitoring and prosecuting Panamanian vessel violators in IATTC waters is a geographic and monetary near-impossibility for the United States.²⁰⁴ The United States' jurisdiction over its own EEZ fishery resources covers more than 100,000 miles of United States coastline and more than 2.2 million nautical square miles of the sea.²⁰⁵ This area is nearly double the size of the country and includes nearly 20% of the world's capture fisheries.²⁰⁶ Despite an elaborate domestic statutory framework, political and budgetary enforcement fails to sustain even

199. Ferrell, *supra* note 139, at 355–56.

200. *Id.* at 356.

201. Eichenberg, *supra* note 119, at 610.

202. CIA WORLD FACTBOOK, *supra* note 186.

203. IMPROVING FISHERIES MANAGEMENT, *supra* note 135, at 48.

204. HUNTER, *supra* note 17, at 776.

205. *Id.*

206. *Id.* at 776–77.

the most commercially important domestic fish stocks.²⁰⁷ Attempting to expand regulatory and enforcement efforts beyond the United States' EEZ to international waters is infeasible.²⁰⁸ If the implementation of domestic enforcement has failed to manage EEZ fisheries effectively, what reason is there to think that enforcement in international IATTC waters will prove more successful or even possible?²⁰⁹

Finally, as discussed above, prosecuting individual violators fails to address the underlying issues of state non-compliance.²¹⁰ Individual Panamanian vessel owners and crew may disregard judgments and simply reflag in a new country or join a new crew.²¹¹ Instead, what is needed is an incentive for Panama to alter its flag of convenience vessel registrations from the state level. Sanctions cannot engender the political or economic will needed to do this.

Instead of seeking to punish individual vessel violators, the United States may seek to sanction Panama under the current international fishery framework. One possibility is for the United States to sue Panama in an international tribunal for violations of its international fishery obligations.²¹² However, a *prima facie* case of an international law violation would be difficult to make out, as shown in the previous failures of international fishery litigation.²¹³ Indeed,

207. *Id.* at 777.

208. *Id.*

209. *See id.* (asserting that the United States has managed its fishing resources poorly).

210. Ferrell, *supra* note 139, at 365.

211. Eichenberg, *supra* note 119, at 614.

212. *Fish Stocks Agreement*, *supra* note 55, at art. 3, para. 1.

213. *See* Southern Bluefin Tuna (N. Z. v. Japan; Austl. v. Japan), Case Nos. 3 & 4, Order of Aug. 27, 1999, <http://www.itlos.org/index.php?id=62-c596> (stating that the parties failed to make a *prima facie* case); *see* Fisheries Jurisdiction (Ger. v. Ice.), 1973 I.C.J. 49, 50 (Feb. 2) (deciding a dispute over Iceland extending its fisheries jurisdiction); *see* Fisheries Jurisdiction (U.K. v. Nor.), 1951 I.C.J. 116 (Dec. 18) (discussing the validity of the Norwegian fisheries zone); *see* Fisheries Jurisdiction (U. K. v. Iceland), 1973 I.C.J. 3 (Feb. 2) (adjudicating a dispute between the U.K. and Iceland over Iceland's proposed extension of its exclusive fisheries jurisdiction); *see* Fisheries Jurisdiction (Spain v. Can.), 1998 I.C.J. 432, 468 (Dec. 4) (holding that the court did not have jurisdiction to adjudicate the dispute between Spain and Canada over a Canadian fisheries statute).

Panama has a strong argument that it complies with all its international obligations, at least to the extent that it should not be held liable for damages.²¹⁴ The very fact that flags of convenience exist demonstrates a gap in the international fishery law framework.²¹⁵ Panama's vessel registry is de jure compliant, even if it leads to de facto non-compliance by individual vessels.²¹⁶

In addition, Panama will likely argue that it cannot be held liable as a state for the non-compliance of individual vessels. It cooperates with states under the IATTC framework and does pursue some remedial action against violators in its domestic courts.²¹⁷ Furthermore, what is the remedy to be granted by an international tribunal? Any tribunal is unlikely to have the authority to order Panama to change its domestic law to prevent flag of convenience registration.²¹⁸ While a negative judgment against Panama may generate some political will to alter domestic policies, the economic obstacles remain, favoring no behavior change on the part of Panama.

Seeking to change this economic situation, the United States may try to impose trade sanctions against Panama. However, trade sanctions based on environmental fishing considerations have yet to prevail in the WTO.²¹⁹ The United States cannot impose trade sanctions unilaterally under current interpretations of GATT restrictions,²²⁰ and it will have to seek negotiation and permission for sanctions under the multilateral auspices of IATTC.²²¹ Currently,

214. See *Whaling*, 2014 I.C.J. at 18–22 (assessing Japan's liability).

215. Ferrell, *supra* note 139, at 329.

216. *Flags of Convenience*, *supra* note 184.

217. IMPROVING FISHERIES MANAGEMENT, *supra* note 135, at 48–49.

218. UNCLOS, *supra* note 39, at art. 297, para. 1, sub. b.

219. See *WTO Restrictions on Tuna Imports*, *supra* note 102 (holding that the U.S. restrictions did not meet the requirements under GATT Article XX); see *WTO Panel Report on Shrimp Ban*, *supra* note 102 (holding that the U.S. restrictions did not meet the requirements under GATT Article XX *chapeau*).

220. See *WTO Restrictions on Tuna Imports*, *supra* note 102 (holding that the U.S. restrictions did not meet the requirements under GATT Article XX); see *WTO Panel Report on Shrimp Ban*, *supra* note 102 (holding that the U.S. restrictions did not meet the requirements under GATT Article XX *chapeau*).

221. See Tyler, *supra* note 38, at 88 (stating that “unilateral trade measures are appropriate when all of Article XX's requirements have been met, and . . . multilateral solutions are a precursor to such actions”).

IATTC's authority does not include such far-reaching, binding authority.²²² This means that multilateral sanctions under IATTC will require a change of law approved by the IATTC member states.²²³ As Panama is a voting member in IATTC,²²⁴ any attempt to alter the organization's authority towards this outcome is unlikely at best. Therefore, the United States' ability to impose trade sanctions will also be ineffective.

The imposition of sanctions under the current international fishery framework simply cannot deal with the problem of Panamanian-flagged IUU fishing vessels. Whether the United States attempts to name and shame, seek individual vessel enforcement, sue Panama, or impose trade sanctions, there is not enough force behind these actions to incentivize Panama to overcome the political and economic obstacles to engender better compliance. Instead, the United States could offer an incentive for Panama to comply with sustainable fishing practices. This method would change the rational equation in favor of Panama's compliance by offering it both political and economic benefits for its actions.

2. The United States and Panama: Incentives

Since Panama heavily relies on the United States for trade, especially fish exports,²²⁵ the United States is in a unique position to offer incentives that encourage fisheries regulation compliance from Panama. Similar to the financial and diplomatic position the United States found itself in during the Israel–Egypt negotiations,²²⁶ this position allows the United States to negotiate an innovative solution. In addition, as the United States valued stability in the Middle East,²²⁷ the United States values sustainable fishing compliance,²²⁸

222. See *Rules of Procedure*, INTER-AM. TROPICAL TUNA COMM'N, <https://www.iattc.org/PDFFiles/IATTC-Rules-of-procedureENG.pdf> (last visited Oct. 31, 2014) (providing the rules that govern the IATTC).

223. *Id.*

224. INTER-AMERICAN TROPICAL TUNA COMM'N, <https://www.iattc.org/HomeENG.htm> (last visited Nov. 9, 2014).

225. *Panama Relations Fact Sheet*, *supra* note 180.

226. Quigley, *supra* note 170.

227. *Id.*

and finding the right incentives to offer Panama grants the United States many benefits in which it declares an interest.²²⁹

If the United States enables Panama to better comply with sustainable fishing practices, the United States will be able to fulfill many domestic statutory goals.²³⁰ These include: strengthening its leadership in improving international fisheries management and enforcement, especially for IUU fishing; helping the Secretaries of Commerce and State improve the effectiveness of international RFMOs; incorporating market-related measures to combat governments whose vessels participate in IUU fishing; encouraging other nations to take necessary steps to prevent IUU fish harvesting; and improving compliance for high seas and RFMO-regulated fisheries.²³¹ Furthermore, the United States “is a member of or has substantial interests in numerous international fisheries and related agreements and organizations,” which have sustainability and compliance goals of their own.²³² NMFS further believes that IUU activities jeopardize the United States’ ability to manage its fisheries sustainably and unfairly disadvantages national fishers.²³³ It is clear that the United States places a lot of value, in the form of economic and political capital, in combating IUU fishing and helping other nations do the same.²³⁴ Therefore, it is plausible that incorporating another enforcement mechanism—the introduction of incentives to generate other nations’ compliance towards this goal—is possible.

However, the United States must first find an appropriate incentive that will tip the balance of the decision in favor of Panama’s compliance with international law. As the United States

228. IMPROVING FISHERIES MANAGEMENT, *supra* note 135, at 7.

229. *Id.* at 7–8; *see also* Shark Conservation Act of 2010, 16 U.S.C. § 1801 (2012); Moratorium on Taking and Importing Marine Mammals and Marine Mammal Products, 16 U.S.C. § 1371 (2012); Lacey Act, 16 U.S.C. § 3371 (2001); Pelly Amendment to the Fisherman’s Protective Act of 1967, Pub. L. No. 92-219, 85 Stat. 786 (1971); Marine Mammal Protection Act, 16 U.S.C. § 1361 (2012); Endangered Species Act, 16 U.S.C. §§ 1531–1544 (2012); International Dolphin Conservation and Protection Act, Pub. L. No. 105-42, 111 Stat. 1122 (1997).

230. IMPROVING FISHERIES MANAGEMENT, *supra* note 135, at 7.

231. *Id.* at 7–9.

232. *Id.* at 9.

233. *Id.* at 15.

234. *Id.* at 7–8.

identified the appropriate financial and political incentives to offer Israel and Egypt for peace in 1979,²³⁵ it must similarly identify the appropriate incentives to offer Panama to engender its fishing compliance. Deforestation is one area where this trade-off is possible.

Deforestation in Panama is a significant problem, requiring United Nations and United States Agency for International Development (“USAID”) assistance.²³⁶ Agriculture is the largest driver of deforestation.²³⁷ Small farmers often engage in “slash and burn” tactics, cutting and burning a few acres of forest to feed their families.²³⁸ In addition, loggers not only cut down trees, but also continually build roads to access more remote forests.²³⁹

The results of deforestation are many, including the loss of habitat.²⁴⁰ Deforestation is also a driver of climate change.²⁴¹ While the quickest solution to the issue is to place a moratorium on all tree-harvesting activities, the international community recognizes that because of the involvement and reliance of indigenous communities on the forest, sustainable management is a more workable solution.²⁴²

Panama lacks a national forest program to deal with its deforestation problem on its own.²⁴³ Indicative of this are the USAID

235. Quigley, *supra* note 170.

236. See generally *Panama’s Efforts to Reduce Emissions*, UNEP NEWS CTR. (Dec. 13, 2013), <http://www.unep.org/newscentre/default.aspx?DocumentID=2756&ArticleID=10680> (last visited Oct 31, 2014) (discussing Panama’s efforts to stop deforestation); UNITED STATES AGENCY FOR INT’L DEV., PANAMA: ENVIRONMENT (2013), available at <http://www.usaid.gov/where-we-work/latin-american-and-caribbean/panama/environment> [hereinafter USAID PANAMA].

237. *Deforestation: Modern-Day Plague*, NAT’L GEOGRAPHIC, http://environment.nationalgeographic.com/environment/global-warming/deforestation-overview/?rptregcta=reg_free_np&rptregcampaign=20131016_rw_membership_r1p_us_se_c1#.

238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.*

242. *Id.*

243. See FOOD & AGRIC. ORG. OF THE UNITED NATIONS, GLOBAL FOREST RESOURCES ASSESSMENT 302 (2010) (reporting that while Panama has passed a national forest program, it has not implemented it yet).

and United Nations programs that provide resources for Panama to fight deforestation practices.²⁴⁴ USAID's regional program, the Management of Aquatic Resources and Alternative Development ("MAREA"), established a Sustainable Community Forestry in Darien, Panama.²⁴⁵ The program promotes sustainable forestry management by building capacity in indigenous communities.²⁴⁶ It does this by targeting the use of unsustainable resources in indigenous reserves of Panama.²⁴⁷ Increasing the budget of MAREA for deforestation assistance is an incentive the United States could offer in exchange for greater Panamanian compliance with international fisheries regulation.

To start, Panama faces great international pressure to deal with deforestation²⁴⁸ because deforestation is closely related to climate change and involves the rights of indigenous communities protected under international law.²⁴⁹ Panama would be able to "clean up" its environmental record on the international stage with increased USAID assistance to fight deforestation. Furthermore, because the United Nations recognizes indigenous issues as the most important in Panama's deforestation efforts, and because the existing USAID program builds capacity in indigenous communities and focuses on climate change adaptation,²⁵⁰ the United Nations program could further support the initiative.²⁵¹ This UN support could help underwrite USAID requests for increased budget allocations. In addition, connecting the deforestation effort to the United States' statutory obligations to assist Panama in fighting IUU fishing²⁵² would help

244. See *Panama's Efforts*, *supra* note 236 (discussing how the UN helps Panama's anti-deforestation efforts); USAID PANAMA, *supra* note 236.

245. USAID PANAMA, *supra* note 236.

246. *Id.*

247. See *id.* (targeting unsustainable resources in Panama).

248. See *Panama's Efforts*, *supra* note 236.

249. See *id.* (discussing the agreement between the Panama government and indigenous people to work together).

250. USAID PANAMA, *supra* note 236.

251. See *Panama's Efforts*, *supra* note 236 (discussing the United Nations' involvement with anti-deforestation efforts in Panama).

252. 16 U.S.C.A § 1801; 16 U.S.C. § 1371; 16 U.S.C. § 701; Pelly, *supra* note 229; 16 U.S.C. § 1361; 16 U.S.C. §§ 1531–1544; International Dolphin Conservation and Protection Act § 111.

generate economic and political capital for increased MAREA budgetary allocations. It is also easier to fund an existing program than to create a new program.²⁵³

Moreover, because Panama would exchange fisheries compliance for deforestation assistance, its reputation on environmental issues on the international stage could be strengthened. Because Panama is recognized by many states—including its largest trading partner, the United States—for poor environmental compliance when it comes to international fisheries,²⁵⁴ the incentive to repair its reputation will be meaningful to Panama. Indeed, one international legal scholar identified a positive reputation as the main driving force behind state compliance with its international obligations.²⁵⁵ Unlike the ineffectiveness of deteriorating Panama's reputation, the prospect of improving Panama's reputation provides Panama with tangible political benefits it could leverage internationally and domestically.

The United States receives at least 21% of Panamanian imports as fish and seafood products.²⁵⁶ This benefit, combined with its domestic duty to fight IUU fishing and to assist nations like Panama, allows the United States to enjoy the benefits of its resources expended for greater Panamanian compliance. While other states party to the IATTC will also receive benefits from greater Panamanian compliance, this “free riding” will not be enough to offset the United States' benefits because it receives them directly.

Of course, Panama must value the benefits of the deforestation program as greater than those it receives from engaging in IUU fishing. Given the negative attention, the poor reputation, and the costs of IUU investigations and judicial proceedings that Panama receives for non-compliance activities,²⁵⁷ the benefits of the

253. See *Glossary: Continuing Resolution/Continuing Appropriations*, U.S. SENATE, http://www.senate.gov/reference/glossary_term/continuing_resolution.htm (last visited Oct. 31, 2014) (defining a continuing resolution/appropriation as a resolution that provides continuing funding to current programs at the beginning of each fiscal year).

254. IMPROVING FISHERIES MANAGEMENT, *supra* note 135, at 36.

255. Guzman, *supra* note 152, at 1827.

256. *Panama*, *supra* note 183.

257. IMPROVING FISHERIES MANAGEMENT, *supra* note 135, at 46–49.

deforestation program could plausibly change Panama's rational decision making in favor of compliance. In contrast, the sanctions that the United States could impose on Panama are not strong enough to tip the balance in favor of compliance. Therefore, offering Panama the incentive of deforestation assistance is one example where the introduction of a bilateral incentive by the United States creates greater international fisheries regulation compliance.

CONCLUSION

The world does not want to repeat the same mistakes that led to the Newfoundland cod fishery collapse. Fishery resources remain an important food and economic resource for developed and developing countries alike.²⁵⁸ Despite the addition of the Fish Stocks Agreement and RFMOs to the regulatory framework in recent decades, the fish stocks of the world remain in peril.²⁵⁹ Many continue to be over-exploited, and the majority are fully exploited.²⁶⁰ Given the inexact science of predicting stock numbers and maximum sustainable yields, even those stocks supposedly exploited at "sustainable" levels may also be in danger.²⁶¹ While the international fishery law framework is expansive, many regulatory gaps allow countries to rationalize noncompliance with sustainable fishing practices.²⁶² Furthermore, scholarship focuses on the imposition of sanctions to engender greater sustainable fishing compliance.²⁶³ This approach is simply ineffective in the international fishery context. Instead, countries like the United States need to learn from the example of the Israel–Egypt Peace Treaty of 1979 and start offering countries incentives to comply with sustainable fishing practices. The introduction of incentives allows non-compliant states, like Panama, to overcome political and economic obstacles and make rational decisions in favor of compliance. Indeed, the world will catch less

258. FAO STATE OF THE WORLD, *supra* note 9, at 10.

259. *Id.* at 59.

260. *Id.* at 53.

261. *Id.*

262. Tyler, *supra* note 38.

263. Guzman, *supra* note 152, at 1825.

fish when countries start offering more honey in furtherance of this goal.