

THE REGIME FOR FLAG STATE RESPONSIBILITY IN INTERNATIONAL FISHERIES LAW – EFFECTIVE FACT, CREATIVE FICTION, OR FURTHER WORK REQUIRED?

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1 Introduction

The principle of flag State jurisdiction is one of the most widely acknowledged in international maritime law, yet it remains one of the most contentious. The *rights* of flag States have remained largely unchanged since the original evolution of the concept. But the list of their *responsibilities* has grown exponentially, in areas ranging from ship safety standards and crew training to marine pollution, maritime security, and seafarer welfare. The increasing importance attributed to the role of the port State and the coastal State, the ever-present debate on ‘open registries’ or ‘flags of convenience’, and the unresolved question of the ‘genuine link’ have all contributed to an ongoing international discussion regarding the effectiveness of flag State jurisdiction, and the extent of responsibility which can, or should, be effectively met by flag States.

In general maritime law, this discussion has produced a range of initiatives intended to combat inadequate flag State action, reduce the impacts and attraction of open registries, and ensure that responsibilities which are not met by flag States are fulfilled through complementary controls. While the topic of flag State jurisdiction is still the subject of significant discussion in the general maritime context, the principal focus is now on implementing internationally agreed rules and requirements, rather than developing significant new areas of flag State responsibility.

In the international fisheries sector, however, flag State responsibility is the subject of an almost entirely different regime. Attention is centred on the responsible flag State as the key panacea for combating illegal, unreported and unregulated (IUU) fishing, and the concept of flag State responsibility itself is still evolving. As fish stocks around the world reach the point of collapse,¹ and IUU fishing continues to undermine international management efforts, issues such as the need for a ‘genuine link’ between the vessel and its flag State, what action could be taken against ‘flags of non-compliance’, and the criteria for a responsible flag State are front and centre in international discussions. But these developments present a range of new challenges, and raise the question whether a system of extensive flag State responsibility is an effective approach, or whether we should be concentrating our efforts on the development of complementary controls to assist where flag State jurisdiction fails.

This paper will consider the rationales, rights, responsibilities and lessons learned regarding flag State responsibility in the general maritime context, before discussing the contemporary concept and specific regime of the ‘responsible flag State’ in international fisheries, and the legal and practical challenges this concept presents. In concluding, the paper makes some observations about the effectiveness of flag State responsibility and the alternatives that might be available.

2 Background: the responsible flag State

The institution of the ‘flag State’ developed over several hundred years. Its early development was influenced by two key imperatives, which can be summed up as ‘nationality’ and ‘registration’. The importance of the ‘flag’ or ‘nationality’ of vessels stems from the principle of freedom of the seas, and the realities of long-distance sea voyages. Historically, the flag embodied the idea of national protection and national administration of the vessels of a nation-state, and was necessary to ensure adequate protection of vessels travelling far from their home port. Over time, requirements for registration, regulating the ownership and operation of vessels, developed to give effect to improvements in safety standards for navigation, vessels and seafarers, and to put in place some environmental protections in relation to the conduct of shipping operations.²

The international codification of the principle of flag State jurisdiction took place as part of the development of legally binding global instruments on the law of the sea in the second half of the 20th century. The *Draft Articles Concerning the Law of the Sea 1956*,³ prepared by the International Law Commission, formed the basis for discussion and

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¹ In 2008, 80 per cent of the world fish stocks for which information is available were fully exploited or over exploited. Fisheries and Aquaculture Department: Food and Agriculture Organization of the United Nations, *The State of World Fisheries and Aquaculture 2008*, (2009) Rome.

² A detailed account of the historical development of the concept of flag State responsibility can be found in John Mansell, *An Analysis of Flag State Responsibility from an Historical Perspective: delegation or derogation?* (D Phil Thesis, University of Wollongong, 2007).

³ *Yearbook of the International Law Commission 1956*, vol II, 256.

adoption of the *High Seas Convention 1958* (the High Seas Convention)⁴ which was the first legally binding international instrument to set out the rights and responsibilities relating to flag State jurisdiction. The *United Nations Convention on the Law of the Sea 1982* (1982 Convention),⁵ which now provides the basis for understanding flag State jurisdiction in international law, developed the ideas of the 1958 Convention, notably in relation to the responsibilities of flag States to take measures to ensure safety at sea.⁶

2.1 Flag State rights and responsibilities

All States, whether coastal or land-locked,⁷ have the right to fix conditions for the grant of their nationality to ships, for the registration of ships in their territory, and for the right to fly their flag.⁸ Flag States have exclusive jurisdiction over vessels flying their flag on the high seas, except in exceptional cases provided for in international treaties or in the 1982 Convention.⁹ The only specific condition set by international law for the grant of nationality (other than the requirement that a vessel may only have one flag at a time) is that there must be a ‘genuine link’ between the State and the ship.¹⁰

Naturally, the corollary of flag State rights is flag State responsibilities. The basic responsibilities of flag States are those set out in Article 94 of the 1982 Convention, which requires a flag State to effectively exercise jurisdiction and control over ships flying its flag, and to take measures to ensure safety at sea. This includes a requirement for the flag State to maintain a register of ships flying its flag and to assume effective jurisdiction under its internal law for the ship, officers and crew in respect of administrative, technical and social matters.¹¹ Measures to ensure safety at sea must be taken with respect to: construction, equipment and seaworthiness of ships; manning of ships, labour conditions and the training of crews; and the use of signals, maintenance of communication and prevention of collisions.¹²

Flag States are required to conform to generally accepted international regulations, procedures and practices in respect of the things listed in Article 94(3) and (4).¹³ As Churchill and Lowe point out;

[t]he emphasis upon internationally accepted standards ... is dictated by practical necessity. While each State remains free in theory to apply its own legal standards relating to such matters as seaworthiness and crew qualifications to ships flying its flag ... there would be chaos if these standards varied widely or were incompatible. Furthermore, because safety measures usually involve extra costs for shipowners ... most States are reluctant to impose stricter safety legislation on their shipowners than other States impose on theirs. For these reasons, therefore, the international community has developed a set of uniform standards to promote the safety of shipping.¹⁴

The internationally accepted maritime safety standards relate principally to the seaworthiness of ships, procedures for collision avoidance, standards for crew training, and navigational aids.¹⁵

Internationally accepted standards are also relevant in relation to marine pollution. Article 211 of the 1982 Convention contains specific requirements relating to pollution from vessels, and requires flag States to adopt laws and regulations for the prevention, reduction and control of pollution from their vessels which ‘at least have the same effect as that of generally accepted international rules and standards established through the competent international organization or general diplomatic conference.’¹⁶ This requirement is given greater specificity by Article 217, which imposes flag State responsibilities for compliance and enforcement in relation to these rules and standards. There is no definition in

⁴ Opened for signature 29 April 1958, 1963[ATS]12, (entered into force 30 September 1962).

⁵ Opened for signature 10 December 1982, 1994[ATS]31, (entered into force 16 November 1994).

⁶ The 1982 Convention is understood to embody customary international law as regards flag State jurisdiction, and the flag State rights and responsibilities set forth in it are generally accepted by all States.

⁷ Article 90.

⁸ Article 91.

⁹ Article 92. See Part IV below for a discussion about the exceptions to exclusive flag State jurisdiction.

¹⁰ Article 91. There is ongoing debate about whether the ‘genuine link’ is a ‘pre-condition’ to the grant of nationality, or part of the exercise of effective jurisdiction and control. See further discussion in Part II below.

¹¹ Article 94(2)(a) and (b).

¹² Article 94(3) and (4).

¹³ Article 94(5).

¹⁴ R R Churchill and AV Lowe, *The Law of the Sea*, (3rd ed, 1999), 265.

¹⁵ The principal safety conventions are the *Convention on the Safety of Life at Sea (SOLAS)*, opened for signature 1 November 1974, 2004[ATS]29, (entered into force 25 May 1980); the *International Convention on Load Lines*, opened for signature 5 April 1966, 1968[ATS]23, (entered into force 21 July 1968) (*Load Line Convention*); the *Convention on the International Regulations for Preventing Collisions at Sea (COLREGs)*, opened for signature 20 October 1972, 1980[ATS]5, (entered into force 15 July 1977); and the *International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW)*, opened for signature 7 July 1978, 1984[ATS]7, (entered into force 28 April 1984). There are also a large number of International Labour Organisation (ILO) Conventions which set safety standards regarding conditions of employment and training for seafarers. These have recently been revised and incorporated into the *Maritime Labour Convention 2006* (not yet in force).

¹⁶ Article 211(2).

the 1982 Convention of 'generally accepted international rules and standards',¹⁷ but it is generally acknowledged that the International Convention on the Prevention of Pollution from Ships (MARPOL) is the primary source of international rules governing pollution from vessels.¹⁸

2.2 Practical challenges

In theory, this international legal framework for flag State control should be a very effective means of addressing maritime safety and marine pollution, and ensuring good order on the high seas. Yet the practical challenges inherent in, and not addressed by, this system were obvious even before the customary principles had been codified in international law.¹⁹ They can be summarised as: (i) inadequate flag State control of ships as a result of lack of any 'genuine link' between the ship and the State of registration; and (ii) lack of adequate implementation and enforcement by flag States of internationally accepted regulations, procedures and practices.

2.2.1 'Flags of convenience' and the 'genuine link'

International law leaves flag States free to determine the conditions for the grant of their nationality to ships, provided that there is a 'genuine link' between the ship and the State concerned, and although it requires flag States to exercise effective jurisdiction and control over ships flying their flag, there tend to be no immediate consequences for a flag State which fails to do so. Accordingly, the conditions for registration and the degree of oversight and enforcement action by flag States vary widely, allowing shipowners to select their state of registration with these factors in mind.

Shipping is a highly competitive industry, within which many shipowners and flag State administrations seek to reduce operating costs and increase returns. In this environment, 'flags of convenience' or 'open registers',²⁰ enable shipowners, whether or not they have any national or economic connection to the State concerned, to register ships cheaply, or to register substandard ships which would not meet the conditions for registration set by more stringent administrations. In addition, shipowners are able to move vessels between registries, so if a ship becomes unable to meet the registration requirements of its flag State (for example, in terms of vessel safety or marine pollution standards), it can be re-flagged to a less stringent register that does not take such a responsible attitude toward its international obligations. The ability for vessels to consistently re-flag with less and less vigilant registers further undermines the effective operation of flag State jurisdiction.

The problems associated with 'flags of convenience' have been the subject of extensive debate, particularly in light of high-profile oil tanker accidents and marine pollution incidents, and in this context there has been much discussion about the requirement of the 'genuine link' and its role in ensuring the effective exercise of flag State responsibility. The idea of the 'genuine link' was introduced in Article 5 of the 1958 Convention, and was a compromise between those who favoured the inclusion of more detailed owner or crew nationality requirements as a condition of the grant of nationality to ships (traditional maritime states), and those who opposed this idea (states with open registries).²¹

Although the 'genuine link' received little attention in the discussions leading to the adoption of the 1982 Convention, the effects of registration conditions for ships on maritime transport was an ongoing consideration in other relevant fora,²² and the concept resurfaced in discussions for the *United Nations Convention on Conditions for the Registration of Ships 1986* (the Registration Convention).²³ The Registration Convention adopted requirements concerning the

¹⁷ There are a variety of ways in which 'generally accepted international rules and standards' are referred to in the 1982 Convention. See inter alia arts 94(3),(4) and(5), 211, 217, 218, 219, 220 and 226.

¹⁸ It is unclear to what extent the other Conventions, resolutions and guidelines adopted by the IMO are considered to form part of these standards. Some writers are of the view that only instruments which have reached the status of customary international law can form part of the 'generally accepted international rules and standards', while others would attribute 'generally accepted' status to any IMO Convention that is in force, regardless of whether the State concerned is a party to it. See discussion by, inter alia, Alan Khee Jin-Tan, *Vessel Source Pollution: the law and politics of international regulation*, (1st ed, 2006), 196; E Molenaar, *Coastal State jurisdiction over vessel-source pollution*, (1st ed, 1998), 151.

¹⁹ For example, the need to elaborate criteria for a genuine link was the subject of discussions in the International Law Commission in preparing the Draft Articles on the Law of the Sea (see 'Articles concerning the Law of the Sea with commentaries' *Yearbook of the International Law Commission 1956*, vol II, commentary on Article 29), and in the negotiations for the High Seas Convention (see Oude Elferink, *The Genuine Link Concept: Time for a Post-Mortem?*, (1999), 2-3).

²⁰ There is no definition in the international instruments of the terms 'flag of convenience' or 'open register', but both are widely used. See Judith Swan, FAO Fisheries Circular 980, *Fishing Vessels Operating Under Open Registers and the Exercise of Flag State Responsibilities: Information and Options*, FAO, Rome, 2002, 2.

²¹ Elferink, above n 19. Oude Elferink notes that, even at this point in time, nationality requirements were seen as a means to halt the massive reflagging from the more costly registries of traditional maritime states to open registries.

²² Ibid 6-7.

²³ Elferink notes that negotiations for the Registration Convention revealed a conflict of interest between, on the one hand, developing States and States without open registries, which advocated the inclusion of economic criteria to define the genuine link (in the hope that it would give them greater control over their exports), and on the other hand, developed States and States with open registries, which opposed the inclusion of an economic link requirement. This conflict could only be solved by adopting a vaguely worded text. See Ibid, 7.

nationality of ownership²⁴ and crew²⁵ of ships as an element of registration with the flag State, but the requirements are linked to effective jurisdiction and control, and are not really a stand-alone ‘genuine link’ criteria. In any case, the Registration Convention has received very few ratifications, and has never come into force.²⁶

Some writers have suggested that the ‘genuine link’ requirement is necessary to guarantee the principle of effective flag State jurisdiction and control; otherwise there is no actual authority over a vessel, and the concept of nationality of ships becomes little more than a fiction, and the public order at sea which it is intended to guarantee is impossible.²⁷ Others refute this suggestion, including on the basis of the negotiating history of the genuine link requirement and its placement (as a pre-condition to the grant of nationality) in the relevant instruments.²⁸ Academic debate aside, neither the 1958 Convention, the 1982 Convention or the Registration Convention effectively define what a genuine link is, nor what the consequences will be if a genuine link does not exist,²⁹ and attempts to elaborate the ‘genuine link’ have not been successful.³⁰

2.2.2 Inadequate flag State implementation

Given the difficulty of finding a generally acceptable definition of the ‘genuine link’, the international community has, in practice, found it more useful to refocus the discussion on specific performance requirements to be applied to flag States, and other ways of enforcing those requirements when flag State implementation is inadequate or ineffective. As noted above, generally accepted international standards are necessary to set a benchmark which all flag States should meet, to avoid the development of sub-standard registries and flags of convenience. However, lack of enforcement of these standards by flag States, and delegation of many of the key responsibilities to private sector ‘Classification Societies’, which vary in credibility and are often less than stringent in carrying out their duties, has undermined the effectiveness of the system. The general inadequacy of flag State implementation has been an ongoing issue affecting maritime safety and the marine environment.³¹

2.3 A range of solutions

A range of initiatives have been developed to counter inadequate flag state performance including within the IMO, through other multilateral fora, and on a unilateral basis. These include:

- the establishment of minimum standard *Guidelines for the Authorisation of Organisations acting on behalf of the Administration*, designed to combat the delegation of flag State responsibilities to ineffectual Classification Societies,³²
- a system of flag State self-assessment to allow flag States to assess their ability to give effect to all relevant IMO Conventions,³³ and
- a *Voluntary IMO Member State Audit Scheme*, to allow IMO members to assess their effectiveness in the implementation and enforcement of relevant standards.³⁴

Perhaps the most successful means of combating inadequate flag State performance has been port State control, requiring the inspection of foreign-flagged ships in the ports of coastal States to verify compliance with international standards, particularly those imposed under IMO and ILO Conventions. Although port States may, under customary international law, exercise jurisdiction over ships voluntarily within their territory (at their ports or offshore terminals), the 1982 Convention contains only limited references to port State rights or responsibilities.³⁵ However, concerns about the vulnerability of coastal States to substandard foreign-flagged ships transiting through their waters

²⁴ Article 8.

²⁵ Article 9.

²⁶ There are currently 14 Parties to the Registration Convention. To enter into force, the Registration Convention must be ratified by 40 States, constituting not less than 25 per cent of world tonnage as set out in Annex III (Article 19). Annex III sets out the tonnage of the merchant fleet by country, on the basis of ships of 500 GRT and above, as at 1 July 1985.

²⁷ Elferink, above n 19, 1. See for more detail Herbert Meijers, *The Nationality of Ships*, (1967).

²⁸ Robin R Churchill, *The Meaning of the “Genuine Link” Requirement in relation to the nationality of ships*, A Study prepared for the International Transport Workers’ Federation, University of Wales, Cardiff, October 2000, 69.

²⁹ *Ibid*, 68, 72.

³⁰ Elferink, above n 19, 13.

³¹ ‘Oceans and the law of the sea’ Consultative Group on Flag State Implementation, Report of the Secretary-General, A/59/63, 5 March 2004, 3.

³² Resolution A.739(18) of the IMO Assembly.

³³ Resolution A.912(22) of the IMO Assembly.

³⁴ Resolution A.946(23) of the IMO Assembly.

³⁵ Except in the marine pollution context, where coastal States have certain rights with relation to protection of the marine environment.

and visiting their ports led to the development of regional Memoranda of Understanding (MOUs) on Port State Controls, of which there are now nine.³⁶

The Port State Control systems do not introduce new rules or standards, but provide for the inspection of vessels to ensure compliance with existing standards, detention of substandard ships until problems are rectified, and a system of information exchange regarding the history of ships and results of inspections. They have also enabled the development of positive and negative lists of flag States, and performance tables for Classification Societies. In light of the weaknesses in the system identified above, Port State control has become an effective mechanism for the complementary enforcement of international standards.

3 Contemporary developments: the responsible fisheries flag State

Many aspects of the day to day operation of a fishing vessel are identical to those of any other ship, and they operate in the same marine environment – so the rationales and underlying principles, as well as the rights and responsibilities discussed above should apply equally to vessels engaged in fishing and fishing related activities. And yet the responsibilities of flag States for their fishing vessels are, in large part, constituted by a separate regime from that of the general maritime industry.

In part, this is because the principal international conventions relating to maritime safety do not generally apply to fishing vessels, due mostly to their size, design, construction and operation. More importantly, however, the concept of a responsible *fisheries* flag State must take into account the different way in which fishing vessels ‘use’ the marine environment. For example, unlike merchant vessels, fishing vessels harvest living marine resources (often in large quantities), including both target species and other species taken unintentionally as ‘bycatch’ (which may include marine mammals and even sea birds), using fishing gear of all types (some of which may be lost or discarded in the sea during or after fishing operations). These activities give rise to two key imperatives in the fisheries context. The first is the need for responsible fisheries management, to ensure the sustainable use of fishery resources and the conservation of the marine environment in which those resources are found. The second is the need to prevent, deter and eliminate IUU fishing, and the ‘flags of non-compliance’ which facilitate this activity. These issues have led to the development of a separate, and in many ways quite different, regime for flag state responsibility in the fisheries sector.

3.1 Application of general flag State obligations to the fishing sector

The rights and responsibilities of flag States set out in the 1982 Convention to register and exercise effective jurisdiction and control over vessels pertain to any vessel. However, the application of some of the ‘generally accepted international rules and standards’ which are incorporated by reference into the 1982 Convention differs between fishing vessels and other kinds of vessels. In relation to marine pollution, the same rules and standards generally apply.³⁷ In relation to maritime safety, flag States are obliged to ensure the safety of all vessels (including fishing vessels), and the appropriate standards of training and operation in relation to their crew, in accordance with the basic requirements of Article 94(3) and (4). However, the ‘generally accepted international regulations, procedures and practices’ which must be observed by virtue of Article 94(5) are contained in international instruments that do not generally apply to fishing vessels by virtue of their design, construction and operation.³⁸

In recognition of this significant gap in the regulatory framework, specific conventions have been developed to deal with safety standards in the fisheries sector, but they have not received sufficient ratifications to come into force. This was summed up succinctly by the Secretary-General of the IMO, speaking in 2004, when he said;

The fishing sector of the maritime industry, which suffers the most casualties – 24,000 lives lost per year is a commonly quoted figure – is still lacking the international mandatory safety regime which, if they were in force, would be provided by the 1993 Torremolinos Protocol for the Safety of Fishing Vessels and the 1995 International Convention on Training, Certification and Watchkeeping for Fishing Vessel Personnel.³⁹

³⁶ These are: the Paris MOU, which covers the waters of the European coastal states and the North Atlantic basin from North America to Europe; the Tokyo MOU for the Asia Pacific region; the Caribbean MOU; the Vina del Mar Agreement for the Latin American region; the Indian Ocean MOU; the Mediterranean MOU; the West and Central African MOU; the Black Sea MOU and the Riyadh MOU for the Gulf region. Australia is a signatory and active member of both the Indian Ocean and Tokyo MOUs. For links to these MOUs, see <http://www.imo.org/TCD/mainframe.asp?topic_id=159>, at 26 August 2009.

³⁷ The *International Convention for the Prevention of Pollution by Ships* and its Protocols (the MARPOL Convention), which is the principal source of generally accepted international rules and standards for the prevention of marine pollution (see note 16 above) applies to all ships and its application is not limited by the type of voyage on which the ship is engaged.

³⁸ Notably, SOLAS, STCW and the Load Lines Convention do not apply to fishing vessels.

³⁹ Address by the Secretary-General to the 46th Session of the Sub-Committee on Stability and Load Lines and on Fishing Vessels’ Safety, 8 – 12 September 2003., cited in Cdr Brice Martin-Castex, *Potential link between IUU fishing and the status of safety-related international instruments*

This is the subject of ongoing work within the International Maritime Organisation (IMO), the International Labour Organisation (ILO) and the United Nations Food and Agriculture Organisation (FAO).

3.2 Fisheries-specific flag state obligations

As noted above, fishing vessels 'use' the marine environment in a different way to other ships, requiring the development of further elements of flag State responsibility to address the need for effective cooperative management of shared resources, and the effective control of fishing operations through the prevention, deterrence and elimination of IUU fishing. These rationales were not a focus of the 1982 Convention, which does not incorporate detailed requirements for the management of high seas fisheries, or the conduct of fishing on the high seas.

The 1982 Convention specifically provides that, in principle, fishing on the high seas is open to all States.⁴⁰ This includes general (but relatively unspecific) duties on interested States to 'cooperate with each other' in the conservation and management of living marine resources of the high seas.⁴¹ Where appropriate, this cooperation should take place through regional fisheries management organizations (RFMOs).⁴² There are also general duties to cooperate with regard to straddling stocks,⁴³ highly migratory stocks,⁴⁴ and particular species.⁴⁵ However, these various requirements for 'cooperation' are as far as the 1982 Convention goes in establishing any fisheries-specific flag State responsibilities.⁴⁶ Coupled with the principle of exclusive flag State jurisdiction, this produced a lacuna in the international legal framework, allowing flag States that were unwilling or unable to regulate their fishing vessels on the high seas to prevent any action from being taken against those vessels without there necessarily being any adverse consequences for the State concerned.⁴⁷

Against this backdrop, an international governance framework has developed for high seas fishing that gives effect to the duty to cooperate through a system of regional fisheries management organisations (RFMOs),⁴⁸ and sets out the responsibilities of flag States for ensuring compliance with the international fishery conservation and management measures adopted by those organisations. The principal flag State responsibilities are set out in two instruments: the *Agreement to Promote Compliance with International Conservation and Management Measures on the High Seas*⁴⁹ (the Compliance Agreement) and the *United Nations 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 1995*⁵⁰ (the UN Fish Stocks Agreement). These Agreements enunciate a range of flag State duties that give specific practical effect to the obligation to ensure effective jurisdiction and control in relation to the activities of fishing vessels. In this way, they could usefully be considered to implement the 'duty to cooperate' set out in the 1982 Convention much in the same way as 'generally accepted international rules and standards' in MARPOL and SOLAS (for example) implement the general obligations in the 1982 Convention relating to maritime safety and marine pollution.

The Compliance Agreement creates a set of basic obligations requiring flag States to control the activities of their vessels on the high seas, including by requiring an authorization for high seas fishing (which must only be issued where the flag State is able to effectively control the fishing operations of the vessel),⁵¹ and by ensuring that vessels do not undermine the effectiveness of international conservation and management measures.⁵² Flag States are also

applicable to fishing vessels and fishermen, Presentation to the Workshop on IUU Fishing Activities, OECD Paris, 19 and 20 April 2004, available at < <http://www.oecd.org/dataoecd/19/23/31652379.pdf> >, at 26 August 2009.

⁴⁰ Article 116.

⁴¹ See Articles 117 - 120.

⁴² Article 118.

⁴³ Article 63.

⁴⁴ Article 64.

⁴⁵ Articles 66 and 67.

⁴⁶ The responsibility to cooperate is actually expressed to apply to States with respect to their 'nationals', rather than specifically in their role as 'flag States', although the outcome will in most cases be the same. Specific additional obligations for States regarding the control of nationals who own, operate or crew vessels flagged to third States are becoming increasingly common in the fisheries sector.

⁴⁷ David Balton, *Dealing with the "Bad Actors" of Ocean Fisheries*, paper prepared for the FAO Fisheries Directorate IUU Workshop, 19-20 April 2004.

⁴⁸ Currently there are 38 regional fishery bodies worldwide, 18 of which are RFMOs (Michael Lodge, *Managing International Fisheries: Improving Fisheries Governance by Strengthening Regional Fisheries Management Organizations*, Briefing Paper prepared for Chatham House Energy, Environment and Development Programme, London, March 2007). There are also at least two more RFMOs currently under negotiation (for the South Pacific Ocean and the North West Pacific Ocean).

⁴⁹ Opened for signature 24 November 1993, [2004] ATS 26, (entered into force 24 April 2003).

⁵⁰ Opened for signature 4 December 1995, [2001] ATS, (entered into force 11 December 2001).

⁵¹ Compliance Agreement, Article III(2) and (3).

⁵² Compliance Agreement, Article III(1)(a).

required to maintain records of authorized vessels,⁵³ provide information about those vessels to the FAO,⁵⁴ and cooperate in exchanging information about the activities of vessels.⁵⁵ There are generic responsibilities requiring flag States to take enforcement action against vessels acting in contravention of the Agreement,⁵⁶ and obligations not to grant authorizations to vessels previously registered in another State under certain circumstances.⁵⁷ Unfortunately the Compliance Agreement has failed to gain widespread ratification,⁵⁸ and does not apply to all fishing vessels,⁵⁹ both of which have limited its application and its efficacy.

The UN Fish Stocks Agreement includes the elements of flag State responsibility set out in the Compliance Agreement,⁶⁰ and adds some important elements of its own to the concept. The first new element is a detailed set of responsibilities requiring the flag State to ensure compliance by its vessels with conservation and management measures, and to take enforcement action where necessary, including full and immediate investigation into alleged violations, referral to appropriate authorities for the institution of proceedings, and the imposition of appropriate sanctions.⁶¹

The second new element is more controversial, and attempts to promote the effectiveness of RFMOs and the conservation and management measures adopted by them. Article 8 of the UN Fish Stocks Agreement requires States whose vessels are fishing for straddling or highly migratory stocks regulated by RFMOs to give effect to their duty to cooperate by either becoming members of or participants in the RFMO, or by agreeing to apply the conservation and management measures adopted by the RFMO. Article 8(4) states the consequence of this obligation very clearly;

Only those States which are members of such an organization or participants in such an arrangement, or which agree to apply the conservation and management measures established by such organization or arrangement, shall have access to the fishery resources to which those measures apply.

The UN Fish Stocks Agreement has been far more successful than the Compliance Agreement (at least in terms of ratification),⁶² and although its scope is formally limited to fishing for straddling and highly migratory fish stocks, the principles it contains have been widely accepted as applying more broadly. The flag State responsibilities created by these Agreements have been adopted and further developed in instruments creating RFMOs, in a multiplicity of individual conservation and management measures of RFMOs all over the world, and in a range of non-binding instruments.⁶³ The obligations set out in these Agreements create a specialised system of flag State responsibility for fisheries much more complex than the basic principles enunciated in the 1982 Convention. But is it effective? And is it sufficient?

4 Challenges faced in the fisheries construct

Creating a set of standards and hoping they will work is never enough – the real challenge is in implementation and enforcement. The challenges faced in the fisheries sector include some of those already discussed above in relation to general shipping - in particular, the practice of reflagging vessels to avoid international obligations, and the ‘genuine link’ issue. However, there are also practical challenges to implementation which are unique to, or more problematic in, the fisheries context. In particular, lack of ratification of relevant Agreements (or non-acceptance of the obligations established therein), institutional problems and lack of political will continue to hamper the effective operation of the system of flag State responsibility.

⁵³ Compliance Agreement, Article IV.

⁵⁴ Compliance Agreement, Article VI.

⁵⁵ Compliance Agreement, Article V.

⁵⁶ Compliance Agreement, Article III(8).

⁵⁷ Compliance Agreement, Article III(5).

⁵⁸ There are currently 38 Parties to the Compliance Agreement (including Australia).

⁵⁹ Compliance Agreement, Article II.

⁶⁰ UN Fish Stocks Agreement, Article 18. These Agreements were negotiated at roughly the same time, although the UN Fish Stocks Agreement took a lot longer to negotiate, so there is quite a lot of overlap in relation to flag State responsibilities.

⁶¹ UN Fish Stocks Agreement, Article 19.

⁶² There are currently 75 parties to the UN Fish Stocks Agreement. These include a number of the principal distant water fishing nations, such as Japan, Korea, the European Community, the Russian Federation and the United States. Australia is a party to the UN Fish Stocks Agreement.

⁶³ The most important of these are the 1995 FAO *Code of Conduct for Responsible Fisheries* and the 2001 FAO *International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing*. These are both non-binding instruments adopted by the FAO Committee on Fisheries and endorsed by the FAO Council.

4.1 'Flags of non-compliance' and the 'genuine link'

The lack of effective jurisdiction and control exercised over vessels by 'flags of convenience' States or, as they are sometimes described in the fisheries sector 'flags of non-compliance',⁶⁴ is one of the main factors contributing to the failure of the flag State system to effectively manage international fisheries. This manifests itself principally in the practices of 'flag-hopping' and 're-flagging', which are common and serious problems. These practices allow vessels to repeatedly change flag, either to avoid the consequences of violations of conservation and management measures committed under a previous flag, or to facilitate non-compliance with such measures by finding a flag which is unable or unwilling to ensure compliance by its vessels with international requirements.⁶⁵

The characteristics of a 'flag of non-compliance' generally include: lack of laws and regulations applying to fishing on the high seas; failure to ratify relevant international agreements (particularly the UN Fish Stocks Agreement) and join RFMOs; identical registration requirements for fishing vessels and other vessels; and consequently no appropriate licensing, monitoring or reporting requirements for fishing vessels.⁶⁶ The consequences of this are that such flag States fail to give effect to many of the principal elements of flag State responsibility – such as only issuing authorizations to fish in situations where the flag State can effectively ensure the vessel's compliance with relevant obligations, and refusing to flag vessels with a history of non-compliance.

As is the case with flags of convenience in the mainstream shipping industry, the process of 're-flagging' enables a continuous circle of non-compliant behaviour, as vessels are able to re-flag to a new register when the conditions imposed by their current flag, or the consequences of non-compliant behaviour under that flag, become too onerous or restrictive. Similarly, if a previously non-compliant flag State decides to mend its ways and clean up its register, or to de-register vessels in order to reduce overcapacity, de-registering a vessel can export the problem, as the vessel concerned can simply find a new, less responsible flag State.

In addition, the lack of any meaningful 'genuine link' with the flag State is a serious problem with practical ramifications in the fisheries context. Those wishing to engage in IUU fishing not only register their vessels in open registers with which they have no economic or national link, but actively take steps to hide behind shell companies and use complex beneficial ownership structures to avoid detection.⁶⁷ Thus, even if the flag State concerned wanted to exercise effective control over the vessel, or the national operating the vessel, the relevant person or company may well not be identifiable. This also hampers other means of effectively combating IUU fishing, since the structures and owners can be hard to identify, making the provision and exchange of information about IUU fishing vessels and operators, and any enforcement action, very difficult.

4.2 Non-members and new members

There are few maritime law principles more cherished than the freedom of fishing on the high seas, and States are generally unwilling to surrender any aspect of such a fundamental right. However, the international governance framework for fisheries discussed above intrudes substantially on the freedom of fishing, by requiring flag States to fish only in accordance with the measures adopted by RFMOs (whether as members or simply by agreeing to apply the measures). However, this principle is neither universally ratified,⁶⁸ nor universally accepted, which has a range of practical ramifications.

Since not all flag States have ratified the UN Fish Stocks Agreement, they have not specifically accepted the obligation to 'join or stop fishing', and continue to assert the right for their nationals to exercise the freedom of fishing on the high seas without regard to the conservation and management measures of relevant RFMOs. These flag States are essentially 'free-riding' on the conservation efforts of others in relation to the shared resources of the high seas.⁶⁹

⁶⁴ Angelo Mouzouropoulos, 'On the water: How FOC Vessels Operate – Gaps in the International Regulatory Regime', speech delivered to the Expert Workshop on Flag State Responsibilities, Vancouver, Canada, 25 to 28 March 2008. The author argues that the relevant test is not whether a register is 'open' or 'closed', but whether it is 'compliant' (in that it enforces the relevant provisions of the 1982 Convention, the UN Fish Stocks Agreement, the Compliance Agreement and conforms with conservation and management measures of the RFMOs in whose areas of competence its vessels are operating), or it is 'non-compliant' (in that it turns a blind eye or otherwise fails to enforce those obligations). Accordingly, the author argues, the relevant term should be 'flag of non-compliance', not 'flag of convenience'.

⁶⁵ FAO Fisheries Circular No 980, 18.

⁶⁶ Mouzouropoulos, above n 64, 3.

⁶⁷ *Report of the FAO on the Implementation of the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing*, 3.2.5.

⁶⁸ This principle is found in Article 8 of the UN Fish Stocks Agreement, which is currently only ratified by 75 States. However, this is a similar level of ratifications to that achieved by the 1982 Convention (much of which is now generally accepted as customary international law) in the same time period.

⁶⁹ Andrew Serdy, 'Evaluating performance of flag States of fishing vessels', University of Southampton, 9 May 2006, accessible at <http://www.illegal-fishing.info/item_single.php?item=presentation&item_id=33>, 4, accessed 26 August 2009.

Due to the legal and practical constraints relating to the exercise of jurisdiction over foreign-flagged vessels, it is difficult (if not impossible) to enforce RFMO measures against vessels of these States, and the only real ramifications at this stage are political.⁷⁰ These States are key targets for vessel owners seeking to ‘re-flag’ in a different jurisdiction in order to avoid having to comply with RFMO conservation and management measures.

This requirement also gives rise to the quite different problem of ‘new members’. The UN Fish Stocks Agreement provides that any State with a ‘real interest’ in the fishery can be a member of an RFMO.⁷¹ However, the phrase ‘real interest’ has become quite contentious, as flag States which have ratified the UN Fish Stocks Agreement seek admission to RFMOs in order to enable their vessels to legally fish in the areas, or for the stocks, regulated by those organizations.⁷² On the one hand, States which are already members of RFMOs resist accepting new members into the organization, in order to safeguard their share of the total catch in fisheries which are usually already fully exploited or over-exploited. On the other hand, keeping States outside the system may encourage them to allow their vessels to engage in unauthorized fishing anyway. This creates a roadblock to compliance for flag States seeking to enter a fishery, and unless it is successfully resolved, will challenge the credibility and effectiveness of a governance regime which includes both a ‘freedom to fish’ and a requirement (effectively) not to fish without permission.

4.3 Institutional failures and lack of political will

The system of flag State responsibility is also hampered by other institutional failures. The first is the lack of institutional linkage between the flag State responsibilities in the 1982 Convention, which are generally accepted as reflecting customary international law, and the more detailed responsibilities in the UN Fish Stocks Agreement and the Compliance Agreement, which have a much lower level of ratification and acceptance. As suggested above, the flag State responsibilities in these Agreements could usefully be regarded as being generally accepted international rules and standards in relation to the duty to cooperate in international fisheries. However, there is no provision in the 1982 Convention requiring States to comply with any such rules and standards in relation to fisheries,⁷³ and although the UN Fish Stocks Agreement has been ratified by 75 States,⁷⁴ its provisions are not yet generally acknowledged as having reached the level of customary international law. Accordingly, there is a fragmented system of flag State responsibility in international fisheries, with different States claiming to be bound by different rules, in relation to vessels fishing for common resources.⁷⁵

There are also institutional failures inherent in the operation of RFMOs, in particular, in the decision-making process. The majority of RFMOs employ consensus-based decision-making, which enables flag States to avoid the consequences of non-compliant behaviour by their vessels, or to hamper the effective management of a fishery resource, simply by refusing to agree to RFMO decisions. For example, flag States may refuse to agree to decisions such as the inclusion of their vessel on an IUU vessel list, or a cut to their national allocation as a consequence of overcatch resulting from inadequate or ineffective flag State control. Or they may simply fail to agree to a decision being taken at all, leaving the RFMO unable to take a decision, and often leaving a heavily fished resource without a sustainable management regime.

Another less direct challenge to the success of the flag State system is the lack of political will to give effect to flag State responsibilities in the fisheries context. The ‘generally accepted international standards’ of the IMO and ILO in relation to maritime safety and pollution have been widely implemented, driven by the political imperatives of publicity and economics resulting from oil tanker pollution incidents. And, more recently, heightened international security awareness since the events of 11 September 2001 have driven the adoption and implementation of new maritime security obligations. To date, similar imperatives have not existed to generate political will to comply with international standards for fisheries. However, with the recent publicity attracted by reports of the collapse of bluefin tuna stocks,⁷⁶ and the growing concern worldwide about international food security, the effective implementation of flag State responsibilities in relation to sustainable fishing could attract more attention.

⁷⁰ Ibid. However, with the increasing use of port and market state measures, the ‘impunity’ available for those undermining RFMO conservation and management measures on the high seas may become much less. See discussion in Part V below.

⁷¹ Article 8(3).

⁷² ‘Real interest’ is incorporated in Article 8(3) of the UN Fish Stocks Agreement as a condition that States must fulfil before they can participate in an RFMO. See Erik Molenaar, ‘The Concept of “Real Interest” and Other Aspects of Co-operation through Regional Fisheries Management Mechanisms’ (2000) 15(4) *International Journal of Marine and Coastal Law*.

⁷³ Article 118 only requires States to ‘cooperate with each other’, ‘enter into negotiations with a view to taking the measures necessary for the conservation of the living resources concerned’, and ‘[a]s appropriate, cooperate to establish subregional or regional fisheries organizations to this end’. Cf the requirements in Articles 94(5), 211 and 217 to comply with internationally accepted rules and standards.

⁷⁴ See <http://www.un.org/Depts/los/reference_files/status2008.pdf> at 5 February 2009.

⁷⁵ In this context, it is useful to consider the rationale given by Churchill and Lowe for the development of uniform standards in shipping, which is equally applicable in the international fisheries context (above n 12).

⁷⁶ Such as the recent report of Robert Mielgo, ‘The 2008 bluefin tuna dossier’ featured in the new documentary film ‘The End of the Line, showing in cinemas: accessible at <<http://endoftheline.com/blog/archives/455>, at 26 August 2009.>

5 Solutions: 'combating' or 'complementing' inadequate flag State control?

A number of solutions have been, and are being, developed to meet the challenges and fill the gaps of the current system. Some of these consist of efforts to combat inadequate flag State performance by the further elaboration of flag State responsibilities. But a range of complementary initiatives are also being developed to meet the rationale (responsible fisheries management and the prevention, deterrence and elimination of IUU fishing) by other, non-flag State, means of enforcement.

5.1 'Further elaborating' or 'elaborating further' flag State responsibilities

In 2002, an FAO Fisheries Circular stated;

The rights and responsibilities of flag States, codified half a century ago in the 1958 Geneva Convention on the High Seas, have progressively become more detailed with subsequent instruments, binding and voluntary. They have shifted from a focus on the rights of the flag States, to a multitude of duties and responsibilities, including administrative duties, enforcement obligations, duties to cooperate and ensure compliance, and duty to comply with management measures of RFMOs. The global and repeated recognition of the significance of these duties and responsibilities is encouraging, but more can still be achieved through broader acceptance and implementation. The number of fishing vessels on open registers continues to grow, and while some positive steps have been taken to implement flag State responsibilities in respect of some open register vessels that do not comply with conservation and management measures, further action is needed to strengthen compliance by many other vessels.⁷⁷

The international community is still moving in this direction, with a range of initiatives underway regarding flag State responsibilities. An Expert Workshop on Flag State Responsibilities was held in Canada in March 2008, following the request of FAO members for an expert consultation to develop criteria for assessing the performance of flag States. Discussions were focussed on elaborating criteria to evaluate flag State performance, and identifying the range of actions that can be taken in the event of flag States falling short of, or not complying with, international norms and standards for flag State control.⁷⁸ A range of possibilities were put forward, including a consolidated legal regime setting out minimum standards, a comprehensive legal instrument for flag State responsibilities, an 'International Plan of Action on Flag State Control' or the development of FAO guidelines.⁷⁹

A model for the development of long-term guidelines for assessing flag State performance has also been developed by the Ministerially-led Task Force on IUU Fishing on the High Seas, with the purpose of enabling the evaluation of the performance of individual flag States against a range of indicators, and giving publicity to those that fall short of relevant standards.⁸⁰ The guidelines assess flag States against their participation in: (i) global fisheries agreements (the 1982 Convention, the UN Fish Stocks Agreement, the Compliance Agreement and fisheries safety conventions); (ii) membership of regional fisheries agreements and compliance with RFMO measures; and (iii) domestic implementation and regulation of a range of basic obligations (such as maintaining a record of vessels, requiring standardized marking of vessels, and requiring authorizations for fishing on the high seas).

5.2 Complementary controls – the growing importance of non-flag State enforcement

While further work on the role of flag States will continue to be important, there is also recognition that, as in the general maritime industry, the development of other controls may be a useful and cost-effective alternative which will complement and reinforce flag State responsibility.

5.2.1 High seas boarding and inspection systems

As discussed above, the 1982 Convention provides that ships on the high seas are under the exclusive jurisdiction of the State whose flag they fly, save in exceptional cases provided for in international treaties or in the Convention itself.⁸¹ The principle of exclusive flag State jurisdiction is fiercely protected, and generally speaking, the exceptions to it are few and far between. Those provided for in the Convention itself are piracy, slavery, illegal broadcasting,

⁷⁷ Judith Swan, FAO Fisheries Circular 980, *Fishing Vessels Operating Under Open Registers and the Exercise of Flag State Responsibilities: Information and Options*, FAO, Rome, 2002

⁷⁸ Meeting Report of the Expert Workshop on Flag State Responsibilities: Assessing Performance and Taking Action, 25-28 March 2008, Part 1 (accessible at www.dfo-mpo.gc.ca/overfishing-surpeche/documents/flag-state-eng.htm, at 26 August 2009).

⁷⁹ Meeting Report of the Expert Workshop on Flag State Responsibilities, Part 4.

⁸⁰ *Evaluating Flag State Performance*, Prepared for the High Seas Task Force by OceanLaw Information and Consultancy Services, February 2006. The report can be accessed at <<http://www.high-seas.org/>>, at 26 August 2009. The High Seas Task Force was established by the fisheries Ministers from Australia, Canada, Chile, New Zealand, Namibia and the United Kingdom and a range of non-governmental organisations to combat IUU fishing on the high seas.

⁸¹ Article 92(1).

stateless vessels, and disguised vessels.⁸² There are also some specific treaty regimes providing for varying degrees of non-flag State enforcement – notably in relation to drug trafficking, people smuggling, liquor smuggling and the protection of submarine cables.⁸³

In the fisheries context, however, exclusive flag State jurisdiction has been diluted by the establishment of systems for non-flag State enforcement. The most far-reaching is the global high seas boarding and inspection system provided for in the UN Fish Stocks Agreement, but there are also boarding and inspection regimes operating under the auspices of various regional fisheries management organisations.⁸⁴ Other collaborative forms of jurisdiction are also becoming increasingly common in the high seas fisheries context, such as ‘ship-rider’ agreements, and cooperative maritime surveillance and enforcement agreements.⁸⁵ The increasing use of collaborative forms of jurisdiction recognises the practical limitations on flag State enforcement, and although not necessarily the most cost-effective form of non-flag State enforcement in the fisheries context (since high seas patrols and enforcement operations are quite expensive), these are a welcome development from a compliance perspective.

5.2.2 Port State Measures Agreement

As discussed above, port State control regimes are well-established and have had a significant impact in the area of merchant shipping. Some States have extended their domestic port State control regimes to cover foreign fishing vessels and address fisheries governance issues, and port State jurisdiction was first included as part of an international fisheries instrument in the 1989 *Convention for the Prohibition of Fishing with Long Drift-nets in the South Pacific*, which provided that Parties to the Convention might prohibit access to and use of its ports for driftnet fishing vessels, including for landing, transshipment, importation and processing of fish caught by drift nets, and use of port services.⁸⁶ The 2006 UN Fish Stocks Agreement Review Conference recommended that States initiate a process within the FAO to develop a legally-binding instrument on minimum standards for port State measures to prevent, deter and eliminate IUU fishing.⁸⁷

In 2007, the FAO Committee on Fisheries endorsed the development of a new legally-binding instrument which ‘would represent minimum standards for port States, with flexibility to adopt more stringent measures’.⁸⁸ Recognizing the importance and usefulness of such a scheme, the negotiations were ‘fast-tracked’, and following four negotiating sessions held over fifteen months, the Technical Consultation convened by the FAO adopted the text of a draft Agreement in August 2009, which is expected to be adopted by the FAO Conference and opened for signature in November 2009.⁸⁹ The Port State Measures Agreement will include a range of obligations requiring port States to ensure that fish and fish products landed or transhipped in their ports by foreign-flagged fishing vessels are not the product of IUU fishing. In particular, the Agreement requires port States to prohibit access to their ports for vessels on the IUU vessel list of an RFMO, or to take action which is at least as effective in preventing IUU fishing as denying entry into port.⁹⁰ This Agreement will be a useful ‘second line of defence’ against IUU fishing, and will be a cost-effective way to ensure compliance with conservation and management measures where flag States are not willing or able to do so.

5.2.3 Other applications of port State controls

The practicality of port State enforcement rather than flag State responsibility is also finding application in the field of global environmental agreements, notably within the *Convention on International Trade in Endangered Species of Wild Fauna and Flora* (CITES).⁹¹ Article IV of CITES provides for certain species listed in Appendix II of the Convention to be traded commercially subject to the fulfilment of certain requirements. In the case of marine species

⁸² See Articles 110(1) and (2).

⁸³ Rosemary Rayfuse, *Non-Flag State Enforcement in High Seas Fisheries*, (1st ed, 2004), 52. Rayfuse also notes that non-flag at sea enforcement is permitted in cases of self-defence and in some circumstances as a result of United Nations resolutions.

⁸⁴ Organisations with boarding and inspection regimes of particular relevance to Australia include the *Convention on the Conservation of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean* 2004[ATS]15, and the *Convention on the Conservation of Antarctic Marine Living Resources* 1982[ATS]9.

⁸⁵ For example, the *Niue Treaty on Cooperation in Fisheries Surveillance and Law Enforcement in the South Pacific Region* [1993] ATS 31, and subsidiary Agreements entered into under that Treaty.

⁸⁶ Opened for signature 23 November 1989, 1992[ATS]30 (entered into force 17 May 1991).

⁸⁷ Report of the Review Conference on the *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*, (2006), A/CONF.210/2006/15, para 108.

⁸⁸ Report of the 27th Session of the Committee on Fisheries, *FAO Fisheries Report* No 830, (2007), [68].

⁸⁹ See <<http://www.fao.org/fishery/nems/38926/en>> However, as currently drafted, the Agreement will require 25 ratifications to enter into force, which is likely to take some time (the Compliance Agreement, which also required 25 ratifications, took ten years to enter into force).

⁹⁰ Article 8bis. The Report of the Technical Consultation, attaching the Chairperson’s Draft Agreement is available at <<ftp://ftp.fao.org/FILEDOCUMENT/tc-psm/2009/report.pdfpdf>>, at 10 October 2009.

⁹¹ Opened for signature 3 March 1973, [1987] ATS 28, (entered into force 1 July 1975).

'introduced from the sea', certificates must be issued by the 'State of introduction' confirming that the introduction of the species will not be detrimental to the survival of the species involved (a 'non-detriment finding').⁹² However, there is some uncertainty about whether the 'State of introduction' is the flag State of the vessel which catches the marine species, or the port State at which the species is landed for the first time.⁹³ Some Parties have expressed the view that for the purpose of issuing non-detriment findings, the relevant State should be the port State, although flexibility should be built in to the process to allow consultation and information exchange. However, others refer to the principle of flag State jurisdiction on the high seas as supporting the issuance of certificates by the flag State of the vessel concerned.⁹⁴

Port State controls have also been employed on a unilateral basis on many occasions by States unhappy with the way that flag States regulate their vessels. The most recent example of this is the European Community's new *Council Regulation (EC) No 1005/2008 of 29 September 2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing* (EC IUU Regulation), which will come into effect on 1 January 2010.⁹⁵ The EC IUU Regulation states that;

Community rules governing access to Community ports of fishing vessels flying the flag of a third country should be strengthened with a view to ensuring a proper control over the legality of the fishery products landed by fishing vessels flying the flag of a third country. This should notably imply that access to Community ports is only authorised for fishing vessels flying the flag of a third country which are able to provide accurate information on the legality of their catches and to have this information validated by their flag State.⁹⁶

Chapter II of the IUU Regulation puts in place a system of port State measures with respect to third country fishing vessels entering EC member ports, including requirements for advance notification, declarations of catch, and in-port inspections. The Regulation provides for the establishment of a Community IUU vessel list, and states that vessels on that list will not be allowed entry into the ports of EC member states, as well as establishing a system for the identification of 'non-cooperating' flag, port and market States which will be prohibited from engaging in the trade of fishery products with the European Community.⁹⁷

5.2.4 Global Record of Vessels

In the *2005 Rome Declaration on Illegal, Unreported and Unregulated Fishing*, Fisheries Ministers called for the development of a comprehensive Global Record of Fishing Vessels, incorporating information on beneficial ownership.⁹⁸ The proposed Global Record and the accompanying concept of a 'unique vessel identifier' for fishing vessels would allow flag States and port States (in particular) to identify non-compliant vessels, track their ownership, operations and location, and improve traceability.⁹⁹ This would make it more difficult for non-compliant vessels to 'flag-hop', because flag States would be better able to ascertain the actual identity and fishing history of vessels seeking registration. Work on the Global Record is in progress at the FAO under the auspices of the Committee on Fisheries.

6 Conclusion: achieving an effective balance of obligations

The role of the flag State evolved as part of customary international law on the basis of practical imperatives – distance, disrepair, accidents, discharge and malfunctions. Over the last fifty years, solutions to these practical imperatives have been gradually built into the obligations of effective jurisdiction and control, producing a highly developed and complex regime of flag State responsibilities. In the general maritime context, this regime has passed through its period of most frantic, active standard setting, although there are still plenty of ongoing practical challenges to deal with. Anchored firmly in the customary roots of the 1982 Convention, and given detailed expression through a range of well ratified and generally accepted instruments, flag State responsibility regarding maritime safety and marine pollution prevention is more or less in a period of implementation, audit and 'self-assessment'.

⁹² Article IV (5) and (6).

⁹³ See, inter alia, CITES CoP14 Doc 33 Annex II (available at <<http://www.cites.org/eng/cop/14/doc/E14-33.pdf>>, at 26 August 2009).

⁹⁴ See CITES CoP 14 Doc 33 Annex 5.

⁹⁵ Available at <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:286:0001:0032:EN:PDF>> (accessed 26 August 2009).

⁹⁶ Paragraph 10.

⁹⁷ See inter alia arts 37 and 38.

⁹⁸ *2005 Rome Declaration on Illegal, Unreported and Unregulated Fishing*, adopted by the FAO Ministerial Meeting on Fisheries, Rome, 12 March 2005, para 4.

⁹⁹ FAO Expert Consultation on the Development of a Comprehensive Global Record of Fishing, Food and Agriculture Organization of the United Nations, *Report of the expert consultation on the development of a comprehensive global record of fishing vessels*, (2008), para 30.

In the fisheries sector, however, things are not yet so straightforward. The 1982 Convention provides very limited guidance on the responsibilities of the flag State in relation to fisheries. This has necessitated the development of new legal instruments, and the creation of a separate legal regime with new responsibilities, which will take some time to achieve universal acceptance, let alone effective implementation. And the 'standard-setting' period is not over in international fisheries – there is still a need for agreement on a set of clearly defined responsibilities for flag States. These must be sufficient to ensure effective exercise and control over fishing vessels, in order to prevent them from undermining conservation and management measures. But they must also avoid imposing unnecessary responsibilities on flag States, which are not always best placed to ensure compliance, and consider the reasonable attribution of responsibility to other actors.

The key rationales for flag State responsibility in the fisheries context are responsible fisheries management, and combating IUU fishing. These two principles are fundamental, but they are also complementary, and there is no point addressing one without the other. However, they can be highly political (or highly politicised) and sensitive issues. This balance is reflected in the Report of the Expert Workshop on Flag State Responsibilities in Canada which noted that;

[T]he issue of flag State control cannot only be addressed in the context of IUU fishing, as is often the case, and which unhelpfully focuses attention on non-compliance with internationally agreed conservation measures by RFMO non-contracting parties. Rather, improved flag State control is a foundation for responsible fisheries management.¹⁰⁰

In the context of a regime still under development, where important elements of the legal framework are not yet universally accepted, defining and enforcing flag State responsibility for fishing vessels will require a delicate balance of carrot and stick, and a steady eye on the ultimate goals. For the moment, it can be assessed as partly 'effective fact', partly 'creative fiction' and partly 'further work required'.

¹⁰⁰ The Department of Fisheries and Oceans of Canada in collaboration with the Food and Agriculture Organization of the United Nations, *Expert Workshop on Flag State Responsibilities: Assessing Performance and Taking Action*, (2008), Part 4.