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### Flag State responsibility and the contribution of recently concluded international instruments in preventing, deterring and eliminating illegal, unreported and unregulated (IUU) fishing, by Annick Van Houtte, Legal Officer, FAO.

#### Setting the scene

Already in the mid nineteen-nineties, the only restrictions to the freedom of fishing beyond the then so-called territorial sea were those which flag States negotiated with coastal States or among themselves. Under the prevailing jurisdiction of the flag State on the high seas, only the flag State of the fishing vessel could impose regulations. This meant in many instances no compliance even with regard to agreed restrictions and no effective enforcement.

Countries over the last twenty years have come to recognize that the concerns underlying the granting of local status to fishing vessels differ substantially from those underlying granting the right to fly their flags. While according local status to fishing vessels is primarily an allocation of preferred access to resources, granting the right to fly a country's flag raises issues of jurisdiction, control and revenue. A decade later, it can be said that greater and determinative weight has been given to the concept of flag State responsibility for compliance control

A remarkable characteristic of the international shipping industry is the degree to which vessels are concentrated under the flag of relatively few States while the beneficial owners of vessels may not be nationals of or resident in flag State concerned.

The terminology "Illegal, Unreported and Unregulated Fishing"(IUU) was initiated in the context of CCAMLR<sup>1</sup> a few years ago in the light of some major problems it was facing. IUU catches in the Commission's area were exceeding reported fishing "*by a factor several times over and ... more than half the vessels presumed to engage in IUU fishing fly the flags of CCAMLR Member States*"<sup>2</sup> The Rome Declaration on the Code of Conduct for Responsible Fisheries which was shortly afterwards adopted in the course of the FAO Ministerial Meeting on Fisheries in 1999 expressed concern at the growing amount of IUU fishing activities being carried out, including vessels by flying "flags of convenience". The development of the IUU problem, including fishing by vessels flying "flags of convenience" and the consequent undermining of conservation and management measures in fisheries were further dealt with in various fora including UN, FAO and IMO. A "definition" of the terms "Illegal Unreported and Unregulated" is provided for in the IPOA-IUU under Article II. However it should be noted that the text of the IPOA always refers to IUU-fishing without necessarily distinguishing between its various components. Hence the scope is very broad and reflects the nature of the problem in the area of fisheries.<sup>3</sup> The Plan embraces, generally speaking: fishing activities which contravene or undermine conservation and management measures in any marine area, the failure to fully and accurately meet fishery and fishing vessel data collection and reporting requirements, the absence of effective exercise of the required jurisdiction or control over vessels and nationals. A copy of the definition is provided in Annexe 1.

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<sup>1</sup> Convention on the Conservation of Antarctic Marine Living Resources.

<sup>2</sup> <http://www.affa.gov.au/ecoiuuuf/papers.html> : AUS:IUU/2000/4)

<sup>3</sup> See Edeson, The International Plan of Action on Illegal, Unreported and Unregulated Fishing: Legal Context of a Non-Legally Binding Instrument, IJMCL, Vol. 16, No.4, 2001

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The issue of “flags of convenience” is not new and the expressions “flag of convenience” or “open registry” States refer often to States that permit foreign vessel owners having no real connection with those States to register their vessels under the flags of those States. Low fees, tax exemptions, lower crew costs, some savings for not having to comply with international safety standards have made registration in these States often attractive. Those States lack often the will or the capacity to exercise effective jurisdiction in matters of vessel safety, pollution control and, last but not least, fisheries control. It is convenient to note though that the matter of a link between those States and the vessels is of less importance than the matter of the willingness of these States to exercise effective control and jurisdiction over vessels after having granted registration.

Article 91 of the 1982 UN Convention on the Law of the Sea (hereafter referred to as the 1982 UN Convention) leaves each State exclusive jurisdiction over granting of its nationality to ships. These matters are regulated by a State in its domestic law.<sup>4</sup> The same Article states that “*There must exist a genuine link between the State and the ship.*” The issue of the “genuine” link has a long history and goes back to before the Geneva Convention on the High Seas, 1958 and is still causing problems today. A State grants nationality to a vessel usually by means of registration and by authorising a vessel to fly its flag.<sup>5</sup> A vessel flying two or more flags is regarded as having no nationality.<sup>6</sup>

The acquisition by a vessel of the nationality of a State generates legal rights and obligations for both the vessel and the flag State. A ship derives indeed its rights and obligations from the State whose flag it flies and whose nationality it accordingly bears. Foremost, to the extent that it confers to a vessel a flag, the nationality allows it to benefit from the freedom of navigation (Art.87 1982 UN Convention)<sup>7</sup>. Moreover, the nationality confers on the State of nationality (and exceptionally to other States) jurisdiction and control over the vessel. In other words, the nationality of a vessel indicates which State is to exercise flag State jurisdiction. Finally the nationality creates a regime of flag State responsibility in international law in relation to its obligations vis-à-vis other States because of its status as the State which has granted nationality.

This paper does not intend to deal with the freedom of navigation. Rather it intends to look into how recent international fisheries instruments have addressed IUU fishing with a particular focus on flag State responsibility. A number of States indeed, while accepting the rights linked to the granting of nationality, have not accepted their correlative obligations of performance. Typically, in the high seas fisheries context, a number of States have shown themselves to be either unwilling or unable to exercise their flag State jurisdiction in a manner consistent with their duty under article 117 of the 1982 UN Convention, if at all

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<sup>4</sup> “Saiga” No.2 case of the International Tribunal of the Law of the Sea, para 63.

<sup>5</sup> For the purposes of this paper the author considers the expressions the State of registration and the flag State as synonyms for the State whose nationality the vessel bears. The High Seas Convention (art.5(1), the 1982 UN Convention, art. 91 and the UN Convention on Conditions for Registration of Ships (art.4(2) considers the flag State and State of nationality as synonymous and the last convention treats flag State and State of registration as generally being identical. (see arts 4 and 11). In the “Saiga” No.2 case the International Tribunal of the Law of the Sea, confirmed that Article 91 leaves each State exclusive jurisdiction over granting of its nationality to ships.... These matters are regulated by a State in its domestic law (para 63).

<sup>6</sup> High Seas Convention, art.6; 1982 UN Convention, art.92).

<sup>7</sup> It should be noted that ships of foreign vessels normally enjoy different navigational rights in the various zones of coastal States and on the high seas.

**Flag State Responsibility in the Fisheries Context**

The concept of flag State responsibility in the fisheries context found its origins in various bilateral agreements regarding the granting of licences to fish (access) within coastal States' Exclusive Economic Zone that were concluded in the late 1970s and throughout the 1980s between coastal States (often developing States) on the one hand and major fishing nations on the other hand. Respective flag States were under the obligation to ensure that vessels flying their flag would act in accordance to the terms of the agreement. (*pacta sunt servanda*). The concept was found for the first time in a regional agreement in 1987: the Treaty on Fisheries between Governments of certain Pacific Island States and the Government of the United States of America.<sup>8</sup> Article 4 formulates the basic concept of flag State responsibility and was followed by a set of provisions giving effect to such flag State responsibility. These provisions referred to procedures that the flag State must follow for investigating offences against the Treaty and the laws of the Pacific Island States, to impose penalties and to ensure payment of fines collected from violators through its domestic procedures. The concept of flag State responsibility remained limited to fisheries that were conducted within the scope of the agreement to which the flag State is a party and to "zones under sovereign rights" of coastal States and the parties to the Treaty. The Niue Treaty on Cooperation in Fisheries Surveillance and Law Enforcement in the South Pacific Region concluded in 1992 ensured the concept of flag State responsibility in fisheries access agreements. It required the parties to "*ensure that foreign fishing agreements with flag States require the flag State to take responsibility for the compliance by its flag vessels with the terms of any agreement and applicable laws*"<sup>9</sup>

Agenda 21, chapter 17, took the concept of flag State responsibility in the fisheries context further i.e. on the high seas and independently of a specific agreement to which a flag State is party and in the context of the sustainable use of fisheries resources. This "extension" on the high seas found its legal basis in the article 94 ("duties of the Flag State") and Articles 116-120 (Part VII, section 2, "Conservation and management of living resources of the high seas") of the 1982 UN Convention. However, the provisions of the 1982 UN Convention on high seas fishing were considered by many to be in need of strengthening, hence the attention it received in Agenda 21. The concept was further developed in a global context under the FAO Compliance Agreement where the flag State is required to undertake itself those steps necessary in order to ensure that fishing vessels operating under its flag do not engage in activities that undermine the effectiveness of international conservation and management measures.<sup>10</sup> In many respects the UN Fish Stocks Agreement under the title "Duties of the Flag State" maintains the basic concept developed in the FAO Compliance Agreement and outlines specific obligations which a flag State must agree to and implement before its nationals are permitted to fish on the high seas and in areas managed by regional fisheries bodies. The FAO Compliance Agreement and the UN Fish Stocks Agreement have been supplemented by the Code of Conduct for Responsible Fisheries, which is a voluntary Code adopted by the FAO Conference in Resolution 4 of 1995.

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<sup>8</sup> 26ILM 1053

<sup>9</sup> Niue Treaty on Cooperation in Fisheries Surveillance and Law Enforcement in the South Pacific Region (1992); Art. IV (5).

<sup>10</sup> FAO Compliance Agreement, Article III; G. Moore, "Enforcement without force: New Techniques in Compliance Control for Foreign Fishing Operations based on Regional Cooperation", *Ocean Development and International Law*, 24 (1993).

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Finally, the efforts taken to address the growing concern of Illegal, Unreported and Unregulated Fishing (IUU) since 1999 bolstered the importance of the concept of flag State responsibility. The General Assembly Resolution 54/32 called on States not to permit vessels flying their flags to engage in fishing on the high seas without having effective control over their activities and to take specific measures to control fishing vessels flying their flags. It also called upon IMO, in cooperation with FAO, regional fishery bodies and arrangements and other relevant organisations, and in consultation with States and entities, to define the concept of the genuine link between the fishing vessel and the State in order to assist in the implementation of the UN Fish Stocks Agreement.

FAO Fisheries Report No 937 of IMO Working Group

The World Summit on Sustainable Development in Johannesburg, South Africa from 2-4 September 2002 (WSSD) reflects and strengthens the concepts found 1992 Rio Declaration of Principles and reaffirms the commitment to sustainable development. Under the Johannesburg Plan of Implementation,<sup>11</sup> oceans and fisheries are considered primarily under the general chapeau of “Chapter IV on the Management of the Natural Resource Base”. The putting into effect of the IPOA on IUU by 2004 and the IPOA for the Management of Fishing Capacity by 2005 is particularly urged. A number of special issues are addressed, including the need for the development of effective monitoring, reporting and enforcement, for control of fishing vessels, “including by flag States”.

The oil tanker accidents, most notably those involving the *Erika* in December 1999 and the *Prestige* in November 2002 have highlighted the need to thoroughly investigate the problems caused by inadequate, or even non-existent, flag State implementation and enforcement of their international legal obligations. The Secretary General decided recently that it was time to address in a comprehensive and coordinated manner among different international organizations within and outside the UN the issues of ship registration, the lack of a “genuine link” between a vessel and the State of registration, and the lack of adequate implementation and enforcement by certain flag States. A special inter-agency task force was convened to this effect in May 2003 to produce recommendations for future action.

### **The 1982 UN Convention**

The effective exercise of flag State jurisdiction is dealt with by article 94 of the 1982 UN Convention. The legal link of nationality which exists between a State and a vessel flying its flag generates obligations for the flag State. *“Every State shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.”*

Every State needs to address a number of matters described in Article 94 of the 1982 UN Convention. These duties in administrative, technical and social matters do not relate specifically to fisheries but have over the past decade been extended to fisheries matters allowing as such for the development of “new” powers of “police” on high seas through recent international developments. Article 94 of the 1982 UN Convention requires a flag State to maintain a register of ships flying its flag. Such register must contain elements and information facilitating the identification of a ship flying its flag. It further requires a flag State to assume jurisdiction under its internal law over each ship flying its flag and its master,

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<sup>11</sup> The full text is available on the official website: [www.johannesburgsummit.org](http://www.johannesburgsummit.org).

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officers and crew in respect of administrative, technical and social matters concerning the ship.<sup>12</sup> Moreover a flag State must take all necessary measures to ensure safety at sea in conformity with generally accepted international regulations, procedures and practices. To fulfil its mandate a flag State may be assisted by other States either based on a report of the latter<sup>13</sup> or upon request<sup>14</sup>.

It is worth reporting here the conclusions of the International Tribunal with respect to the Articles 91 and 94 of the 1982 UN Convention in the “Saiga” No 2 case:

*"...the purpose of the provisions of the Convention on the need for a genuine link between a ship and its flag State is to secure more effective implementation of the duties of the flag State, and not to establish criteria by reference to which the validity of the registration of ships in a flag State may be challenged by other States." (paragraph 83)*

The provisions of article 94 of the 1982 UN Convention evidence that fishery matters were not really a concern for States when that Convention was being drafted. As we will see in the following sections, the FAO Compliance Agreement and the UN Fish Stocks Agreement have allowed to complete in a certain way the provisions encompassed by article 94 of the 1982 UN Convention. More specifically with respect to fisheries, jurisdiction and responsibility of a flag State varies along whether a vessel flying its flag is under the jurisdiction of the flag State, on the high seas or under the jurisdiction of a State other than the flag State or in a port other than the flag State. In the first case, the flag State will have exclusive jurisdiction over the fishing vessel and the responsibility to control its fishing activities. In the second case, the flag State has traditionally exclusive responsibility for controlling the fishing activities of the vessel. However, with the adoption of a number of international fisheries instruments like the UN Fish Stocks Agreement, other States than the flag State have certain rights with respect to fishing vessels on the high seas. The flag State continues to have responsibilities with respect to fishing activities when its fishing vessel is fishing in the waters under jurisdiction of a State other than a flag State including the responsibility to ensure that the vessel does not undertake unauthorized fishing in waters under the jurisdiction of another State.

Under Article 117 of the 1982 UN Convention, all States are required to take measures for their nationals as may be necessary for the conservation of living resources on the high seas. The 1982 UN Convention is silent on the types of measures that a flag State is to adopt for its fishing vessels which are undertaking fishing activities on the high seas. Reference is only made to the need to take into consideration the interdependency of the stock and the obligation to take measures to apply the MSY principle for the purposes of restoring or maintaining stock.

### **The FAO Compliance Agreement and IUU Fishing**

The 1993 FAO Compliance Agreement was adopted by the Conference of the Food and Agriculture Organization in November 1993 and entered into force on 24 April 2003, upon receipt of the twenty-fifth instrument of acceptance. In addition it forms an integral part of the Code of Conduct.

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<sup>13</sup> Art. 94, 6 of the 1982 UN Convention.

<sup>14</sup> Art.94, 7 and art.108,2 of the 1982 UN Convention.

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The Agreement developed in the attempts to prevent re-flagging of vessels with a view to avoiding the application of high seas conservation and management measures determined by regional fisheries organizations. It has also a general objective, as the title suggests, “to promote compliance” with agreed fishery conservation rules. The primary focus of the FAO Compliance Agreement is flag State responsibility in the authorization of to fish on the high seas as well as increased transparency through exchange of information.<sup>15</sup>

Article III is the most important clause in the Agreement, for it sets out the responsibility of the flag State in respect of fishing vessels operating on the high seas<sup>16</sup> and elaborates a number of obligations for parties whose fishing vessel operate on the high seas. These fundamental obligations are very relevant in the context of IUU fishing.

In essence, the Article places firstly an obligation on the flag State, whether or not a member of a RFMO having adopted international conservation measures, to take “*such measures as may be necessary to ensure that fishing vessels entitled to fly its flag do not engage in any activity that undermines the effectiveness of international conservation and management measures.*”<sup>17</sup> Secondly it continues: “*In particular, no Party shall allow any fishing vessel entitled to fly its flag to be used for fishing on the high seas unless it has been authorized to be so used by the appropriate authority or authorities of that Party. A fishing vessel so authorized shall fish in accordance with the conditions of the authorization*”<sup>18</sup>; and thirdly, no Party to the Agreement shall authorize any fishing vessel entitled to fly its flag to be used for fishing on the high seas unless the party is satisfied that it is able, taking into account the links that exist between it and the fishing vessel concerned, to exercise effectively its responsibilities in respect of the vessel (Article III 3).

Further duties are imposed to give content to these basic obligations, including provisions concerning: non authorization of a vessel still under a suspension procedure (Article III 5), the requirement that vessel be marked so as to be readily identified in accordance with generally accepted standards, such as the FAO vessel marking scheme (Article III 6), the requirement of information on the operations of a vessel (Article III 7), and the imposition of sanctions of sufficient gravity as to be effective in securing compliance with requirements of the Agreement (Article III 8).

Another pillar of the Agreement is laid down in those provisions ensuring the appropriate flow of information on activities of the high seas fishing vessels. These are Articles IV and VI. Under Article IV, flag States are required to maintain a record of fishing vessels which have been duly authorized for fishing on the high seas and to take such measures as are necessary to ensure that all such vessels are entered on that record. On the other hand, pursuant to Article VI, such information has to be made available to FAO on a real time basis

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<sup>15</sup> Flag state responsibility is regulated in article III of the FAO Compliance Agreement

<sup>16</sup> The concept of the responsibility of the flag State for the activities of its fishing vessels was put forward in the World Fisheries Strategy adopted by FAO World Conference on Fisheries Management and Development held in Rome 1984. See Paragraph 14 (XVII) of Part III of the Strategy for Fisheries Management and Development - Principles and practices for the rational management and optimal use of fish resources reads as follows: “Where access is granted to foreign fishing vessels, the flag States themselves should take measures to ensure compliance with the terms of access agreements and with coastal States fisheries laws and regulations; Coastal States should consider including provisions to this effect in bilateral access agreements. See Report of the FAO World Conference on Fisheries Management and Development, FAO, Rome, 1984.

The concept flag State responsibility is also contemplated in Article 94 of the 1982 Convention on the Law of the Sea.

<sup>17</sup> Article III, 1 (a) of the FAO Compliance Agreement.

<sup>18</sup> Article III 2 of the FAO Compliance Agreement.

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by the flag State. In turn, FAO shall circulate periodically the information provided to all Parties, and, on request, individually to any Party.

The Agreement calls also for collective actions and amongst the matters referred to are the exchange of information, including evidentiary material, relating to activities of fishing vessels in order to assist the flag State in identifying those vessels flying its flag reported to have engaged in activities undermining the effectiveness of conservation and management measures.

The Agreement aims at preventing and combating in particular illegal and unregulated fisheries on the high seas. Flag States have to control and survey the activities of their fishing vessels on the high seas, have to consider on a case-by-case basis whether or not to grant an authorisation and, most importantly, they should not grant an authorisation unless they are able to deter and prevent their vessels from undermining international conservation measures. A principal benefit to a flag State will also come from the availability of reliable information regarding vessels authorized to fish on the high seas, which can lead to an increased ability to identify those vessels fishing without authorization on the high seas. This will be even more important in the context of global, regional or sub-regional fisheries organizations or arrangements.

Remarkably, the criterion of a “genuine” link referred to in article 91 of the 1982 UN Convention, in the high seas fishing context, is not given any contents. Rather the focus is on the obligation of every State to fulfil its duties with respect to fishing vessels and vessels engaged in transshipment of fish entitled to fly their flag.

### **The UN Fish Stocks Agreement**

The 1995 UN Fish Stocks Agreement is intended to give practical effect to the provisions of Articles 63 and 64 of the 1982 UN Convention which deal with straddling stocks and highly migratory species. The Agreement was adopted in New York in December 1995 and entered into force in 19...

In general, the Fish Stocks Agreement applies to straddling stocks (i.e. those occurring both within and beyond the fishing jurisdiction of coastal nations) and highly migratory species “beyond areas under national jurisdiction”. So, except as specified, the Fish Stocks Agreement does not apply to non-straddling, non-highly migratory stocks and does not apply to any stocks within areas under national jurisdiction.

Articles 18, 19 and 20 refer to the duties of the flag State that are party to the Agreement with respect to their vessels fishing on the high seas, apparently not uniquely for straddling fish stocks and highly migratory fish stocks. The basic concept of flag State responsibility over vessels fishing the high seas is maintained: Flag States are to ensure that the vessels flying their flags and fishing on the high seas, comply with sub-regional and regional conservation and management measures and do not undermine the effectiveness of those measures. Flag States are not to authorize their vessels to fish on the high seas unless they are sure that they are able to exercise their responsibilities in accordance with the 1995 UN Fish Stocks Agreement and the 1982 UN Convention. In this respect it is similar to the 1993 FAO Compliance Agreement, but the 1995 UN Fish Stocks Agreement goes on to make this duty even more explicit in Article 18(3)-(4). States need to take the particular measures to discharge properly their responsibility for vessels flying their flag (art. 18(3): control over

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fishing activities by means of licences, authorizations or permits in accordance with regionally or globally agreed procedures, national regulations to ensure that its fishing vessels in fishing activities if authorized to do so, a national record of authorised fishing vessels, requirement for recording and timely reporting on vessel position, catch of target and non target species, fishing effort and other relevant data, monitoring, control and surveillance of vessels their operations and market statistics transshipment regulations and regulation of fishing activities in accordance with regional and global measures).

The Agreement requires flag States to ensure compliance by vessels flying its flag but actually under Article 19 the flag State has a basic obligation to enforce against all vessels sub-regional and regional conservation and management measures for straddling fish stocks and highly migratory fish stocks irrespective of where violations occur. It must investigate any alleged violation of sub regional or regional conservation and management measures and report promptly to the State alleging the violation and the relevant sub regional or regional organization or arrangement on the progress and outcome of the investigation. If there is sufficient evidence of an alleged violation, the case must be referred to its authorities with a view to instituting proceedings. Where appropriate, the flag State must detain the vessel concerned; The flag State must ensure that, where it has been established, in accordance with its laws, a vessel has been involved in the commission of a serious violation of such measures, the vessel does not engage in fishing operations on the high seas until such time as all outstanding sanctions imposed by the flag State in respect of the violation have been complied with.

Sanctions applicable in respect of violations must be adequate in severity to be effective in securing compliance and discouraging violations. An additional obligation for a flag State is laid down in article 20(6) where a flag State is required to investigate its vessel on the high seas, at the request of a coastal State, in which waters there are reasonable grounds to believing that its vessel has been engaged in unauthorized fishing. The Agreement under Article 20 calls for cooperation in enforcement.

Collection and sharing of data and scientific information receives also attention under the UN Fish Stocks Agreement. It expands the basic obligation laid down in articles 61(5) and 119(2) of the 1982 UN Convention. The Agreement lays down the basic principle that coastal States and States fishing on the high seas shall “*collect and share, in a timely manner, complete and accurate data concerning fishing activities on, inter alia, vessel position, catch of target and non-target species, fishing effort, ...as well as information from national and international research programmes*” In doing so, they ought to follow the “standard requirements” as set out in Annex 1.

The UN Fish Stocks Agreement reaffirms the basic principles laid down in the Compliance Agreement. It calls for an enhancement of flag State responsibility and exercise of jurisdiction and control, amongst others through regional collaboration in enforcement. It is difficult to establish which one is wider in scope since the former applies “unless otherwise provided” to the conservation and management of straddling fish stocks and highly migratory fish stocks “beyond areas of national jurisdiction”. Unlike the FAO Compliance Agreement, which applies to the high seas in general, it does not contain a definition of “fishing vessels” nor provides for exemptions from the flag State responsibilities.

It provides a legal basis for preventing, deterring and combating IUU fishing on the areas beyond areas of national jurisdiction and with respect of those fishing vessels fishing for



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straddling fish stocks and highly migratory species. It establishes the legal conditions for a right of visit to fishing vessels of States Parties in an area of high seas covered by a sub regional or regional fisheries organization and fishing for straddling fish stocks and highly migratory fish stocks. The Agreement promotes enhancement of effective control and jurisdiction over vessels and the contents of the “genuine” link is, like the FAO Compliance Agreement, by reference to the effective exercise of flag State responsibilities. Notably in both agreements there is a parallel strengthening of the role of coastal and port States in securing compliance of vessels with international rules. The focus is no more exclusively on flag State.

Provisions concerning compliance and enforcement in the Agreement raise many “new” points. Of particular interest is Article 21 on “Sub-regional and regional co-operation in enforcement” which applies only to the State Party. A very much debated issue relates to the boarding and inspection powers of States party of vessels flying the flags of other States party in any high seas area covered by a sub-regional or regional fisheries a management organization or arrangement. Though the concept is not new<sup>19</sup>, many distant water fishing States are critical vis-à-vis these provisions and in particular vis-à-vis the implementation of the enforcement procedures spelled out in articles 20-21 with regard to non-members of RFOs. It should be noted that should the Agreement be effectively implemented, in practice fishing vessels flying the flag of States that are not parties to the Agreement could expect to face difficulties if they do not comply with the regional or sub-regional conservation measures in a region covered by a regional fisheries management organisation.<sup>20</sup>

### **Code of Conduct for Responsible Fisheries**

The Code of Conduct was developed in response to a number of international calls for action against the increasing threat of overexploitation of fisheries resources caused by the rapid and often uncontrolled exploitation of the resources and development of the fishing industry. Among the main concerns was the increasing problem of unregulated fishing on the high seas, including that by vessels flying flags of convenience or being registered in countries operating open registries. The Code of Conduct was developed in 1993 and was adopted by the FAO Conference on 31 October 1995. It is global in scope, applicable to all fisheries and is voluntary in nature. Despite the heavy focus originally accorded to the re-flagging problem in the call for the development of the Code, it does not deal solely and directly with this issue. The Code does however deal with the issue of flag State duties and it urges, in its General Principles, States to exercise effective flag State control in order to ensure the proper application of the Code. This principle is further developed in Article 8 on “Fishing Operations” *inter alia*, by requiring that States should not authorize fishing vessels entitled to fly their flag to fish on the high seas “unless such vessel have been issued with a Certificate of Registry and have been authorized to fish by the competent authorities”<sup>21</sup>. Among the other duties of the flag State are the maintenance of records of fishing vessels, marking requirements, requirements for the safety of fishing vessels and fishers and enforcement

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<sup>19</sup> Several regional fisheries arrangement such as the Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR), and the Convention on the Conservation and Management of Pollock Resources in the Central Bering Sea include a joint enforcement scheme allowing for boarding, inspection and subsequent investigation by inspectors of States other than the Flag State on the high seas. It is however also convenient to note that Article 21, 15 allows for an alternative mechanism other than boarding and inspection. Furthermore, the legal proceedings, penalty levels and prosecution rest still primarily the responsibility of the Flag State.

<sup>20</sup> See Article 33(2) of the UN Fish Stocks Agreement.

<sup>21</sup> Article 8.2.2 of the Code.

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measures in case of contravention of applicable conservation and management measures. An indirect reference to the reflagging problem can also be found in Article 7.8.1 providing that “without prejudice to relevant international agreements, States should encourage banks and financial institutions not to require, as a condition of a loan or mortgage, fishing vessels or fishing support vessels to be flagged in a jurisdiction other than that of the State of beneficial ownership where such a requirement would have the effect of increasing the likelihood of non-compliance with international conservation and management measures.”

The Code, while reiterating the basic obligation of jurisdiction and control by flag States, touches upon elements which are likely to reinforce effective control and it suggests focussing on the elaboration of mechanisms to pull other players into the game, including vessel owners, financial institutions, crew, etc..

### **IPOA-IUU**

It is now proposed to turn to the provisions of the IPOA-IUU that directly address the question of flag State responsibility over fishing vessel.

On the 2 March 2001 the Committee on Fisheries of FAO agreed on an international plan of action to prevent, deter, and eliminate illegal, unreported and unregulated fishing.<sup>22</sup> The instrument is voluntary in character, it is not meant to give rise to any legally binding obligations. The IPOA-IUU has been placed within the framework of the Code of Conduct for Responsible Fisheries.<sup>23</sup> The IPOA-IUU reaffirms basic provisions of the 1982 UN Convention, the 1993 FAO Compliance Agreement, the 1995 UN Fish Stocks Agreement and the Code of Conduct for Responsible Fisheries. It does go further though, and more in detail with respect to certain actions, and it introduces some more novel provisions, for example, with respect to trade, port State control and controls over nationals. More importantly, the IPOA-IUU gives an impetus to all State responsibilities, including flag State responsibility. The IUU reflects the need for increased flag State control over activities of its fishing vessels, within areas under national jurisdiction as well as on the high seas. As a priority task, the IPOA-IUU calls for a more effective flag State control and within the EEZ this implies a more effective use of existing powers.

The basic objective of the IPOA-IUU is set out in PART III Objectives and Principles. It states :

*The objective of the IPOA is to prevent, deter and eliminate IUU fishing by providing all States with comprehensive, effective and transparent measures by which to act, including through appropriate regional fisheries management organizations established in accordance with international law.*<sup>24</sup>

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<sup>22</sup> In this paper the International Plan of Action will be abbreviated as IPOA-IUU.

<sup>23</sup> . One of the objectives of the Code is to “to serve as an instrument of reference to help States to establish or to improve the legal and institutional framework required for the exercise of responsible fisheries and in the formulation and implementation of appropriate measures.” (Article 3 c), and to “provide guidance which may be used where appropriate in the formulation and implementation of international agreements and other legal instruments, both binding and voluntary” (Article 3d).

<sup>24</sup> Para.8

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The IPOA-IUU is to be considered as a toolbox and as such it offers a variety of tools for a flag State to take up its responsibilities and control its fishing vessels. Flag State Responsibility under the IPOA-IUU is covered in paragraphs 34 – 50. They are subdivided into 3 main headings: Fishing vessel registration (A); Record of Fishing Vessels (B); Authorization to fish (C)

### (A) Fishing Vessel Registration

As seen above, in most cases, registration is a means to grant a nationality to a vessel. First and foremost and, as a matter of general principle, States should by all means (legal and practical) ensure that fishing vessels entitled to fly their flag do not engage in or support IUU fishing and as far as registration is concerned, prior to engaging into registration activities, a flag State should consider whether it can “exercise its responsibility to ensure that the vessel does not engage in IUU fishing”.<sup>25</sup>

This section draws the attention to the meaning of registration<sup>26</sup>, process of registration, including conditions for registration of fishing vessels<sup>27</sup>, to the need to harmonize registration processes at national, sub-regional and regional level<sup>28</sup> and the need to coordinate registration activities and the record of fishing authorizations as well as the issuance of authorization.<sup>29</sup>

It highlights the specific problems linked to chartering agreements and invites flag States and other States not to enhance IUU fishing while allowing for such agreements to take place.<sup>30</sup> The Plan invites countries to “unveil the corporate veil” to avoid flagging a vessel with a history of non compliance.<sup>31</sup> It urges flag States not to create incentives for vessel owners to re-flag their vessels to other States.

A particular focus is placed on the need for coordination and information sharing with a view to linking the registration of fishing vessels and the authorization to fish, whether the latter is being issued by the flag State to fish on the high seas or waters under this jurisdiction or by a coastal State. This need for coordination is imperative where different institutions are involved in the registration and fishing authorization process.

### (B) Record of Fishing Vessels

This section builds on the articles developed in the FAO Compliance Agreement, relating to the record of Fishing vessels (Article IV and VI). The record relates to those vessels authorized to fish and in particular on the high seas, and refers to the substance of such records. The basic scheme developed under the FAO Compliance Agreement is in this manner improved. Compared to the latter Agreement, the Plan urges States to collect additional information to identify all the players in the game: from the name, address and nationality of the person in whose name the vessel is registered, of the manager of the operations of the vessel, of the person with **beneficial ownership** of the vessel. Where possible, a link is to be made between the **ownership history** of a vessel, and the history of non-compliance by that vessel at a national, regional or global level. Finally, with respect to fishing on the high seas, the issue of record relates not only to authorized vessels but also to non authorized vessels.

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<sup>25</sup> Para. 35

<sup>26</sup> Para.35

<sup>27</sup> Para. 36-38

<sup>28</sup> Para. 38

<sup>29</sup> Para. 40

<sup>30</sup> Para. 37

<sup>31</sup> Para. 36

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These paragraphs underscore the need for sharing of information at national, sub-regional, regional and global level.

### (C) Authorization to Fish

As pointed out in the FAO Technical Guidelines for Responsible Fisheries, the IPOA-IUU reaffirms the responsibility of, and calls upon, flag States to require their vessels to obtain express authorization before fishing in any marine area. In paragraphs 46 and 47 the IPOA suggests a broad range of terms and conditions to be set out in an authorization, from the traditional one like name of the vessel, the species, the gear authorized, the duration, to more “modern” terms and conditions, relating to vessel monitoring systems, catch reporting, transshipment reporting and those generated under arrangements applicable to the flag State.

Attention is also drawn to the issue of support and transport vessels often mis-report or under-report. The IPOA-IUU urges the flag State to ensure that support and transport vessels flying their flag do not support IUU fishing and closely monitor and control transshipment activities involving their vessels by requiring prior authorization to transship and accurate and timely reporting.

Flag State responsibility is not only dealt with under the heading “Flag State Responsibility” in the IPOA. The primary responsibility of the flag State in preventing, deterring and combating IUU fishing implies also that non-flag States, whether coastal or port States, cooperate in the implementation thereof and share information with each other and with regional fisheries organizations.<sup>32</sup> The IPOA-IUU calls also for States to discourage their nationals from flagging fishing vessels under the jurisdiction of a State that does not meet its flag State responsibilities.<sup>33</sup>

### **IPOA and a glance at some practical developments to build the primary responsibility of flag States**

TABLE to come in

### **Conclusions**

While the illegal, unreported and unregulated fishing activities still continue International Law seems to be growing into increasing responsibility of flag States. The instruments referred to in this paper provide the framework for future actions concerning fisheries *inter alia* under jurisdiction and control of flag States especially in the area of high seas fishing. The 1982 UN Convention is not conclusive though in particular in the context of high seas fisheries. But it should be reiterated here that all matters not regulated by this Convention continue to be governed by the rules and principles of general international law. The FAO Compliance Agreement, the UN Fish Stocks Agreement and the Code of Conduct for Responsible Fisheries were negotiated over a broadly similar time frame and many negotiators were the same. This resulted in a high level of consistency between the three instruments with respect to the concept of flag State responsibilities but also in progress with respect to the contents of this concept and in the introduction of some “novel” provisions. The non-binding nature of the Code of Conduct and the IPOA on IUU allowed going sometimes beyond the letter of the 1982 UN Convention (based on a consensus of the international community) and making additional steps forward to combat undesirable

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<sup>32</sup> Para 29-31.

<sup>33</sup> Para 19

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behaviours of fishing vessels towards more adequate global, regional, sub-regional and national adequate fisheries management. The extent to which the international voluntary instruments will allow for more progressive interpretation of the concept flag State responsibility as provided for in binding international instruments is though unknown.

It may be asked whether the implementation of the voluntary international instruments such as the Plan will be more successful than the binding agreements. The implementation and compliance of an international instrument is not always a matter of a binding or not binding instrument, or of accession or ratification. It may be a simple matter of concerns or of different interpretation of concepts. However, if these instruments are not widely implemented, the problems identified at the root of IUU fishing will remain. For implementation and compliance to occur, States have also to choose to implement and comply.

The link between a vessel and a flag State remains a primary link. The international instruments referred to in this paper appear to sidestep the issue of “genuine” link. Instead the concept of flag State responsibility including in particular the obligation of effective control by a flag State over fishing vessels flying its flag is underscored. In other words, States could register vessels even if the “genuine” link between the State and the vessel was doubtful (i.e. absence of a genuine link), but if they did they then are under the obligation to exercise effective control. Effective control by a flag State implies in turn *inter alia* a flag state’s ability to ensure its vessels do not undermine international conservation and management measures and to take enforcement measures against those that do so. This development is not surprising. Indeed since the attempts to give contents to the notion of “genuine” link have not been successful, the focus has evolved on the obligation of States that register a fishing vessel and grant nationality to a fishing vessel to exercise effective control over such vessel.

International Law must evolve to accommodate changing legal and practical realities but all States must participate in combating IUU fishing and undertake their obligations in good faith which they have agreed to namely in the course of the global negotiations of relevant international fisheries instruments. Finally States should also bear in mind the potential impacts of Article 300 of the 1982 UN Convention as it is unknown how international law evolves.