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SOVEREIGN IMMUNITY OF NON-COMMERCIAL GOVERNMENT VESSELS AND DUE REGARD: CHINA COAST GUARD IN THE NATUNAS

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Abstract

coastal states possess sovereign rights and jurisdiction within their Exclusive Economic Zone (EEZ), including the exercise of enforcement jurisdiction against foreign vessels conducting violations within the EEZ. However, certain ships are granted sovereign immunity and thus are not subject to coastal state's jurisdiction. The United Nations Convention on the Law of the Sea (UNCLOS) only stipulated that injuries to the coastal state caused by activities conducted by a sovereign immune vessel will engage that vessel's flag state responsibility. Indonesia had witnessed numerous violations within its EEZ, especially in waters around Natuna Islands. These violations are conducted by Chinese fishing vessels, which were escorted by China Coast Guard (CCG) vessels. Consequently violations by Chinese vessels would hamper Indonesia's exercise of enforcement jurisdiction against Chinese fishermen caught committing illegal, unreported and unregulated fishing (IUUF), thus violating Indonesia's sovereign rights and jurisdiction. This article discusses to what extent sovereign immunity applies to non-commercial government vessels, and whether they can be subjected to coastal state jurisdiction, should they hamper the exercise of coastal state's enforcement jurisdiction within its EEZ. The article applies normative legal research by utilizing applicable regulations, theories, and existing practices. Sovereign immune vessels are required to pay due regard to other states, including coastal state. Activities constituting 'abuse of rights' jeopardizing coastal state's exercise of enforcement jurisdiction will result in their flag state responsibility being invoked by the coastal state. This article recommends peaceful settlement of dispute through bilateral means, or multilateral means in the spirit of the 2002 Declaration of Conduct by pursuing a regional fisheries agreement.

Keywords : enforcement jurisdiction, sovereign immunity, UNCLOS

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I. INTRODUCTION

Coastal states are authorized by UNCLOS to carry out law enforcement measures against foreign vessels committing violations of their national laws within its EEZ.¹ They are not only able to carry out enforcement jurisdiction, but also enact national regulations to serve as the legal basis for enforcement jurisdiction; this being the 'legislative jurisdiction', whereas 'enforcement ju-

¹ United Nations Convention on the Law of the Sea. 1822 UNTS 397 (entered into force 16 November 1994), art. 73 (1).

jurisdiction' entails measures taken to ensure that such laws are respected.² Both jurisdictions are to be exercised according to the economic function of the EEZ (also known as 'functional jurisdiction'), as well as having regard to the exercise of rights and duties of other State's vessels within the EEZ.³ Thus, enforcement jurisdiction is balanced out by the obligation of 'due regard', meaning that coastal states shall not enforce their law by prejudicing other State's right to conduct activities in the EEZ; the enforcement jurisdiction being part of coastal state's rights in its own EEZ under UNCLOS.⁴

Non-commercial government vessels are protected by sovereign immunity under UNCLOS.⁵ Sovereign immunity allows no State jurisdiction to be exercised upon such vessels other than those of the flag state. In the EEZ, coastal state is barred from exercising its jurisdiction – including enforcement jurisdiction – against non-commercial government vessels of another State.⁶ Yet, these vessels tend to abuse this right at the expense of the coastal state's interests in its own EEZ; CCG's coordination with, and escort of, Chinese fishermen conducting IUUF within Indonesian EEZ, as well as hampering Indonesian exercise of its enforcement jurisdiction against those fishermen being an example of such abuse.⁷ Article 300 of UNCLOS stipulated that vessels protected by sovereign immunity are also under an obligation not to commit acts which would be regarded as 'abuse of rights', i.e. avoiding actions regarded as being non-compliant to the coastal state's regulations (Article 30) or causing loss or damage to the coastal state's interests by virtue of its non-compliance (Article 31). They will also lose sovereign immunity if they engage in piracy and thus may be boarded by authorities of the coastal state.⁸ Additionally, the flag state's responsibility towards the coastal state can be engaged if its sovereign immune vessels do not comply with the national regulations of the coastal state and incurring loss or damage upon the coastal state due to such non-compliance.⁹

² Yoshifumi Tanaka, *The International Law of The Sea* (Cambridge; New York: Cambridge University Press, 2012), 127.

³ Maria Gavouneli, *Functional Jurisdiction in the law of The Sea: Publications on Ocean Development v. 62* (Leiden; Boston: Martinus Nijhoff, 2007), 68-69.

⁴ Shicun Wu, Mark J Valencia & Nong Hong (eds), *UN Convention on the Law of the Sea and the South China Sea: Contemporary Issues in the South China Sea*, (Farnham; Burlington: Ashgate, 2015), 65.

⁵ UNCLOS, art. 96.

⁶ Anne Bardin, "coastal state's Jurisdiction over Foreign Vessels" *Pace International Law Review* 14, no. 1 (2002): 62.

⁷ Hongzhou Zhang & Sam Bateman, "Fishing Militia, the Securitization of Fishery and the South China Sea Dispute," *Contemporary Southeast Asia* 39, no. 2 (2017): 292-293.

⁸ Bardin, "coastal state's Jurisdiction", 47, 52.

⁹ UNCLOS, art. 31.

IUUF is defined as fishing activities in a coastal state's maritime territory that is conducted without any license or does not abide by that State's regulation, as well as such activities being conducted without proper reporting made to that State.¹⁰ coastal states are empowered to exercise their enforcement jurisdiction upon vessels conducting IUUF within their EEZ in order to conserve the marine environment and its living resources.¹¹ This stems from both coastal state's jurisdiction and duty to regulate conservation and management of the marine environment under UNCLOS.¹² Nationals (and vessels, regardless of whether they are sovereign immune or not) of other States are therefore prohibited from carrying out IUUF and have to comply with the coastal state's regulation on such matters.¹³

As a coastal state, Indonesia experienced problems in practicing its jurisdiction over Chinese fishing vessels conducting IUUF from Chinese authorities since 2010,¹⁴ which took place on waters around Natuna Islands, which form parts of the Indonesian EEZ and was renamed as the North Natuna Sea in 2017.¹⁵ In 2016, CCG vessels rammed Indonesian authorities' vessel, *Kapal Pengawas Hiu II*, when it tried to exercise its enforcement jurisdiction over Chinese fishing vessel *Kway Fey 100078*, then committing IUUF.¹⁶ A more recent incident took place on the 30th December 2019 involving Indonesian Navy ships and CCG vessels escorting Chinese fishermen within the North Natuna Sea, where Indonesian vessels expelled CCG vessels to prevent IUUF within its EEZ¹⁷; this was repeated on 2 January 2020.¹⁸ Despite Indonesia's

¹⁰ Usmawadi Amir, "Penegakan Hukum IUUF Menurut UNCLOS (Studi Kasus: *Volga Case*) [IUUF Law Enforcement According to UNCLOS (Case Study: *Volga Case*)]," *Jurnal Opinio Juris* 12 (2013): 74.

¹¹ Valentin J. Schatz, "Combating Illegal Fishing in the Exclusive Economic Zone - flag state Obligations in the Context of the Primary Responsibility of the coastal state," *Goettingen Journal of International Law* 7, no. 2 (2016): 392, 395.

¹² UNCLOS, art. 56 (1) (b) (iii) & 61 (2).

¹³ UNCLOS, art. 62 (4) & 236.

¹⁴ Fu-Kuo Liu & Jonathan Spangler (eds), *South China Sea Lawfare: Legal Perspectives and International Responses to the Philippines v. China Arbitration Case* (Taipei: South China Sea Think Tank/Taiwan Center for Security Studies, 2016), 108.

¹⁵ Leo Suryadinata, "Did the Natuna Incident Shake Indonesia-China Relations?" *ISEAS Perspective* 19 (2016): 2, 5.

¹⁶ Intan Kusumadewi & Anugrah Adiastruti, "Intervensi Tiongkok dalam Penegakan Hukum *Illegal Fishing* di Wilayah Zona Ekonomi Eksklusif Indonesia (Kasus Kapal Kway Fey 10078, Tiongkok) [Chinese Intervention in Enforcing Illegal Fishing Laws in the Indonesian Exclusive Economic Zone (Kway Fey 10078 Ship Case, China)]," *Belli ac Pacis* 4, no. 1 (2018): 3.

¹⁷ "Kapal Perang TNI AL Usir Kapal Penjaga Pantai China di Perairan Natuna [The Indonesian Navy Warship Expels the Chinese Coast Guard Ship in Natuna Waters]," *BBC News Indonesia*, <https://www.bbc.com/indonesia/dunia-50966528>, 2020.

¹⁸ Muhammad Iqbal, "Tegas! Kapal Perang RI Usir Coast Guard China di Laut Natuna [Assertive! Indonesian Warship Expels Chinese Coast Guard in Natuna Sea]," *CNBC Indonesia*,

measures to assert its sovereign rights and jurisdiction over its EEZ in waters around Natuna Islands, CCG escorted Chinese fishermen in conducting their fishing activities by virtue of its nine-dash line claim, which encompasses Natuna Islands' waters,¹⁹ but was invalidated by the Permanent Court of Arbitration (PCA) through its 2016 award on the South China Sea case as it was inconsistent with UNCLOS.²⁰ However, China disregarded the award and the CCG is persistent in escorting Chinese fishermen under the basis of the nine-dash line; there also exists coordination between them, where CCG would hinder Indonesian authorities from performing their enforcement jurisdiction against such fishermen committing IUUF within its EEZ.²¹

This article will focus on a single issue; namely, whether sovereign immune vessels can be subjected to coastal state's jurisdictions as mentioned in Article 31 of UNCLOS, should they hamper the exercise of coastal state's enforcement jurisdiction within its EEZ, and whether their flag state can be held responsible for such acts. This issue will be broken down into four parts. The first two parts will discuss requirements and limitations regarding sovereign immunity of non-commercial government vessels. The latter two parts will discuss the correlation of the principle of due regard and sovereign immunity, and the invocation of sovereign immune vessel's flag state responsibility upon hindering the performance of sovereign rights and jurisdiction of the coastal state in its EEZ per Article 31 of UNCLOS; whether the coastal state is able to exercise its jurisdiction upon such vessels, or whether the coastal state is solely authorized to invoke that vessel's flag state responsibility under UNCLOS. Additionally, the article will provide recommendations that can be considered by Indonesia to prevent another repetition of IUUF escorts within the Natunas.

II. THE NATURE OF SOVEREIGN IMMUNITY OF NON-COMMERCIAL GOVERNMENT VESSELS

Sovereign immunity as regulated by UNCLOS applies to warships (Articles 32, 95, 236), naval auxiliary (Article 236), non-commercial government vessels (Articles 32, 96, 236), as well as vessels authorized by the flag state,

<https://www.cnbcindonesia.com/news/20200103112805-4-127376/tegas-kapal-perang-ri-usir-coast-guard-china-di-laut-natuna>, accessed 2020.

¹⁹ Liu & Spangler, *South China Sea Lawfare*.

²⁰ The South China Sea Arbitration (Republic of the Philippines v. People's Republic of China), Award, PCA Case 2013-19, 12th July 2016, Permanent Court of Arbitration [PCA], para. 1203(B) (2) (The South China Sea Arbitration).

²¹ Hongzhou and Bateman, "Fishing Militia, the Securitization of Fishery and the South China Sea Dispute," 292-293.

being clearly marked and identifiable as vessels on government services.²² Sovereign immunity as applicable to non-commercial government vessels, having similar status with those of warships²³, merely shields them from enforcement jurisdiction of other States²⁴ and are thus not absolute in nature.²⁵ Indeed, such limitations exist under international law, which will be discussed in turn, along with requirements for government vessels to be accorded sovereign immunity.

A. REQUIREMENTS FOR GOVERNMENT VESSELS TO OBTAIN SOVEREIGN IMMUNE STATUS

Only government vessels operate for non-commercial purposes (aside from warships) are eligible to possess sovereign immunity.²⁶ The 1926 Brussels Convention for the Unification of Certain Rules relating to the Immunity of State-Owned Vessels (Brussels Convention) describes two types of government vessels; those operating for commercial purposes, and those operating for non-commercial purposes, with the latter acquiring sovereign immunity.²⁷ Brussels Convention specifically stipulated that ‘ships of war, State-owned yachts, patrol vessels...and other vessels owned or operated by a State and employed exclusively at the time when the time of action arises on Government and non-commercial service’ shall not be subjected to any enforcement measures or legal process.²⁸ Whether a government vessel is entitled to sovereign immunity is a factual question, determined especially by its function and relation to the flag state.²⁹

Concerning the vessel’s function, UNCLOS stated that such vessels are to be used for non-commercial purposes only.³⁰ This equates to the view that

²² Novena Clementine Manullang, Achmad Gusman Siswandi & Chloryne Trie Isana Dewi, “The Status of Maritime Militia in The South China Sea Under International Law Perspective,” *Jurnal Hukum Ius Quia Iustum* 27, no. 1 (2020): 31; Henrik Ringbom, ed., *Jurisdiction Over Ships: Post-UNCLOS Developments in the Law of the Sea*, (Leiden; Boston: Brill Nijhoff, 2015), 88.

²³ *Ibid.*

²⁴ Christopher R Budd, “Warship Navigation in Foreign Exclusive Economic Zones: How to Determine What is Permissible”, *Australian Journal of Maritime & Ocean Affairs* 7, no. 4 (2015): 249; Henrik Ringbom, ed., *Jurisdiction over Ships*, 95.

²⁵ Djibril Moudachirou, “Does a Sovereign State Immunity Say More than We Think? ITLOS’s Decision in ARA Libertad Case,” *Journal of Law, Policy and Globalization* 37, (2015): 10.

²⁶ UNCLOS, art. 32, 96 & 236.

²⁷ Moudachirou, “Sovereign State Immunity,” 10.

²⁸ Brussels Convention for the Unification of Certain Rules relating to the Immunity of State-Owned Vessels, 176 LNTS 199 (entered into force 8 January 1937), art. 3 (1).

²⁹ Manullang, et. al, “The Status of Maritime Militia,” 31.

³⁰ UNCLOS, art. 32 & 236.

those vessels are acting on behalf of the State whose flag they fly, shielding them and their crews from local, enforcement jurisdiction.³¹ Following the theory of restrictive immunity, sovereign immunity in this regard will apply to sovereign acts (*acta jure imperii*) and not private acts (*acta jure gestionis*), although this is a matter of nature instead of the purpose of such acts.³² Ships owned by a State, but operated for commercial purposes (i.e., for trading), which is functionally and naturally private, are ineligible to be extended sovereign immunity.³³

Non-commercial government vessels entitled to sovereign immunity shall comply with UNCLOS' regulations.³⁴ They shall comply with the coastal state's regulations upon entering its maritime zones, including within the EEZ, and not cause injuries to it, which will evoke those vessels' flag state responsibility.³⁵ In the 2016 South China Sea award, the PCA noted that Chinese authorities' vessels should ensure safe operations at sea *vis-à-vis* the Philippine vessels; China was expected to exercise their jurisdiction and control over their vessels, including as regards safety at sea.³⁶ This part of PCA's award refers to Article 94 (1), (3) and (5) of UNCLOS, where this article incorporates the Convention on the International Regulations for Preventing of Collisions at Sea of 1972 (COLREGS) as part of UNCLOS regarding the implementation of measures regarding maritime safety.³⁷ As such, a sovereign immune vessel shall comply with UNCLOS in its operation, especially *vis-à-vis* the interests of the coastal state and in relation to safety at sea.

B. LIMITATIONS OF NON-COMMERCIAL GOVERNMENT VESSEL'S SOVEREIGN IMMUNITY

The flag state of sovereign immune vessels are liable to coastal state's measures, should they disregard relevant national regulations of that State; these range from expelling said vessels from its maritime zone to their flag state's responsibility being invoked when the coastal state's interests have been damaged by such vessels' conducts.³⁸ In the coastal state's EEZ, sovereign immune vessels are able to retain their immunity, insofar as they do not act contrarious to Part V of UNCLOS (as seen on Article 58 (2), and having

³¹ Tanaka, *Law of the Sea*, 79.

³² Malcolm N. Shaw, *International Law*, 8th ed, (Cambridge; New York: Cambridge University Press, 2017), 532.

³³ Ringbom, ed., *Jurisdiction over Ships*, 89.

³⁴ UNCLOS, art. 236

³⁵ *Ibid.*, art. 31 & 58 (3).

³⁶ PCA, *The South China Sea Arbitration*, para. 1082.

³⁷ *Ibid.*, para. 1083.

³⁸ UNCLOS, art. 30 & 31.

due regard to the coastal state per Article 58 (3)); these serve to balance its rights with those of the coastal state's.³⁹ Although non-commercial government vessels are expressions of their flag state's sovereignty⁴⁰, they are also required to exercise this right while not hampering the exercise of relevant or similar rights by other States, including the coastal state.⁴¹ Such limitations are recognized by UNCLOS and were also taken into account in PCA's 2016 South China Sea award.

1. Articles 30 and 31 of UNCLOS

Article 30 of UNCLOS allows coastal state to expel sovereign immune vessels when they disregard its national laws and regulations, specifically concerning innocent passage within its territorial sea. The coastal state can also owe such vessels' flag state responsibility under Article 31, should they incur 'any loss or damage' to that State by virtue of their non-compliance with its laws. As such, UNCLOS authorizes the coastal state to exercise legislative jurisdiction over sovereign immune vessels, since it may enact relevant regulations to be abided to by sovereign immune vessels entering its maritime zones.⁴²

The coastal state implements its jurisdiction in the EEZ in line with its economic nature.⁴³ However, it practices both legislative and enforcement jurisdictions, although the latter may not be conducted against sovereign immune vessels; however, it is argued that concerning environmental regulations in UNCLOS, coastal state may enforce its laws on such matters when necessary.⁴⁴ In spite of this, UNCLOS made it clear that sovereign immune vessels are prohibited from conducting activities hampering the coastal state's exercise of its sovereign rights and jurisdiction in its EEZ⁴⁵; in the case of *Arctic Sunrise*, PCA confirmed that a coastal state may act to prevent 'violations of its laws adopted in conformity with the Convention'.⁴⁶ Thus, Article 31 of

³⁹ Gavouneli, *Functional Jurisdiction*, 65-66.

⁴⁰ "ARA Libertad" (Argentina v. Ghana), Provisional Measures, Order, Case No. 20, ITLOS Rep. 2012, 15 December 2012, International Tribunal for the Law of the Sea [ITLOS], para. 94.

⁴¹ Natalie Klein, *Maritime Security and the Law of the Sea* (New York: Oxford University Press, 2011), 35-36.

⁴² UNCLOS, art. 56 (1) (b), 58 (3) & 236.

⁴³ Gavouneli, *Functional Jurisdiction*, 68-69.

⁴⁴ Ken Booth, *Law, Force and Diplomacy at Sea*, (Oxon; New York: Routledge, 2014), 43-44.

⁴⁵ UNCLOS, art. 236 & 300; Wu (et al) (eds), *UN Convention on the Law of the Sea*, 67.

⁴⁶ Arctic Sunrise (the Netherlands v. Russia), Award on the Merits, PCA Case 2014-02, 14 August 2015, Permanent Court of Arbitration [PCA], para. 326-327; Camille Goodman, "Rights, Obligations, Prohibitions: A Practical Guide to Understanding Judicial Decisions on coastal state Jurisdiction over Living Resources in the Exclusive Economic Zone", *International Journal of Maritime & Coastal Law* 32 (2017): 20.

UNCLOS will provide for this limitation of what sovereign immune vessels may do in the coastal state's EEZ; failure to respect this limitation will invoke those vessels' flag state responsibility to the coastal state.⁴⁷

2. Limitations of Sovereign Immune Vessels in the 2016 South China Sea Award

While the 2016 South China Sea award did not expressly discuss issues on sovereign immunity, PCA did discuss flag state's duties as regards Chinese vessels' conduct towards Philippine vessels and its implications. Vessels of the China Marine Surveillance (CMS) and the Fisheries and Law Enforcement Command (FLEC) were implicated in escorting, and coordinating with, Chinese fishing vessels committing IUUF within Philippine EEZ in the vicinity of Mischief Reef and Second Thomas Shoal. PCA found that China had failed to respect due regard obligation under Article 58 (3) of UNCLOS as regards Philippines's sovereign rights in matters relating to fisheries within the two areas; CMS vessels were also reported to have escorted Chinese fishing vessels in conducting IUUF there.⁴⁸ Furthermore, this escort constitutes 'official acts of China' and is thus attributable to it, thereby invoking China's flag state responsibility.⁴⁹

The Philippines also argued that CMS and FLEC vessels were engaged in maneuvers endangering Philippine vessels on 28 April and 26 May 2012. PCA noted that both China and the Philippines are parties to COLREGS, though the said convention was considered as being a part of Article 94 (5) of UNCLOS regarding 'generally accepted international regulations'.⁵⁰ Again, PCA considered such maneuvers made by CMS and FLEC vessels to be China's official acts, which violates COLREGS.⁵¹

These issues highlight limitations of a non-commercial government vessel's sovereign immunity. Firstly, a flag state is obligated under UNCLOS (Article 58 (3), read in conjunction with Article 62 (4)) to ensure vessels flying its flag to comply with the coastal state's regulation and not to assert jurisdiction in another State's EEZ.⁵² In its Case No. 21 Advisory Opinion of 2015, the International Tribunal for the Law of the Sea (ITLOS) observed that the flag state is under an obligation to exercise effective control and jurisdiction over

⁴⁷ Klein, *Maritime Security*, 35.

⁴⁸ PCA, *The South China Sea Arbitration*, para. 746, 753.

⁴⁹ *Ibid.*, para. 755.

⁵⁰ *Ibid.*, para. 1081-1083.

⁵¹ *Ibid.*, para. 1091-1092.

⁵² *Ibid.*, para. 741, 743; Valentin J Schatz, "Fishing for Interpretation: The ITLOS Advisory Opinion on flag state Responsibility for Illegal Fishing in the EEZ," *Ocean Development & International Law* 47, no. 4 (2016), 331.

its vessels, taking Article 94 of UNCLOS into account.⁵³ Similarly, under the United Nations Straddling Fish Stocks Agreement (Fish Stocks Agreement) of 1995, flag states shall ensure its vessels do not conduct IUUF within ‘areas under the national jurisdiction of other States.’⁵⁴ Chinese CMS and FLEC vessels failed to ensure that Chinese fishermen did not conduct IUUF within the Philippine EEZ and instead, claimed it to be an area of Chinese exercise of sovereign rights and jurisdiction, hence the escort.⁵⁵ PCA found the area to be the Philippines’s EEZ, and their escort constituted non-exercise of due diligence in preventing the commission of IUUF within maritime zones of another State.⁵⁶ Accordingly, China’s flag state responsibility is triggered by virtue of such escort in the Philippines’s EEZ.

The second issue highlighted the obligation of sovereign immune vessels regarding safe conduct at sea. The Philippines referred to Article 94 (3) regarding flag state’s obligation to ensure safety at sea, which included measures to prevent collisions. Referring specifically to incidents of 28 April 2012, PCA noted the near-collision between FLEC 306 of China and MCS 3008 of the Philippines.⁵⁷ Rule 7 (a) of COLREGS stipulated that vessels must determine any risk of collision, using ‘all available means’ appropriate to the ‘prevailing circumstances and conditions’, and to take actions to avoid such collision to result ‘in passing at a safe distance’ under Rule 8 (d) of COLREGS. None of the Chinese vessels’ conducts were compliant with Rule 8 of COLREGS, and instead ‘made the possibility of a collision substantially more likely.’⁵⁸ Since China and the Philippines are parties to COLREGS and that it is also incorporated into Article 94 of UNCLOS⁵⁹, Chinese vessels are expected to take measures to ensure safety at sea under Article 94 (3) of UNCLOS. PCA finally concluded that such conducts by Chinese vessels violated COLREGS, and thus also Article 94 of UNCLOS⁶⁰; these engaged China’s State responsibility under international law.

⁵³ Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission [2015], Case No. 21, Advisory Opinion, ITLOS Rep. 2015, para. 116, 119 (ITLOS 2015 Advisory Opinion).

⁵⁴ 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, 2167 UNTS 3 (entered into force 11 December 2001) (Fish Stocks Agreement), art. 18 (3) (b) (iv); Schatz, “Combating Illegal Fishing,” 400.

⁵⁵ PCA, The South China Sea Arbitration, para. 730, 747.

⁵⁶ *Ibid.*, para. 735, 744.

⁵⁷ *Ibid.*, para. 1098.

⁵⁸ *Ibid.*, para. 1100-1101.

⁵⁹ *Ibid.*, para. 1083.

⁶⁰ *Ibid.*, para. 1109.

III. SOVEREIGN IMMUNITY OF VESSELS INTERFERING WITH coastal state'S RIGHTS AND JURISDICTION IN ITS EEZ

Sovereign immune vessels may not be subjected to enforcement jurisdiction by the coastal state.⁶¹ However, it is still empowered to exercise legislative jurisdiction in its EEZ, and those vessels shall comply with its laws and regulations.⁶² This correlates with the principle of due regard as regulated under Article 58 (3) of UNCLOS, as well as the principles of good faith and due diligence.⁶³ Due regard obligation requires a State to comply with the coastal state's exercise of legislative jurisdiction⁶⁴, while due diligence obligation requires said State to actively ensure that vessels flying its flag follow the coastal state's national laws and regulations (including matters relating to fishing and IUUF).⁶⁵ In short, due diligence obligates and allows said State to not only enact laws in ensuring their compliance with their due regard obligation, but also to enforce them against vessels falling under its jurisdiction.⁶⁶ When sovereign immune vessels of a State conduct, or assist, activities contrarious with such obligation (including IUUF, an activity disregarding the coastal state's sovereign right to manage its living resources in the EEZ), this would imply that the due diligence obligation is also disregarded for their failure to prevent the commission of such activities; thus, that State's responsibility will be engaged towards the coastal state.⁶⁷

⁶¹ UNCLOS, art. 32, 95-96 & 236; Tanaka, *Law of the Sea*, 79, 91; Bardin, "coastal state Jurisdiction," 52, 62.

⁶² Clive Schofield, Seok-woo Lee & Moon-Sang Kwon (eds), *The limits of maritime jurisdiction*, (Leiden; Boston: Martinus Nijhoff Publishers, 2014), 351; Ringbom (ed), *Jurisdiction over Ships*.

⁶³ Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, ICJ Reports 2010, para. 101, 197 (Pulp Mills); ITLOS 2015 Advisory Opinion, para. 129; Victor Alencar Mayer Feitosa Ventura, "Tackling illegal, unregulated and unreported fishing: the ITLOS Advisory Opinion on Flag-state Responsibility for IUUF and the principle of due diligence", *Brazilian Journal of International Law* 12, no. 1 (2015): 62-63.

⁶⁴ Tanaka, *Law of the Sea*, 127-128, 130.

⁶⁵ ITLOS 2015 Advisory Opinion, para. 134, 138; Siti Noor Malia Putri, "State Responsibility for IUUF: A Reflection on the 2015 ITLOS Advisory Opinion on IUUF and Its Relevance to Indonesia," *Indonesia Law Review* 8, No. 2 (2018): 232.

⁶⁶ Siti Noor Malia Putri, "State Responsibility for IUUF: A Reflection on the 2015 ITLOS Advisory Opinion on IUUF and Its Relevance to Indonesia," 232; Joanna Kulesza, *Due Diligence in International Law* (Leiden; Boston: Brill Nijhoff, 2016), 104.

⁶⁷ UNCLOS, art. 31; Klein, *Maritime Security*, 37.

A. CORRELATION OF THE DUE REGARD OBLIGATION AND SOVEREIGN IMMUNITY

Foreign vessels – including sovereign immune vessels – shall respect the exercise of rights and jurisdiction by the coastal state in its EEZ.⁶⁸ Warships and non-commercial government vessels are accorded sovereign immunity to ensure the exercise of their rights and duties while having regard to rights and jurisdiction exercised by the coastal state within its maritime zone.⁶⁹ Any conducts disregarding due regard obligation constitute ‘abuse of rights’, therefore compromising their sovereign immune status and invoking their flag state’s responsibility.

UNCLOS calls for other State’s vessels (and nationals) to comply with the coastal state’s national laws and regulations, and respect its exercise of sovereign rights and jurisdiction.⁷⁰ This embodies the nature of the due regard obligation, which balances the exercise of rights and jurisdiction of both the flag state and the coastal state. The flag state must ensure that its sovereign immune vessels respect the exercise of rights and jurisdiction of the coastal state in its EEZ, including its right to perform legislative jurisdiction.⁷¹ Furthermore, they shall perform its conduct according to their nature and function, whereas the coastal state is required to perform its rights and jurisdiction according to the functional, economic nature of those rights and jurisdiction relating to the EEZ.⁷² Therefore, if a sovereign immune vessel does not have due regard in its conduct to the coastal state in its EEZ, it has committed an ‘abuse of rights’, prohibited under Article 300 of UNCLOS.

1. Due regard and due diligence of sovereign immune vessels in the EEZ

While due regard obligation concerns a State’s observance and respect to the coastal state’s laws and regulations in its EEZ⁷³, due diligence obligation focuses on that State’s obligation to ensure the observation of that coastal state’s laws and regulations by its vessels.⁷⁴ In *Pulp Mills*, due diligence entails ‘not only the adoption of appropriate rules and measures’, but also ‘a certain level of vigilance’ on the part of the concerned State to enforce such rules and measures.⁷⁵ These principles are closely related with each other; States shall have due regard to the rights and jurisdiction of the coastal state under

⁶⁸ UNCLOS, art. 58 (3) & 236.

⁶⁹ Budd, “Warship navigation”, 244; Ringbom (ed), *Jurisdiction over Ships*, 95-96.

⁷⁰ UNCLOS, art. 58 (3) & 62 (4).

⁷¹ UNCLOS, art. 58 (3); Tanaka, *Law of the Sea*, 127, 130.

⁷² Schatz, “Fishing for Interpretation”.

⁷³ Wu, et. al. eds., *UN Convention on the Law of the Sea*, 65, 67.

⁷⁴ Schatz, “Combating Illegal Fishing,” 408.

⁷⁵ ICJ, *Pulp Mills*, para. 197.

Article 58 (3), and when these rights and jurisdictions are disregarded, such States will have their international responsibility invoked, should they cause ‘loss or damages’ under Article 31.

Sovereign immune vessels, being signs of expression of their flag state’s sovereignty,⁷⁶ have a direct link to their flag state. In this regard, sovereign immune vessels shall ensure that other vessels flying the same flag respect due to regard obligation, and to take measures against vessels failing to comply with such obligation.⁷⁷ In relation to IUUF, UNCLOS only requires States to take cooperative measures in combating such activities⁷⁸, although other instruments such as the Fish Stocks Agreement requires them to ensure that no vessels flying their flags undertake IUUF; this would imply that their sovereign immune shall take enforcement measures, ‘irrespective of where violations occur’, as long as said vessels are authorized to perform them.⁷⁹ The principles of due regard, due diligence and sovereign immunity thus correlate in this matter, and said requirement under the Fish Stocks Agreement is compatible with Article 58 (3) of UNCLOS. Moreover, the Fish Stocks Agreement reinforces the duty to cooperate under Article 117 of the UNCLOS; the instrument having also been ratified by many States, therefore reinforcing that the due diligence as regards enforcement to ensure compliance with the due regard principle has been accepted internationally.⁸⁰

While Article 62 (4) of UNCLOS only require ‘nationals’ of a State fishing in a coastal state’s EEZ to comply with its laws and regulations, Article 58 (3) made it clear that the said State is also required to do the same when they exercise their rights and in ‘performing their duties’, implying that it shall exercise due regard and due diligence obligations concurrently; its sovereign immune vessels will have to respect these obligations as regards IUUF.⁸¹ Rights exercised with ‘absoluteness’, i.e. disregarding due regard and due diligence obligations under UNCLOS, will raise the concerned State’s international responsibility, as seen in the 2016 South China Sea award.⁸² Conclusively, Chi-

⁷⁶ UNCLOS, art. 96; ITLOS, ARA Libertad” (Argentina v. Ghana).

⁷⁷ Tamo Zwinge, “Duties of flag states to Implement and Enforce International Standards and Regulations – And Measures to Counter Their Failure to Do So,” *Journal of International Business & Law*, 10, No. 2 (2011): 300.

⁷⁸ UNCLOS, art. 117.

⁷⁹ UNCLOS, art. 111 (5); Fish Stocks Agreement, art. 19 (1) (a).

⁸⁰ Zwinge, “Duties of flag states to Implement and Enforce International Standards and Regulations – And Measures to Counter Their Failure to Do So,” 307, 309.

⁸¹ R. Rajesh Babu, “State responsibility for illegal, unreported and unrelated fishing and sustainable fisheries in the EEZ: some reflections on the ITLOS Advisory Opinion of 2015,” *Indian Journal of International Law* 55, no. 2 (2015): 255-256.

⁸² Wu, et. al. eds., *UN Convention on the Law of the Sea*, 67.

na will be liable for any conducts disregarding the concurrent due regard and due diligence principle, including by escorting instead of preventing, IUUF committed within Indonesian EEZ in the Natunas.

2. ‘Loss or Damage’ to Indonesia as the coastal state: Non-observance of Due Regard and Due Diligence Obligations by Sovereign Immune Vessels

Article 31 of UNCLOS stated that the flag state of a sovereign immune vessel causing ‘loss or damage’ to the coastal state by virtue of its non-compliant conducts as regards its national laws, will bear ‘international responsibility for such conducts. In this regard, there exists ‘duty not to breach’ coastal state’s law – a duty to respect the exercise of legislative jurisdiction on the part of the coastal state by a vessel of another State.⁸³ Breaching this duty means violating Article 31 of UNCLOS, therefore constituting an internationally wrongful act (IWA).⁸⁴ However, it should be noted that Article 31 of UNCLOS contains the wordings ‘international responsibility for any loss or damage to the coastal state’, which should be interpreted in good faith, according to its ordinary meaning and taking into account its context and its purpose.⁸⁵

‘Loss or damage’ is not specified in Article 31 of UNCLOS, although the article implies an obligation to respect and comply with the coastal state’s legislative jurisdiction. Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA) noted that a State ‘is entitled as an injured State to invoke international responsibility of another State, if the obligation that was breached is owed to that (injured) State.’⁸⁶ An injured State in invoking another State’s responsibility for its conducts shall be in one of the following conditions:⁸⁷

- 1) It has an individual right to the performance of an obligation, as in bilateral agreements;
- 2) It is particularly affected by the breach of such obligation, although said obligation cannot be said to be owed individually to the injured State; and

⁸³ Douglas Guilfoyle, *Shipping Interdiction and the Law of the Sea* (Cambridge; New York: Cambridge University Press, 2009), 298.

⁸⁴ *Ibid.*

⁸⁵ Vienna Convention on the Law of Treaties, 1155 UNTS 331 (opened for signature 23 May 1969, entered into force 27 January 1980), article 31 (1).

⁸⁶ Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA) 2001, art. 42 (a).

⁸⁷ International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, United Nations, 2008, UN Doc. A/56/10, 117-118 (ARSIWA Commentary).

- 3) in the case of ‘integral’ or ‘independent’ obligation – here, the performance of said obligation by the responsible State is required for its performance by all other States.

Sovereign immune vessels are representatives of their flag state, thus only the flag state has the right to exercise jurisdiction over such vessels, and their actions are attributable to the flag state.⁸⁸ In the 2016 South China Sea award, PCA concluded that CMS and FLEC vessels’ escort of IUUF within Philippine EEZ at Mischief Reef and Second Thomas Shoal to be acts of China. In determining that such escorts are IWA, they must be attributable to the State (subjective element), and are breaches of its international obligations (objective element).⁸⁹ Turning to the subjective element of IWA, these escorts are carried out by CMS and FLEC vessels, being representatives of the Chinese government; on the objective element, the obligations of due regard and due diligence for China to prevent conducts prejudicing the Philippines’s sovereign rights and jurisdiction in its EEZ have been accepted as parts of UNCLOS, and in that case, both the escort and the IUUF injured Philippine’s sovereign rights as has been determined by the PCA as both Mischief Reef and Second Thomas Shoal are parts of Philippine EEZ.⁹⁰ Under the principle of the unity of the State, acts of State’s organs shall be construed as acts of that State ‘for international responsibility’ purposes, meaning that such conducts are attributable to China in relation to its escort of IUUF.⁹¹ As all elements of IWA were fulfilled and there also existed ‘loss or damage’ on the Philippines’ part as regards its exercise of sovereign rights, it would be acceptable to view the Philippines as the ‘injured State’, therefore enabling it to call for China’s international responsibility owed to it individually under UNCLOS.

It would also be necessary to establish whether ‘loss or damage’ had been incurred by China upon Indonesia, by first turning to establish all elements of IWA. The CCG answers to the Chinese government through the State Oceanic Administration since its formation in 2013⁹², and to the Chinese armed forces (specifically, the People’s Armed Police Force) since 2018.⁹³ It is empowered to perform ‘law enforcement tasks’, as prescribed by Chinese law.⁹⁴ However,

⁸⁸ UNCLOS, art. 95 & 96; ARA Libertad, (Argentina v. Ghana).

⁸⁹ ARSIWA, art. 2; Phosphates in Morocco (Italy v. France), Judgment, PCIJ Series A/B No. 74, ICGJ 326 (PCIJ 1938), 22; ARSIWA Commentary, 34.

⁹⁰ The South China Sea Arbitration, para. 751, 753.

⁹¹ ARSIWA Commentary, 40.

⁹² China. *The decision of the First Session of the Twelfth National People’s Congress on the Plan for Restructuring the State Council and Transforming Functions*, 2013, art. 5.

⁹³ Ian Bowers & Swee Lean Collin Koh (eds), *Grey and White Hulls: An International Analysis of the Navy-Coastguard Nexus*, (Singapore: Palgrave Macmillan, 2019), 21-22.

⁹⁴ China. *The decision of the Standing Committee of the National People’s Congress on the*

as was the case in the Philippines-China dispute, coordination efforts were observed between CCG vessels and Chinese fishermen in the March 2016 incident, when the CCG prevented Indonesian authorities from detaining a Chinese fishing vessel suspected of committing IUUF, also taking place in the Natunas.⁹⁵ As the coastal state, Indonesia has the right to exercise enforcement jurisdiction to ensure its exercise of sovereign rights and jurisdiction within its EEZ.⁹⁶ When CCG vessels obstructed such exercise of enforcement jurisdiction against Chinese fishermen, their act would be considered as China's disregard of its obligation under Article 236, namely to ensure that its sovereign immune vessels 'act in a manner consistent...with this Convention.' Furthermore, CCG's function as a law enforcement agency as prescribed by China would entitle its vessels to sovereign immunity as they are authorized by China as being 'on government service' under UNCLOS⁹⁷, but their conducts would be the responsibility of China as the flag state, which fell short of both due regard and due diligence in deterring IUUF committed by Chinese fishermen; these would give rise to China's State responsibility *vis-à-vis* Indonesia as the coastal state.⁹⁸ Therefore, there exist 'losses or damages' incurred by China through its escort of IUUF by the CCG in the Natunas, rendering Article 31 of UNCLOS compatible for invoking China's State responsibility for such conducts.

IV. RECOMMENDATIONS FOR MEASURES AGAINST CCG VESSELS INTERFERING WITH INDONESIA'S RIGHTS AND JURISDICTION

EEZ is a maritime zone *sui generis*, having different nature than those of the high seas and the coastal state's territorial sea.⁹⁹ The presence of EEZ enables the coastal states to manage its living resources while also allowing high seas' freedom to be exercised by other States.¹⁰⁰ To this end, the coastal state is empowered to exercise legislative and enforcement jurisdiction to ensure the performance of its sovereign rights and jurisdiction under Article 73 (1)

Exercising of the Marine Right Safeguarding and Law Enforcement Functions and Powers by the China Coast Guard, 2018, art. 1.

⁹⁵ Hongzhou & Bateman, "Fishing Militia, the Securitization of Fishery and the South China Sea Dispute," 292-293.

⁹⁶ UNCLOS, art. 73 (1); Arctic Sunrise, para. 281.

⁹⁷ UNCLOS, art. 110 (5) & 111 (5); Manullang, et. al, "The Status of Maritime Militia," 31.

⁹⁸ ITLOS, ITLOS 2015 Advisory Opinion, para. 146-147; Babu, "State responsibility", 261.

⁹⁹ Tanaka, *Law of the Sea*, 126.

¹⁰⁰ UNCLOS, art. 56 (1) (a), (b) & 58 (1), (2); Charles Quince, *The Exclusive Economic Zone*, (Delaware; Malaga: Vernon Press, 2019): 133.

of UNCLOS. While sovereign immune vessels may not be subjected to the coastal state's enforcement jurisdiction, they are under an obligation to respect the coastal state's legislative jurisdiction.¹⁰¹ As such, sovereign immune vessels are prohibited to exercise their rights and duties by prejudicing coastal state's jurisdiction in its EEZ.

By virtue of Article 31 of UNCLOS, Indonesia as the coastal state may invoke China's State responsibility for CCG's escort of Chinese fishermen committing IUUF in the Natunas, and obstruction of performance of its sovereign rights and jurisdiction in its EEZ. These are measures that can be considered to prevent or mitigate such conducts.

A. REQUEST FOR REPARATION AND SETTLEMENT OF DISPUTES THROUGH NEGOTIATION AND JUDICIAL PROCEEDINGS

UNCLOS stipulates that any loss or damage suffered by the coastal state by virtue of a State's non-compliance with its regulation is to be borne by the responsible State.¹⁰² Reparation is an obligation that calls for that State to re-establish the situation predating such an act.¹⁰³ Per *Factory at Chorzow*, reparation shall be made 'in the adequate form', and need not to be established as a necessity by relevant convention(s) since it is an 'indispensable complement of a failure to apply a convention.'¹⁰⁴ Therefore, any violation against Article 31 of UNCLOS would entail an obligation to make reparation for injury caused by the responsible State.

It has been established that CCG's escort of Chinese fishermen committing IUUF within the Indonesian EEZ in the Natunas is regarded as an IWA. The obligations of due regard and due obligation in preventing IUUF by the flag state are 'obligations of conduct' or 'obligations of means', where China as the flag state shall ensure compliance by vessels flying its flag as regards exercise of sovereign rights and jurisdiction by Indonesia as the coastal state. As CCG was escorting, rather than preventing, IUUF within Indonesia's EEZ in the Natunas, its conduct would be attributable to China due to CCG vessels' status as sovereign immune vessels. Such conducts have been regarded as against the obligation under Article 58 (3) of UNCLOS; therefore China can be requested to make reparations for obstructing Indonesia's exercise of sovereign rights and jurisdiction as the coastal state. However, both States will

¹⁰¹ UNCLOS, art. 58 (3) & 236.

¹⁰² UNCLOS, art. 31; ARSIWA, art. 31 (1).

¹⁰³ ARSIWA Commentary, 91.

¹⁰⁴ *The Factory at Chorzow* (Germany v. Poland), Judgment, PCIJ Series A No. 9, ICGJ (247) (PCIJ 1927), 21.

first need to negotiate in order to settle the issues between them, including CCG's escort of Chinese fishermen in the Natunas.¹⁰⁵ Should local remedies between Indonesia and China in resolving their disputes have been exhausted, Indonesia can submit them to relevant international tribunals under Article 287 (1) of UNCLOS, with any award being rendered binds both China and Indonesia, regardless of their participation in the proceedings.¹⁰⁶

B. AGREEMENT OR PROVISION ON REGIONAL FISHERIES MANAGEMENT IN THE SOUTH CHINA SEA

States bordering the South China Sea – a ‘semi-enclosed sea’ – shall cooperate on managing and conserving living resources, including fisheries.¹⁰⁷ This would be necessary for the light of maritime boundaries dispute among claimant States in the South China Sea – which by itself ignite fisheries incidents, and when such is coupled by the depletion of regional fish stocks, these would lead to fishermen moving further afield to look for better catches, possibly opening up another avenue for IUUF.¹⁰⁸

When referring to ‘regional fish stocks’, it would be useful to draw another parallel, this time with the 2015 ITLOS Advisory Opinion, where the expressions ‘shared stocks’ and ‘stocks of common interest’ were equated to stocks occurring within the EEZ of two or more coastal states, or both within the EEZ and in an area beyond and adjacent to that zone; this being Article 63 of UNCLOS. The involved States shall seek to agree on measures necessary to coordinate and ensure the conservation of such stocks, either directly or by way of sub-regional or regional organizations.¹⁰⁹ Furthermore, States shall both ensure proper conservation of such fish stocks and taking of measures relating thereto.¹¹⁰ The 2002 Declaration on the Conduct of Parties in the South China Sea (the 2002 Declaration of Conduct) called for cooperation among State Parties to that declaration – which included ten member States (including Indonesia) of the Association of Southeast Asian Nations (ASEAN) and China – including in the field of ‘marine environmental protection’.¹¹¹

The cases of Chinese escort of IUUF in both the Philippines and Indonesia highlight the need for a regional fisheries management agreement, where co-

¹⁰⁵ UNCLOS, art. 283 (1).

¹⁰⁶ UNCLOS, Annex VII, art. 296 (1) & 9.

¹⁰⁷ UNCLOS, art. 123; Hongzhou Zhang, “Fisheries cooperation in the South China Sea: Evaluating the options”, *Marine Policy* 89 (2018): 67.

¹⁰⁸ Joshua H. Ho & Sam Bateman (eds), *Maritime Challenges and Priorities in Asia: Implications for regional security*, (Oxon; New York: Routledge, 2012), 24.

¹⁰⁹ UNCLOS, art. 63 (1) & (2).

¹¹⁰ ITLOS 2015 Advisory Opinion, para. 207.

¹¹¹ Declaration on the Conduct of Parties in the South China Sea, 2002, art. 6.

operation among States can result in the decrease of depletion and degradation of marine resources and the environment in the South China Sea.¹¹² ASEAN tried to manage the South China Sea disputes by way of moving on from the 2002 Declaration of Conduct to a binding Code of Conduct between ASEAN member States and China – the latter also participating in the making of such agreement.¹¹³ Since all States involved in the South China Sea disputes – including non-claimant State such as Indonesia – are parties to UNCLOS, and that the convention has been confirmed as a ‘basic norm’ in the 2002 Declaration of Conduct, this shall co-opt ASEAN member States and China to cooperate in managing marine resources, preferably through the creation of a regional fisheries management agreement based on the 2002 Declaration of Conduct or the inclusion for such in the form of certain provisions under the Code of Conduct, which is still being discussed. In particular, a ‘vessel compliance clause’ obligating States to ensure compliance of its vessels (especially fishing vessels) with the coastal state’s fisheries laws and regulations can be considered, since while States can exercise freedoms of the seas as stated under Article 58 (2) of UNCLOS, the coastal state shall weigh their interests against those of the other States.¹¹⁴ These options would better ensure the compliance of interested States on those obligations, and they are therefore barred from escorting such activities.

V. CONCLUSION

Sovereign immunity is given to warships and non-commercial government vessels since they are representatives of their flag state, and the only applicable jurisdiction on sovereign immune vessels is those of the flag state. However, when such immunity is used arbitrarily and caused injuries to the coastal state, then the flag state of said sovereign immune vessels will bear international responsibility for its wrongdoings, since their actions would be recognized as acts of the flag state, owing to the restrictive immunity theory and their disregard for due regard and due diligence principles owed to the coastal state in the EEZ per Article 58 (3) of UNCLOS. In this case, Indonesia

¹¹² Shih-Ming Kao, Nathaniel Slifford Pearre & Jeremy Firestone, “Regional Cooperation in the South China Sea: Analysis of Existing Practices and Prospects”, *Ocean Development & International Law* 43, No. 3 (2012): 285-286.

¹¹³ Ralf Emmers, “ASEAN’s Search for Neutrality in the South China Sea”, *Asian Journal of Peacebuilding* 2, no. 1 (2014): 62, 64-65.

¹¹⁴ UNCLOS, art. 62 (3); Schatz, “Combating Illegal Fishing”, 402. For an example of a vessel compliance clause, see Article 4.1., Treaty on Fisheries between the Governments of Certain the Pacific Island States and the Government of the United States of America, 26 ILM 1048 (signed 2 April 1987).

can request China's state responsibility for the CCG's obstruction of Indonesia's exercise of its sovereign rights and jurisdiction in its EEZ in the Natunas as they did not exercise due regard with respect to Indonesia as the coastal state, and due diligence obligations towards its fishermen carrying IUUF in Indonesian EEZ. Alternatively, Indonesia and China shall seek to cooperate on managing the issue of fisheries to combat IUUF among them in particular, and in the South China Sea in general. The creation of either a standalone regional fisheries management agreement based on the 2002 Declaration of Conduct or the inclusion of regional fisheries management provision within the Code of Conduct involving the ASEAN Member States and China will not only minimize another repetition of IUUF escorts, but also stresses the need to comply with both due regard and due diligence obligation under UNCLOS, especially through the inclusion of a vessel compliance clause.

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