



**The potential role of classification societies  
in improving flag State performance  
in marine capture fisheries**

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## List of abbreviations

EU	European Union
EEZ	exclusive economic zone
FAO	Food and Agriculture Organization of the UN
IUU fishing	illegal, unreported and unregulated fishing
IMO	International Maritime Organisation
MoU	Memorandum of Understanding
RFMO	Regional Fisheries Management Organisation
TAC	total allowable catch
UN	United Nations
UNCLOS III	Third UN Conference on the Law of the Sea
VMS	vessel monitoring system

The growing of crops, for example wheat, is relatively easy to regulate. The farmer owns a certain area of land and is, tenant farming excluded, owner of the wheat on that land as well. Moreover, the wheat does not move and stays at the same place from sowing to harvesting. Notwithstanding the fact that agriculture and fisheries are mentioned in the same phrase in most cases, regulating fisheries is a totally different issue. Fishermen do not own a certain piece of sea, are not the owners of a certain stock of fish and fish stocks can be highly migratory. Nevertheless, a few initiatives have seen the light in relation to the governance of the fishing industry to prevent a “tragedy of the commons”.<sup>1</sup>

In the 1982 UN Convention on the Law of the Sea (1982 LOS Convention), the State Parties “will promote the peaceful uses of the seas and the oceans, the equitable and efficient utilization of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment”.<sup>2</sup> In case of internal waters, the territorial sea and the exclusive economic zone (EEZ), it is in general relatively easy to provide and enforce rules because the coastal State has a particular degree of jurisdiction. Concerning the high seas, only the five articles in the second section of Part VII specify a little about fishing in these areas. Part XII of the 1982 LOS Convention provides some basis for protection and preservation of the marine environment. Section 6 of Part XII is dedicated to enforcement of this regulation of the marine environment, dividing the obligations among different kinds of pollution and States in different capacities. The 1995 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 (Fish Stocks Agreement) adds more detail to the 1982 LOS Convention with regard to fisheries law and an important role for flag States, port States and regional fisheries management organisations (RFMOs).

Quintessential to note is that the freedom of the high seas – *in casu* everyone’s right to fish on the high seas – is no longer absolute.<sup>3</sup> The idea of the freedom of the high seas is based on the 17<sup>th</sup> century assumption that ocean resources are endless. Nowadays,

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<sup>1</sup> G. Hardin. ‘The Tragedy of the Commons’. 1968 *Science*, pp. 1243-1248.

<sup>2</sup> 1982 LOS Convention, preamble.

<sup>3</sup> K.M. Gjerde. ‘High Seas Fisheries Management under the Convention on the Law of the Sea’ in D. Freestone, R. Barnes and D.M. Ong (eds.). *The Law of the Sea: Progress and Prospects*. Oxford (Oxford University Press) 2006, pp. 281-307, p. 304.

however, it forms one of the basic problems for ocean fisheries.<sup>4</sup> Notwithstanding this claim, Grotius already acknowledged that fishing might be prohibited when it is proven that the resources are exhaustible.<sup>5</sup> Undoubtedly, measures are needed. And current international fisheries law acknowledges this necessity.<sup>6</sup>

Particular characteristics of the fishing industry are also troublesome when it comes to regulation. There is no incentive for an individual fisherman to reduce his or her catch at a certain point in time with the objective to catch more later on. Namely, a stock of fish needs time to recover and is subject to the risk of collapse if this possibility is not provided. However, most of the fisherman's colleagues will not hesitate to take this risk. For this reason, long-term objectives are close to non-existent in the fisheries industry without governmental regulation.<sup>7</sup> The same economic analysis of this tragedy-of-the-commons example is valuable at the level of States. A flag State has no incentive to regulate the industry, let alone reduce its total allowable catch (TAC) voluntarily, if other flag States with vessels fishing in the same area are not likely to do the same.<sup>8</sup> These vessels would then simply catch what the others will not.

Moreover, fishermen see themselves as attributing directly to the economy's most important part in their region.<sup>9</sup> It can be very difficult to find alternative employment in coastal areas, making the fishing industry a very sensitive political issue.<sup>10</sup> This feature gives the political parties in government an opportunity to simply 'buy' votes by subsidising the fishing industry. Evidently, this characteristic results in a negative effect on the objective to eradicate overfishing; it is only a stimulation to fish more. Consequently, a race for fish arises. Normally, such a race means that fishermen try to reach the quota as

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<sup>4</sup> *Ibid.*, p. 303.

<sup>5</sup> H. Grotius, *Mare liberum sive de iure quod Batavis competit ad indicana commercia*. *Dissertatio* (translated by R. van Deman Magoffin). Union, New Jersey (Lawbook Exchange) 2001, p. 43.

<sup>6</sup> See Gjerde (2006) note 3 *supra*.

<sup>7</sup> P. Birnie, A. Boyle and C. Redgwell. *International Law & the Environment*. 3<sup>rd</sup> edition. Oxford (Oxford University Press) 2009, p. 705 and see note 1 *supra*.

<sup>8</sup> R.R. Churchill and A.V. Lowe. *The Law of the Sea*. 3<sup>rd</sup> edition. Manchester (Manchester University Press) 1999, p. 286.

<sup>9</sup> C. Lequesne. 'Quota Hopping: The Common Fisheries Policy Between States and Markets'. 2000 *Journal of Common Market Studies* no. 5, pp. 779–793, pp. 781-783.

<sup>10</sup> E. da Conceição-Heldt. 'Taking Actors' Preferences and the Institutional Setting Seriously: the EU Common Fisheries Policy.' 2006 *Journal of Public Policy* no. 3, pp. 279-299, p. 290.

quickly as this quota is determined.<sup>11</sup> Furthermore, criminal organisations make their way into the fisheries industry.<sup>12</sup>

Classification societies may provide part of the solutions to the above-described difficulties. These societies have their origin in the world of shipping and are currently active mostly in this field. The regulatory system that serves the shipping industry – maritime law<sup>13</sup> – has a considerable national component. Taking into account the fact that every State in the world has the right to establish a fleet,<sup>14</sup> approximately two hundred legal systems regulating national fleets are potentially in existence. To maintain a general scope, this thesis will focus on the possibilities for classification societies from an international viewpoint. This choice points directly towards the International Maritime Organisation (IMO) and the international instruments that are developed under its guidance.

Virtually none of these IMO instruments are applicable to fishing vessels.<sup>15</sup> Unfortunately, the ones that could be relevant for fishing vessels are either not in force (yet) or beyond the functional scope of classification societies. Until recently, classification societies did not focus primarily on the manner in which the crew operates the vessel – developments concerning the International Safety Management Code might provide an exception - neither did they pay attention to manning itself. Any reference to the work of the International Labour Organization was therefore difficult to apply to classification societies. As a consequence, searching for provisions in international legal instruments that could offer the foundation for applying tasks of classification societies to fishing vessels in order to improve flag State performance is similar to looking for a needle in a haystack. Arguably, this approach is not the most suitable way forward.

The reason for the exclusion of fishing vessels in most cases seems to be a simple lack of competence of maritime administrations over fishing vessels.<sup>16</sup> This characteristic

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<sup>11</sup> R. Hilborn et al. 'States of the world fisheries' 2003 *Annual Review of Environmental Resources*, pp. 15.1-15.40.

<sup>12</sup> General Assembly of the UN. *Sustainable fisheries, including through the 1995 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, and related instruments* (A/RES/65/38), Para. 56.

<sup>13</sup> For the sake of clarity in this thesis, maritime law is regarded as operating in the national private law sector dealing mainly with contracts, as insurances, for example. On the contrary, law of the sea is a part of international law and therewith public law to a large extent.

<sup>14</sup> This right is highly relevant for landlocked States.

<sup>15</sup> 1977 International Convention of the Safety of Fishing Vessels, preamble.

<sup>16</sup> J. Fitzpatrick. 'Measures to enhance the capability of a flag State to exercise effective control over a fishing vessel' in FAO. *Report of and papers presented at the Expert Consultation on Illegal, Unreported*

makes it unlikely that international legal instruments will include provisions that could be relevant for fishing vessels in the near future. Therefore, it is considered wise to start with a blank sheet and develop a potential basis for classification activities in fisheries around the globe from the scratch.<sup>17</sup> Following this approach, however, does not mean that the IMO is not willing to deal with fishing vessels. The special value of port State control in the fight against illegal, unreported and unregulated fishing (IUU fishing) is noticeable in this regard.<sup>18</sup>

In close connection with these issues, the problems with flags of non-compliance and flags of convenience need to be described. These can include, for example, the willingness and ability to comply, external private institutions that exercise public functions and temporal problems as lagging behind in implementing policies. Less attention will be paid to the separate jurisdiction of States; the emphasis will be on cooperation between States. Special attention has to be paid, though, to general international rules for RFMOs, also taking into account their non-contracting parties. Next to existing law, expert advices and draft regulations deserve some attention. The discussion of these documents will lead to the conclusion that existing legislation and proposed rules are of considerable significance.

All the above leads to the main question to be answered, which is what could be the potential role of classification societies in improving flag State performance in marine capture fisheries. First of all, the basic obligations in international fisheries law are set out. Secondly, an elaboration on flag State jurisdiction and its significance today will follow. Thirdly, an outline of the current work of classification societies introduces the key developments in the maritime field. Fourthly, the differences between examining a vessel and assessing a whole flag State come to surface and both the legal and practical issues linked to that are explained. Connected risks also deserve attention, as does the possible progressive development of the law. Finally, a conclusion tries to bind the loose ends together. In order to exercise the research, the widest range possible of all forms of hard law, soft law, cases, documents, reports, books and articles was assessed.

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*and Unregulated Fishing* (Sydney, Australia, 15-19 May 2000) *FAO Fisheries Report* no. 666. Rome (FAO) 2001, Executive Summary.

<sup>17</sup> *Ibid.*, Para. 42.

<sup>18</sup> Sub-Committee of the International Maritime Organisation on Flag State Implementation (Note by the Secretariat). *Outcome of the fourth IMO Workshop for PSC MoU/Agreement Secretaries and Directors of Information Centres*. 11 February 2009. FSI 17/7/1, Annex, Para. 19.



The idea for this application of classification societies originates with the Norwegian government. The bridge that it builds between law of the sea and the maritime field makes the subject highly topical. The present thesis tries to provide a fairly new and creative solution to the problem of flag State performance. The text merely demonstrates the potential basis for any further development both in a practical and legal way. The novelty of the topic goes hand in hand with caveat that the present document does potentially not include all the possible insights. However, the most comprehensive coverage is pursued.

The specific properties of the fishing community ask for governmental intervention, as is indicated above. However, unilateral measures by flag States could contribute heavily to the elimination of overfishing - in other words the conservation of fish stocks – but cooperation with other States is necessary.<sup>19</sup> Fortunately, the drafters of the 1982 LOS Convention recognised this difficulty. The 1982 LOS Convention encourages cooperation between coastal States, flag States, other States and possible international or regional organisations involved at more than one place.<sup>20</sup> The 1982 LOS Convention already clearly lays down duties of the flag State.<sup>21</sup> The Fish Stocks Agreement gives more detail to this provision with regard to fisheries. The details contain for instance membership of an RFMO, regulation of licences, establishment of a national vessel record and compliance with international guidelines for markings, monitoring, control and surveillance.<sup>22</sup>

Right at the beginning of the negotiations of the Third UN Conference on the Law of the Sea (UNCLOS III), the International Court of Justice held “that the former *laissez-faire* treatment of the living resources of the sea in the high seas has been replaced by a recognition of a duty to have due regard to the rights of other States and the needs of conservation for the benefit of all.”<sup>23</sup> This clear restriction, or at least alteration, of the freedom of the high seas found its way into the 1982 LOS Convention.<sup>24</sup> As is already mentioned, the flag State is the principal actor to exercise jurisdiction on the high seas.<sup>25</sup> The 1982 LOS Convention lays down the duties for the flag State.<sup>26</sup> In this regard, it is important always to keep in mind the due regard-principle. This provision mentions the “interests of other States” and does not specify if only flag States or also other than flag States are mentioned.<sup>27</sup> Additionally, the section on the conservation and management of the living resources of the high seas obliges cooperation with other States.<sup>28</sup> Again, the

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<sup>19</sup> See note 8 *supra*.

<sup>20</sup> 1982 LOS Convention, Artt. 63 and 64 and Part VII, Section 2 and Churchill (1999) note 8 *supra*, pp. 207, 285 and 286.

<sup>21</sup> 1982 LOS Convention, Art. 94.

<sup>22</sup> Fish Stocks Agreement, Art. 18.

<sup>23</sup> *Fisheries Jurisdiction* (United Kingdom of Great Britain and Northern Ireland v. Iceland), International Court of Justice, The Hague, 25 July 1974, Para. 72.

<sup>24</sup> M.H. Nordquist et al. (eds.). *United Nations Convention on the Law of the Sea 1982. A Commentary* vol. III. The Hague, London and Boston (Martinus Nijhoff Publishers) 1995, p. 287.

<sup>25</sup> 1982 LOS Convention, Art. 92(1).

<sup>26</sup> See note 21 *supra*.

<sup>27</sup> 1982 LOS Convention, Art. 87(2).

<sup>28</sup> *Ibid.*, Artt. 116-118.

1982 LOS Convention gives no definition of “other States”. At a minimum, one could interpret this term as pointing towards coastal States. Nowadays, it might be useful to include also port States and maybe even market States.

Conservation and management measures should be taken, supplementing the fishing rights of States’ nationals.<sup>29</sup> Such measures should be based on the “best scientific evidence available” and biological, ecological, economic and environmental factors as well as fishing patterns should be taken into account while establishing these measures. Maintenance and restoration of populations is the key phrase. Moreover, the 1982 LOS Convention foreshadows the ecosystem approach by the reference to the importance of the interdependence of stocks.<sup>30</sup>

Within the EEZ, the coastal State determines the applicable regulation for the use of living resources. Regulation should avoid over-exploitation.<sup>31</sup> Furthermore, the coastal State should take into account the potential effects on the whole ecological system when it ensures the maintenance of living resources in the EEZ.<sup>32</sup> In order to accomplish the purpose of optimal utilisation, what a coastal State cannot catch should be available for other States.<sup>33</sup> These other States might especially include land-locked or other geographically disadvantaged States.<sup>34</sup>

The fifth part of the 1982 LOS Convention on the EEZ lists five provisions that contain law on marine capture fisheries, which deal with specific categories of species or fish stocks. First, it considers stocks occurring in one or more EEZ and the high seas. It encourages States to cooperate with each other.<sup>35</sup> The 1982 LOS Convention emphasises the importance of international organisations for both straddling and highly migratory species.<sup>36</sup> Second, the article on highly migratory species calls for cooperation between coastal and other States with regard to these species both in and beyond the EEZ.<sup>37</sup> Though the drafters placed this provision in the part of the 1982 LOS Convention on the EEZ, the part on the high seas follows the wording to a certain extent. All states have the right to let

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<sup>29</sup> *Ibid.*, Artt. 117 and 118.

<sup>30</sup> *Ibid.*, Art. 119(1) and see *United Nations Convention on the Law of the Sea 1982. A Commentary* vol. III (1995) note 24 *supra*, p. 305.

<sup>31</sup> 1982 LOS Convention, Art 61(2).

<sup>32</sup> *Ibid.*, Art. 61(4).

<sup>33</sup> *Ibid.*, Art. 62.

<sup>34</sup> *Ibid.*, Artt. 62, 69 and 70.

<sup>35</sup> *Ibid.*, Art. 63.

<sup>36</sup> *Ibid.*, Artt. 63 and 64.

<sup>37</sup> *Ibid.*, Art. 64(1).

their nationals fish on the high seas, subject however to what is laid down in, for example, the provision on highly migratory species.<sup>38</sup>

Third, the 1982 LOS Convention allows coastal States or international organisations to regulate the catch of marine mammals.<sup>39</sup> Some States made use of these provisions to prohibit such catch, as does the International Whaling Commission for whales to a large extent.<sup>40</sup> Fourth, the 1982 LOS Convention provides a framework for the regulation of fishing for anadromous species.<sup>41</sup> The primary responsibility for and benefits of these fisheries are taken away from the flag State and granted to the State of origin because these stocks originate in internal waters of States.<sup>42</sup> The drafters of the 1982 LOS Convention preferred agreement between the State of origin and other States.<sup>43</sup> The 1982 LOS Convention also provides a role for regional organisations.<sup>44</sup> Fifth, catadromous species begin their lives at sea but then migrate to fresh water. Though the catch of these stocks on the high seas is prohibited, the coastal State is the principal actor to regulate the conservation of these species.<sup>45</sup> Finally, the EEZ regime is not applicable to sedentary species.<sup>46</sup>

Noticeable is that fishing vessels might also be subject to the right of hot pursuit. This implies that the State of nationality of the pursuing vessel, in other words the coastal State, can exercise its jurisdiction on the high seas.<sup>47</sup> Such a case unmistakably interferes with the flag States' exclusive rights.

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<sup>38</sup> *Ibid.*, Art. 116(b).

<sup>39</sup> *Ibid.*, Artt. 65 and 120.

<sup>40</sup> See Churchill (1999) note 8 *supra*, p. 317.

<sup>41</sup> 1982 LOS Convention, Art. 66.

<sup>42</sup> *Ibid.*, Art. 66(1), W.T. Burke. *The New International Law of Fisheries: UNCLOS 1982 and Beyond*. Oxford (Clarendon Press) 1994, pp. 166-169 and see Churchill (1999) note 8 *supra*, p. 315.

<sup>43</sup> 1982 LOS Convention, Art. 66(2)-(4).

<sup>44</sup> *Ibid.*, Art. 66(5). Examples of this are given in Churchill (1999) note 8 *supra*, pp. 315 and 316.

<sup>45</sup> 1982 LOS Convention, Art. 67.

<sup>46</sup> *Ibid.*, Art. 68.

<sup>47</sup> *Ibid.*, Art. 111. Of course, the violation of the law has then taken place in the territorial sea of the pursuing State.

## Chapter 3 Flag State jurisdiction

The freedom for every State to fish on the high seas has been undisputed for a long time. Nowadays, however, problems mount due to the rising capacities of fishing fleets all over the globe. Undoubtedly, this development brings with it an increasing burden for flag States, which in principal have the exclusive duty to control compliance of their fleet with international regulations. Nonetheless, a shift takes place with regard to this exclusive responsibility. The 2008 Report of the Secretary General on Oceans and the Law of the Sea recognizes that “there is now a prevailing view that fishing vessels on the high seas which are not effectively controlled by their flag States are liable to sanctions by other States should they happen to contravene international conservation and management measures”.<sup>48</sup> Therefore, the question is to what extent an international legislative anticipation exists towards the shift away from flag State jurisdiction with regard to the high seas fisheries.

### 3.1 Introduction

Ever since Grotius proclaimed the absolute freedom of the high seas, flag States are the principal actors to exercise jurisdiction on the high seas. The 1982 LOS Convention splits this freedom into more than one freedom.<sup>49</sup> Evidently, the high seas constitute, together with the deep-sea bed, the only area of the oceans where States could not claim sovereignty on the basis of their geographical position.<sup>50</sup> Therefore, jurisdiction on the high seas has to be based on the nationality principle.

A State, however, has not only jurisdiction over its nationals on a vessel. More important, the vessel itself must have a nationality.<sup>51</sup> Back in the 1920s, the Permanent Court of International Justice held in the *Lotus* case that “vessels on the high seas are exclusively subject to the authority of the State whose flag they fly”.<sup>52</sup> Granting nationality by the flag State is subject to certain conditions of which probably the most significant and at the same time the least clear prerequisite is that there “must exist a genuine link between

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<sup>48</sup> Report of the Secretary General on Oceans and Law of the Sea. UN Doc A/63/63. 10 March 2008, Para. 249.

<sup>49</sup> 1982 LOS Convention, Art. 87.

<sup>50</sup> *Ibid.*, Artt. 89 and 137(1).

<sup>51</sup> See note 21 *supra*.

<sup>52</sup> *S.S. Lotus* (France v. Turkey), Permanent Court of International Justice, The Hague, 7 September 1927.

the State and the ship.”<sup>53</sup> The judgement of the International Court of Justice in the *Nottebohm* case - where such a requirement emerged with regard to the nationality of a person - clearly influenced the requirement of a genuine link.<sup>54</sup>

It is unclear if the term “genuine link” constitutes codification of customary international law. In addition, it is up to States to decide whether or not they grant a vessel the right to fly its flag. For this purpose, it has the exclusive right to lay down rules and requirements in domestic legislation. In practice, States differ on how they implement the requirement of a genuine link. Moreover, it is not certain what the effect of the non-existence of a genuine link between the vessel and its State of nationality is.<sup>55</sup> Arguably, this problem creates “the most significant enforcement gap in the legal regime for the high seas.”<sup>56</sup> The International Tribunal for the Law of the Sea addressed the issue in the *M/V “Saiga” (No. 2)* case where it held that “genuine link” under any circumstances means that the State of nationality must be capable of the effective exercise of jurisdiction and control.<sup>57</sup>

The 1982 LOS Convention, among others, lists the rules to which flag States are subject.<sup>58</sup> Although they seem to be extensive to a certain extent, many ways around them and space for broad interpretation are recognisable in practice. Nonetheless, it should first of all be noted that not all States in the world are a party to the 1982 LOS Convention and therefore, its provisions bind not all States.<sup>59</sup> Second, not all States are capable or willing to make their vessels comply with the international standards. A State that is unable or unwilling to control its fleet according to the international legal standards is known as a flag of convenience. If, in a worse situation, non-compliance results, one speaks of flags of non-compliance. Ship-owners, and even criminal organisations, use these flag States to find a way around the law and this scheme often results in over-fishing and IUU fishing. The phenomenon of bareboat chartering thrives well also due to the existence of flags of convenience. In case of bareboat chartering, a vessel with the nationality of a State is

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<sup>53</sup> 1982 LOS Convention, Art. 91.

<sup>54</sup> *Nottebohm* (Liechtenstein v. Guatemala), International Court of Justice, The Hague, 6 April 1955.

<sup>55</sup> See Churchill (1999) note 8 *supra*, p. 258.

<sup>56</sup> R. Rayfuse. ‘The Anthropocene, Autopoiesis and the Disingenuousness of the Genuine Link: Addressing Enforcement Gaps in the Legal Regime for Areas Beyond National Jurisdiction’ in E.J. Molenaar and A.G. Oude Elferink (eds.). *The International Legal Regime of Areas beyond National Jurisdiction: Current and Future Developments*. Leiden (Martinus Nijhoff) 2010, pp. 165-190, p. 171.

<sup>57</sup> *M/V “Saiga” (No. 2)* (Saint Vincent and the Grenadines v. Guinea), International Tribunal for the Law of the Sea, The Hague, 1 July 1999, Paras. 80-83.

<sup>58</sup> See notes 53 and 21 *supra*.

<sup>59</sup> This is of course apart from the fact that some provisions might contain customary international law or provisions of earlier conventions.

chartered to a company in another State flying the flag of the latter during the period of chartering.<sup>60</sup>

### 3.2 Vessel registration

“Ships have the nationality of the State whose flag they are entitled to fly.” That means that the piece of cloth a vessel flies is just a proof of its nationality. Flying the flag of a certain State does not give the vessel the nationality of that State. Then again, every State should to set conditions for the registration of ships.<sup>61</sup> A State is also obliged to maintain such a register.<sup>62</sup> To take the British example, this register contains different categories and fishing vessels constitute one.<sup>63</sup> Many States have outsourced the management of their registries to a private company. For instance, the ship register of Sierra Leone has its office in New Orleans. The tight connections of these companies with both the flag State and the shipping industry makes such a construction prone to corruption. This situation is even more expected to occur if the flag State is unaware of, unable or unwilling to control vessels that are flying its flag, including fishing vessels. Especially, IUU fishing becomes more financially beneficial when the chances of being caught are smaller. The corruption takes, therefore, place from registration, authorisation and licensing to monitoring, control and enforcement.<sup>64</sup>

Nonetheless, a ship that is not registered in only one State should be compared to a stateless ship or a vessel without nationality. The first exception in between these extremes is the fact that a vessel does not need to be registered because of its small size due to generally accepted international regulations or national law.<sup>65</sup> It is not the intention of the drafters of this provision to exclude any vessels that are capable of sailing on the oceans. It is presumed that the excepted small vessels will mainly sail in coastal waters.<sup>66</sup> Bareboat

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<sup>60</sup> See Churchill (1999) note 8 *supra*, p. 262.

<sup>61</sup> 1982 LOS Convention, Art. 91(1).

<sup>62</sup> *Ibid.*, Art. 94(2)(a).

<sup>63</sup> As set out in S. Hodges and C. Hill. *Principles of Maritime Law*. London (LLP) 2001, p. 16.

<sup>64</sup> E. de Coning. *Transnational Organized Crime in the Fishing Industry* (publication prepared for the United Nations Office on Drugs and Crime) 2011, pp. 118-128 and 147.

<sup>65</sup> See note 62 *supra* and Churchill (1999) note 8 *supra*, p. 213, footnote 19.

<sup>66</sup> See *United Nations Convention on the Law of the Sea 1982. A Commentary* vol. III (1995) note 24 *supra*, p. 146.

chartering is the second exception.<sup>67</sup> Additionally, it is not the case that every State can exercise jurisdiction over a stateless vessel.

### 3.3 Beyond flag State jurisdiction

A certain link between the vessel or the individuals on it and the State that exercises jurisdiction has to exist.<sup>68</sup> On the one hand, the 1982 LOS Convention provides a few of these connections.<sup>69</sup> On the other hand, this list is not exhaustive, so there might be more jurisdictional bases for a State to exercise jurisdiction.<sup>70</sup> A coastal State has no more rights in its EEZ than the ones that are listed in the relevant part of the 1982 LOS Convention.<sup>71</sup> For example, the coastal State may not exercise custom jurisdiction in the EEZ.<sup>72</sup> It is suggested, however, that in the case of stateless vessels, the coastal State can exercise jurisdiction regardless of the reason to exercise it.<sup>73</sup> A coastal State does not necessarily have to be a party to the 1982 LOS Convention to call upon it. The EEZ regime is regarded as customary international law.<sup>74</sup>

The exclusiveness of the flag State to exercise jurisdiction on the high seas has created considerable criticism. An increasing amount of problems, and sometimes disasters, in the field of pollution and overfishing resulted in the suggestion of more than only jurisdiction by flag States on the high seas.<sup>75</sup> Cooperation on a regional scale between coastal States and States of nationality of vessels that fish on the high seas (distant-water fishing States) is highly recommended because of the particular transboundary characteristic of fish stocks.<sup>76</sup> In the past, such cooperation seemed doomed to be ineffective.<sup>77</sup>

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<sup>67</sup> See note 60 *supra*.

<sup>68</sup> See Churchill (1999) note 8 *supra*, p. 214.

<sup>69</sup> *Ibid.* and 1982 LOS Convention, Part VII.

<sup>70</sup> 1982 LOS Convention, Art. 87(2) and Churchill (1999) note 8 *supra*, p. 205.

<sup>71</sup> Part V is the starting point for the EEZ in the 1982 LOS Convention. See also Churchill (1999) note 8 *supra*, p. 160.

<sup>72</sup> See *M/V "Saiga" (No. 2)*, note 59 *supra*, Para. 127.

<sup>73</sup> See note 68 *supra*.

<sup>74</sup> *Case concerning the Continental Shelf (Libyan Arab Jamahiriya v. Malta)*, International Court of Justice, The Hague, 3 June 1985, Para. 34 and see Churchill (1999) note 8 *supra*, pp. 161 and 162.

<sup>75</sup> M.N. Shaw. *International Law*. 5<sup>th</sup> edition. Cambridge etc. (Cambridge University Press) 2003, p. 543, A.G. Oude Elferink. 'De Groot – A founding father of the law of the sea, not the Law of the Sea convention' 2009 *Grotiana*, pp. 153-168 and see Churchill (1999) note 8 *supra*, p. 205. The latter concisely presents further discussion at p. 220.

<sup>76</sup> See Birnie (2009) note 7 *supra*, p. 739.

<sup>77</sup> See Churchill (1999) note 8 *supra*, pp. 286, 287 and 297.



Art. 8 of the Fish Stocks Agreement contains the key provisions of the treaty to finally reach the goal of effective cooperation. The Fish Stocks Agreement encourages States further to collaborate on no less than thirteen points.<sup>78</sup> This list forms the basis of RFMOs. Evidently, these organisations operate in the regional sphere in contrast with for example the International Convention for the Regulation of Whaling, the Convention on International Trade in Endangered Species of Wild Fauna and Flora and the Convention on the Conservation of Migratory Species of Wild Animals that all contain provisions for the global environment and therefore also some concerning fish stocks in the high seas. To return to the RFMOs, it is said that these globally applicable rules for regional organisations and their members indicate an obligatory character. This property is twofold in a way that it forms a basis for the RFMOs and obliges member States to comply with them.<sup>79</sup>

Besides this, certain provisions make it practically impossible to exercise a right to fish for a State when it is not a member of an RFMO.<sup>80</sup> Moreover, the fourth part of the Fish Stocks Agreement holds provisions for non-members of organisations and States that are not participating in arrangements. There even exists an incentive for State parties to the Fish Stocks Agreement to promote other States to become a party.<sup>81</sup> Although it is not clear if the Fish Stocks Agreement will contribute to the eradication of IUU fishing, arguably, the included rules are based on the access to high seas fishing rather than on freedoms of the high seas.<sup>82</sup> The fact that more States might, amongst other actions, arrest vessels contributes to the thought that flag State jurisdiction on the high seas starts to diminish nowadays.<sup>83</sup>

### 3.4 Expert consultation on flag State performance

The instruments that are discussed above outline just the general obligations and encouragements in existence for States and international and regional instruments. In preparation of draft criteria or international guidelines to lay down these obligations, the Food and Agriculture Organization of the United Nations (FAO) had the ability to organise

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<sup>78</sup> Fish Stocks Agreement, Art. 10.

<sup>79</sup> See note 76 *supra*.

<sup>80</sup> Fish Stocks Agreement, Art. 8(3) and (4).

<sup>81</sup> *Ibid.*, Part XI.

<sup>82</sup> See Birnie (2009) note 7 *supra*, p. 740.

<sup>83</sup> Fish Stocks Agreement, Artt. 21 and 22 and note 76 *supra*.

an expert consultation on the subject. In June 2009, such a consultation was held to discuss the topic of flag State performance. Already in the opening statement of that consultation, Nomura, then Assistant Director-General of the FAO for Fisheries and Aquaculture, acknowledged that with regard to the fishing fleets that fly a flag of non-compliance “the burden to control these fleets, which has a high price tag, is shifted to other States, including coastal States, port States and members of regional fisheries management organizations and arrangements”.<sup>84</sup> This opinion seems to be based on the 2008 Report of the Secretary General on Oceans and the Law of the Sea, quoted in the introduction.<sup>85</sup> The consultation was merely focused on the fight against IUU fishing on the high seas and in EEZs.<sup>86</sup> Experts delivered six papers and presentations and all of these received a comment of other experts. Four of these papers are relevant for the discussion below.

Hogan, Deputy Director of the U.S. Office of Marine Conservation, sets out criteria for assessing the performance of flag States in the first paper.<sup>87</sup> These criteria itself should also be subject to timely assessment.<sup>88</sup> The author also argues that a clear legal basis to assess the compliance of fishing vessels is present - both implicit and explicit. With regard to the implicit part, the reasoning starts with the fact that the 1982 LOS Convention and subsequent legal instruments codify cooperation in conservation and management between States. Consequently, Hogan views upon the assessment of flag State performance as a measure of cooperation. The explicit obligation rests in the performance assessments eventually required by RFMOs.<sup>89</sup>

Further, the paper emphasises the existence of reciprocity in flag State performance. If a flag State makes sure its fleet will comply with international regulation, such a State expects the same of other flag States. Moreover, the author is of the opinion that, apart from the reciprocity, this expectation is seen more as a responsibility or moral obligation, especially in cases of fisheries on the high seas.<sup>90</sup> The other side of the coin shows an obvious advantage for States, companies and individual vessels that do not obey

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<sup>84</sup> FAO. *Report of the Expert Consultation on Flag State Performance* (Rome, 23–26 June 2009) *FAO Fisheries and Aquaculture Report* no. 918. Rome (FAO) 2009, p. 16.

<sup>85</sup> See note 48 *supra*.

<sup>86</sup> See FAO (2009) note 84 *supra*, p. 1.

<sup>87</sup> *Ibid.*, pp. 24–27.

<sup>88</sup> *Ibid.*, p. 23.

<sup>89</sup> *Ibid.*, p. 21.

<sup>90</sup> *Ibid.*, p. 20.

the rules. Namely, they can proceed with hardly controlled harvesting, which delivers them an advantageous competition for the resources and its markets.<sup>91</sup>

Even then, there exist situations where the flag State or a RFMO barely covers the compliance of vessels. This is where port State control can come into play, necessarily.<sup>92</sup> It follows that it is practical to have a division on compliance assessment between flag States, port States, coastal States and RFMOs. Such a division in itself asks for “a comprehensive framework that could provide the basis to draw conclusions on flag State performance under a wide range of application, and be adaptable to specific circumstances”.<sup>93</sup> These criteria mainly try to heal the deficiencies in the system of compliance control. In other words, the report touches upon the desirable improvement of negative behaviour of States. The comment strives for the contrary and tries to stimulate flags of integrity. By unveiling the benefits of flying such a flag, for example access to product markets with higher prices, the international community could motivate States to compliance.<sup>94</sup>

Rayfuse, professor of International Law at the University of New South Wales, addresses possible actions against vessels flying the flags of States not meeting the criteria for flag State performance in the second paper. She delivers a very clear-cut view on the responsibility of the flag State: “only those States which effectively control their vessels enjoy the freedom to fish.” The author leaves no leeway for flags of non-compliance by stating that a State that is unable or unwilling to make its fleet comply should not allow vessels to fly its flag. Moreover, a State that denies this obligation is internationally responsible and vessels flying a flag of non-compliance can be compared to stateless vessels.<sup>95</sup> Injured States should be able to act through countermeasures against the flag State that fails to comply.<sup>96</sup> The paper offers a whole set of possible actions against flag States and requirements therefore, categorised in three options: self-assessment, unilateral assessment and multilateral assessment.<sup>97</sup>

Lugten, senior lecturer at the Faculty of Law of the University of Tasmania, deals with the role of national governments in implementing criteria and actions for flag State performance in the third paper. She suggests that potential flag States should investigate

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<sup>91</sup> See note 89 *supra*.

<sup>92</sup> See FAO (2009) note 84 *supra*, p. 22.

<sup>93</sup> See note 88 *supra*.

<sup>94</sup> See FAO (2009) note 84 *supra*, p. 2.

<sup>95</sup> *Ibid.*, pp. 29, 34 and 36.

<sup>96</sup> *Ibid.*, p. 36.

<sup>97</sup> *Ibid.*, pp. 31-38.

the history of a ship that wants to register. Furthermore, a State should only grant a vessel its flag if it is capable of exercising control regarding that particular vessel.<sup>98</sup> The idea of linking fishing permits to registration is copied from the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing of 2001 (IPOA-IUU).<sup>99</sup> This plan contains many ideas to improve the current practice in controlling compliance by providing possibilities of actions by the flag States themselves, coastal States, port States, market States and RFMOs. Miller, Executive Secretary of the Commission for the Conservation of Antarctic Marine Living Resources, discusses the role of regional fisheries management organizations in implementing criteria and actions for flag State performance in the fourth paper. He provides many guidelines to circumscribe this function for RFMOs in practice.<sup>100</sup>

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<sup>98</sup> *Ibid.*, p. 44.

<sup>99</sup> *Ibid.*, pp. 44 and 45 and IPOA-IUU, Paras. 40 and 41.

<sup>100</sup> See FAO (2009) note 86 *supra*, pp. 64-71.

It is undisputable that rights go hand in hand with duties in many legal systems. This principle is also valid for the rights of a flag State. As outlined above, the 1982 LOS Convention lays down the most general flag State duties.<sup>101</sup> The assessment of the technical requirements in this regard began in the private sector. In the early 1760s in London, a group of underwriters started to classify ships according to the ships' condition in order to provide insurances. Not only insurers but also the owners of the cargo became interested in the application. They soon created a register of ships. Over the centuries, this idea developed into a system of classification societies that examines the quality of ships.<sup>102</sup> This indeed is directly a limitation of working field of classification societies: their responsibilities do not extend to manning and operation of vessels.<sup>103</sup> Harmonisation of the classification standards is currently one of the main goals of the ten largest classification societies.<sup>104</sup>

#### 4.1 Introduction

Nowadays, it is custom to provide the name of the classification society, the rating of the vessel and when the last survey took place in the official papers of, for example, the sale of a ship. Inspection of the report of the classification society by a potential buyer is, therefore, normal procedure.<sup>105</sup> The quality of the classification society is of great importance because a potential insurer will take its track record into account.<sup>106</sup> Not applying for a new survey in time can cause the 'loss of class'.<sup>107</sup> Strictly seen, it is not obligatory for ship-owners to have their vessels classified. In practice however, it will be close to impossible to obtain insurance or sell a vessel without a classification. Consequently, a vessel cannot sail when it has no class. Even if a ship has a classification, caution is important because it is not sure if the seller reported all defects to the

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<sup>101</sup> See note 58 *supra*.

<sup>102</sup> R. Grime. *Shipping Law*. 2<sup>nd</sup> edition. London (Sweet & Maxwell) 1991, p. 75.

<sup>103</sup> M. Strong and P. Herring. *Sale of Ships: The Norwegian Saleform*. 2<sup>nd</sup> edition. London (Sweet & Maxwell Thomson Reuters) 2010, p. 416 and see Özçayir (2004) note 110 *infra*.

<sup>104</sup> I. Goldrein and P. Turner. *Ship Sale and Purchase*. 4<sup>th</sup> edition. London (LLP) 2003, p. 2.

<sup>105</sup> *Ibid.*, p. 1.

<sup>106</sup> See note 104 *supra*.

<sup>107</sup> See Grime (1991) note 102 *supra*, p. 76.

classification society.<sup>108</sup> Classification, in short, “provides a practical method of maintaining standards.”<sup>109</sup> The maintenance of these standards is not only done by classification but also by the detection of defects in the vessels.<sup>110</sup>

Where classification is still the obvious main function, the experts working for a society can now be hired for any task concerning a vessel’s condition. With assessing the requirements of international agreements regarding shipping, classification societies moved into the field of flag State duties as well.<sup>111</sup> Since the nineteenth century, regulation and inspection fall under their responsibilities too.<sup>112</sup> Flag States and port States rely nowadays heavily on the documents of surveys by classification societies.<sup>113</sup> In fact, not all flag States have the capability to examine vessels regarding their compliance with the national and international requirements. Neither do flag States have a global network of surveyors to carry out this work.<sup>114</sup> Therefore – at the moment of writing – approximately 120 States use classification societies for these purposes.<sup>115</sup> As far as insurance is concerned, the specialised Protection and Indemnity Clubs also require a ship to have or obtain a certain class. Evidently, this business relies upon classification societies.<sup>116</sup> A strict division in public and private functions is, arguably, hard to sustain.<sup>117</sup> Both in the private and the public sector, the question concerning the liability of classification societies emerges.<sup>118</sup> Fortunately, an increasing amount of measures starts to fill up what was not too long ago regarded as a vacuum.<sup>119</sup>

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<sup>108</sup> See Goldrein and Turner (2003) note 104 *supra*, pp. 3, 5 and 6 and see Özçayir (2004) note 110 *infra*, p. 480.

<sup>109</sup> See Grime (1991) note 102 *supra*, p. 77.

<sup>110</sup> Z.O. Özçayir. *Port State Control*. London (LLP) 2004, p. 479.

<sup>111</sup> *Ibid.*, p. 480 and see note 102 *supra*.

<sup>112</sup> P. Boisson, ‘Classification societies and safety at sea: Back to basics and prepare for the future’. 1994 *Marine Policy* no. 5, pp. 363-377, p. 363.

<sup>113</sup> See Falkanger (2011) note 117 *infra*, pp. 83 and 84, R. Pilley and F. Lorenzon. ‘International Regulations for Ship Operators, their Verification and Enforcement, in: *Southampton on Shipping Law*. London (Informa) 2008, pp. 227-249, p. 246 and see Boisson (1994) note 112 *supra*, p. 371 and Mandaraka-Sheppard (2009) note 121 *infra*, p. 283.

<sup>114</sup> See Vorbach (2001) note 115 *infra*, p. 31 and see Boisson (1994) note 112 *supra*, p. 371.

<sup>115</sup> J.E. Vorbach, ‘The Vital Role of Non-Flag State Actors in the Pursuit of Safer Shipping’. 2001 *Ocean Development & International Law* no. 1, pp. 27–42, p. 33.

<sup>116</sup> *Ibid.*, p. 32.

<sup>117</sup> T. Falkanger, H.J. Bull and L. Brautaset. *Scandinavian Maritime Law: The Norwegian Perspective*. 3<sup>rd</sup> edition. Oslo (Universitetsforlaget) 2011, p. 72.

<sup>118</sup> R. Pilley and F. Lorenzon. ‘International Regulations for Ship Operators, their Verification and Enforcement, in: *Southampton on Shipping Law*. London (Informa) 2008, pp. 227-249, pp. 245-249, M. Strong and P. Herring. *Sale of Ships: The Norwegian Saleform*. 2<sup>nd</sup> edition. London (Sweet & Maxwell Thomson Reuters) 2010, pp. 241-245 and see Hodges (2001) note 63 *supra*, pp. 43-47 and Mandaraka-Sheppard (2009) note 121 *infra*, pp. 522-531.

<sup>119</sup> See Mandaraka-Sheppard (2009) note 121 *infra*, p. 288.

In order to improve flag State performance in the field of fisheries, this thesis proposes the involvement of classification societies. However, very few documents or literature deal with such a proposal. In other words, involvement of classification societies in global fisheries is undoubtedly only in the proposal phase yet. Nevertheless, the encouragement is there and few references have been made lately and it is regarded valuable to take notice of these cases.<sup>120</sup> First of all, a necessary step is to determine the already existing scope of classification societies and the potential scope of these non-profit non-governmental organisations.

#### 4.2 Origin of potential role for classification societies

As with so many ideas, it is hard to track the exact first thought of the potential application of classification societies in the field of fisheries or the mentioning thereof. With the birth of the first classification society already halfway the eighteenth century, it is not very likely that the proposal came up only recently. Nonetheless, the notion of the possible depletion of fish stocks does not date back that far. Thus, the negative side of the use of flags of convenience within fisheries receives mounting attention in recent decades. This unclear history serves the purpose of pointing out only a few useful instances where the idea might have evolved.

*Reeman v Department of Trade and Others*, a civil liability case in the United Kingdom, provides the first illustration.<sup>121</sup> A fishing vessel that is registered in the United Kingdom needs a certificate of the Department of Trade to sail out. In order to receive such a certificate, the vessel needs to be inspected by a surveyor that is appointed by the Department of Trade. However, in this case, the Department of Trade based the certification upon a miscalculation. The outcome of the case is not relevant, only the fact that the role of the surveyor is similar to that of a classification society is important. In other words, this practice in the United Kingdom - and the subsequent use of this particular case in the common law system – illustrates the fact that classification societies within the field of fisheries do not have to be an entire novelty.

At this point, it is deemed necessary to emphasise the role of a classification society when it fulfils public duties - in other words: the statutory services that classification

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<sup>120</sup> See FAO (2009) note 84 *supra*, p. 33.

<sup>121</sup> As outlined in A. Mandaraka-Sheppard, *Modern Maritime Law and Risk Management*. 2<sup>nd</sup> edition. London (Informa) 2009, at pp. 527 and 528.

societies provide. The societies are neutral, impartial and independent. The responsible ones are committed to ship safety. Undoubtedly, surveyors of a flag State should have the same characteristics. In practice however, not every flag State is able or willing to exercise its duties itself. This is the moment where the classification society comes into play. They have a worldwide network of highly qualified engineers who only are allowed to work for one employer, *in casu* the classification society. Every flag State finds a balance in what it delegates to a classification society and what it executes itself. Evidently, one extreme is that a flag State delegates everything to a classification society, the other is that a flag States delegates nothing. The Federal Republic of Germany is an example of a flag State that executes some of its duties by its own surveyors and delegates some of them to a particular classification society. One last remark in this regard is that classification societies do not assess the seaworthiness of a vessel. That is the responsibility of the owner.

This being said, it should be admitted directly that there exists a less far-fetched hint on the application of classification societies. Therefore, a short introduction to the international regulatory system concerning port State control is essential. There is no legally binding instrument with a global scope for port State control, although many IMO conventions contain provisions on the issue. Instead, a chain of regional non-binding Memoranda of Understanding (MoUs) has been negotiated. These MoUs are applicable to the shipping industry - the industry in which classification societies are so important. Fishing vessels are normally excluded from these MoUs<sup>122</sup> and therewith also automatically the application of classification societies. It is also contested that inspection of fishing vessels in the framework of port State control is the best option to achieve compliance in the sphere of conservation and management of marine living resources although it can serve as a model for the development of a new agreement regarding fisheries.<sup>123</sup> The outcome of this process is the 2009 Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (Port State Measures Agreement).

Notwithstanding the aforementioned, the application of such a MoU to fishing vessels creates a window of opportunity for the application of classification societies in fisheries. A very careful first move in this direction might have occurred a few years ago.

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<sup>122</sup> See Fitzpatrick (2001) note 16 *supra*, Para. 35.

<sup>123</sup> *Ibid.*, Para. 36 and see Lobach (2001) note 130 *infra*, Paras. 32 and 33.



Two of the most important ones, the Paris MoU and the Tokyo MoU, organised their second joint ministerial conference in 2004. The following statement of the Ministerial Declaration is significant: “To support the continuing efforts of relevant international organizations in the development of measures to combat IUU fishing.” This support should be followed up by the following action under the two MoUs: “To consider the expansion of PSC to fishing vessels and further consider ratification of the Torremolinos Convention and STCW 95-F.”<sup>124</sup> The former convention deals with safety of fishing vessels and the latter abbreviation stands for the 1995 International Convention on Standards of Training, Certification and Watchkeeping for Fishing Vessel Personnel.

#### 4.3 Levels of analysis in international politics

In order to be able to analyse the potential role of classification societies in fisheries, an explanation of different levels on the international plane might be helpful. In the sphere of international politics, it has become natural to make a distinction in the levels at which influence and power can occur. In case of the use of classification societies in global fisheries, a similar distinction could be helpful to determine where the existing and potential responsibilities occur. First of all, it is essential to note that vessels are the units that are controlled by the State in a regulatory manner. It is the flag State that bears flag State responsibility and not the crew of the vessel or its owner. In between these two levels, the operational space of classification societies is defined. One could argue that they fulfil an outsourced public task.

Next to the individual (vessel) level and the State level, there is the international level. International agreements and instruments shape the latter. It is quintessential to realise at this stage that the classification societies do not currently operate between the international and the State level. In other words, classification societies are not able to assess flag States’ behaviour. Notwithstanding this point, an extra level of relevance emerges right in between that of the State and the international level. In the case of fisheries, this regional level is gaining importance.<sup>125</sup> RFMOs might provide a stage for

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<sup>124</sup> Sub-Committee of the International Maritime Organisation on Flag State Implementation (submitted by the Paris MoU and Tokyo MoU). *Update on actions emanating from the Second Inter-regional Ministerial Conference on Port State Control*. 19 January 2009. FSI 17/INF.6, Annex, p. 2.

<sup>125</sup> A. D’Andrea. *The “genuine link” concept in responsible fisheries: Legal aspects and recent developments*. *FAO Legal Papers Online* no. 61. 2006, p. 12.

classification societies. Namely, RFMOs build their regulations heavily on the provisions that are provided by international fisheries law, as outlined above.<sup>126</sup>

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<sup>126</sup> See Lobach, note 130 *infra*, Paras. 35-43.

Improving flag State performance is possible in different ways. A range of different kinds of jurisdictions might be engaged in reaching this purpose. One can deduce from this hierarchy that port State authority is secondary to flag State jurisdiction.<sup>127</sup> Port State control can never be a substitution for the responsibility of flag States. If the latter cannot or will not live up to the expectations of the international community with regard to shipping standards, “the port State comes into play. The control measures taken under port State control are supposed to be regarded as complementary to national measures taken by flag State administrations and are intended to provide assistance to these administrations.”<sup>128</sup> The General Assembly of the UN once more underlines this point when stating that although “flag States have primary responsibility for ensuring the effective implementation and enforcement of such instruments, coastal States and port States have had an increasingly important role due to the failure of some flag States to exercise effective control over vessels flying their flag.”<sup>129</sup> Port States could of course provide this assistance with their own surveyors but the technical knowledge of the surveyors of classification societies might be of an additional value.

## 5.1 Introduction

It has to be emphasised that classification societies mainly examine the status of the vessel in a technical way. The surveyors are most of time highly qualified engineers. A natural result is that the focus lies less on the activities of the vessel. The practice of visiting a vessel only once in certain period of time reinforces this perception. For the sake of clarity, it might be helpful to note that a surveyor from a classification society is thus more familiar with assessing a static situation. However, a dynamic situation – the activity of fishing – constitutes the problem regarding the lack of flag State performance in the field of fisheries. Improving flag State performance should therefore focus in the first place on fishing and to what extent this activity is carried out according to applicable regulations. Second, the status of the technicalities on board that provide the ability to fish is of

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<sup>127</sup> See Vorbach (2001) note 115 *supra*, p. 34.

<sup>128</sup> See Özçayir (2004) note 110 *supra*, p. 1.

<sup>129</sup> Report of the Secretary General on Oceans and Law of the Sea. UN Doc A/66/70/Add. 1. 11 April 2011, Para. 285.

significance. In the latter setting, there might be room for the use of classification societies.<sup>130</sup>

The notion of IUU fishing could be viewed upon as one of the main boosters for the development that aims for sustainable fisheries since the start of the 21<sup>st</sup> century. It was, for instance, in this regard that the States took up the idea to draft the Port State Measures Agreement. This inseparable connection between the combat of IUU fishing and port State regulation needs to be memorised at all times. Considering this reminder, not all tools to fight IUU fishing lay within in the capacity of the fisheries manager. To be more specific, the instruments that are needed to reach the aim of sustainable fisheries extend beyond competences of fisheries management. Port State authority provides a good example here because the involvement of the IMO and its legal instruments is obvious. Operating at night without lights, lacking proper marking, abandoning fishing gear, disabling positioning systems that are used for vessel monitoring systems (VMS) and modifying the construction of the vessel in order to hide illegal catches constitute violations of administrative laws, which are not necessarily regulating fisheries only.<sup>131</sup>

It goes without saying that classification societies have the proper experience to examine at least a few of these offences. Although, the legal basis for such action is non-existent yet because the main instruments that currently regulate port State control – regional MoUs – are not willing to extent their sphere of competence to fisheries.<sup>132</sup> Provisions of many convention – either in force or not – could be used as a starting point to create a legal basis for port State control of fishing vessels. High priority to develop an agreement that provides such legal basis is already stated right at the start of the fight against IUU fishing.<sup>133</sup> Classification societies know how to examine vessels on the basis of these conventions. This conclusion suggests looking at the fisheries from the shipping perspective. But because this approach would possibly not go beyond the copy and modification of articles into a new instrument that is applicable to fisheries, it is rather

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<sup>130</sup> A similar point is made in T. Lobach. ‘Measures to be adopted by the port State in combating IUU fishing’ in FAO, *Report of and papers presented at the Expert Consultation on Illegal, Unreported and Unregulated Fishing* (Sydney, Australia, 15-19 May 2000) *FAO Fisheries Report* no. 666. Rome (FAO) 2001, Para. 32.

<sup>131</sup> See Fitzpatrick (2001) note 16 *supra*, Paras. 7 and 35.

<sup>132</sup> *Ibid.*, Para. 36 and see Lobach (2001) note 130 *supra*, Para. 32.

<sup>133</sup> See Fitzpatrick (2001) note 16 *supra*, Paras. 37 and 42, Lobach (2001) note 130 *supra*, Paras. 33 and 34, and note 150 *infra*.

more interesting to look at potential tasks for classification societies in the existing international fisheries law.<sup>134</sup>

## 5.2 Risks

The involvement of classification societies in the field of fisheries brings risks with it too. Classification societies need to be totally independent and non-profit.<sup>135</sup> Otherwise, the exercise of public tasks as authorisation and control would turn into a dangerous development. In this regard, a port State control officer should be differentiated from a surveyor who works for a classification society. The former may not in any way be affiliated with a classification society.<sup>136</sup> History shows that when private entities fulfil public roles that are similar to those of the police or the armed forces, lines of responsibility blur. Armed forces should be mentioned here because in many countries the coast guard is part of the navy. Classification societies in a public role have therefore no enforcement capabilities.<sup>137</sup> Liability of classification societies is already a heavily debated issue in many jurisdictions.<sup>138</sup> Therefore, it seems wise to limit the role of classification societies to the tasks that they are used to: assessment of the static technical condition of the ship and - to a lesser extent - its activities. When a classification society collects data in order to achieve the final goals of flag State performance improvement, such activity should happen in an atmosphere of total transparency and openness.<sup>139</sup>

It might be mentioned at this point that classification societies themselves are currently more thoroughly scrutinised as well. Increasing competition among them brings with it the risk of being less strict in applying the rules in order to keep or attract clients.<sup>140</sup> Moreover, the image of classification societies is damaged due to huge pollution accidents that recently took place in Europe.<sup>141</sup> Classification societies are known as ‘recognised organisations’ within the IMO. A code for these recognised organisations is under development. This code would sum up all the relevant provisions in the IMO conventions

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<sup>134</sup> See Fitzpatrick (2001) note 16 *supra*, Para. 38.

<sup>135</sup> See note 110 *supra*.

<sup>136</sup> See Özçayir (2004) note 110 *supra*, p. 112.

<sup>137</sup> J.N.K. *Flag State Responsibility: Historical Development and Contemporary Issues*. Dordrecht etc. (Springer) 2009, pp. 130 and 137.

<sup>138</sup> N. Lagoni. *The Liability of Classification Societies*. Springer (Berlin and Heidelberg) 2007.

<sup>139</sup> See Kuemlangan, note 213 *infra*, Para. 12 and see Lobach (2001) note 130 *supra*, Para. 35.

<sup>140</sup> See Mansell (2009) note 137 *supra*, pp. 29-32.

<sup>141</sup> See Özçayir (2004) note 110 *supra*, p. 5.

with regard to classification societies in order to provide a clear overview. The creation of minimum standards for recognised organisations is important in this regard.<sup>142</sup> The European Union (EU) already centralised its policy concerning recognised organisations.<sup>143</sup> For instance, member States should submit a request to the European Commission if they plan to recognise a new organisation. The IMO requires many more detailed regulations of recognised organisations and the EU is among those to have implemented these rules.<sup>144</sup> Implementation of these rules in general, however, is arguably ineffective – both through flag States, port States and the IMO itself – and creates as such an essential weakness for the effectuation of flag State responsibility.<sup>145</sup>

### 5.3 Possible types and sources of assessment criteria

To proceed to the core, it needs to be answered in what fields of the worldwide fishing industry classification societies might become active. Following the levels of analysis in international politics, it would not be surprising to analyse international fisheries law at the international, regional and national level. The approach that this thesis takes is, however, restricted to the international level due to the high amounts of legislation at the other two levels. Anyway, the hierarchy in the international system requires starting with an examination of the provision of fisheries law at the international level that may provide room for the application of classification societies. The 1982 LOS Convention is the obvious instrument to start when it comes to international fisheries law because it provides the most widely accepted regulatory framework for the oceans. Consequently, subsequent instruments – containing either hard law or soft law – are based on the provisions in the 1982 LOS Convention.

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<sup>142</sup> See Mansell (2009) note 137 *supra*, pp. 112-114, 136 and 137, Sub-Committee of the International Maritime Organisation on Flag State Implementation (submitted by Nigeria, Sierra Leone, and St. Kitts and Nevis). *Development of a Code for Recognized Organizations: Proposal for future work*. 6 February 2009. FSI 17/14/2 and Sub-Committee of the International Maritime Organisation on Flag State Implementation (submitted by Mongolia). *Development of a Code for Recognized Organizations: Analysis of the factors to be addressed in the development of a Code*, 26 February 2009. FSI 17/14/4.

<sup>143</sup> See Özçayır (2004) note 110 *supra*, pp. 503-505.

<sup>144</sup> *Ibid.*, p. 503, see Mansell (2009) note 137 *supra*, pp. 139-143, Regulation (EC) no. 391/2009 of 23 April 2009 on common rules and standards for ship inspection and survey organisations. *Official Journal of the European Union* (28 May 2009) L 131/11 – L 131/23 and Directive 2009/15/EC of 23 April 2009 on common rules and standards for ship inspection and survey organisations and for the relevant activities of maritime administrations. *Official Journal of the European Union* (28 May 2009) L 131/47 – L 131/56.

<sup>145</sup> See Mansell (2009) note 137 *supra*, pp. 3-6.

## 1982 LOS Convention

At the outset of this paragraph, it is significant to clarify the scope for classification societies again regarding their potential function in the field of fisheries. They will be used to improve flag State performance. Flag States are the prime actors on the high seas. Surveyors of classification societies operate mainly in ports and the port State is not necessarily the coastal State or the flag State as well. When it comes to the fishing in the EEZ, the coastal State has the regulatory competence.<sup>146</sup> Nationals from other States than the coastal State should of course comply with the rules. A few of these obligations are spelled out.<sup>147</sup> For instance, the licences of the fishermen, their vessels and equipment could be checked on validity by classification societies.

## Compliance Agreement

The FAO deals with all the issues concerning fisheries and in that respect the organisation tries to combat flags of convenience. Since UNCLOS III, there was still an increasing practice of reflagging - in other words reregistering vessels for the convenience of its owners and to circumvent general applicable rules on the high seas or regulations by RFMOs.<sup>148</sup> The failure of the 1986 United Nations Convention on Conditions for the Registration of Ships (Registration Convention), in the sense that it is heavily criticised and has not entered into force yet, might have contributed to the idea of dealing with the problems created by the genuine link in the field of fisheries itself.<sup>149</sup>

Swan suggests taking this Registration Convention as a model for the development of a fisheries agreement that covers the same topic.<sup>150</sup> Copying the provision that asserts that vessels of a flag State “are periodically surveyed by its authorized surveyors in order to ensure compliance with applicable international rules and standards” would form a perfect basis for the introduction of classification societies in the field of fisheries.<sup>151</sup> Further, the Registration Convention lists many data and documents that could possibly be

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<sup>146</sup> 1982 LOS Convention, Artt. 61, 62, 66 and 67.

<sup>147</sup> *Ibid.*, Art. 62(4).

<sup>148</sup> See Churchill (1999) note 8 *supra*, p. 260.

<sup>149</sup> M. McConnell. ‘Business as Usual: An Evaluation of the 1986 United Nations Convention on Conditions for the Registration of Ships’. 1987 *Journal of Maritime Law & Commerce* no. 3, pp. 435-449, p. 449.

<sup>150</sup> J. Swan, *Fishing Vessels operating under open registers and the exercise of flag State responsibilities. Information and options*. FAO Fisheries Circular no. 980. Rome (FAO) 2002, p. 10.

<sup>151</sup> Registration Convention, Art. 5(3)(b).

checked by surveyors of classification societies if its provisions were applicable to fishing vessels and it entered into force.

The process within the FAO concerning compliance in the fishing industry resulted in the Agreement to Promote Compliance with International Conservation and management Measure by Fishing Vessels in the High Seas (Compliance Agreement). The preamble lays down the objective to reduce the amount of reflagging vessels next to the emphasis that the right to fish on the high seas is subject to international regulations. Furthermore, the Compliance Agreement encourages States to cooperate and to participate in fisheries organisations.<sup>152</sup> The emphasis on the responsibility of the flag State is clear. A flag State should strive for the prevention of “any activity that undermines the effectiveness of international conservation and management measures.”<sup>153</sup> And these measures should also be applicable to small vessels, which fall initially outside the scope of the Compliance Agreement.<sup>154</sup> This provision reinforces the obligation for State parties to make the vessels that fly its flag comply with the rules; the State should expressly authorise a vessel to fish on the high seas.<sup>155</sup> The examination if these authorisations are obeyed might be a potential task for classification societies.

The burden is even higher as far as fishing on the high seas is concerned. Effective exercise of flag State responsibility is then a prerequisite for authorisation.<sup>156</sup> The obligatory marking of vessels provides another point of examination.<sup>157</sup> Reflagging of a ship is also subject to severe conditions to limit this undesirable practice.<sup>158</sup> To enforce sanctions, the Compliance Agreement promotes other States’ support. A special role is, for the first time, reserved for the port State.<sup>159</sup> It lists technicalities of vessels that classification societies could potentially examine.<sup>160</sup> In addition, the Compliance Agreement urges its parties to do everything in their power to prevent non-parties from violating international conservation and management measures.<sup>161</sup>

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<sup>152</sup> Compliance Agreement, preamble, Artt. V and VIII.

<sup>153</sup> *Ibid.*, Art. III(1)(a).

<sup>154</sup> *Ibid.*, Art. III(1)(b).

<sup>155</sup> *Ibid.*, Art. III(2).

<sup>156</sup> *Ibid.*, Art. III(3).

<sup>157</sup> *Ibid.*, Art. III(6).

<sup>158</sup> See Churchill (1999) note 8 *supra*, p. 303.

<sup>159</sup> *Ibid.* and Compliance Agreement, Art. V.

<sup>160</sup> Compliance Agreement, Art. VI(1) and (2).

<sup>161</sup> *Ibid.*, Art. VIII.



The creation of national records for fishing vessels is a novelty in the Compliance Agreement.<sup>162</sup> Fishing vessels are normally exempted from national ship registers.<sup>163</sup> A record of vessels, however, is not the same as a register of vessels. Maritime administrations, shipbuilders and classification societies supply the IMO with information for a global record concerning the shipping industry.<sup>164</sup> This idea could be copied to the fishing industry. Consequently, classification societies could then not only provide input for such a record but also profit from the data in it while examining vessels. The transparency and exchange of information that is aimed for in the Compliance Agreement is very supportive for this development.<sup>165</sup> The process within the FAO for the creation of a global record for fishing vessels has gone through important stages already and experts also promote the transparency and openness of such a record.<sup>166</sup> Earlier attempts to construct a global record failed but currently the necessary procedures are finalised.<sup>167</sup>

One of the other purposes of the global record is “strengthening risk assessment for both governments and industry at all levels”.<sup>168</sup> This function seems to fit the role of a classification society perfectly because it comprehends exactly their experience. Large fishing vessels are already included in the record that the IMO uses and this commercial record offers many particularities that could be reproduced in the fishing industry, including a unique vessel identifier.<sup>169</sup> Many RFMOs already use fishing vessel records, so the regional level seems to be ahead of the international level.<sup>170</sup>

### Fish Stocks Agreement

The provisions of the 1982 LOS Convention concerning straddling and highly migratory fish stocks needed implementation just over a decade after their acceptance. The resulting

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<sup>162</sup> *Ibid.*, Art. IV.

<sup>163</sup> FAO. *Report of the Expert Consultation on the Development of a Comprehensive Global Record of Fishing Vessels* (Rome, 25–28 February 2008) *FAO Fisheries Report* no. 865. Rome (FAO) 2008, Appendix H, p. 38 and 39.

<sup>164</sup> See Fitzpatrick (2001) note 16 *supra*, Para. 21.

<sup>165</sup> Compliance Agreement, Artt. V and VI.

<sup>166</sup> See FAO (2008) note 163 *supra*, Para. 30.

<sup>167</sup> *Ibid.*, Appendix H, p. 43 and 44.

<sup>168</sup> See note 166 *supra*.

<sup>169</sup> See FAO (2008) note 163 *supra*, Paras. 41-46, FAO. *Report of the Technical Consultation to Identify a Structure and Strategy for the Development and Implementation of the Global Record of Fishing Vessels, Refrigerated Transport Vessels and Supply Vessels* (Rome, 8–12 November 2010) *FAO Fisheries and Aquaculture Report* no. R956. Rome (FAO) 2011, pp. 3-5 and see Government of Canada (2009) note 199 *infra*, p. 8.

<sup>170</sup> See FAO (2008) note 163 *supra*, Appendix G.

Fish Stocks Agreement has many purposes of which one codifies the increasing significance of port States. The preamble lays down the wish for more effective enforcement of conservation and management measures by all kinds of States. Both coastal States and States that are involved in high seas fishing shall care for effective monitoring, control and surveillance.<sup>171</sup> The Fish Stocks Agreement also encourages the deterrence of violation by vessels that are flying the flag of non-parties.<sup>172</sup> In both the provisions for port States and flag States, the first encouragement that the drafters provide is international or regional cooperation.<sup>173</sup> These rules form a good example of a detailed elaboration on its counterparts in the 1982 LOS Convention.<sup>174</sup> The extensive rights of port States are merely a codification of customary international law.<sup>175</sup>

The third and fourth part of the Fish Stocks Agreement deal with mechanisms for international cooperation as do some articles in Part VI. The latter gives special attention to port States. The Fish Stocks Agreement attributes the power of inspection of documents, fishing gear and catch on board to port States.<sup>176</sup> Especially the former two components may be potential tasks for classification societies. Furthermore, the Fish Stocks Agreement emphasises duties for flag States.<sup>177</sup> The Fish Stocks Agreement repeats in a slightly more detailed manner the provision concerning authorisation of fishing vessels and the accompanying requirements from the Compliance Agreement.<sup>178</sup> The same is true for the paragraphs on a national vessel record and the requirements for marking of vessels and gear.<sup>179</sup> Moreover, the Fish Stocks Agreement makes a start with encouraging the development of VMS.<sup>180</sup> Again, classification societies are perfectly suited to check licences, markings and VMS.

Sustainable use is a recurring theme throughout the whole Fish Stocks Agreement. Evidently, States should pursue the protection of both target and non-target species.<sup>181</sup> Further, the precautionary approach and ecosystem approach should guide the fishing

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<sup>171</sup> Fish Stocks Agreement, Artt. 5(l) and 10(h).

<sup>172</sup> *Ibid.*, Art. 33(2).

<sup>173</sup> *Ibid.*, Artt. 18, 19 and 23.

<sup>174</sup> See Birnie (2009) note 7 *supra*, p. 743.

<sup>175</sup> *Ibid.*, p. 744.

<sup>176</sup> Fish Stocks Agreement, Art. 23.

<sup>177</sup> *Ibid.*, Artt. 18 and 19.

<sup>178</sup> *Ibid.*, Art. 18(1)-(3)(b).

<sup>179</sup> *Ibid.*, Art. 18(3)(c) and (3)(d).

<sup>180</sup> *Ibid.*, Art. 18(3)(e) and (3)(g)(iii).

<sup>181</sup> *Ibid.*, Artt. 5(f) and 6(5).

measures.<sup>182</sup> Whatever happens, States have to take into account that the same fish stocks live under both national jurisdiction and the areas beyond. Thus, States should have compatibility of measures as a goal.<sup>183</sup> And if States could not agree on conservation measures directly, they should place “provisional arrangements of a practical nature” instead.<sup>184</sup>

### Code of Conduct

Responsibility is evidently what the 1995 Code of Conduct for Responsible Fisheries (Code of Conduct) focuses on. The Code of Conduct links the right to fish directly to effective “conservation and management of the living aquatic resources”.<sup>185</sup> Further, the Code of Conduct hints on a clear ecosystem approach concerning the availability, diversity and quality of resources for today and in the future.<sup>186</sup> This long-term perspective is of crucial significance with regard to fisheries management.<sup>187</sup> The emphasis on the ecological system as a whole means unmistakably the integration of fisheries management into the bigger picture of coastal zone management.<sup>188</sup> Regional cooperation is an inevitable part of the latter.<sup>189</sup> The emphasis on the “best scientific evidence available” reoccurs, related to the precautionary approach.<sup>190</sup> Furthermore, a severe stance should be taken against vessels undermining the effectiveness of measures and not flying the flag of a contracting party to the relevant RFMO.<sup>191</sup> Destructive fishing operations should be prohibited to diminish the devastating effects on the ecosystem.<sup>192</sup>

The Code of Conduct is directly connected to other international fisheries instruments that were adopted in the 1980s and 1990s.<sup>193</sup> Consequently, this soft-law instrument strives for compliance and enforcement. Monitoring and control of fishing vessels is an inseparable part of that.<sup>194</sup> Flag States should provide access to insurance for

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<sup>182</sup> *Ibid.*, Artt. 5(c-f), 6 and Annex II.

<sup>183</sup> *Ibid.*, Art. 7.

<sup>184</sup> *Ibid.*, Art. 7(5) and (6).

<sup>185</sup> Code of Conduct, Artt. 6.1 and 6.12.

<sup>186</sup> *Ibid.*, Artt. 6.2-6.4, 6.6, 6.8, 7.2.2(d), 7.2.3, 12.10 and 12.11.

<sup>187</sup> *Ibid.*, Artt. 7.1.1, 7.2 and 7.3.3.

<sup>188</sup> *Ibid.*, Art. 10.

<sup>189</sup> *Ibid.*, Art. 10.3.

<sup>190</sup> *Ibid.*, Artt. 6.4, 6.5 and 7.5.

<sup>191</sup> *Ibid.*, Art. 7.7.5.

<sup>192</sup> *Ibid.*, Art. 8.4.2.

<sup>193</sup> *Ibid.*, Artt. 1 and 3.

<sup>194</sup> *Ibid.*, Artt. 6.10, 7.1.7, 7.7.3 and 8.1.4.

ship-owners and –charterers.<sup>195</sup> Since classification societies are founded for this specific reason, they can assist along the whole process of insurance. The examination of compliance with safety requirements and requirements regarding the reduction of pollution provide two other tailor-made opportunities for the involvement of classification societies.<sup>196</sup> Concerning port States, the Code of Conduct urges cooperation with and assistance of other States in the fulfilment of their duties, especially flag States.<sup>197</sup>

One of the topics that the Code of Conduct also brings to the attention of the public is the issue of capacity. Avoidance, prevention, reduction and elimination are the goals concerning excess capacity of the fishing fleet.<sup>198</sup> The International Plan of Action for the Management of Fishing Capacity (IPOA-Capacity) implements these provisions. Though both instruments’ suggestions are not directly applicable to the potential involvement of classification societies, there might exist a role for the latter. Both the Code of Conduct and the IPOA-Capacity are directed towards overcapacity at the State level. Excessive capacity at individual vessels, however, might be eligible to examination by classification societies.<sup>199</sup>

When it comes to the prevention and elimination of IUU fishing, the FAO provides guidance with the IPOA-IUU. Its principles are to a certain extent derived from or related to those described in the Code of Conduct.<sup>200</sup> The IPOA-IUU covers collaboration between States and sets out very generally what measures should be taken, at first.<sup>201</sup> Nevertheless, many – if not almost all – of the given encouragements are applicable for RFMOs. This conclusion is evidently especially valid for the part of the IPOA-IUU covering RFMOs.<sup>202</sup>

### Bycatch regulations

From the negotiations of the Fish Stocks Agreement onwards, bycatch and discards attracted the attention of international lawyers. In its general principles, the Fish Stocks Agreement tries to minimise “discards, catch by lost or abandoned gear, catch of non-

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<sup>195</sup> *Ibid.*, Art. 8.2.8.

<sup>196</sup> *Ibid.*, Artt. 8.2.5, 8.7.2 and 8.8.2.

<sup>197</sup> *Ibid.*, Art. 8.3.

<sup>198</sup> *Ibid.*, Artt. 7.1.8, 7.2.2(a) and 7.6.3.

<sup>199</sup> Government of Canada, *Expert Workshop on Flag State Responsibilities: Assessing Performance and Taking Action. Guidance Document*, May 2009, p. 7.

<sup>200</sup> IPOA-IUU, Art. 9.

<sup>201</sup> *Ibid.*, Artt. 28, 29, 32 and 33.

<sup>202</sup> *Ibid.*, Artt. 78-84.

target species, both fish and non-fish species, (hereinafter referred to as non-target species) and impacts on associated or dependent species, in particular endangered species, through measures including, to the extent practicable, the development and use of selective, environmentally safe and cost-effective fishing gear and techniques”.<sup>203</sup> In addition, the Fish Stocks Agreement encourages States to provide data on the catch of non-target species, which is reiterated for the duties of flag States.<sup>204</sup> Furthermore, it regulates observance, inspection and monitoring of this information and lays down the need to ensure compliance with international rules on this issue.<sup>205</sup>

Where the Fish Stocks Agreement only pushes coastal States and States that have vessels fishing on the high seas to cooperate with regard to the abovementioned phrases, the Code of Conduct uses stronger language. States simply should minimise “catch of non-target species, both fish and non-fish species, and impacts on associated or dependent species”.<sup>206</sup> Moreover, the precautionary approach and ecosystem approach come visibly into play in the Code of Conduct. The topic of bycatch and discards, which is dealt with in the Code of Conduct on various places, is one where technical requirements play a major role. The use of selective gear is important in this regard and management measures should aim to encourage this usage.<sup>207</sup> This obligation exists also more in general concerning gear, methods and practices.<sup>208</sup> The International Plans of Action implement these encouragements from the Code of Conduct.<sup>209</sup> The examination of special gear could be attributed to surveyors of classification societies. Additionally, they could be significant in the monitoring of the introduction of new gear.<sup>210</sup> The technical measures for the prevention of the incidental catch of seabirds fall in the same category.

### Monitoring of vessels

Part of the obligation to implement monitoring, control and surveillance measures is the promotion of VMS.<sup>211</sup> VMS fits into more than one of these three elements.<sup>212</sup> For

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<sup>203</sup> Fish Stocks Agreement, Art. 5(f).

<sup>204</sup> *Ibid.*, Artt. 5(j) and 18(3)(e).

<sup>205</sup> *Ibid.*, Art. 18(3)(f) and (3)(i).

<sup>206</sup> Code of Conduct, Art. 6.6.

<sup>207</sup> *Ibid.*, Artt. 7.2.2(g), 7.6.9 and 8.5.

<sup>208</sup> *Ibid.*, Art. 7.6.4.

<sup>209</sup> IPOA-Capacity, Art. 10 and IPOA-Sharks, Art. 22.

<sup>210</sup> IPOA-IUU, Art. 12.11.

<sup>211</sup> *Ibid.*, Art. 24.3 and Code of Conduct, Art. 7.7.3.

instance, VMS can comprehend automatic location communicators or vessel tracking units.<sup>213</sup> Law needs to require these parts to be placed on board. Governments and RFMOs could decide, for example, only to issue authorisations if the core condition, being the presence of an automatic location communicator, is met.<sup>214</sup> The examination of the functioning of these systems provides an excellent opportunity for the involvement of classification societies. There exists a clear encouragement to implement mandatory reporting and VMS at the level of RFMOs.<sup>215</sup> The significance of VMS is so extensive that it could arguably diminish the importance of port State control in the future.<sup>216</sup> Then, a ministerial meeting emphasised this point by setting a deadline for the presence of VMS on all large-scale fishing vessels.<sup>217</sup>

### Port State measures

Port State measures in relation to IUU fishing experienced a very quick development compared to other issues under international law. A year after the adoption of the IPOA-IUU, plans were already made for a document bringing together IUU fishing and port State measures to prevent them. In 2005, a Model Scheme was published in this regard. Two years later, an expert consultation was convened with the task to make a draft for a legally-binding instrument. In 2008, a technical consultation commenced and altered the draft of the Expert Consultation. And in the same year, 2009, a final agreement saw the light. The increasing importance of port States in the prevention, deterrence and elimination of IUU fishing might assist flag States to improve their performance in this area. The potential application of classification societies could be used in the realm of flag States but also extended to port State duties. Cooperation between different kinds of States is quintessential for the improvement of the framework in which fisheries nowadays operate.

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<sup>212</sup> J.M. Davis. 'Monitoring Control Surveillance and Vessel Monitoring System Requirements to Combat IUU Fishing' in FAO. *Report of and papers presented at the Expert Consultation on Illegal, Unreported and Unregulated Fishing* (Sydney, Australia, 15-19 May 2000) *FAO Fisheries Report* no. 666. Rome (FAO) 2001, Paras. 6 and 7.

<sup>213</sup> B. Kuemlangan, 'National legislative options to combat IUU fishing' in FAO. *Report of and papers presented at the Expert Consultation on Illegal, Unreported and Unregulated Fishing* (Sydney, Australia, 15-19 May 2000) *FAO Fisheries Report* no. 666. Rome (FAO) 2001, Para. 30.

<sup>214</sup> Code of Conduct, Art. 47.1 and see Kuemlangan (2001) note 213 *supra*, Para. 31.

<sup>215</sup> IPOA-IUU, Artt. 80.3 and 80.7.

<sup>216</sup> T. Lobach, *Port State control of foreign fishing vessels*. *FAO Fisheries Circular* no. 987. Rome (FAO) 2003, p. 12.

<sup>217</sup> 2005 Rome Declaration on Illegal, Unreported and Unregulated Fishing, Para. 3.

## Safety of fishing vessels

As stated earlier, the international legal instruments concerning shipping are hardly applicable to the fishing industry.<sup>218</sup> Therefore, the IMO developed an international convention for the safety of fishing vessels. Classification societies are clearly involved in this field. States, for instance, have to publish a list with non-governmental organisations to which they attributed power relating to construction, design and equipment.<sup>219</sup> A very extensive and detailed annex to the Convention lists the requirements concerning these topics.<sup>220</sup> The contracting parties needed a protocol to update the convention within two decades.<sup>221</sup> This protocol specifies, among other things, more about the certification of fishing vessels where classification societies might become involved again but has not entered into force yet.<sup>222</sup>

### 5.4 Potential legal developments regarding classification societies

Considering the above, the potential application of classification societies fits legally into many already existing provisions and guidelines. However, none of the existing law on fisheries mentions explicitly the role of classification societies. One gap that is necessary to bridge is that classification societies currently examine vessels and not flag States as a whole. Consequently, a legal framework for the application of classification societies needs to be developed. The similar process within the IMO could serve as an example in this regard. The FAO could pick up this idea within the scope of its work on improving flag State performance. As far as IUU fishing is concerned, the General Assembly already encourages

strengthened collaboration between the Food and Agriculture Organization of the United Nations and the International Maritime Organization, taking into account the respective competencies, mandates and experience of the two organizations, to

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<sup>218</sup> 1977 International Convention for the Safety of Fishing Vessels, preamble.

<sup>219</sup> *Ibid.*, Art. 6(1)(b).

<sup>220</sup> *Ibid.*, Annex.

<sup>221</sup> 1993 Protocol Relating to the Torremolinos International Convention for the Safety of Fishing Vessels.

<sup>222</sup> *Ibid.*, Art. 4.

combat illegal, unreported and unregulated fishing, particularly in improving the implementation of flag State responsibilities and port State measures.<sup>223</sup>

Here, the General Assembly once again underscores the complementary function of flag State responsibilities and port State measures. The General Assembly further stresses that, apart from the FAO, also RFMOs are competent “to develop guidelines on flag State control of fishing vessels”.<sup>224</sup>

Quintessential for the work of classification societies is that every “State shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.”<sup>225</sup> Further detail points out that this jurisdiction and control comprehends construction, equipment and seaworthiness of vessels and their use of signals, the maintenance of communications and the prevention of collisions.<sup>226</sup> In order to comply with these duties, it is necessary “that each ship, before registration and thereafter at appropriate intervals, is surveyed by a qualified surveyor of ships, and has on board such charts, nautical publications and navigational equipment and instruments as are appropriate for the safe navigation of the ship”.<sup>227</sup> This provision lays down the work for classification societies clearly; the first half mentions its employees and the second part sums up the objects that should be examined. Other States are permitted to bring deficiencies of vessel to the attention of the flag State.<sup>228</sup>

## 5.5 Flag State performance assessment

So far, classification societies could assist flag States in keeping their fleet in compliance with international requirements. There is, however, a difference between assessing the performance of individual vessels and assessing the performance of a State in its capacity as a flag State.<sup>229</sup> When “the ultimate objective of assessing flag State performance must be to identify situations where a flag State has breached its international obligations by failing to meet the criteria required of a responsible flag State”, the potential role of

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<sup>223</sup> See General Assembly of the UN (2010) note 12 *supra*, Para. 51.

<sup>224</sup> *Ibid.*, Para. 58.

<sup>225</sup> *Ibid.*, Art. 94(1).

<sup>226</sup> *Ibid.*, Art. 94(3)(a) and (3)(c).

<sup>227</sup> *Ibid.*, Art. 94(4)(a).

<sup>228</sup> *Ibid.*, Art. 94(6).

<sup>229</sup> See FAO (2009) note 84 *supra*, p. 30.



classification societies becomes much more doubtful.<sup>230</sup> With such an objective, the focus is more on enforcement and international responsibility of States. For reasons outlined above, classification societies are currently less suitable for a role as international guardian of international fisheries law on a regional or global level.

Nevertheless, there might exist some opportunities in this direction. In order to elaborate on these options, the different kinds of assessment need to be kept in mind. First, self-assessment of flag State performance could be perfectly possible when resources are abundant. Classification societies could also assist in such an assessment, especially with regard to technical requirements, but a State that assesses its own performance would certainly not guarantee an objective outcome. Second, the same is true for unilateral assessment, which involves one State assesses the performance of another.<sup>231</sup>

The third option has probably the largest potential because many States could potentially be involved in the assessment or a group of States organises such assessment through an RFMO. Multilateral assessment through RFMOs is already practiced in some parts of the world but the focus is on assessment of the whole organisation than on the individual member States.<sup>232</sup> A discussion during the expert consultation at FAO in the summer of 2009 showed a positive attitude towards the possibilities for RFMOs to be engaged in enhancing flag State performance and fight IUU fishing especially.<sup>233</sup> The General Assembly of the UN consequently urges such a development as well.<sup>234</sup> Guidelines for RFMOs concerning the assessment of flag State performance are overtly based on the above discussed international legal instruments.<sup>235</sup>

As the next logical step, a technical consultation followed the expert consultation. Many States turned out to be sceptical about third-party assessment of their flag State performance and sanctions. Furthermore, some raised the suggestion that guidelines for responsible flag States should only be applicable to the high seas. The chairperson did not officially close the technical consultation in May 2011 to leave room for a second session whenever funding is available. In the meantime, the chairperson wrote a report covering the discussion so far.<sup>236</sup> The accompanying draft criteria for flag State performance define

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<sup>230</sup> *Ibid.*, p. 29.

<sup>231</sup> *Ibid.*, pp. 30-33.

<sup>232</sup> *Ibid.*, pp. 33 and 34.

<sup>233</sup> *Ibid.*, p. 7.

<sup>234</sup> See General Assembly of the UN (2010) note 12 *supra*, Para. 44.

<sup>235</sup> See FAO (2009) note 84 *supra*, pp. 64-72.

<sup>236</sup> *Chairperson's Report on the First Session of the Technical Consultation on Flag State Performance*. Rome (FAO) 2-6 May 2011.

broad objectives and some requirements on national vessel registry and authorisations. All these criteria are largely based on the already existing rules and encouragements contained in the international legal instruments above and the criteria that were developed during the expert consultation.<sup>237</sup> One regional example where classification societies assist in flag State enforcement occurs in Europe. The EU provides its member States with the opportunity to delegate their authority partly to recognised organisations. Such a delegation should be strictly regulated.<sup>238</sup> The scope of this delegation lies within those IMO instruments that are mandatory for EU member States.<sup>239</sup> There is no special mentioning of fishing vessels but the EU Flag State Code could be applicable to this part of the fleet.

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<sup>237</sup> *Ibid.*, Appendix B & see FAO (2009) note 86 *supra*, Appendix F.1.

<sup>238</sup> Annex I. Flag State Code of 29 March 2007. *Official Journal of the European Union* (31 January 2008) C 27 E/154 - E/162, Para. 18.

<sup>239</sup> *Ibid.*, Paras. 6 and 20.

In even stronger language than in the 2008 Report of the Secretary General on Oceans and the Law of the Sea that is quoted in the first chapter, one could state that a shift away from exclusive flag State jurisdiction on the high seas concerning fisheries is crystal clear. The international legal instruments that are discussed above constitute only the top of the iceberg on ideas and drafts in this field. Port States, coastal States, States of origin with regard to anadromous species, and even market States gain unmistakably more jurisdiction compared to flag States. One cannot conclude, though, that there is a strict divide between flag State performance on the one hand and other unilateral or multilateral forms of control on the other hand. The international community could use both elements complementary.

The Secretary-General of the UN once again points out that it is highly necessary that changes take place.

The need to enhance effective implementation and enforcement of the international legal and policy instruments relating to oceans and the seas continues to be a challenge for the international community. Although lack of capacity and technical knowledge contribute to that issue, insufficient political will and lack of long-term, integrated planning also play a role.<sup>240</sup>

As was seen, there are areas - either legally or geographically - where it is close to impossible for flag States to make their fleet comply with the rules. The huge environmental risks of over-fishing, IUU fishing and harmful fishing techniques should not be underestimated. Additionally, in discussing the international law on fisheries, a distinction has to be made in hard law, soft law and customary law. There is always the common difficulty with international legal instruments that not all relevant States are party to that particular instrument. In case of high seas fisheries, this problem is even worse because a flag State has no incentive to unilaterally comply with the rules if this results in the fact that others will catch the fish it does not catch.<sup>241</sup> Judge Paik of the International Tribunal for the Law of the Sea draw in this regard the general conclusions that further 'qualifications to the freedom of high seas fishing and the exclusivity of flag State

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<sup>240</sup> Report of the Secretary General on Oceans and Law of the Sea. UN Doc A/66/70/Add. 1. 11 April 2011, Para. 284.

<sup>241</sup> See Churchill (1999) note 8 *supra*, pp. 322 and 323.

jurisdiction’ are needed.<sup>242</sup> He sees a broadening of ‘the mandate of RFMOs and strengthening their roles and functions’ as an evident next step.<sup>243</sup> In sum, the shift to a multilateral responsibility for high seas fisheries by way of RFMOs is very much welcomed but there is still a long way to go and much more effort is needed.

To come to an assessment of the possibilities for involvement of classification societies in worldwide fisheries, one has to be both positive and creative. Above, a concise overview is given of the possibilities and limitations. A probably even better summarising statement is made in one of the early elaborations on port State control in fisheries:

Naturally, it will be impossible to observe fishing and processing operations during an inspection in port, but it should nevertheless be possible to reconstruct the fishing activities of the vessel. In addition to formalities such as identification etc, a port inspector should be able to determine the fishing pattern, catches, and verify the fish on board through an inspection. It should also be possible to check the hold and construction of the fishing gear. Even if not landed, information about the fish on board the vessel may in some cases also be determined as precisely as desired.<sup>244</sup>

Noticeably, no mention is made of classification societies. Nevertheless, if one bears in mind that those societies could carry out port State control, the connection is clear. This quote also eloquently explains that, though the classification system developed to execute static checks, reconstructing the activity – fishing itself – is very well possible.

First of all, the legal status of the ship and the relevant official documents can be investigated. The widespread practice of reflagging vessels could be addressed through this channel. The Registration Convention provides a good starting point here. The fact that flag States shall ensure that their vessels “are periodically surveyed by its authorized surveyors in order to ensure compliance with applicable international rules and standards” could be used as a model for a new instrument concerning fisheries.<sup>245</sup> Consequently, the Registration Convention sums up many data and documents that are eligible for examination by these surveyors. Second, however, the classification system started out to

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<sup>242</sup> Lecture of Judge Jin-Hyun Paik at the fifth summer academy of the International Foundation for the Law of the Sea in Hamburg, 2 August 2011. Presentation on file with the author.

<sup>243</sup> *Ibid.*

<sup>244</sup> See Lobach (2003) note 216 *supra*, p. 13.

<sup>245</sup> See note 151 *supra*.

assess the technical condition of a ship. Regarding fishing vessels, these checks could be carried out within the scope of observer programmes of States or RFMOs. Points of attention might be the legality of the fishing gear on board, excessive capacity, the marking of vessels and gear, the functioning of VMS and insurance issues. Especially the examination of gear has to do with the control of bycatch as well. In sum, classification societies will operate in the field of what is known as monitoring, control and surveillance. It should be kept in mind, however, that classification societies would not fulfil the job of a police officer. So, there is only a pre-assessment and post-assessment of the fishing activity. This conclusion directs back to remark concerning static and dynamic assessment.

The above relates to the potential tasks to fulfil by classification societies when a government will hire them. A function that comes even closer to exercising a public task is the issuing of authorisations and licences. The size and catch capacity of the ship are key points in this regard.<sup>246</sup> Experts already concluded that non-governmental organisations – as which classification societies are categorised - could be used for these purposes.<sup>247</sup> Important here is to keep track of the international developments regarding the topic as well. As elaborated upon above, registration of vessels is a prerequisite for any action. Notwithstanding this significance, the registration itself also creates problems related to the required genuine link between the vessel and the flag State. A global overview of registered fishing vessels is under development and will potentially solve some of the problems relating to the unclear processes of changes in name, ownership and nationality of ships.<sup>248</sup> A role for classification societies is imaginable.

In order to develop a framework for the functioning of classification societies, the drafters might look in the direction of the IMO where a code for recognised organisations is near completion. Such a process would also bridge the gap between the examination of a vessels and the assessment of flag States. On the one hand, it cannot be emphasised enough that the scope in which classification societies can operate is limited. Classification “means assessing, evaluating, and estimating a ships’ reliability and the financial risks it presents.”<sup>249</sup> On the other hand, these tasks are essential in the maintenance of safety of fishing vessels. Updating the Code of Conduct or integrating a legal framework for the

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<sup>246</sup> See FAO (2008) note 163 *supra*, p. 7, FAO (2009) note 84 *supra*, p. 25 and IPOA-IUU, Artt. 44-50.

<sup>247</sup> See FAO (2009) note 84 *supra*, p. 33.

<sup>248</sup> FAO, ‘Global Record of Fishing Vessels, Refrigerated Transport Vessels and Supply Vessels’ in FAO Fisheries and Aquaculture Department [online] cited 6 April 2011 <http://www.fao.org/fishery/global-record/en>.

<sup>249</sup> See Boisson (1994) note 112 *supra*, p. 377.

involvement of classification societies in the world of fisheries in another or new instrument might be necessary.<sup>250</sup> Ideas on the improvement of flag State performance already demonstrate windows of opportunity for the potential application of classification societies, without mentioning the latter specifically though.<sup>251</sup> This omission of a direct link to classification societies is the case for all the major international legal instruments concerning fisheries. Nevertheless, the application in global fisheries of this new entity with centuries of experience might be of indispensable importance in order to improve flag State performance.<sup>252</sup>

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<sup>250</sup> Code of Conduct, Art. 4.3.

<sup>251</sup> See FAO (2009) note 84 *supra*, p. 25.

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## Bibliography

### International legal instruments

International Convention for the Regulation of Whaling (adopted 2 December 1946, entered into force 10 November 1948) 161 *UNTS* 72.

Convention on International Trade in Endangered Species of Wild Fauna and Flora (adopted 3 March 1973, entered into force 1 July 1975) 993 *UNTS* 243.

International Convention for the Safety of Fishing Vessels (adopted at 2 April 1977, not in force).

Convention on the Conservation of Migratory Species of Wild Animals (adopted 23 June 1979, entered into force 1 November 1983) 1651 *UNTS* 355.

Memorandum of Understanding on Port State Control (adopted 26 January 1982, in effect 1 July 1982).

United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 21 *ILM* 1245.

United Nations Convention on Conditions for Registration of Ships, adopted 7 February 1986, not in force).

Protocol Relating to the International Convention for the Safety of Fishing Vessels (adopted 24 April 1993, not in force).

Agreement to Promote Compliance with International Conservation and management Measure by Fishing Vessels in the High Seas (adopted 24 November 1993, entered into force 24 April 2003) 33 *ILM* 969.

Asia-Pacific Memorandum of Understanding on Port State Control in the Asia-Pacific Region (adopted 1 December 1993, in effect 1 April 1994).

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 Straddling Fish Stocks and Highly Migratory Fish Stocks (adopted 4 August 1995, entered into force 11 November 2001) 34 *ILM* 1542.

Code of Conduct for Responsible Fisheries (adopted by the Twenty-eight Session of the FAO Conference, Rome, 31 October 1995).

International Plan of Action for the Conservation and Management of Sharks (adopted by FAO's Committee on Fisheries in February 1999 and endorsed by the FAO Council in June 1999).

International Plan of Action for Reducing Incidental Catch of Seabirds in Longline Fisheries (adopted by FAO's Committee on Fisheries in February 1999 and endorsed by the FAO Council in June 1999).

International Plan of Action for the Management of Fishing Capacity (adopted by FAO's Committee on Fisheries in February 1999 and endorsed by the FAO Council in June 1999).

International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (adopted by consensus by FAO's Committee on Fisheries on 2 March 2001 and endorsed by the FAO Council on 23 June 2001).

Model Scheme on Port State Measures to Combat Illegal, Unreported and Unregulated Fishing (implicitly endorsed by FAO's Committee on Fisheries in March 2005).

Declaration on Illegal, Unreported and Unregulated Fishing (Rome, 2005).

Annex 1. Flag State Code of 29 March 2007. *Official Journal of the European Union* (31 January 2008) C 27 E/154 - E/162.



Regulation (EC) no. 391/2009 of 23 April 2009 on common rules and standards for ship inspection and survey organisations. *Official Journal of the European Union* (28 May 2009) L 131/11 – L 131/23.

Directive 2009/15/EC of 23 April 2009 on common rules and standards for ship inspection and survey organisations and for the relevant activities of maritime administrations. *Official Journal of the European Union* (28 May 2009) L 131/47 – L 131/56.

Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (adopted 22 November 2009, not in force).

General Assembly of the UN. *Sustainable fisheries, including through the 1995 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, and related instruments* (A/RES/65/38).

## Cases

*S.S. Lotus* (France v. Turkey), Permanent Court of International Justice, The Hague, 7 September 1927.

*Nottebohm* (Liechtenstein v. Guatemala), International Court of Justice, The Hague, 6 April 1955.

*Fisheries Jurisdiction* (United Kingdom of Great Britain and Northern Ireland v. Iceland), International Court of Justice, The Hague, 25 July 1974.

*Case concerning the Continental Shelf* (Libyan Arab Jamahiriya v. Malta), International Court of Justice, The Hague, 3 June 1985.

*M/V "Saiga" (No. 2)* (Saint Vincent and the Grenadines v. Guinea), International Tribunal for the Law of the Sea, The Hague, 1 July 1999.

## Documents

Canada, Government of. *Expert Workshop on Flag State Responsibilities: Assessing Performance and Taking Action. Guidance Document*. May 2009.

*Chairperson's Report on the First Session of the Technical Consultation on Flag State Performance*. Rome (FAO) 2-6 May 2011.

FAO. *Report of the Expert Consultation on the Development of a Comprehensive Global Record of Fishing Vessels* (Rome, 25–28 February 2008) *FAO Fisheries Report* no. 865. Rome (FAO) 2008.

FAO. *Report of the Expert Consultation on Flag State Performance* (Rome, 23–26 June 2009) *FAO Fisheries and Aquaculture Report* no. 918. Rome (FAO) 2009.

FAO. *Report of the Technical Consultation to Identify a Structure and Strategy for the Development and Implementation of the Global Record of Fishing Vessels, Refrigerated Transport Vessels and Supply Vessels* (Rome, 8–12 November 2010) *FAO Fisheries and Aquaculture Report* no. R956. Rome (FAO) 2011.

FAO. 'Global Record of Fishing Vessels, Refrigerated Transport Vessels and Supply Vessels' in *FAO Fisheries and Aquaculture Department* [online] cited 6 April 2011 <http://www.fao.org/fishery/global-record/en>.

Report of the Secretary General on Oceans and Law of the Sea. UN Doc A/63/63. 10 March 2008.

Report of the Secretary General on Oceans and Law of the Sea. UN Doc A/66/70/Add. 1. 11 April 2011.

Sub-Committee of the International Maritime Organisation on Flag State Implementation (submitted by the Paris MoU and Tokyo MoU). *Update on actions emanating from the Second Inter-regional Ministerial Conference on Port State Control*. 19 January 2009. FSI 17/INF.6.

Sub-Committee of the International Maritime Organisation on Flag State Implementation (submitted by Nigeria, Sierra Leone, and St. Kitts and Nevis). *Development of a Code for Recognized Organizations: Proposal for future work*. 6 February 2009. FSI 17/14/2.

Sub-Committee of the International Maritime Organisation on Flag State Implementation (Note by the Secretariat). *Outcome of the fourth IMO Workshop for PSC MoU/Agreement Secretaries and Directors of Information Centres*. 11 February 2009. FSI 17/7/1.

Sub-Committee of the International Maritime Organisation on Flag State Implementation (submitted by Mongolia). *Development of a Code for Recognized Organizations: Analysis of the factors to be addressed in the development of a Code*, 26 February 2009. FSI 17/14/4.

## Books

Birnie, P., A. Boyle and C. Redgwell. *International Law & the Environment*. 3<sup>rd</sup> edition. Oxford (Oxford University Press) 2009.

Burke, W.T. *The New International Law of Fisheries: UNCLOS 1982 and Beyond*. Oxford (Clarendon Press) 1994.

Churchill, R.R. and A.V. Lowe. *The Law of the Sea*. 3<sup>rd</sup> edition. Manchester (Manchester University Press) 1999.

Coning, E. de. *Transnational Organized Crime in the Fishing Industry* (publication prepared for the United Nations Office on Drugs and Crime) 2011.

Falkanger T., H.J. Bull and L. Brautaset. *Scandinavian Maritime Law: The Norwegian Perspective*. 3<sup>rd</sup> edition. Oslo (Universitetsforlaget) 2011.

Goldrein I. and P. Turner. *Ship Sale and Purchase*. 4<sup>th</sup> edition. London (LLP) 2003.

Grime, R. *Shipping Law*. 2<sup>nd</sup> edition. London (Sweet & Maxwell) 1991.

Grotius, H. *Mare liberum sive de iure quod Batavis competit ad indicana commercia. Dissertatio* (translated by R. van Deman Magoffin). Union, New Jersey (Lawbook Exchange) 2001.

Hodges, S. and C. Hill. *Principles of Maritime Law*. London (LLP) 2001.

Lagoni, N. *The Liability of Classification Societies*. Springer (Berlin and Heidelberg) 2007.

Lobach, T. *Port State control of foreign fishing vessels. FAO Fisheries Circular no. 987*. Rome (FAO) 2003.

Mandaraka-Sheppard, A. *Modern Maritime Law and Risk Management*. 2<sup>nd</sup> edition. London (Informa) 2009.

Mansell, J.N.K. *Flag State Responsibility: Historical Development and Contemporary Issues*. Dordrecht etc. (Springer) 2009.

Nordquist et al., M.H. (eds.). *United Nations Convention on the Law of the Sea 1982. A Commentary* vol. III. The Hague, London and Boston (Martinus Nijhoff Publishers) 1995.

Özçayır, Z.O. *Port State Control*. 2<sup>nd</sup> edition. London (LLP) 2004.

Shaw, M.N. *International Law*. 5<sup>th</sup> edition. Cambridge etc. (Cambridge University Press) 2003.

Strong, M. and P. Herring. *Sale of Ships: The Norwegian Saleform*. 2<sup>nd</sup> edition. London (Sweet & Maxwell Thomson Reuters) 2010.

Swan, J. *Fishing Vessels operating under open registers and the exercise of flag State responsibilities. Information and options. FAO Fisheries Circular no. 980*. Rome (FAO) 2002.

## Articles & papers

Boisson, P. 'Classification societies and safety at sea: Back to basics and prepare for the future'. 1994 *Marine Policy* no. 5, pp. 363-377.

Conceição-Heldt, E. da. "Taking Actors' Preferences and the Institutional Setting Seriously: the EU Common Fisheries Policy.' 2006 *Journal of Public Policy* no. 3, pp. 279-299.

D'Andrea, A. *The "genuine link" concept in responsible fisheries: Legal aspects and recent developments. FAO Legal Papers Online* no. 61. 2006.

Davis, J.M. 'Monitoring Control Surveillance and Vessel Monitoring System Requirements to Combat IUU Fishing' in FAO. *Report of and papers presented at the Expert Consultation on Illegal, Unreported and Unregulated Fishing* (Sydney, Australia, 15-19 May 2000) *FAO Fisheries Report* no. 666. Rome (FAO) 2001.

Fitzpatrick, J. 'Measures to enhance the capability of a flag State to exercise effective control over a fishing vessel' in FAO. *Report of and papers presented at the Expert Consultation on Illegal, Unreported and Unregulated Fishing* (Sydney, Australia, 15-19 May 2000) *FAO Fisheries Report* no. 666. Rome (FAO) 2001.

Gjerde, K.M. 'High Seas Fisheries Management under the Convention on the Law of the Sea' in D. Freestone, R. Barnes and D.M. Ong (eds.). *The Law of the Sea: Progress and Prospects*. Oxford (Oxford University Press) 2006, pp. 281-307.

Hardin, G. 'The Tragedy of the Commons'. 1968 *Science*, pp. 1243-1248.

Hilborn et al., R. 'States of the world fisheries' 2003 *Annual Review of Environmental Resources*, pp. 15.1-15.40.

Kuemlangan, B. 'National legislative options to combat IUU fishing' in FAO. *Report of and papers presented at the Expert Consultation on Illegal, Unreported and Unregulated*

*Fishing* (Sydney, Australia, 15-19 May 2000) *FAO Fisheries Report* no. 666. Rome (FAO) 2001.

Lequesne, C. 'Quota Hopping: The Common Fisheries Policy Between States and Markets'. 2000 *Journal of Common Market Studies* no. 5, pp. 779–793.

Lobach, T. 'Measures to be adopted by the port State in combating IUU fishing' in FAO, *Report of and papers presented at the Expert Consultation on Illegal, Unreported and Unregulated Fishing* (Sydney, Australia, 15-19 May 2000) *FAO Fisheries Report* no. 666. Rome (FAO) 2001.

McConnell, M. 'Business as Usual: An Evaluation of the 1986 United Nations Convention on Conditions for the Registration of Ships'. 1987 *Journal of Maritime Law & Commerce* no. 3, pp. 435-449.

Oude Elferink, A.G., 'De Groot – A founding father of the law of the sea, not the Law of the Sea convention' 2009 *Grotiana*, pp. 153-168.

Pilley, R. and F. Lorenzon. 'International Regulations for Ship Operators, their Verification and Enforcement, in: *Southampton on Shipping Law*. London (Informa) 2008, pp. 227-249.

Rayfuse, R. 'The Anthropocene, Autopoiesis and the Disingenuousness of the Genuine Link: Addressing Enforcement Gaps in the Legal Regime for Areas Beyond National Jurisdiction' in E.J. Molenaar and A.G. Oude Elferink (eds.). *The International Legal Regime of Areas beyond National Jurisdiction: Current and Future Developments*. Leiden (Martinus Nijhoff) 2010, pp. 165-190.

Vorbach, J.E. 'The Vital Role of Non-Flag State Actors in the Pursuit of Safer Shipping'. 2001 *Ocean Development & International Law* no. 1, pp. 27—42.