

The Possibility of Litigation Regarding Liability of Flag States in the Case of Vessel-Based Pollution: Where We Stand in the Law of the Sea

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Structured Abstract

Article Type: Research Paper

Purpose—Examining whether the current International Law of the Sea framework allows for litigation on flag state liability on the grounds of lack of compliance with pollution prevention provisions in the Law of the Sea Convention's Part XII.

Design, Methodology, Approach—Analyzing the issue according to the current legal and jurisprudential background, taking into consideration the international law of state responsibility and due diligence obligations. The aim is to establish whether there would be the possibility for this liability in international law.

Findings—The existing framework would allow for litigation regarding flag State liability for oil spills pursuant to the provisions of Part XII of the Law of the Sea Convention.

Practical Implications—This article could be used as a suggestion for improving marine pollution prevention mechanisms in terms of oil spills and other environmental regulations in the Law of the Sea.

Keywords: flag States, ITLOS, LOSC, oil spills, Part XII

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I. Introduction

Among all forms of marine pollution, oil spills attract the most attention, and have thus mobilized the international community the most in terms of codifying preventive legislation.¹ As a result of major oil spills at sea, the United Nations Convention on the Law of the Sea of 1982 (“LOSC”) establishes comprehensive regimes for the prevention of maritime pollution, with a particular emphasis on vessel-based pollution.² Some oil spills at sea, mainly those caused by oil tankers, occur due to a lack of maintenance and control of seaworthiness. Control of the seaworthiness and maintenance of vessels is a responsibility which exclusively pertains to the flag State, according to the LOSC’s provisions on the protection of the marine environment.³

The LOSC establishes a duty for flag states to exercise jurisdiction over their registered vessels, extending from administrative issues to those regarding maritime safety and seaworthiness.⁴ It also contains an extensive set of provisions for environmental protection and pollution prevention, including pollution resulting from oil spills.⁵ Flag states are called upon to adopt adequate legislation in order to prevent, reduce, and control pollution from ships flying their flag, establishing a standard to be followed in compliance with these duties.⁶

Flag state jurisdiction remains exclusive in the high seas and thus, is an obstacle to the proper enforcement of regulations against marine pollution.⁷ After all, this exclusivity means only these states can take preventative measures, and no other states can intervene. An attempt to strengthen this control has been seen in the form of initiatives such as the Paris Memorandum of Understanding, which establishes forms of port state control and monitoring over issues such as the seaworthiness of vessels.⁸ However, there is not worldwide coverage of these initiatives, and proper enforcement is ultimately debilitated since a large percentage of the world’s maritime tonnage is subject to what are called “flags of convenience.”⁹ These are states that provide for open registry of ships, with benefits such as lower taxes.¹⁰ These states usually make it easier for individuals to establish companies within their territories, resulting in weaker links between vessel owners and the state itself, making actual flag state enforcement a distant reality from the one aimed for during international conferences.¹¹ Many of the world’s famous pollution incidents, such as the *Erika* case, were caused by defective vessels flying such flags.¹²

The issue becomes even more complex due to the lack of a clear concept of “genuine link” between flag states and vessels, required by the LOSC for the registry of vessels.¹³ The concept was presented in the LOSC as an attempt to achieve a wider enforcement of norms through a stricter linkage between vessels and flag states, but remains undefined in the Law of the Sea. While the exclusivity of flag state jurisdiction is still regarded as a major obstacle in the enforcement of maritime pollution prevention legislation, some obligations and a certain degree of liability have been recognized.¹⁴ This article argues that public international law and Law of the Sea rules make it possible to litigate the issue of flag state liability when there is a lack of enforcement of pollution prevention provisions outlined in Part XII of the LOSC. Consequently, it also argues that this should be used as a way of elevating the stan-

dards to be applied by all flag states. In order to argue this, an overview of the applicable law on flag state jurisdiction is provided; the issue of “genuine link” and flags of convenience is analyzed; the attribution of responsibility for internationally wrongful acts in international law is conceptualized, with a specific focus on private actors; the issue of due diligence obligations is analyzed according to the current paradigm and, finally, the specific issue of flag state liability is discussed in light of current jurisprudence and legislation.

II. Flag State Jurisdiction and Oil Spills— An Overview of the Applicable Law

Although the advent of the LOSC signified many steps forward toward marine environmental protection, the regime of the high seas is still based on the premise of freedom of navigation.¹⁵ The LOSC, when regulating activities on the high seas, states freedoms in a non-exhaustive list, including the freedom of navigation.¹⁶ This is complemented by the logic presented immediately afterwards in the text, which establishes flag state jurisdiction as exclusive in the high seas, and concurrent in other states’ maritime zones.¹⁷

Besides the flag states’ primacy of jurisdiction over vessels, the LOSC also appears to give them discretion within their domestic laws regarding the registration of vessels, declaring that conditions to fix nationality are to be established within states’ own domestic laws.¹⁸ This was emphasized by the International Tribunal for the Law of the Sea (“ITLOS”) in the *M/V Saiga* case. Here, ITLOS stated that article 91 of the LOSC allows each state exclusive jurisdiction over issues of granting of nationality, with the freedom to fix their own conditions, seeing it as a codification of customary international law.¹⁹ This ends up leaving plenty of autonomy for flag states to establish their means of registering ships, and potentially to establish fewer ship registration requirements, which could arguably result in more legitimacy for so-called “flags of convenience.”

While conferring jurisdiction primarily on flag states, the LOSC establishes corresponding duties that should be performed.²⁰ There is a duty for the flag state to “[...] effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.”²¹ These duties are seen as complementary to guaranteeing freedom of navigation.²² Measures regarding, *inter alia*, the assessment of vessels’ seaworthiness are also imposed by the LOSC.²³

Along with the duty to exercise jurisdiction over vessels flying its flag, a state is also bound by environmental standards established in the LOSC. One of the LOSC’s major innovations was to provide for a general duty to preserve the marine environment.²⁴ This is seen by some as having passed into customary international law as a duty, while others, such as the authors of the Virginia Commentary, argue that it is a mere general provision which is always subject to other LOSC rights and duties.²⁵

Moreover, States are required to take measures to avoid incidents happening

under their jurisdiction and put controls in place to prevent cross border damage or pollution to other states.²⁶ Seeing the aforementioned issues regarding flag state jurisdiction, the logical conclusion is that this is yet another duty of flag states imposed by article 194 and subsequently by the LOSC.²⁷ The provisions of article 194 and its following articles, are defined by Czybulka as “[...] where the rather general principles of Arts. 192 and 193 are concretized and transformed into specific obligations of States.”²⁸ The understanding of the international jurisprudence in the *Trail Smelter*, *Corfu Channel* and *Pulp Mills* cases, in this sense, is that there is an obligation on states not to use their territories to cause harm to others.²⁹ This was echoed within the LOSC’s article 194, and is called the “no-harm principle.”³⁰ It is suggested that the wording in the article would make it applicable not only to states party to the LOSC, but also toward other states, which is important for a uniform approach to environmental protection if recognized as a part of customary international law.³¹

In order to establish the obligations of preservation of the marine environment and prevention of pollution, legislative standards are suggested in the LOSC’s article 211. The article is the result of a balance between the interests of the states involved, and presents a framework for dividing rights and duties between the LOSC’s main parties (coastal, flag and port states).³² As a result of this provision, flag states need to adopt regulations to prevent, reduce and control pollution, and said regulations must not be less effective than the international standards. Coastal states can adopt such regulations without hampering inherent rights of navigation, and port states can establish such measures before allowing entry into their internal waters, as long as they are duly publicized.³³

As pointed out by Treves, enforcement jurisdiction to be exercised by flag states under the LOSC is not only a right, but an obligation, due to the articles’ wording.³⁴ These enforcement obligations complement the general obligations on the previous articles. They should be performed “effectively” and independently of where the issues occur.³⁵ These obligations were brought as an answer to the criticism of lack of enforceability of the concept.³⁶ They impose specific duties on flag states in order to ensure better enforcement subject to internationally accepted rules and standards.³⁷ These enforcement obligations are comprehensive: enforcing measures to preventing ships from sailing should they not be compliant with the necessary standards, ensuring their due certification is maintained, and most importantly (with the chosen wording “shall”), initiating investigations should there be incidents at sea.³⁸

At the end of Part XII, the LOSC establishes states’ liability for fulfilling international environmental responsibilities, as well as for ensuring recourse within their domestic systems to provide for adequate compensation regarding environmental damages happening under their jurisdiction.³⁹ “Liability in terms of international law,” as is worded in paragraph 1 of article 235, refers to the principle of liability within the ILC Articles on State Responsibility for Internationally Wrongful Acts (“ASR”).⁴⁰ Such was the understanding of the ITLOS in its “Advisory Opinion on the Responsibilities of Sponsoring States in the Area.”⁴¹ Article 235 of the LOSC

establishes a responsibility for flag states over their registered vessels to be settled in accordance with the principles set out in the ASR.

Therefore, the LOSC has a framework establishing both rights and duties of flag states. This allocation of rights and duties, including those of enforcing international regulations and standards is evidently flag state centered. This becomes a significant problem when there is little to no true linkage between the flag state and the vessel flying its flag, which is examined in the following section.

III. The Problem of Flags of Convenience and “Genuine Link”

As established in the previous section, customarily flag states have the primacy of jurisdiction and enforcement over their registered vessels throughout all maritime zones. However, this primacy of enforcement of flag states has been criticized due to the fact that most of the world’s maritime tonnage today is composed of ships flying “flags of convenience.” These states allow for the registration of foreign owned ships, offering as advantages lower taxes, as well as more lax labor, environmental and safety requirements.⁴² As summarized by Boczek, flags of convenience “[...] refer to the flags of states which grant nationality to ships with which they have no genuine connection: the relation between them is merely the formality of the grant of certificate of registry.”⁴³ Another worrisome issue is that usually states offering these kinds of advantages also allow for easy incorporation of companies, which permits ships to be registered under shell companies.⁴⁴ Consequently, the actual linkage between the real owner of the vessel and the state of registry is either less strict or barely existent. “Flags of convenience” are thus not only an unavoidable topic when discussing marine pollution and flag state jurisdiction, but are also seen as a major obstacle toward the proper enforcement of flag state duties.⁴⁵ According to UNCTAD’s “Maritime Transport Report” released in 2019, the top three countries of shipping tonnage, which corresponds to over 40 percent of the world’s tonnage, are known flags of convenience: Panama, Liberia and the Marshall Islands.⁴⁶ Hence, this remains a reality today as ever.

The issue of “genuine link,” has been approached in both international conferences and international jurisprudence alike. The topic came up in United Nations conferences preceding the current LOSC as an attempt to strengthen the control of flag states over their registered ships, thus avoiding flags of convenience.⁴⁷ Despite all efforts, the article adopted had a similar wording to the article already present in the High Seas Convention, relying on the concept of “genuine link” without any specific definition given to the term.⁴⁸ The concept still lacks a clear definition in the several treaties dealing with the issue.

The first case in which ITLOS had the chance to assess “genuine link” was that of the *M/V Saiga*. When questioned about the issue and the necessity of there being a “genuine link” between a flag state and a vessel in order for other states to recognize a vessel’s nationality, the tribunal affirmed that the purpose of the “genuine link” requirement was to secure a more effective implementation of duties, and not to

establish a framework for other states to question the registration of ships.⁴⁹ It also stated that the evidence provided by the flag state, St. Vincent and the Grenadines, did not allow for questioning the fulfilment of its functions as flag state.⁵⁰ The tribunal's approach has been criticized as having established a very low threshold of evidence to establish a vessel's link with the state, and, thus, favoring the increasing usage and spreading of "flags of convenience."⁵¹

ITLOS' reasoning was, nonetheless, echoed in the more recent case of the *M/V Virginia G*. According to the tribunal, if the evidence presented was enough to sustain that upon registration a flag state was performing its duties under article 94, there would be a fulfillment of this requirement.⁵² Arguably, by the tribunal's jurisprudence, the mere fact of a ship having been registered by a state would mean the existence of a "genuine link."⁵³ Seen in a more positive light, ITLOS' reasoning in these cases could also mean that responsibility is acquired once a state accepts the registration of a vessel, due to the obligations it acquires when it decides to become a party to the LOSC.⁵⁴

Considering this apparent lack of an exact definition of what constitutes a "genuine link," it is arguable that it is easier to base a case of flag state liability on the flag state duties listed under article 94 than on the basis of the existence of a "genuine link."⁵⁵ Arguably, presenting a case on the issue of flag state duties under article 94 could also entail another opportunity to discuss the concept in more detail. The obligations that article 94 sets out regarding the exercise of jurisdiction over ships, when questioned, such as after an investigation, could have implications on the existence or absence of a "genuine link."⁵⁶

As there is still no exact definition of what constitutes a "genuine link," there is a convenient way of registering vessels which do not hold any true links to states, and, as a consequence, incidents resulting from lack of enforcement remain.⁵⁷ A study by researchers at the University of British Columbia shows that, since the 1960s, such flags are still responsible for over 40 percent of oil spills worldwide.⁵⁸ Although the LOSC has introduced many provisions on the enforcement of regulations and rules by flag states, those are still dependent on the existence of a true link between vessels and flag states.⁵⁹ While there is no concept or guidance, one is forced to accept the fact that there will still be vessels registered in order to circumvent stricter controls, arguably presenting more environmental risks to maritime transportation.⁶⁰ This circumvention not only appears to be allowed by the current jurisprudence and legislation, but also comes as a natural consequence of competition in the shipping industry.⁶¹ Thus "genuine link" does not appear to present the most feasible alternative to attribute responsibility to flag States regarding enforcement of marine pollution measures.

IV. Attribution of Responsibility Under International Law

Before addressing the specific issue of liability in the case of flag states, it is important to understand how public international law rules govern attribution of

responsibility for wrongful acts of states. The current system is guided by the ASR. Although the ASR are not binding *per se* in international law, they are used as a reference due to being recognized by the United Nations General Assembly.⁶² The articles aim to establish the consequences of internationally wrongful acts occurring as a result of either actions or omissions of a state.⁶³ For instance, if a state violates an international obligation and harms another state, this would constitute an international wrongful act. In the view of this article, the existence of a general obligation to protect the marine environment and to prevent pollution is contained in the text of the LOSC's Part XII.⁶⁴ A breach of these obligations will amount to an internationally wrongful act of a state if the act in question is attributable to the state. In order for responsibility for a breach of an international obligation to be attributed to states, the acts or omissions in question must have been performed by the state directly or through its organs, or, if by private actors, when performed in a sovereign capacity or under the instructions of the state.⁶⁵

It is common for states to rely upon private entities to carry out ship verification. This is the case with most flags, mostly "flags of convenience," and was the reality in the *Erika* case. In that case, the company which gave out licenses in the name of the Maltese State was Malta Maritime Authority ("MMA"), a private contractor.⁶⁶ It is, thus, important to verify how attribution of responsibility for acts or omissions of private actors works in the international plane.

Article 5 of the ASR presents the first possibility of attributing responsibility to entities which are not organs of the State:

The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.⁶⁷

This suggests the possibility of attributing the acts or omissions of private entities to the state, as long as they act in governmental authority. There are, of course, limitations to which kinds of acts can be considered as possessing the characteristics of governmental acts; these are listed in the article's commentary.⁶⁸ The commentary to the articles also limits acts performed by States to acts of entities specifically authorized to act in governmental authority by internal law.⁶⁹ This seems to be a narrower possibility of attributing responsibility only when the authorization is specifically granted by internal law.

When that is not the case, there is still the possibility of using article 8 of the ASR, which states that "[t]he conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct."⁷⁰ This would be an easier way of establishing attribution, and would require authorization of conduct, such as through a contract or administrative arrangements, thus favoring a wider scope of ways for that authorization to be granted.⁷¹

Thus, after analyzing both possibilities, there are two options which could be

applied in practice when there is the delegation by the state to private entities of its duty to monitor its own flagged vessels. This attribution would make it possible to hold States accountable, for instance, in the case of a negligent certification performed by a private agent.

Since this article focuses on international litigation as an alternative to raising the standards to be followed by flag states, an important issue to determine is who could bring an international claim against a flag state for not fulfilling its duties. Under the ASR, the denominated “injured states” are entitled to the responsibility of others. Since Law of the Sea obligations are owed to the international community as a whole, sometimes it is hard to determine whether there is a directly injured state.⁷² Sometimes there will be a clearly affected state, such as a coastal state affected by breaches of norms of marine pollution that has had its coastline polluted directly as a result of oil spills.⁷³ In such a case, one can argue an oil spill affecting a particular state would make it an “injured” state under article 42 of the ASR.⁷⁴ Moreover, it is important to argue that Law of the Sea obligations toward flag states when it comes to environmental protection and other standards, are owed to a collective international community, and hence could be invoked by states other than the “injured,” according to article 48 of the ASR.⁷⁵ The main difference between both proceedings would be that while the injured state could ask for compensation for damages, ones other than the directly injured would only be able to ask for the cessation of the offending act or omission.⁷⁶

There are international obligations, and the act of violating or by omission failing to uphold these standards by states would constitute internationally wrongful acts. This could indeed occur in the case of an oil spill if a non-seaworthy vessel is granted a license, even if through a private party, because it does not ascribe to the duties established in article 94 of the LOSC. The possibility of flag state liability arising directly from an oil spill is unlikely, as it would imply that the state would be directly liable for what happens on a ship, even if it remains a private actor and not its agent.⁷⁷ Considering the LOSC’s rules on flag state duties, however, this attribution would be more easily applicable in the scenario of ship monitoring and certification. For that, some states delegate those functions to private actors, and the possibility for attributing responsibility for its acts and omissions would still stand as a feasible alternative, if proven that those actors are exercising sovereign acts or acting under a state’s directions. Therefore, if one applies the ASR in the case of private contractors, this raises the question of whether the act could be considered of a sovereign nature, in order to make attribution of such acts or omissions to states more or less likely. This is discussed in the following section.

V. Attribution and Flag State Liability in International Law—The Issue of Private Actors

Attribution of acts or omissions of states requires that the act or omission be performed either by the state through its organs, or by private actors acting under

governmental authority or under instructions of the state. Some states do not license and authorize certifications to vessels themselves. Rather, they delegate that function to private agents. This section analyzes how liability could still be attributed under the ASR, considering the current jurisprudence. Importantly, according to instruments which are also encompassed by the LOSC such as MARPOL (International Convention for the Prevention of Pollution from Ships), relying on private agents, such as classification societies, does not remove the state's burden to control those entities.⁷⁸

One of the most emblematic cases in the issue of oil pollution was that of the *Erika*. In that case, an oil tanker, flying the flag of Malta, carrying crude oil, broke in half and sank near the French coast, in its exclusive economic zone (EEZ), spilling its contents onto the coast of Brittany.⁷⁹ After French investigations, it was verified that the ship should not have been authorized to navigate as it was not seaworthy.⁸⁰

The French court, when judging the *Erika* case, based its approach on state immunity, saying that it could not judge the Malta Maritime Authority, the company which issued the *Erika*'s right to navigate, as it was, in fact, performing acts on behalf of the Maltese state.⁸¹ It stated that although it was a private institution, it was performing duties under the exercise of public authority and referred to French rules about the issue as well as international custom. Following the French position in this case, it would be possible to argue that omissions of control or acts of negligence performed by these private agents could still be connected to the state, as they are acting in a sovereign capacity and, thus, could mean that the state is still responsible for these acts. This rationale also makes it harder for states to avoid their international duties under the LOSC by hiring private contractors to perform the duties they assumed when signing the LOSC.

A more current issue, which has not yet been solved, has been posed by the *LG v Rina SpA and Ente Registro Italiano Navale* dispute heard before the European Court of Justice (ECJ). The case originated from a shipwreck near the Italian coast, and the families of the victims sought to sue the classification societies which allowed for the ship to sail.⁸² In it, both companies alleged to have fulfilled their functions as delegates of the Panamanian state, and, thus, would hold immunity from proceedings.⁸³ The advocate-general's opinion based itself on the issue of immunity not being an absolute concept and that functions delegated by a state to comply with international obligations would not necessarily mean public authority had been exercised.⁸⁴ This line of reasoning ended up being accepted by the ECJ, which concluded that immunity would not preclude the Genovese Courts to analyze the case and then conclude whether the activities were performed under public authority.⁸⁵ This was done referring to an European Union Law directive which could place the actions of private entities, such as classification societies, under the civil and commercial acts' exception from sovereign immunity.⁸⁶ Thus, this remains to be addressed by the referring court regarding the exercise of public functions in the acts of private parties when they are delegated.

Even after analyzing both these perspectives, there is still a lack of consensus. If one is to argue that those acts are still sovereign, as there is a duty of the flag state to ensure that vessels are seaworthy and up to international standards, then it would

not harm the possibility of liability on an international litigation level. If one is to argue to the contrary, that those private agents' actions would not make the state liable, it could make attributing liability harder. However, even if the second possibility is later confirmed, it can still be argued that the state still had the obligation to make its best efforts to preserve the environment according to the provisions in the LOSC. This is examined in the following sections.

VI. “Due Diligence” in Configuring Flag State Liability for Oil Pollution

Arguably, the concept of “due diligence” obligations is relevant when interpreting the obligations of states in relation to oil spills at sea. The notion of “due diligence” obligations under the LOSC has been developed by ITLOS in its two advisory opinions regarding the activities of private agents in the Area and activities of Illegal, Unregulated and Unreported (IUU) fishing.⁸⁷ It is consequently imperative to understand what those obligations are, how they have been applied by international tribunals and how they affect flag state liability.

Due diligence obligations are not exclusive to the Law of the Sea, being present in other public international law fields.⁸⁸ They are also seen as key elements in environmental law.⁸⁹ These are, according to ITLOS jurisprudence, obligations “[...] ‘of conduct’ and not ‘of result.’”⁹⁰ Thus, what matters is not the result itself, such as a maritime casualty, but the conduct taken by the state in order to avoid it. This makes it somewhat harder to establish a state’s liability, even if something harmful to other states, such as an oil spill, occurs. This is due to the fact that, since due diligence comprises a state’s conduct to avoid harming another, it will only be enforceable if confirmed that a state did not do all it could do to prevent said harm from taking place.⁹¹ Such measures within an environmental context would be adopting and enforcing legislation on the issue, and providing recourse for affected parties within domestic systems.⁹²

Attributing liability to states for issues only if their conduct was not appropriate was seen as a way to encourage a wider participation in international treaties, as more autonomy is given to states when the focus is on their conduct, thus making it more easily conciliated with concepts of sovereignty and non-interference.⁹³ Although evidently not easy to apply, due diligence can still be evaluated and found as not having been complied with, still making it possible for states to bring to an international litigation the others’ lack of due diligence in abiding to their international environmental obligations. Thus, while flag states are unlikely to be held strictly liable for an oil spill, they can still be held liable if their conduct goes against the international obligations that they are subject to.

The most emblematic practical application of due diligence was that of the International Court of Justice (ICJ) in the *Pulp Mills on the River Uruguay* case. The ICJ concluded that due diligence consisted both of enforcing measures and being vigilant of the activities performed by the controlled parties.⁹⁴ The ICJ stated that a

party's liability would be triggered when it was "[...] shown that it had failed to act diligently and thus take all appropriate measures to enforce its relevant regulations on a public or private operator under its jurisdiction."⁹⁵

The ICJ's position was later echoed by ITLOS on different occasions in which it clarified issues on state liability in its two advisory opinions. This is particularly important, as ITLOS would be a relevant institution should a dispute arise regarding vessel-based pollution. The first case to use this rationale was the advisory opinion regarding the "Responsibility of States in the Sponsoring of Activities in the Area." ITLOS concluded, through article 139's wording, that there was a responsibility "to ensure," and that was related to a "due diligence" obligation, which could not make a state liable for all conduct but that they would not be completely excused from liability.⁹⁶ This resulted in saying that there was an obligation regarding employing the best means to prevent a result, and not to achieve a certain result, focusing on the state's conduct and, thus, an obligation of "due diligence."⁹⁷ The tribunal's reasoning on the opinion in the Area was adopted in its second opinion, on IUU Fishing. Something to note about this decision, however, is that while the part on the Area especially refers to an "obligation to ensure" in article 139, there is no specific wording on that respect regarding IUU fishing, as is the case with marine pollution. In order to make said rationale "fit" within the analyzed articles of the LOSC for IUU fishing, ITLOS applied the wording of the articles on flag state jurisdiction regarding the EEZs of other states, as well as of general flag state duties under article 94 in order to apply the same reasoning as the previous advisory opinion, of the "responsibility to ensure."⁹⁸ The tribunal called for special attention to the text of article 194 which says that states shall take necessary measures to ensure that activities under their jurisdiction and control are conducted as to not cause damage by pollution. In both cases, liability for wrongful acts of the sponsored entities or vessels would not be directly attributable to the state, which could only be liable for not having taken adequate measures to fulfill its due diligence obligations.⁹⁹

We are thus faced with two analyses made by ITLOS on different occasions, but none directly regarding the issue of oil spills. Considering ITLOS' relevance, should a case or an advisory opinion be proposed on the issue, it is interesting to reflect on the applicable reasoning. It is, thus, interesting to look at which of the LOSC's norms could be applied to the issue. Regarding oil spills, Part XII of the LOSC has major relevance, as it contains the norms on marine pollution prevention. Arguably, should an oil spill case arise involving a state's lack of compliance with general requirements, this would closely resemble the "responsibility to ensure" in the articles on the Area. That is because article 217 of the LOSC, when discussing enforcement by flag states, explicitly says "States shall ensure compliance by vessels flying their flag or of their registry with applicable international rules and standards [...]." Although there is not a literal "responsibility to ensure" as the one brought forward by article 139, that did not prevent ITLOS from applying the same line of reasoning in the IUU Fishing Advisory Opinion, where the articles analyzed did not have a similar wording regarding enforcement. In this sense, a likely approach by ITLOS to this subject would be in the same sense as the IUU Fishing opinion, where

more general obligations which do not literally contain the term “responsibility to ensure” were used in order to state such obligations, regarding the analysis done by the tribunal on the duties of the flag state under article 94. In the view of this author, the most probable articles to be used in the case of an oil spill would be the flag state duties under article 94 such as in the IUU Fishing opinion, along with the general obligation to preserve the marine environment in articles 192 and subsequent of the LOSC, with a possible emphasis on article 194, as it specifically states the obligation of states to take measures so that activities under their jurisdiction or control do not cause damage to other states through pollution. Another likely emphasis would be on the language of article 217 on the enforcement by flag states, as it establishes their need to ensure compliance by their flagged vessels. Finally, article 235 should be relevant, as it does entail responsibility of states for fulfilling their obligations over preserving the marine environment and makes them liable according to international law. Article 211 could be relevant as a standard to be followed regarding the need for the due diligence obligation to be met, as it focuses on the regulations’ content regarding vessel-based pollution and the need for vessels to be up to international standards.

Considering that on both occasions, albeit in different contexts, ITLOS has used due diligence, focusing on conduct, arguably this would be the same in the case of litigation against flag states for oil spills at sea. In such a case, it appears impossible that states would be liable for the specific casualty of a single oil spill, but would be, generally, should they be seen as not being compliant with pollution prevention standards. If one is to consider the alternatives presented throughout this exposition, some ways of holding flag states liable could be envisioned. These are critically analyzed in the following section.

VII. Attributing Responsibility to Flag States in Practice—Considering the Possibilities

The previous sections of this article present the possibilities of attributing responsibility to flag states regarding their compliance with their duties under the LOSC. What remains is to analyze more deeply which ones would be more likely to thrive in practice in the case of an eventual future international litigation on the theme. Before heading into this specific analysis, it is important to clarify that it only applies to oil spills, which happen due to a flag state’s failure to apply its standards, not those which are solely based on human failure or other *force majeure* reasons.

Firstly, it is important to see whether the single event of an oil spill could be attributable to a flag state. In this author’s view, there are two trains of thought that could be followed. If one considers the reasoning contained in both *Corfu Channel* and *Trail Smelter*, as well as the LOSC’s dispositions on jurisdiction, a possible rationale would be that casualties that occur under a state’s jurisdiction should not cause harm to another state. There is, however, a major obstacle toward this appli-

cation, which would be the notion of jurisdiction as territorial or extraterritorial jurisdiction. Both cases use the term jurisdiction in a sense of territorial jurisdiction, as both issues happened within the states' territories, which is not the case should something happen inside a ship. Although there is the use of extraterritorial jurisdiction in some areas of law, such as international human rights law, it is still seen as controversial and exceptional by doctrine and jurisprudence alike.¹⁰⁰ To assume every ship is under a state's full jurisdiction after registration seems to stretch the concept in a way that it was perhaps not intended when negotiating the LOSC. That can also be seen concerning the specific areas listed within article 94 over which the flag State should have jurisdiction.

The most important counterpoint to consider, however, is that actions or omissions by ships themselves are hard to be considered as *per se* attributable directly to a state, as ships are private actors, although primarily under the jurisdiction of flag states.¹⁰¹ The nature of maritime transport is, in itself, a complex one, involving an entangled network of different private providers. However, it does not mean that, in case that the state fails its duties of inspecting ships and verifying their seaworthiness, among other duties in enforcing marine environment protection regulations, it cannot be held liable for not disposing of its duties as would be required by the LOSC. Hence, a more solid argument would be that liability could be attributed for not pursuing LOSC duties accordingly, rather than the casualty caused by a ship.

Assuming flag state liability for oil spills due to lack of control over flagged vessels as a possibility, could it be triggered merely by a state's lack of compliance with its duties assumed under the LOSC? Former ITLOS Registrar Philippe Gautier argues in a sense that "[...] once it has accepted to register a vessel, the flag state is required to carry out the tasks and responsibilities entrusted to it by the 1982 Convention."¹⁰² That being said, it seems like a logical conclusion that a state could be seen as being in breach of these obligations if it does not comply with the enforcement of these standards when it comes to its flagged vessels. After all, the flag states' duties are mostly focused on prevention of casualties, by monitoring and certifying its vessels. If proven that it did all it could to monitor these vessels and yet something happened, it would be hard to argue that the state did not, in fact, fulfill its duties under the LOSC.

Even if one considers the possibility of attributing responsibility for oil spills to states which have not properly pursued their duties under the LOSC, it is still hard to argue that they would be liable for the direct event of oil spills. Not only because the ship is a private party which is not usually performing activities under the name of the state, but also because it is not compatible with the current jurisprudence regarding liability of states for activities performed by private parties. The current jurisprudence, as presented, is more focused on the concept of due diligence than on the result of the lack of compliance with those obligations.

In both of its Advisory Opinions, the response of ITLOS has been primarily focused on the concept of due diligence and obligations of conduct. This could mean that, in the case of litigation of a maritime casualty, the event itself would not be considered individually as a source of liability. The liability in this case would derive

from the proven lack of compliance of the state with the regulations it should have enforced over private parties under its jurisdiction in order to prevent maritime pollution established in Part XII. This would include the legislation of preventive measures as well as providing a system of recourse inside their own domestic systems. Thus, no liability would arise should necessary precautions have been taken to prevent the casualty from happening and if adequate recourse and compensation were made available.

This paper still maintains that international litigation is a valuable solution, due to its capacity to form precedent and, consequently, lift the general standards for ships. Although this would mean specific casualties would not be addressed individually in a Law of the Sea setting. This is because these kinds of disputes could help prevent similar events from happening in the future, as they could work to establish general minimum standards to be followed by states independently of them being “flags of convenience.” These kinds of cases could also arise even if there is no damage, should states not be fulfilling their duties of properly monitoring vessels. Those could be due to a lack of effective regulation, or lack of enforcement, as well as lack of compliance with the required standards.¹⁰³ It is still important that these kinds of judicial avenues are pursued in a manner of trying to generally raise the applicable standards.

Thus, states would most likely not be held liable for specific circumstances of oil spills. The mere fact of an international litigation, however, would set an important precedent that should not be disregarded. As previously mentioned, most of the world’s marine tonnage is under the jurisdiction of so-called “flags of convenience.” This not only makes controlling them harder, due to lack of identification of owners, but also threatens environmental protection if not duly enforced by those flag states.¹⁰⁴ Eventual litigation over this specific matter would help improve the general standards of flag states, once a ruling on the matter of what would constitute diligent conduct when it comes to preventing vessel-based oil pollution has been made.

VIII. Conclusion

This paper examines the possibility of attributing liability to flag states in respect of their lack of compliance with vessel-based oil pollution regulations under the international law of the sea. The attribution of responsibility to flag states is based on the fact that the flag state, besides having the primacy of jurisdiction over its registered vessels throughout maritime zones, has duties to fulfill according to the LOSC regarding prevention of maritime pollution. The LOSC makes these duties subject to the ASR and requires that the states’ own domestic systems provide for adequate recourse. These provisions create obligations for flag states and flag states will be internationally responsible for breaching such obligations according to the general rules on attribution of wrongful conduct of the law of state responsibility. To this end, either article 5 or 8 of the ASR could be used depending on

whether and how a state has delegated power to private entities to certify its flagged vessels.

An analysis of the relevant international jurisprudence indicates that it would be unlikely for a flag state to be held liable for the specific event of an oil spill. That is because international jurisprudence relating to similar types of obligations has considered obligations to prevent certain conducts to constitute “due diligence” obligations, in which a larger focus is placed on the conduct undertaken by states to prevent damage, rather than on the result. Such was the approach taken by ITLOS in both of its advisory opinions, and, as detailed here, a similar reasoning to the opinion on IUU fishing could apply should there be a case regarding an oil spill before the ITLOS. The tribunal could derive a “responsibility to ensure” from the applicable provisions of Part XII in order to state that there was an obligation of conduct, of employing the best means possible in order to avoid pollution. This would mean that, should a state prove it took all necessary measures when licensing a vessel, even if an oil spill causing damage happened, the flag state would not be liable for the specific damage of an oil spill, or not even be held liable at all should damage occur. If proven that measures were not taken or were not effectively enforced, there would be responsibility from the part of flag states, due to their lack of compliance with LOSC standards. It is important to highlight that oil spills are circumstances that not only depend on a state’s conduct or lack of certification, but also on human error. These circumstances would certainly not be attributable to the state should it be proven that it did comply with and enforce international regulations on the prevention of marine pollution.

Considering the current global situation, in which there is still significant ownership of the world’s tonnage of cargo ships by so-called “flags of convenience,” a solution for increasing or clarifying the internationally accepted standards is to litigate the issue before international courts. Such a course of action could be pursued either by those states directly affected by oil spills, or by others in the international community, as LOSC obligations are collectively owed. Although there would not necessarily be direct compensation for the specific event of the oil spill, litigating the issue would contribute to a clarification of the requirements toward a wider abidance by flag states regarding the applicable international rules on the prevention of maritime pollution. This could be a way of elevating standards, making it harder for states with less regulations to maintain them as such. It could also contribute to the clarification of other important concepts, such as that of a “genuine link,” which still remains indeterminate.

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