2011

Duties of Flag States to Implement and Enforce International Standards and Regulations - And Measures to Counter Their Failure to Do So

Tamo Zwinge

Follow this and additional works at: <http://scholarlycommons.law.hofstra.edu/jibl>

Part of the [Law Commons](#)

Recommended Citation

Zwinge, Tamo (2011) "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 and Law*: Vol. 10: Iss. 2, Article 5.
Available at: <http://scholarlycommons.law.hofstra.edu/jibl/vol10/iss2/5>

This Legal Article is brought to you for free and open access by Scholarly Commons at Hofstra Law. It has been accepted for inclusion in Journal of International Business and Law by an authorized administrator of Scholarly Commons at Hofstra Law. For more information, please contact lawcls@hofstra.edu.

DUTIES OF FLAG STATES TO IMPLEMENT AND ENFORCE INTERNATIONAL STANDARDS AND REGULATIONS – AND MEASURES TO COUNTER THEIR FAILURE TO DO SO

*Tamo Zwinge*¹

ABSTRACT

The article investigates the duties of flag States to implement and enforce international standards and regulations. Two related but distinct topics are treated: General duties of flag States (applicable especially to merchant vessels) and duties concerning fishing vessels. After scrutinising the reasons for inadequate flag State implementation and enforcement, the author discusses possible counter measures of non-flag States. The article notably evaluates systems of Port State Control and possibilities of non-flag States to enforce RFMO regulations and other fishing vessel responsibilities against non-member vessels. Finally, possible consequences against the flag State itself, as opposed to merely its vessels, are examined and if it is permissible to non-recognise a vessel's flag in case the flag State consistently violates its duties to control its vessels.

I. INTRODUCTION

Merchant vessel trade and high seas fisheries have become an enormous business. The vast majority of all goods today are transported by sea, and various fishing fleets operate far from their port of registry. It is therefore understandable that those activities cannot be left completely unregulated. Thus, it needs international standards and regulations to be implemented and enforced.

Some of the safety and environmental issues that resulted from the rapidly increasing merchant vessel traffic over the last decades are addressed by the United Nations Convention on the Law of the Sea² (LOSC), or as Ambassador Tommy T.B. Koh, President of the Third United Nations Conference on the Law of the Sea memorably described it – the Constitution for the Oceans.³

The LOSC imposed duties of flag State's to control their vessels. Those duties have been further specified in various international conventions, such as the UN Fish Stocks Agreement⁴ to name only one example in the environmental sector.

¹ Rechtsanwalt, Berlin; LL.M. (Hons), University of Auckland. The author is a lawyer at the international law firm CMS Hasche Sigle in Berlin.

² United Nations Convention on the Law of the Sea, 1833 U.N.T.S. 43 (Nov. 19, 1994) [hereinafter "LOSC"].

³ Tommy T.B. Koh, President, Third United Nations Conference on the Law of the Sea, *A Constitution for the Oceans* (Dec. 11, 1982) available at http://www.un.org/Depts/los/convention_agreements/texts/koh_english.pdf.

⁴ 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, AT2167 U.N.T.S. (Dec. 11, 2001) [hereinafter "UN Fish Stocks Agreement"].

THE JOURNAL OF INTERNATIONAL BUSINESS & LAW

II. CONCEPT OF FLAG STATE CONTROL

In order to illustrate and analyse the various duties of flag States to control their vessels, it is essential to first have a look at the nationality of ships and at who exercises jurisdiction over them. Ships themselves cannot incur responsibilities by international law as they are not subjects of international law. It is instead the flag State who bears the duty to comply with international law. Ships therefore merely derive their rights and obligations from the States whose nationality they have.⁵

A. Nationality of a Ship

Traditionally, jurisdiction over a vessel is linked to its nationality and the flag that a vessel flies is the symbol of its nationality.⁶ Article 91 (1) LOSC provides:

Every State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly.

The right for States to confer their flag to a vessel is therefore unconditional. The only restriction that the LOSC makes is that “[t]here must exist a genuine link between the State and the ship”.⁷

Unfortunately, there is no conclusive, globally accepted definition of the “genuine link”. Neither the High Seas Convention nor the LOSC nor the United Nations Registration Convention⁸ effectively define what a genuine link is.⁹ The current – elusive – situation has by contrast even been confirmed by the International Tribunal on the Law of the Sea (ITLOS).¹⁰

Moreover, it is not determined what the consequences are if a genuine link is missing. Overall, it has to be said that attempts to define the “genuine link” have not been successful.¹¹ State authorities have therefore traditionally refrained from challenging such a link.¹²

Hence, global efforts are rather made in defining specific performance requirements for flag States than trying to define the genuine link in a legally binding way.

⁵ R.R. CHURCHILL & A.V. LOWE, *THE LAW OF THE SEA* 257 (3d 1999) [hereinafter “Churchill & Lowe”].

⁶ Z. Oya Özçayir, *Flag State Implementation*, 9 (2003) 9 J. of INT’L MAR. L. 297. (2003) [hereinafter “Özçayir”].

⁷ LOSC, *supra* note 1, Art. 91(1).

⁸ United Nations Convention on Conditions for Registration of Ships, opened for signature May 1, 1986 (not yet in force) [hereinafter “Registration Convention”]. The Registration Convention would certainly improve flag State control. It is doubtful, however, that it will ever enter into force.

⁹ Camille Goodman, *Flag State Responsibility in International Fisheries Law – effective fact, creative Effective Fact, Creative Fiction, or further work required?* 23 AUSTL. & N.Z. MAR. L. J. 157, 160 (2009) [hereinafter “Goodman”].

¹⁰ DEP’T OF FISHERIES & OCEANS OF CANADA, *EXPERT WORKSHOP ON FLAG STATE RESPONSIBILITIES: ASSESSING PERFORMANCE AND TAKING ACTION* 4 (2008), Part 3.1, available at <http://www.dfo-mpo.gc.ca/international/documents/flag-state-eng.pdf>. [hereinafter “Fisheries and Oceans”].

¹¹ Goodman, *supra* note 8, at 160.

¹² Churchill and Lowe, *supra* note 4, at 255 (referring to UNCTAD, *REVIEW OF MARITIME TRANSPORT* 1978 11 (New York, United Nations 1981)).

LAW OF FLAG STATES

B. Flags of Convenience

Virtually all coastal States and some landlocked States have their own merchant vessel fleet of some sort. However, it is remarkable that the majority of ships fly the flags of relatively few States. That does, nevertheless, not indicate that the vessel owners are nationals of those States. The beneficial owners¹³ of the vessels are very commonly not nationals or residents of the concerned flag State.¹⁴ In 2009 the major ten open and international registries assembled 55 per cent of the world merchant shipping tonnage.¹⁵

Open registries, or as they are also called “flags of convenience registries”¹⁶, permit ship owners to register their ships at low costs or to register substandard ships that would not comply with the requirements of a more stringent registry. In addition, ship owners are able to move their ships between registries. Hence, if a ship does not comply with the requirements of a particular safety or environmental standard, ship owners can easily move their ships to a less stringent registry which does not require fulfilment of the standard in question. This process is called “re-flagging”. The feasibility and permissibility of re-flagging therefore further undermines the effective operation of flag State jurisdiction.¹⁷

It must however be stressed that the problem of substandard ships is not unique to open registries. They can be found under all registries – open and closed. Nevertheless one has to notice that flag of convenience vessels have been involved in many maritime disasters. The frequency of their involvement is usually explained by poorly trained crews and a failure to enforce regulation by the flag State. The casualty rate for the flag of convenience fleet is considerably elevated than that of the regulated fleet as records of open registries show.¹⁸

C. Exclusive Flag State Jurisdiction

¶ The nationality of a ship is so important because of the “concept of exclusive flag State jurisdiction”. Article 92 (1) LOSC provides that flag States have – except in exceptional cases expressly provided for in international treaties or in the LOSC – exclusive jurisdiction over their vessels.¹⁹ “Jurisdiction” in the sense of the LOSC means “competence” or “power”

¹³ *Id.* at 255. The beneficial owner of a vessel is the company or person that obtains the pecuniary benefits from the ship’s operation.

¹⁴ United Nations Conference on Trade and Development (UNCTAD), New York and Geneva, *Review of Maritime Transport 2009, Report by the UNCTAD Secretariat*, UNCTAD/RMT/2009, Annex III (2009), available at http://www.unctad.org/en/docs/rmt2009_en.pdf.

¹⁵ *Id.* Those major ten international and open registries are: Antigua and Barbuda, Bahamas, Bermuda, Cyprus, Isle of Man, Liberia, Malta, Marshall Islands, Panama and Saint Vincent and the Grenadines.

¹⁶ *What are Flags of Convenience?*, INT’L TRANSP. WORKERS’ FEDERATION, available at <http://www.itfglobal.org/flags-convenience/sub-page.cfm> (last visited April 1, 2010). The International Transport Workers’ Federation (ITF) maintains a list of registries it considers to be “flags of convenience registries”. In developing the list, the ITF considers the “ability and willingness of the flag State to enforce international minimum social standards on its vessels,” the “social record as determined by the degree of ratification and enforcement of ILO Conventions and Recommendations,” and the “safety and environmental record.”

¹⁷ Goodman, *supra* note 8, at 159.

¹⁸ Z. OYA ÖZCAYIR, PORT STATE CONTROL 26 (Informa Pub. 2d 2004).

¹⁹ MYRON H. NORDQUIST ET AL., UNITED NATIONS CONVENTION ON THE LAW OF THE SEA, 1982: A COMMENTARY 126 (Myron. H. Nordquist ed., Martinus Nijhoff Publishers 2002). Exceptionally, international treaties, whether bilateral or multilateral, may provide for concurrent jurisdiction in given circumstances.

THE JOURNAL OF INTERNATIONAL BUSINESS & LAW

which might be exercised by a State's legislature (legislative jurisdiction), enforcement agencies (executive jurisdiction), or courts (judicial jurisdiction).²⁰

It seems to be apparent that if the flag State has exclusive jurisdiction over its vessels, it must also exercise its jurisdiction in order to enforce the international binding rules it is subject to. Already the High Seas Convention provided in Article 5 (1) that "the State must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag."²¹

Notwithstanding the decision to leave enforcement primary to the flag State, the LOSC contains a provision that appears to be an important signal of dissatisfaction with many flag States.²² Article 228 (1) LOSC expresses that if the flag State "has repeatedly disregarded its obligation to enforce effectively the applicable international rules and standards in respect of violations committed by its vessels", the port or coastal State does not have to suspend its own proceedings against the vessel.²³

Regardless of that provision, one has to state that the concept of "exclusive flag State jurisdiction" is valid as a general rule in the LOSC. This paper will nevertheless show that there are important exceptions to that general rule or rather various measures taken to bypass the considerable problems that come along with the concept of exclusive flag State jurisdiction.

III. DUTIES OF THE FLAG STATES

The right of States to confer their flag to vessels also entails a body of duties. Before it is possible to evaluate the different methods of implementing and enforcing flag State duties, it is vital to get a summary of the content of the different flag State duties in order to get an overall overview on the topic.

In general, it is sensible to distinguish general flag State duties that apply to all vessels (albeit designed primarily for merchant vessels) and flag State duties in the fishing sector. The fishing sector is subject to a completely different set of rules as will be seen further below.

A. General Flag State Duties

The basis of the general flag State duties lies in the provisions of the LOSC. However, their full extent is only perceivable in relation with further international conventions and agreements.

1. Flag State Duties in the LOSC

The LOSC includes flag State duties in the domain of safety and also in the domain of prevention and protection of the marine environment.

²⁰ LOUIS B. SOHN & JOHN E. NOYES, *CASES AND MATERIALS ON THE LAW OF THE SEA* 157 (Transnational Publishers 2004) [hereinafter "Sohn & Noyes"].

²¹ Convention on the High Seas, art. 5(1), Apr. 29, 1958, 450 U.N.T.S. 11, 82.

²² DAVID ANDERSON, *MODERN LAW OF THE SEA: SELECTED ESSAYS* 256 (Martinus Nijhoff Publishers 2008) [hereinafter "Anderson"].

²³ LOSC, *supra* note 1, art. 228(1).

LAW OF FLAG STATES

(a) Art. 94 (Duties of the flag State)

The LOSC sets out the duties of flag States in greater detail than previous conventions, notably the High Seas Convention. First, Article 94 (1) provides that every State is required to “effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.” However, the LOSC goes further and prescribes in the subsequent Paragraphs of Article 94 a duty of the flag State to maintain regular checks upon the seaworthiness of ships, to ensure that crews are properly qualified, to hold inquiries into shipping casualties, to effectively exercise jurisdiction and control over their ships, to maintain a register of ships, to take measures to ensure safety at sea with regard to the construction, equipment and seaworthiness of ships, the manning of ships, labour conditions and the use of signals, the maintenance of communications and the prevention of collisions.²⁴

The formulation in Article 94 (3) LOSC that “[e]very State shall take such measures for ships flying its flag as are necessary to ensure safety at sea with regard, inter alia, to [the following measures]” indicates that the enumerated flag State responsibilities are non-exhaustive.²⁵ The LOSC therefore leaves room for other flag State duties derived from different international treaties or customary international law.

(b) Protection and Preservation of the Marine Environment

The LOSC also addresses the protection and preservation of the marine environment and therefore establishes some flag State duties in this domain. It provides among others, that there is a general obligation for States “to protect and preserve the marine environment”.²⁶ States are moreover required to take “all measures (. . .) that are necessary to prevent, reduce and control pollution of the marine environment from any source”²⁷ including from vessels flying their flag.²⁸ For that purpose States have to enact the necessary laws and regulations.²⁹

Flag State enforcement of these environmental regulations is governed in Article 217 LOSC. The article underlines again the duty of flag States to ensure compliance of their vessels with international rules and standards.³⁰ Vessels that do not comply have to be prevented from sailing.³¹ Paragraph 3 states that flag States have to provide certificates which were issued according to international standards to their vessels. It moreover prescribes that those certificates are to be accepted by other States “unless there are clear grounds for believing that the condition of the vessel does not correspond substantially with the particulars of the certificates”.³²

²⁴ Sohn & Noyes, *supra* note 20, at 148. Paragraph 1 of Article 94 LOSC originates from the final part of Article 5 (1) High Seas Convention and paragraphs 3 and 5 from Article 10. However, other paragraphs of Article 94 have no corresponding item in the High Seas Convention and were therefore an innovation.

²⁵ John Norman & Keith Mansell, *An Analysis of Flag State Responsibility from an Historical Perspective: Delegation or Derogation?*, 90 (2007) UNIV. OF WOLLONGONG, available at <http://ro.uow.edu.au/theses/742> [hereinafter “Norman and Mansell”].

²⁶ LOSC, *supra* note 2, art. 192. The formulation “States” addresses naturally also flag States.

²⁷ *Id.* at art. 194 § 1.

²⁸ *Id.* at art. 194 § 3(b).

²⁹ *Id.* at art. 211 § 2.

³⁰ *Id.* at art. 217 § 1.

³¹ *Id.* at art. 217 § 2.

³² Anderson, *supra* note 21, at 256.

THE JOURNAL OF INTERNATIONAL BUSINESS & LAW

2. Compliance with International Standards

However, it could not be expected of the LOSC (which dates of 1982) to keep up with rapidly changing technological developments and to regulate all aspects of flag State duties in detail. The LOSC therefore links the essential rules of the law of the sea with other international treaties and conventions. This inter-linkage is regardless of whether the other conventions were adopted before or after the adoption of the LOSC itself.³³

(a) What does “generally accepted” in Art. 94 (5) and Art. 211 (2) mean?

Thus, Article 94 (5) LOSC States that every State is in respect of the measures listed in Article 94 (3) and (4) required to conform to “generally accepted international regulations, procedures and practices”. Churchill and Lowe rightly emphasised:

The 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 ship owners, and because shipping is a very competitive industry, most States are reluctant to impose stricter safety legislation on their ship owners than other States impose upon theirs. For these reasons, therefore, the international community has developed a set of uniform standards to promote the safety of shipping.³⁴

Thus, due to the reference in Article 94 (5) LOSC to “generally accepted regulations, procedures and practices” a flag State might even be bound to a standard although the flag State itself did not specifically adopt it. Important is merely that the standard has been “generally accepted”.³⁵

The reference to “generally accepted international rules and standards” appears in many articles of the LOSC, notably in Parts II, III, V and XII of the Convention. It is moreover generally acknowledged that there is a duty to respect such rules and standards once they are in place.³⁶

(b) IMO Conventions

Those “generally accepted international regulations, procedures and practices” are contained in a variety of international conventions. Most of those conventions have been developed by the IMO. There are however also other bodies that issued relevant conventions.³⁷

³³ *Id.* at 252.

³⁴ Churchill & Lowe, *supra* note 5, at 265.

³⁵ Sohn & Noyes, *supra* note 20, at 149.

³⁶ Anderson, *supra* note 21, at 252.

³⁷ The International Labour Organisation (ILO) furthermore issued a large number of conventions which set safety standards concerning conditions of employment and training for seafarers. These conventions have been recently consolidated and updated into the Maritime Labour Convention 2006, signed 23 February 2006. The convention is however not yet in force.

LAW OF FLAG STATES

The most important IMO conventions are the SOLAS Convention,³⁸ the Collision Regulations,³⁹ the Convention on Load Lines,⁴⁰ and the STCW Convention.⁴¹ Furthermore, in the sector of marine environment, there is MARPOL.⁴²

These conventions have been widely accepted by the international community. As of February 2010 the SOLAS Convention had 159 contracting States, representing 99.04 per cent of world tonnage; the Collision Regulations had 153 contracting States, representing 98.36 per cent of world tonnage; the Convention on Load Lines had 159 contracting States, representing 99.02 per cent of world tonnage; the STCW Convention had 154 contracting States, representing 99.15 per cent of world tonnage and the MARPOL had 150 contracting States, representing 99.14 per cent of world tonnage.⁴³ Those conventions are therefore considered to be “generally accepted” in the sense of Article 94 (5) and 211 (2) LOSC.⁴⁴

The IMO also developed a vast range of recommendations, guidelines and codes in regard to the seaworthiness of ships. These instruments are however not legally binding. Nonetheless, some of these measures do make the transition from “soft” to “hard” law.⁴⁵

(i) SOLAS Convention

The SOLAS convention is commonly considered the most important international treaty in the domain of safety of merchant ships.⁴⁶ It deals with the seaworthiness of vessels and defines standards in regard to fire-safety measures, the carriage of navigational equipment and the construction of ships and life saving appliances.⁴⁷

The SOLAS convention leaves it primarily to the flag States to imply and to enforce the standards of the Convention. The flag State has to ensure that vessels sailing under its flag comply with the Convention’s requirements and it has to issue the prescribed certificates as proof of compliance.⁴⁸ However, there are also provisions allowing port State control. A port State is hence allowed under the convention to verify if a vessel of a SOLAS Convention

³⁸ International Convention for the Safety of Life at Sea, (May 25, 1980) [hereinafter “SOLAS Convention”].

³⁹ Convention on the International Regulations for Prevailing Collisions at Sea, (July 15, 1977) [hereinafter “Collision Regulations”].

⁴⁰ International Convention on Load Lines, (July 21, 1968) [hereinafter “Convention on Load Lines”].

⁴¹ International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, (Apr. 28, 1984) [hereinafter “STCW Convention”].

⁴² International Convention for the Prevention of Pollution from Ships, (Oct. 2, 1983) [hereinafter “MARPOL”].

⁴³ *Status of Conventions*, INT’L MARITIME ORGANIZATION, (Feb. 28, 2011), available at <http://www.imo.org/About/Conventions/StatusOfConventions/Pages/Default.aspx> (last visited Mar. 4, 2011).

⁴⁴ Goodman, *supra* note 9, at 159, fn 18. It is not clear and subject to discussion whether other IMO Conventions, resolutions and guidelines are also considered to be part of the “generally accepted international rules and standards” referred to in the LOSC 1982. Some writers are of the opinion that only instruments that have become customary international law are part whereas others regard every IMO Convention that is in force as part of these rules and standards.

⁴⁵ Churchill & Lowe, *supra* note 5, at 266. For example the Code for the Construction and Equipment of Ships Carrying Dangerous Chemicals in Bulk was subsequently adopted by numerous States and became therefore legally binding (at least in these States).

⁴⁶ Sohn & Noyes, *supra* note 20, at 150.

⁴⁷ Churchill & Lowe, *supra* note 5, at 266

⁴⁸ Sohn & Noyes, *supra* note 20, at 151.

THE JOURNAL OF INTERNATIONAL BUSINESS & LAW

member State disposes of the necessary certificates provided for in the Convention. The Convention nevertheless limits the extent of the inspections. It prescribes:

Port State control inspections are normally limited to checking certificates and documents. But if certificates are not valid or if there are clear grounds for believing that the condition of the ship or of its equipment, or its crew, does not substantially meet the requirements of a relevant instrument, a more detailed inspection may be carried out.⁴⁹

If it turns out that a ship does not comply with the standards required by the Convention the port State should not let it sail unless it leaves the port for the purpose of proceeding to the appropriate repair yard.⁵⁰

(ii) Collision Regulations

There have been numerous regulations aimed to avoid collisions at sea. The current regulations are annexed to the Collisions Regulations of 1972. They mainly relate to a ship's conduct and movements in relation to other ships, especially in cases of limited visibility. The Collisions Regulations do furthermore establish standards for sound and light signals.⁵¹

One of the most important updates compared with the 1960 Collisions Regulations was the introduction of traffic separation schemes. If a vessel violates the prescribed traffic separation schemes, the coastal State may enforce jurisdiction against it. In practice this possibility is usually limited to requesting the vessel to rejoin the separation scheme. In more serious cases the infringing vessel might however be reported to the flag State.⁵²

(iii) Convention on Load Lines

The Convention on Load Lines addresses the problem of overloading, which is in many cases the reason for shipping casualties and thus provides limitations on freeboards. Additional main objectives of the Convention are external weathertight and weathertight integrity.⁵³

The standards of the Convention on Load Lines are enforced in a very similar way to those of the SOLAS Convention. Thus, it does also include provisions for port State control which allow the port State under certain circumstances to withhold a ship that is unable to provide appropriate and valid certificates.⁵⁴

(iv) STCW Convention

Poorly qualified crews are a major factor for shipping accidents. Therefore, it makes sense to agree on global minimum standards for crew qualification and training to prevent accidents. Article 94 (4) LOSC merely States that every flag State has to make sure that "each

⁴⁹ SOLAS, *supra* note 36, at 312. .

⁵⁰ Churchill & Lowe, *supra* note 5, at 266.

⁵¹ *Id.* at 267.

⁵² *Id.* at 268.

⁵³ Convention on Load Lines, *supra* note 38, at art. 1.

⁵⁴ Churchill & Lowe, *supra* note 5, at 266.

LAW OF FLAG STATES

ship is in the charge of a master and officer who possess appropriate qualifications (. . .) and that the crew is appropriate in qualification and numbers for the type, size, machinery and equipment of the ship". The STCW Convention further specifies this rather vague obligation and was therefore the first international agreement on training, certification and watchkeeping for seafarers.⁵⁵

The Convention prescribes minimum standards for the certification of masters and other officers and sets down essential principles for keeping engineering and navigational watches. Enforcement of the standards laid down in the Convention lays primarily with the flag States. However, according to Article X port States have the power to verify if seafarers dispose of the required certifications.⁵⁶

(v) MARPOL

The MARPOL Convention is the most important international convention covering prevention of pollution of the marine environment. The Convention includes regulations aimed at preventing and minimizing pollution from vessels - both accidental pollution and that from routine operations. It is a combination of two treaties adopted in 1973 and 1978 respectively and updated by amendments through the years.⁵⁷

B. Flag State Obligations to the Fishing Sector

The operation of fishing vessels is in many respects identical to the operation of merchant vessels or any other ship. They do operate in the same marine environment, therefore the general duties of flag States outlined above are equally applicable to fishing vessels. Nevertheless, the duties of flag States for their fishing vessels are largely ruled by a different regime from that of the general maritime industry.⁵⁸

Contrary to the rather well defined general rules for flag State duties, the concept of flag State responsibility in the fishing sector is still evolving. As global fish stocks collapse, attention is focused on the flag States to prevent and oppose illegal, unreported and unregulated (IUU) fishing. The discussions for the fisheries sector are hence much livelier and issues such as the need for a "genuine link" between the ships and their flag States, the problem of "flags of non-compliance"⁵⁹ and what actions could be taken against those flags are in the centre of

⁵⁵ Sohn & Noyes, *supra* note 19, at 151; The standards were previously set autonomously by each government which led to the situation that training and procedures varied enormously. .

⁵⁶ Churchill & Lowe, *supra* note 4, at 270.

⁵⁷ MARPOL, *supra* note 40, at art. I ¶1, subdiv. (b), Oct. 2 1983, 1340 U.N.T.S. 61, available at http://www.imo.org/Conventions/contents.asp?doc_id=678&topic_id=258; The International Convention for the Prevention of Pollution from Ships was adopted on 2 November 1973 at IMO and covered pollution by oil, chemicals, harmful substances in packaged form, sewage, and garbage. The Protocol of 1978 relating to the 1973 International Convention for the Prevention of Pollution from Ships was adopted in February 1978. As the 1973 MARPOL Convention had not yet entered into force, the 1978 MARPOL Protocol absorbed the parent Convention and entered into force on 2 October 1983.

⁵⁸ Goodman, *supra* note 9, at 161.

⁵⁹ Fisheries & Oceans, *supra* note 10, at 6. Participants of the "Expert Workshop on Flag State Responsibilities" in Vancouver agreed that it is preferable to use the term "flags of non-compliance" instead of "flags of convenience" for the fisheries sector. The term "flags of convenience" would distract from the fact that the main problem is whether States regulate their registries and control their vessels or not. An open registry per

THE JOURNAL OF INTERNATIONAL BUSINESS & LAW

international discussions. Additionally, efforts are being made to develop specific fishing sector criteria for responsible flag States.⁶⁰

A major problem is that as long as there are no globally agreed minimum standards of flag State responsibilities in the fishing sector, the content of flag State responsibilities varies depending on State's treaty obligations. However, it is only possible to identify a breach of a flag State duty, if the duties themselves are standardized.⁶¹

But why do we need a separate regime for the fishing sector when there is already sophisticated regulation for the general maritime industry? The answer is that the principal international maritime safety conventions do not generally apply to fishing vessels because of their different size, design, construction and operation.

These particularities of the fisheries sector led to the development of specific conventions. However, these conventions have not yet received the sufficient amount of ratifications to come into force.⁶² Thus, William O'Neil, Secretary-General of the IMO said in 2003:⁶³

The fishing sector of the maritime industry, which suffers the most casualties – 24,0000 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.

But more importantly, the existing conventions do not take into account the very different way in which fishing boats use the oceans. Fishing vessels do not merely travel the sea like merchant vessels but harvest living marine resources. In many cases these "harvests" are effectuated on a very large scale and often - voluntary or involuntary - target already overfished species. Hence, there is a need for responsible fisheries management to assure the sustainable use of the fishery resources and the conservation of its environment. Moreover, there is a necessity to fight and eradicate IUU fishing and to constrain "flags of non-compliance" which favour this activity.⁶⁴

1. LOSC Flag State Responsibilities in the Fishing Sector

The 1982 LOSC does not provide detailed requirements for the management of high seas fisheries. Nonetheless, there are some provisions which relate to fishing.

se is not the issue. It was further agreed that not all closed registries effectuate effective flag State control over their vessels. Focusing on the "problem of open registries" would therefore be too simplistic.

⁶⁰ Goodman, *supra* note 8, at 157.

⁶¹ Fisheries & Oceans, *supra* note 10, at 10.

⁶² Goodman, *supra* note 9, at 161.

⁶³ INT'L MAR. ORG., Sub-Committee on Stability and Load Lines and on Fishing Vessel's Safety ("SLF"), *Address by the IMO Secretary-General, William O'Neil, to the 46th Session of the Sub-Committee on Stability and Load Lines and on Fishing Vessels' Safety*, September 8-12, 2003 (last accessed on April 11, 2010) http://www.imo.org/Newsroom/mainframe.asp?topic_id=246&doc_id=3190

⁶⁴ Goodman, *supra* note 9, at 161.

LAW OF FLAG STATES

According to the LOSC all States do in principle have the right to fish on the high seas.⁶⁵ However, States have a duty to “cooperate with each other in the conservation and management of living resources in the areas of the high seas”⁶⁶ and “shall, as appropriate, cooperate to establish subregional or regional fisheries organizations” (RFMOs).⁶⁷ Further, there are duties to cooperate with regard to straddling stocks,⁶⁸ highly migratory stocks,⁶⁹ anadromous stocks and catadromous species.⁷⁰

The United Nations Convention on the Law of the Sea does not however establish any fisheries-specific duties of flag States that go beyond the cooperation-requirements mentioned above. The principle of exclusive jurisdiction of the flag State over their vessels renders it therefore difficult to take actions against vessels that are involved in IUU fishing if the flag State is unwilling or unable to act. Additionally, in this situation there are no provisions for consequences or even sanctions against the flag State in this situation.⁷¹

2. Compliance Agreement and UN Fish Stocks Agreement

Consequently, further international regulations had to be developed to specify the duties of the LOSC and to establish further flag State responsibilities in the fisheries sector. The major flag State duties are now determined in two instruments: The Compliance Agreement⁷² and the UN Fish Stocks Agreement.⁷³

The Compliance Agreement and the UN Fish Stocks Agreement determine a range of duties that are designed to ensure effective jurisdiction and control of flag States over their fishing vessels. They could be considered as an enunciation of the “duty to cooperate” set out in the LOSC. They would therefore provide a similar role as SOLAS and MARPOL which outline the “generally accepted international rules and standards” referred to in the LOSC regarding maritime safety and pollution.⁷⁴

The Compliance Agreement includes provisions that stipulate that flag States have to exercise effective control over their fishing vessels on the high seas. For instance, it provides that flag States have to require a fishing authorization for their fishing vessels and are only allowed to grant that authorization if they are able to effectively control the vessel’s fishing activities.⁷⁵ Flag States have furthermore to ensure that their fishing fleet is not undermining the efficiency of international conservation and management measures.⁷⁶ Moreover, flag

⁶⁵ LOSC, *supra* note 1, at art. 116.

⁶⁶ *Id.* at art. 117-120.

⁶⁷ *Id.* at art. 118.

⁶⁸ *Id.* at art. 63.

⁶⁹ *Id.* at art. 64.

⁷⁰ *Id.* at art. 66-67.

⁷¹ Goodman, *supra* note 9, at 162.

⁷² Agreement to Promote Compliance with International Conservation and Management Measures on the High Seas, 24 April 2003, 2221 U.N.T.S. 91, available at <http://www.treaties.ung.org/doc/Publication/UNTS/Volume%202221/v2221.pdf>, [hereinafter “Compliance Agreement”].

⁷³ 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, Dec. 11, 2001, 2167 U.N.T.S. 3, available at <http://treaties.un.org/doc/Publication/UNTS/Volume%202167/v2167.pdf> [hereinafter “UN Fish Stocks Agreement”].

⁷⁴ Goodman, *supra* note 9, at 162.

⁷⁵ Compliance Agreement, *supra* note 70, at art. III (2)-(3).

⁷⁶ *Id.* at art. III(1)(a).

THE JOURNAL OF INTERNATIONAL BUSINESS & LAW

States are required to maintain a record of their fishing vessels⁷⁷ and to submit information about those vessels to the FAO⁷⁸ and to cooperate and exchange information with other States to identify vessels that undermine international conservation and management measures.⁷⁹ The Compliance Agreement also prescribes that States shall not authorise fishing vessels that have previously been registered in another country and identified as being engaged in activities that undermine conservation and management measures.⁸⁰ Finally, it stipulates that flag States have to take enforcement measures which include sanctions that are of sufficient gravity as to be effective.⁸¹

Unfortunately the Compliance Agreement has not been ratified by many countries.⁸² In addition, it is not applicable to all types of fishing vessels.⁸³ Thus its reach and effectiveness has therefore been restricted.⁸⁴

The other major important international convention for the fisheries sector is the UN Fish Stocks Agreement. It stipulates – very similar to the Compliance Agreement – in Article 18 (1) that States shall take the necessary measures to ensure that vessels comply with subregional and regional conservation and management measures and that they do not engage in any activity which undermines the effectiveness of such measures. Overall, the UN Fish Stocks Agreement comprises the same flag State responsibilities as the Compliance Agreement⁸⁵ but also adds some new aspects. Similar to the Compliance Agreement, the UN Fish Stocks Agreement prescribes compliance and enforcement measures for Flag States. Contrary to the Compliance Agreement, the UN Fish Stocks Agreement does however provide a detailed embodiment of those measures: The flag State is required to enforce compliance measures irrespective of where violations occurred; it must investigate immediately and fully any alleged violation; it has to require its vessels to give information to the investigating authorities; proceedings have to be instituted in case of violations; vessels that committed serious violations must be prevented from continuing their fishing activities until all imposed sanctions have been complied with and finally all investigations and proceedings shall be carried out expeditiously.⁸⁶

Nonetheless, it is another part of the UN Fish Stocks Agreement which is probably most outstanding and controversial.⁸⁷ Article 8 attempts to promote the effectiveness of RFMOs by stipulating in Paragraph 3 that States whose vessels fish for straddling or highly migratory fish stocks shall either join the relevant RFMOs or agree to apply the conservation and management efforts issued by these organisations. Article 8 (4) goes even so far as to determine that only member States of the RFMOs or those States which agreed to apply the

⁷⁷ *Id.* at art. IV.

⁷⁸ *Id.* at art. VI.

⁷⁹ *Id.* at art. V.

⁸⁰ *Id.* at art. III(5).

⁸¹ *Id.* at art. III(8).

⁸² Moritaka Hayashi, *Illegal, Unreported, and Unregulated (IUU) Fishing: Global and Regional Responses*, in *NEW LAW TO OCEAN WATERS* 95, 96 (David D. Canron and Harry N. Schreiber eds., 2004); The main reason for the poor level of ratifications seems to be that many developing countries face financial and human resource limitations to implement it in an effective manner.

⁸³ Compliance Agreement, *supra* note 70, at art. II (restricting the agreement to certain vessel types.)

⁸⁴ Goodman, *supra* note 9, at 163.

⁸⁵ UN Fish Stocks Agreement, *supra* note 72, at art. 18.

⁸⁶ *Id.* at art. 19.

⁸⁷ Goodman, *supra* note 9, at 163.

LAW OF FLAG STATES

RFMO conservation and management measures shall have access to the fishery resources to which those measures apply.

The UN Fish Stocks Agreement has been ratified by 77 countries including a number of the major distant water fishing nations, such as the United States, the European Union, Japan, the Russian Federation and Korea.⁸⁸ In fact, the Agreement expressly stipulates that States parties shall encourage non-parties to become parties.⁸⁹ They are also required to take measures to prevent non-member State vessels from engaging in activities that could undermine the effectiveness of the UN Fish Stocks Agreement.⁹⁰ Although it is technically only applicable to straddling and highly migratory fish stocks, its principles have been accepted to be applicable more broadly.⁹¹

Finally, the flag State duties stated in the Compliance Agreement and the UN Fish Stocks Agreement have been further evolved through application by RFMOs and additionally adopted in various non-binding instruments.⁹² Hence, the agreements achieved to establish a much more detailed system of flag State responsibility than the LOSC.⁹³

IV. INADEQUATE IMPLEMENTATION AND ENFORCEMENT OF INTERNATIONAL STANDARDS

The numerous safety regulations show that there is no shortage of legislation in this domain. The difficulties arising out of exclusive flag State jurisdiction are therefore less to be tackled by developing new standards and responsibilities but more by effectively implementing and enforcing internationally agreed rules and requirements.⁹⁴

In the context of international law, enforcement might be defined as the process of compelling compliance with rules set out in an international agreement.⁹⁵ Effective enforcement would mean that those that violations are first detected by the State and then – through judicial or administrative intervention – “compelled” to comply with the rules.⁹⁶ Rules that are not consequently enforced are ineffective; therefore consistent non-enforcement weakens the entire system of regulations.⁹⁷

The LOSC attempts to ensure effective enforcement of international standards. However, as will be discussed below, the LOSC provisions are only effective in interaction with

⁸⁸ DIVISION FOR OCEANS AFFAIRS AND THE LAW OF THE SEA, Chronological lists of ratifications of, accessions and successions to the Convention and the related Agreements as at 15 November 2010 (Apr. 2, 2010) http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm

⁸⁹ UN Fish Stocks Agreement, *supra* note 70, at art. 33(1).

⁹⁰ *Id.* at art. 33(2).

⁹¹ Goodman, *supra* note 9, at 163.

⁹² See, e.g., FOOD AND AGRICULTURE ORGANIZATION OF THE U.N., CODE OF CONDUCT FOR RESPONSIBLE FISHERIES I (1995) [hereinafter “FAO”]; FAO, INTERNATIONAL PLAN OF ACTION TO PREVENT, DETER, AND ELIMINATE ILLEGAL, UNREPORTED AND UNREGULATED FISHING I (2001).

⁹³ See Goodman, *supra* note 9, at 163.

⁹⁴ See *id.*, at 157.

⁹⁵ Christopher C. Joyner, *Compliance and Enforcement in New International Fisheries Law* (1998), 12 TEMP. INT’L & COMP. L. J. 271, 275 (1998).

⁹⁶ Anderson, *supra* note 21, at 253.

⁹⁷ David Anderson, *The Roles of Flag States, Port States, Coastal States and International Organisations in the Enforcement of International Rules and Standards Governing the Safety of Navigation and the Prevention of Pollution from Ships under the UN Convention on the Law of the Sea and other International Agreements*, 2 SINGAPORE J. OF INT’L & COMPARATIVE L. 557, 560 (1998).

THE JOURNAL OF INTERNATIONAL BUSINESS & LAW

other unilateral and multilateral measures. According to the LOSC enforcement of international standards resides mainly with the flag States but is partly also shared amongst several other types of States.⁹⁸

Unfortunately, progresses made in implementation and enforcement are often very slow. This is due to the fact that it is the flag State itself that is primary responsible for implementing its international obligations. Governments that agreed to an international convention are required to incorporate the provisions into their national law.⁹⁹ Some flag States are however unwilling or unable to implement and enforce the obligations they incurred by IMO conventions.¹⁰⁰ The reality is that compliance with international standards and regulations has primarily been enhanced over the last decades by applying pressure on the shipping industry by responsible port States.¹⁰¹

The issue of insufficient implementation and enforcement of the existing standards is further exacerbated by delegation of many of the flag State's key responsibilities to so called "Classification Societies", private companies which vary in credibility and are often less than stringent in carrying out their duties.¹⁰²

The inadequate control of flag States, notably by "flags of non-compliance" States also constitutes the main problem in the fishing sector. Fishing vessels are often re-flagged to avoid stricter regulations. It is very common that fishing vessels repeatedly change their flags to escape sanctions for violations of conservation and management measures. Moreover, owners of fishing vessels that are involved in IUU fishing often adopt measures to veil behind shell companies and use complex beneficial ownership structures to evade detection. It is therefore very difficult for many flag States to actually take measures against the vessels' owners as they are often not identifiable.¹⁰³

In addition, the freedom of high seas fisheries is one of the most cherished principles in international law. That freedom may be restricted by the provisions of the UN Fish Stocks Agreement, stipulating that only members of RFMOs or States that agreed to RFMOs measures are allowed to fish in certain areas. But by no means all States ratified the UN Fish Stocks agreement. The principle of Article 8 (4) of the UN Fish Stocks agreement is therefore neither universally ratified nor universally accepted.¹⁰⁴

V. MEASURES TO COUNTER NON-ENFORCEMENT BY FLAG STATES

There seems to be no immediate consequences in international law if a flag State neglects to exercise effective jurisdiction and control over its vessels despite the fact that the Law of the Sea Convention of 1982 and other international standards requiring flag States to

⁹⁸ Anderson, *supra* note 21, at 254.

⁹⁹ Özcayir, *supra* note 6, at 299.

¹⁰⁰ Churchill and Lowe, *supra* note 5, at 274.

¹⁰¹ Joseph E. Vorbach *The Vital Role of Non-Flag State Actors in the Pursuit of Safer Shipping* 32 OCEAN DEV. & INT'L L. 27 (2001); See also Asia N. Wright *Beyond the Sea and Spector: Reconciling Port and Flag State Control over Cruise Ship onboard Environmental Procedures and Policies*, 18 DUKE ENVTL. L. & POL'Y F. 215, 249 (2007) (The author expresses the opinion that port States should not restrict flag State responsibility too rigorously. Instead she suggests leaving the (cruise ship) industry the flexibility to achieve its own environmental standards which might be even higher than those of the port State.)

¹⁰² See Goodman, *supra* note 9, at 160.

¹⁰³ See *id.* at 164.

¹⁰⁴ See *id.*

LAW OF FLAG STATES

do so.¹⁰⁵ The LOSC merely sets out in Article 94 (6) that a “State which has clear grounds to believe that proper jurisdiction and control with respect to a ship have not been exercised may report the facts to the flag State.” Consequently, the “flag State shall investigate the matter and, if appropriate, take any action necessary to remedy the situation.”

But what if such a report is unsuccessful, that is, the flag State does not take the appropriate measures to remedy the situation? It turned out to be one of the most intractable questions in the Law of the Sea and in turn what actions non-flag States could take if the flag State is unwilling or unable to enforce its international obligations.¹⁰⁶ Anderson and Nijhoff suggest that the complainant’s State could raise the matter at an international level. For example, it would be possible for example to call upon the IMO or to induce dispute resolution procedures under Part XV of the LOSC.¹⁰⁷

However, many States and organizations were unsatisfied with these remedies. Hence, the inadequate implementation and enforcement of the existing flag State duties initialised various actions to counter poor flag State performance. Some of these actions were within the IMO, but also on other multilateral and unilateral basis. One can distinguish “direct” enforcement and “indirect” enforcement. Direct enforcement is the enforcement of standards by States, and “indirect” enforcement is the enforcement by international organisations which takes measure to improve matters.¹⁰⁸

A. IMO-Guidelines and Resolutions

The IMO has issued a variety of Conventions and guidelines (as a form of “indirect” enforcement”) to support flag States in complying with their responsibilities. For example, it has set up a special committee whose task it is to observe the implementation of IMO Conventions and to identify the required actions to ensure effective and coherent global implementation.¹⁰⁹

Highly remarkable is also the introduction of a so-called “White List” in the amended version of the STCW Convention. A position on the White List entitles other Parties to the STCW Convention to accept certificates issued by or on behalf of the parties on the list that are in compliance with the revised STCW as amended.¹¹⁰ Certificates of States that are not on the “White List” are thus not per se considered in compliance with the STCW standards. This signifies a major modification of the system of certificates.¹¹¹

¹⁰⁵ See *id.* at 159.

¹⁰⁶ See Rosemary Rayfuse *Regulation and Enforcement in the Law of the Sea: Emerging Assertions of a Right to Non-flag State Enforcement in the High Seas Fisheries and Disarmament Contexts* 24 AUSTL. Y.B. INT’L 181 (2005). [hereinafter “Rayfuse”].

¹⁰⁷ See Anderson, *supra* note 21, at 256.

¹⁰⁸ Anderson, *supra* note 21, at 560.

¹⁰⁹ Özçayır, *supra* note 5, at 299. The Joint Maritime Safety Committee (“MSC”) / Maritime Environment Protection Committee (“MEPC”) Working Group on Flag State Implementation was created on the 60th session of the MSC in 1992.

¹¹⁰ INT’L MAR. ORG., *STCW White List Expanded*, http://www.imo.org/inforesource/mainframe.asp?topic_id=67&doc_id=1026 (last visited Apr. 7, 2010).

¹¹¹ Anderson, *supra* note 21, at 257.

THE JOURNAL OF INTERNATIONAL BUSINESS & LAW

B. Port State Control

Some of the drawbacks regarding the concept of exclusive flag State control have, to some extent, been overcome by the rights of port States given by some IMO conventions. These rights permit port States to control vessels lying in their ports. Moreover, it is arguable that it is customary international law that port States have the right to control if the vessels in their harbours are safe and detain them if they are not.¹¹²

Thus, in accordance with customary international law, 14 European States (reacting to the Amoco Cadiz disaster) signed a Memorandum of Understanding ("MOU") on Port State Control in 1982 ("Paris MOU"). The Paris MOU provides that the participating port States maintain an effective system of port State control and also enforce compliance with the main international safety and pollution conventions, regardless of whether the flag State of the concerned ship is a party to these conventions or not. The port States have the control competences that are given by the various conventions. The Paris MOU states that each port authority has to inspect a minimum of 25 per cent of the ships.¹¹³ If deficiencies are discovered, the ship is only allowed to continue its journey after the hazard has been removed.¹¹⁴ It has to be emphasized though that MOUs do not give the right to prosecute foreign vessels for non-compliance with the required standards.¹¹⁵

Port State Control enables participating port States – in cooperation with other States – to develop positive, as well as negative lists of flag States and performance tables for Classification Societies.¹¹⁶ These lists include information on detained ships, their flags, names, and types, which is published on relevant websites. A great part of the success of Port State Control measures is therefore based on the "name and shame" principle.¹¹⁷

As port State control turned out to be an effective measure to enhance compliance with international agreements, other regions of the world followed the example of the Paris MOU and adopted their own MOUs. There are currently nine regional MOUs on Port State Control.¹¹⁸ The United States of America furthermore operate a unilateral Port State Control programme. Regional MOUs increasingly exchange data on inspected ships so that significantly substandard ships have nowhere to go anymore. Moreover, the IMO started to grant technical assistance to developing MOUs in order to harmonise Port State Control activities.¹¹⁹

Another noteworthy provision in the LOSC dealing with Port State Control is Article 218. It concerns the enforcement of environmental standards by port States. The provision resulted from a US suggestion in the Seabed Committee in 1973 and a more specific proposal

¹¹² Churchill & Lowe, *supra* note 5, at 274.

¹¹³ As ships usually use multiple Western European ports per year, it is anticipated to reach a total inspection rate of 90 per cent per year.

¹¹⁴ Churchill & Lowe, *supra* note 4, at 274-275.

¹¹⁵ *Id.* at 276.

¹¹⁶ Goodman, *supra* note 9, at 161.

¹¹⁷ Özcayir, *supra* note 6, at 302.

¹¹⁸ Goodman, *supra* note 9, at 161 n.36. These are: the Paris MOU, that comprises the waters of the European coastal States and the North Atlantic basin from North America to Europe; the Caribbean MOU; the Indian Ocean MOU; the Mediterranean MOU; the Tokyo MOU for the Asia Pacific region; the Vina del Mar Agreement for the Latin American region; the Black Sea MOU; the Riyadh MOU for the Gulf region and the West and Central African MOU.

¹¹⁹ Mansell, *supra* note 23, at 198.

LAW OF FLAG STATES

of several European countries in the Third Committee of the Conference at Caracas in 1974. It was anticipated that Port State Control would be a cost effective alternative to intervention at sea by coastal States.¹²⁰

Article 218 allows port States to undertake investigations of any discharge from a vessel “outside the internal waters, territorial sea or exclusive economic zone of that State in violation of applicable international rules and standards”.¹²¹ The provision therefore amounts to an extra-territorial jurisdiction of some sort.¹²² There are, however, limitations in the number of cases in which case the discharge took place in the internal waters, territorial sea or EEZ of another State. In that case, proceedings shall only be instituted if the other State or the flag State requests so.¹²³

C. Coastal State Control

One of the weaknesses of Port State Control is that a substandard ship cannot be inspected before it reaches a port. Hence, the ship might travel for thousands of miles in dangerous condition and eventually – wilfully or unintentionally – pollute a coastal State’s waters.¹²⁴

The right to enforce international standards are nonetheless very limited for coastal States. That is primarily due to the right of innocent passage.¹²⁵ However, Article 220 of the LOSC includes relevant provisions for Coastal State Control in regard to pollution. . A vessel that navigates in the territorial sea of the coastal State is allowed to be physically inspected if it is suspected of polluting. If sufficient evidence of the pollution is found, the coastal State is empowered to institute proceedings and detain the vessel. The coastal State is nevertheless obliged to respect the provisions of innocent passage.¹²⁶

The coastal State’s rights are narrower in case of a suspected pollution in the coastal State’s EEZ. The LOSC grants the coastal State merely the right to request information regarding the vessel’s identity, port of registry and its last and next port of call.¹²⁷ Physical inspection of the vessel is only allowed in cases of a substantial discharge and only under the condition that the vessel has refused to give the requested information or has given manifestly wrong information.¹²⁸

D. Control of Fishing Vessels by non-Flag States

Insufficient flag State control is also the primary reason for IUU fishing.¹²⁹ It is therefore not surprising that various efforts are made by non-flag States to enforce international fishing regulations, especially RFMO measures.

¹²⁰ Anderson, *supra* note 21, at 259.

¹²¹ MARPOL, *supra* note 40, at art. 218.

¹²² Anderson, *supra* note 21, at 260.

¹²³ LOSC, *supra* note 1, at art. 218(2).

¹²⁴ Mansell, *supra* note 23, at 305-306.

¹²⁵ Anderson, *supra* note 21, at, 262.

¹²⁶ LOSC, *supra* note 1, at art. 220(2).

¹²⁷ *Id.* at art. 220(3).

¹²⁸ *Id.* at art. 220(5).

¹²⁹ Erik Jaap Molenaar, *Non-Flag State Enforcement in High Seas Fisheries*, 19 INT’L J. MARINE & COASTAL L. 203 (2004) (internal citations omitted).

THE JOURNAL OF INTERNATIONAL BUSINESS & LAW

1. Internal Waters, Territorial Waters, EEZ

The LOSC includes provisions that empower non-Flag States to enforce applicable rules and regulations concerning fishing activities. First, the LOSC provides that fishing activities are specifically exempted from the right of innocent passage.¹³⁰ Therefore, Coastal States do therefore have the right arrest any ship for infringement of its fisheries laws within their territorial sea.¹³¹ Moreover, the coastal State can take enforcement actions vessels from other States that illegally fish in its EEZ in order to ensure compliance with its laws and regulations.¹³²

2. High Seas

The LOSC does also contain, albeit more indirectly, the roots for non-flag State enforcement in the high seas fisheries context. The right of fishing on the high seas is restricted by the State's treaty obligations, the duties of conservation, cooperation and non-discrimination¹³³ and the rights, duties and interest of coastal States as provided for in Articles 63 (2) and 64 - 67 of the LOSC. The duty of conservation and cooperation has mainly been exhibited in the creation of RFMOs. These RFMOs aim to protect certain regions or particular species from extensive fishing. RFMOs usually provide for non-flag State enforcement instruments, such as sea-boarding and inspections systems.¹³⁴

The principle of exclusive flag State jurisdiction has been further softened by other non-flag State enforcement systems. One example is the global high seas boarding and inspections system which is included in the UN Fish Stocks Agreement.¹³⁵ Hence, Articles 20 to 23 of the UN Fish Stocks Agreement enable non-flag States to conduct enforcement measures both at sea and in port. Overall, one effect of the UN Fish Stocks Agreement is that all States, whether they are a member of the relevant RFMO or not, have to cooperate to ensure compliance with the conservation and management measures of the particular RFMO.¹³⁶

Moreover, other joint forms of jurisdiction are becoming increasingly common such as cooperative maritime surveillance and enforcement, or "ship-rider", agreements. The increasing number of joint measures arises from the realisation that pure flag State enforcement unavoidably has its limitations.¹³⁷ It is noticeable in general, that non-flag State enforcement measures are becoming mainstream, especially within RFMOs. Although efforts are still needed to obtain consent of the flag State, that consent will be aggressively pursued either bilaterally, multilaterally or on an ad hoc basis. Furthermore, there is now a general expectation that such consent will be given.¹³⁸

Even more controversial is the question of whether there is also a right in customary law for non-flag State enforcement beyond consent-based agreements. Shigeru Oda, Judge of the International Court of Justice, states in his book, "The mere attempt to exercise such

¹³⁰ LOSC, *supra* note 2, at art. 19(2)(i).

¹³¹ *Id.* at art. 25 & 27.

¹³² *Id.* at art. 56 & 73

¹³³ *Id.* at art. 117-120.

¹³⁴ Rayfuse, *supra* note 104, at 184.

¹³⁵ Goodman, *supra* note 9, at 167.

¹³⁶ Rayfuse, *supra* note 104, at 186.

¹³⁷ Goodman, *supra* note 9, at 167.

¹³⁸ Rayfuse, *supra* note 104, at 103, 187.

LAW OF FLAG STATES

competence will be tantamount to a clear violation of the basic principle of the freedom of the high seas.”¹³⁹ However, the practice in numerous RFMOs is to enforce their conservation and management measures against vessels that belong to a State that is not part of the RFMO or the UN Fish Stocks Agreement.¹⁴⁰ That is highly remarkable as it is the UN Fish Stocks Agreement that obliges even non-member States to comply with RFMO measures. Hence, as this link is not given, there is no consent based connection between the flag State and the enforcing non-flag State regarding the enforcement measure.

In these cases, the enforcing States first make attempts to inform the vessel and their flag State that they have been seen. The inspecting vessel then requests the master or the flag State for consent to board and inspect. The consent can be given either expressly or by revocation of the flag, which renders the vessel stateless. It is unclear if there is an obligation to give consent, however, it is nonetheless expected that it is given. Therefore, non-flag State enforcement is not only not prohibited, but expected and perhaps even obligatory.¹⁴¹

The question remains as to whether that practice is backed by customary international law. The basis for such customary law would rest on the twin pillars of flag State responsibility and the obligation to cooperate with RFMOs. Therefore, Rayfuse argues that the international practice increasingly reveals acceptance of a customary rule that a fishing fleet is allowed to engage in fishing activities only if flag its State exercises effective control over its vessels to ensure compliance with RFMO measures.¹⁴²

[I]t may now be taken as an aspect of flag State responsibility that flag States have, in fact, implicitly consented to non-flag enforcement by members of RFMOs where their vessels are fishing in contravention of the measures adopted by that RFMO and where the flag State is unwilling or unable to act (. . .). Moreover, the practice reveals acceptance of a customary duty to cooperate with RFMOs, an essential component of which is now the requirement for non-member flag States to respect the measures adopted by RFMOs either through compliance or by restraint from fishing. Where non-member flag States either fail to ensure compliance or restraint from fishing, practice indicates they may be, as a matter of customary international law, taken to have consented to non-flag State enforcement action by member States of a RFMO acting under its auspices.

It is the author’s opinion that the assumption that such customary international law could evolve is convincing. The obligation to cooperate with RFMOs has indeed been part of various international agreements and conventions, notably the LOSC, the UN Fish Stocks Agreement and the Compliance Agreement. It is, however, questionable if such a rule is already in place. There still seem to be too many countries that did not ratify the UN Fish Stocks Agreement and the Compliance Agreement and do not consider RFMO measures as legally binding.

¹³⁹ SHIGERU ODA, FIFTY YEARS OF THE LAW OF THE SEA (2003).

¹⁴⁰ Rayfuse, *supra* note 104, at 103, 187.

¹⁴¹ *Id.* at 188.

¹⁴² *Id.* at 195.

THE JOURNAL OF INTERNATIONAL BUSINESS & LAW

3. Recent Port State Control Measures in the Fisheries Sector

Although the concepts of freedom of fishing on the high seas and exclusive flag State jurisdiction make it difficult for non-flag States to enforce international standards and regulations in the fishing sector, there is one option for the international community, RFMOs, and coastal States to take action against IUU fishing: All vessels engaged in IUU fishing must sooner or later unload or tranship their IUU catch. An efficient method to combat IUU fishing is therefore to engage in trade controls, especially by means of Port State Control.¹⁴³

Thus, in August 2009 a new treaty was agreed upon by a group of 91 countries during talks mediated by the FAO in Rome. It was subsequently adopted at the FAO conference in November 2009. The "Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing"¹⁴⁴ specifically addresses the problem of IUU fishing. The agreement is meant to make it significantly more difficult for IUU-caught fish to enter international markets. If it is effectively applied it could certainly discourage some fishermen to engage in illicit fishing. The agreement provides a number of steps to seal off ports from IUU fishers. Key points of the agreement are:¹⁴⁵

1. Foreign fishing vessels wishing to dock will be required to request permission from specially designated ports ahead of time. They will have to transmit information on their activities and the fish they have on board which gives authorities an opportunity to spot red flags in advance.
2. The treaty commits countries to regular inspections and outlines a set of standards that will be used during those inspections. Reviews of ship papers, surveys of fishing gear, examining catches and checking a ship's records can often reveal if it has engaged in IUU fishing.
3. Signatories must ensure that ports and inspectors are adequately equipped and trained.
4. When a vessel is denied access, port States must communicate that information publicly and national authorities from the country whose flag the vessel is flying must take follow-up action.
5. The treaty calls for the creation of information-sharing networks to let countries share details on IUU-associated vessels, and also contains provisions intended to assist resource-strapped developing countries meet their treaty obligations.

¹⁴³ Rachel Baird, *CCAMLR Initiatives to Counter Flag State Non-Enforcement in Southern Ocean Fisheries*, 36 VICTORIA UNIV. WELLINGTON L. REV. 735, 739-740 (2005).

¹⁴⁴ FOOD AND AGRIC. ORG. OF THE U.N. [hereinafter "FAO"], *Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing*, Nov. 22, 2009.

¹⁴⁵ Press Release, Food and Agriculture Organization, *New Treaty Will Leave 'Fish Pirates' Without Safe Haven*, United Nations (Sept. 1, 2009), available at <http://www.fao.news/story/en/item/29592/icode/>.

LAW OF FLAG STATES

However, the new treaty still has to be ratified by 25 States before it enters into force, which will most likely take some time.¹⁴⁶

Port State control measures have also previously been taken on a unilateral basis.¹⁴⁷ The European Union enacted for instance a Council Regulation to prevent, deter and eliminate illegal, unreported and unregulated fishing (EC IUU Regulation).¹⁴⁸ The EC IUU Regulation states:¹⁴⁹

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.

Chapter II of the EC IUU Regulation furthermore establishes a system of port State measures regarding fishing ships of non-EU countries that desire to enter an EU member port. Those measures include the need of declarations of catch, a prior notice, and in-port inspections. Moreover, the Regulation makes arrangements for an IUU vessel list and provides that ships on that list will be prohibited to enter into any EU member State port. The Regulation also established a scheme for the identification of States that do not cooperate. Identified States are not allowed to trade fishery products in the European Union.¹⁵⁰

VI. CONSEQUENCES FOR THE FLAG STATE AS OPPOSED TO MERELY ITS VESSELS

International attention usually focuses on how to control vessels of States of non-compliance, however, it should also be asked if there should not be consequences for the flag States itself as opposed to merely its vessels. In this regard, one has to distinguish between two different situations: (1) The failure of a flag State to control an individual vessel which commits individual infractions, and (2) the systematic failure of a flag State to control all of its vessels. The former usually only allows non-flag States to take measures against the infringing individual vessel. The latter, however, could serve as a basis for longer-term consequences such as the denial of the right to fish on the high seas to all of the flag State's vessels or even action by non-flag States against the flag State itself.¹⁵¹

One potential consequence for an ineffective flag State is that it could be taken to an international court or tribunal by one or several other States. Such a case could significantly contribute to the definition of the scope of flag State responsibilities and - perhaps even more importantly - establish possible sanctions for non-compliance with those duties. Developing case law that defines flag State duties as well as possible sanctions in case of non-compliant

¹⁴⁶ FAO, *supra* note 142, at art. 29(1).

¹⁴⁷ Goodman, *supra* note 9, at 168.

¹⁴⁸ Council Regulation (EC) 1005/2008, O.J. (L. 286).

¹⁴⁹ *Id.* at ¶ 10.

¹⁵⁰ Goodman, *supra* note 9, at 168.

¹⁵¹ Fisheries and Oceans, *supra* note 9, Part 3.5.

THE JOURNAL OF INTERNATIONAL BUSINESS & LAW

vessels or flag States might also advance more quickly than agreeing on new international binding regulatory frameworks.¹⁵²

The primary reason for having no such case take place yet is that there is a general reluctance of States to engage in court disputes with other States. In diplomatic terms such a case could possibly be regarded as “hostility” with further unpleasant diplomatic consequences for the claiming State.¹⁵³

As tempting as the idea of taking a State of non-compliance to court might be, there are nonetheless some legal and practical difficulties to consider. A judge would, for instance, have to decide whether the flag-State had taken all necessary measures, although the infringing vessels itself might have clearly breached its obligations. Furthermore, a non-flag State would have to demonstrate that it is the appropriate claimant in this matter and that it has jurisdiction. A possible solution could be that a group of States institutes proceedings under a declaration of common interest. Another issue is the ability to find a solid case that allows the court to create an objective test for the flag State responsibilities and to maximise the likelihood of success for the claimant States.¹⁵⁴ A defeat of non-flag States that sue a State of non-compliance before ITLOS would certainly be detrimental to the attempt of defining flag State responsibilities and would constitute a major setback.

VII. NON-RECOGNITION OF THE FLAG STATE'S FLAG BY OTHER STATES AS A SANCTION

One theoretically conceivable sanction against non-controlling flag States and their vessels would be to refuse to recognise the flag State's flag.

Churchill and Lowe suggested that the instrument of non-recognition of a flag is a valid one.¹⁵⁵

Where the link between a vessel and its flag State clearly was not “genuine”, it would of course be open to the courts and other public authorities of other States to do the equivalent of lifting the corporate veil and not recognise the nationality of the ship concerned.¹⁵⁶

Churchill and Lowe were admittedly referring to the case of a missing “genuine link” and not the case of insufficient flag State control. In fact, there were extensive discussions about whether a non-recognition clause in case of a missing genuine link should be included in the High Seas Convention – where the concept of the genuine link was introduced for the first time. The traditional maritime countries of Europe were in favour of such a clause but ultimately did not prevail.¹⁵⁷

However, it shows that the instrument of non-recognition of a flag is conceivable. If a breach of Article 91 (1) LOSC could lead to the non-recognition of a flag, however, then it

¹⁵² *Id.* at Part 3.6.

¹⁵³ *Id.*

¹⁵⁴ *Id.* at Part 3.6 Discussion.

¹⁵⁵ Churchill and Lowe, *supra* note 5, 261; *see also*, RENÉ JEAN DUPUY AND DANIEL VIGNES, A HANDBOOK ON THE NEW LAW OF THE SEA VOL. 1 405 (Martinus Nijhoff Publishers, Dordrecht, 1991).

¹⁵⁶ BOLESŁAW ADAM BOCZEK, FLAGS OF CONVENIENCE. AN INTERNATIONAL LEGAL STUDY 247-248 (Harvard University Press, Cambridge, 1962).

¹⁵⁷ *Id.*

LAW OF FLAG STATES

is debatable if a fundamental and consistent breach of Article 94 LOSC could entail the same result.

Some authors are even of the opinion that “effective jurisdiction and control” is the definition of the “genuine link” and not an additional test.¹⁵⁸ These authors base their opinion on the wording of Article 5 High Seas Convention. The final version of Article 5 (1) High Seas Convention, which introduces the concept of a “genuine link” for the first time, reads as follows:

Each State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship; *in particular, the State must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.*¹⁵⁹

The crucial question is: Is the requirement to effectively exercise jurisdiction and control, introduced by the words “in particular”, an additional test besides the genuine link or is it part of the genuine link itself?

Boczek, justifying its opinion that “genuine link” and “effective jurisdiction and control” are two sides of the same coin, states:

The failure of the second committee of the conference to define the genuine link points to the fact that the center of gravity has been shifted by the framers of the article from the various criteria, such as ownership (. . .) to the exercise of jurisdiction and control. This interpretation is consonant with the institution of nationality, and is also corroborated by the French text of art. 5, where the English words “in particular” are rendered by the adverb “notamment,” which in English corresponds more to the words “that is” than “in particular.” Therefore the view (. . .) that “there must exist a genuine link between the state and the ship, i.e., the state must exercise its jurisdiction and control effectively in administrative, technical and other related matters,” correctly solves the problem under inquiry.¹⁶⁰

In other words, Boczek says that the concept of the genuine link does not refer to conditions which should exist prior to registration but to events after registration. It is a duty for flag States to do something vis-à-vis ships under their flag. Accordingly the “effective jurisdiction and control” is part of the definition of the “genuine link” and not an additional requirement.¹⁶¹

A strong argument exists for the notion that the definition of the “genuine link” did not change by its introduction in the LOSC. The LOSC does not provide a new definition of the genuine link but merely provides in Article 91 (1) that “[t]here must exist a genuine link

¹⁵⁸ See, e.g., Brunson MacChesney, *Flags of Convenience. An International Legal Study*, Am. J. of Int'l L., 949, 952 (1963) (book review).

¹⁵⁹ Convention on the High Seas, art. 5(1), Apr. 29, 1958, 450 U.N.T.S. 11, 82 (emphasis added).

¹⁶⁰ Boczek, *supra* note 152, at 275.

¹⁶¹ *Id.* at 152, 276.

THE JOURNAL OF INTERNATIONAL BUSINESS & LAW

between the State and the ship.” It therefore only reiterates the genuine link requirement without changing its content.

However, that still does not answer the opening question of whether a State would be allowed to refuse to recognise a vessel’s flag in the case where its flag State does not comply with its obligations. The problem with non-recognition is that its legal consequences are unclear. It would probably render a vessel stateless, and therefore virtually defenceless, as it is not under the protection of a flag State anymore. Some authors opine that harsh treatment of stateless vessels is justified because of the danger they constitute on the high seas. Furthermore, they are vulnerable as there is no flag State that seeks redress on their behalf.¹⁶² Thus, it is seemingly agreed that de-flagging should not be undertaken as a first measure but rather as a last resort.¹⁶³

Roach commented that deprivation of a flag State’s flag would be the ultimate sanction. In his opinion such an action would not be authorised by any existing international instrument. However, he left open the question of whether this could be a new role for the IMO.¹⁶⁴

Overall, non-recognition of a flag is a dangerous tool and its legal validity is questionable as such a sanction could contradict the provisions of the LOSC. The LOSC expressly grants States the right to confer their flag to ships¹⁶⁵ along with the right to fix the conditions for the grant of their nationality.¹⁶⁶ There is a very important difference between Article 91 LOSC and Article 5 High Seas Convention. The High Seas Convention not only provides that there must be a genuine link but further stipulates that “in particular, the State must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.”¹⁶⁷ This sentence is no longer included in the Article 91 LOSC. It was instead moved to Article 94 of the LOSC. This illustrates that the concept of the “genuine link” and “flag state control” have been deliberately separated. They can therefore hardly be regarded as the same any longer.

Thus, if, for instance, the IMO would adopt sanctions that allow the non-recognition of a vessel’s flag in case its flag State does not comply with its responsibilities to control its vessels, then this would be a major alteration, or at least amendment, of the LOSC provisions concerning the nationality of ships. It would certainly entail questioning one of the cornerstones of the law of the sea. Such a measure would therefore risk violating the “pacta sunt servanda” principle of the Vienna Convention¹⁶⁸ which states that “[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith”.¹⁶⁹ The exclusive

¹⁶² Robert C.F. Reuland, *Interference with Non-National Ships on the High Seas: Peacetime Exceptions to the Exclusivity Rule of Flag-State Jurisdiction*, 22 VAND. J. TRANSNAT’L L. 1161, 1198 (1989).

¹⁶³ Fisheries and Oceans, *supra* note 9, Part 3.4. Discussion.

¹⁶⁴ J. Ashley Roach, “Alternatives for Achieving Flag State Implementation and Quality Shipping,” in Myron H. Nordquist and John Norton Moore CURRENT MARITIME ISSUES AND THE INTERNATIONAL MARITIME ORGANIZATION (Martinus Nijhoff Publishers, The Hague, 1999) 170 (Myron H. Nordquist and John Norton Moore (eds.) 1999).

¹⁶⁵ LOSC, *supra* note 2, Art. 90.

¹⁶⁶ LOSC, *supra* note 2, Art. 91(1).

¹⁶⁷ Convention on the High Seas, Art. 5(1), 450 U.N.T.S. 11, 82 (Apr. 29, 1958).

¹⁶⁸ Vienna Convention on the Law of Treaties, art. 26, (May 23, 1969) [hereinafter “Vienna Convention”].

¹⁶⁹ Mansell, *supra* note 23, at 304-305.

LAW OF FLAG STATES

right of States to grant nationality, as stipulated for in the LOSC, has furthermore been accepted by both the IMO and the ILO, and other UN agencies.¹⁷⁰

VIII. CONCLUSION

In the maritime safety and marine pollution context, flag State duties are firmly anchored in customary international law. They have been formulated in the 1982 UN Convention on the Law of the Sea and further detailed through a variety of well-ratified and generally accepted instruments. The remaining challenges are more of a practical than legal manner. Further implementation, audit and self-assessment are therefore necessary.¹⁷¹

The main necessity today is to enhance enforcement. A major step in the right direction has been the clearly noticeable shift towards enforcement of relevant international rules and standards by non-flag States, notably through Port State Control. There are even indications of a further shift away from exclusive flag State jurisdiction primacy towards greater port State jurisdiction. One example is certainly the creation of the “White List” of the STCW Convention parties. Thus, in the future, certificates of non-White List States will not easily convince port State inspectors anymore.¹⁷²

It is questionable whether or not it is legitimate to not recognise the flag of a vessel registered under a State of non-compliance. Overall, the legal doubts are considerable and, in the author’s opinion, prevailing. Nevertheless, as an alternative, it seems to be an appropriate and effective measure in general to deny port access to ships that sail under the flag of a State that does not meet the standards required by mandatory IMO instruments.¹⁷³ Port States could base their refusal on rejection of the flag State’s certificates. It would be conceivable that the IMO issues a “Black List” for that purpose which would list noncompliant States. This sanction would go in a similar direction as non-recognition of a vessel’s flag but probably encounter less legal objections.¹⁷⁴ The European Union already bans substandard ships under certain conditions from entering their ports. This legislation has been continued in the adoption of the Third Maritime Safety Package on 11 March 2009 which is in continuation with the ERIKA I and II packages.¹⁷⁵ It is to be hoped that collective refusal of access to ports will eventually obviate the need of substandard vessels to navigate at all as they would have no place to go anymore.

Another development, coming from a very different angle, could also help to improve the situation. On 30 March 2010, French oil multinational Total lost their appeal to

¹⁷⁰ IMO Secretariat, *Examination of the Duty of Flag States to Exercise Effective Control Over Ships Flying Their Flags Including Fishing Vessels, Taking Into Account Articles 91 and 94 of the United Nations Convention on the Law of the Sea*, 1982, June 13, 2005 GL 1/3 (Containing, U.N. General Assembly, *Open Ended Informal Consultative Process on Oceans and the Law of the Sea: Strengthening Flag State Implementation*, June 7-11, 2004, U.N. Doc. A/AC.259/11).

¹⁷¹ Goodman, *supra* note 9, at 168.

¹⁷² Anderson, *supra* note 21, at 265-266, at 265-266.

¹⁷³ See CHONG IL CHEE, *KOREAN PERSPECTIVES ON OCEAN LAW ISSUES FOR THE 21ST CENTURY* (Kluwer Law International, The Hague, 1999) (noting there exists a principle that ports have to remain open to foreign vessels as “a general rule”).

¹⁷⁴ Mansell, *supra* note 23, at 305.

¹⁷⁵ *Adoption of the Third Maritime Safety Package*, EUROPEAN COMMISSION: MOBILITY AND TRANSPORT, (Dec. 12, 2010), available at http://ec.europa.eu/transport/maritime/safety/third_maritime_safety_package_en.htm (last visited Apr. 8, 2010).

THE JOURNAL OF INTERNATIONAL BUSINESS & LAW

overturn a court decision that found the company guilty of negligence for a 1999 oil spill off the coast of Brittany. Paris' appeals court turned down their case, and confirmed the conviction and a fine of 375,000 Euros. The substandard oil tanker Erika broke in two on 12 December 1999, polluting 400 kilometres of coastline. But Total was not the only party held liable in this case. Together with Total, the ship owner of the Erika, the technical director and, maybe even more importantly, the Classification Society RINA were convicted. The court of appeal also decided that the three latter defendants had to pay 200 million Euro of damages for the damage they caused to the environment. RINA was also fined 375,000 Euro.¹⁷⁶ These severe fines, and the enormous amount of damages that were awarded, show it can be very costly to operate a substandard vessel or, in case of RINA, to certify a substandard vessel to be seaworthy. It is therefore conceivable that further similar criminal and civil judgments of domestic courts could have an impact on the willingness to operate such vessels.¹⁷⁷ Moreover, proceedings before an international tribunal of one or several States against a flag State that consistently fails to comply with its international obligations could further contribute to the definition of the scope of flag State responsibilities and reveal legitimate sanctions.

In the fisheries sector, however, the situation is more complicated. The problems here are not only of practical manner. To the contrary, it is necessary to provide further legally binding regulations. The major problem continues to be that there are no globally agreed minimum standards of flag State responsibilities. Although standards exist, such as the Compliance Agreement or the UN Fish Stocks Agreement in conjunction with various RFMO measures, many countries still refrain from ratifying these important instruments. However, a breach of a duty is only determinable if the duty itself is standardised.

Hence, there are international initiatives underway to further develop flag State responsibilities. In March 2008, an "Expert Workshop on Flag State Responsibilities" was held in Vancouver. The main goal of the Workshop was to develop criteria for flag State performance regarding fishing vessel control. Furthermore, the Workshop attempted to come up with measures that could be taken if a flag State does not comply with its obligations.¹⁷⁸

One recommendation of the Workshop was that more consideration should be given to what the motivation for vessel owners are when they re-flag their vessels. In this context, the FAO's efforts to develop a Global Record of Fishing Vessels was appreciated. Such a record should provide information about owners and operators, beneficial ownership, and so on. That information would be immensely useful to consolidate knowledge about flag State control. In general, there is a need for better and more data to further analyse and solve the flag State control issue.¹⁷⁹

It is also difficult to assess whether collective or unilateral action against non-compliant vessels or States are preferable.¹⁸⁰ Unilateral actions certainly have the advantage of

¹⁷⁶ Pascale Robert-Diard & Yves Bordenave, *Procès de l' "Erika": la cour d'appel confirme et alourdit les sanctions* (Mar. 30, 2010), http://www.lemonde.fr/societe/article/2010/03/30/proces-de-l-erika-la-cour-d-appel-confirme-et-alourdit-les-sanctions_1326142_3224.html (last visited Apr. 9, 2010).

¹⁷⁷ *Total zieht Fall 'Erika' weiter*, NZZONLINE.COM (Apr. 6, 2010), available at http://www.nzz.ch/nachrichten/kultur/literatur_und_kunst/total_kassationsgericht_erika_1.5385094.html (last visited Apr. 9, 2010) (noting the Court of Appeal's judgment is challenged by all four convicts and will now be handled by the French Supreme Court of Appeal).

¹⁷⁸ Fisheries and Oceans, *supra* note n 9, Part 1.

¹⁷⁹ *Id.*, at Part 3.2 Discussion.

¹⁸⁰ *Id.*, at Part 3.4 Discussion.

LAW OF FLAG STATES

being easier to decide and to implement (at least in the territorial waters and the State's EEZ). On the other hand collective actions promise more effectiveness.

Moreover, there is a need to define an objective assessment process whether through self-assessment or third-party assessment. Assessment of breach is a necessary prerequisite for taking actions against non-compliant vessels (or States). It is therefore necessary to determine who undertakes the assessment, what consequences or effects an assessment would have and who would take the actions following the assessment.¹⁸¹

Finally, the ratification of the UN Fish Stocks Agreement should be further promoted. Article 8 declares RFMO measures binding even for non-member States. This is a powerful tool in the fight against IUU fishing. If the Agreement is ratified by a sufficient amount of countries, and State practice continues to tolerate non-flag State enforcement in this sector, a new customary international law rule backing up this procedure could eventually evolve.

¹⁸¹ *Id. at Part 4 Assessment Processes.*