



## HOW WELL ARE FLAG STATES PERFORMING?

Meeting of the High Seas Task Force  
Paris, 9 March 2005

We propose to prepare guidelines on flag State performance with respect to high seas fishing vessels – effectively a statement of best practice. These guidelines may be used as criteria against which to evaluate flag State performance and give publicity to flag States that fall short of international standards.

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## A. INTRODUCTION

1. To help bring greater transparency to the ownership and control of high seas fishing vessels we have proposed to establish a publicly-available international database of information relating to the global high seas fishing fleet. The objective behind this proposal is not only to help to expose and deter IUU fishers but also to create a powerful disincentive to the renaming and reflagging of fishing vessels. We also recognize, however, that an underlying problem is that many flag States fail to live up to their responsibilities under international law to exercise control over fishing vessels flying their flag. The annex to the present paper contains a brief discussion of those responsibilities and some of the major shortcomings in the system of ship registration. The message for the Task Force is that, given the complexity of the issues and the variety of interests involved – which extend far beyond the fishing industry – we should not expect radical improvements to the existing system to be brought about in the immediate future. The efforts of the Task Force should therefore focus on what can easily be achieved in the short term in order to influence flag State performance.

2. To reinforce the global information system on high seas fishing vessels, we propose to prepare guidelines on flag State performance with respect to such vessels. Drawing on precedents from the global ocean-going shipping industry, the aim would be to establish an objective list of the responsibilities that those involved in the high seas fishing industry, including States, RFMOs, fishers and consumers might reasonably expect of flag States in respect of their fishing vessels. Such a list could form the basis for criteria for evaluating the performance of individual flag States and giving publicity to those that fall short of desirable standards.

## B. GUIDELINES ON FLAG STATE PERFORMANCE

3. There is a precedent for this type of action. The Round Table of shipping industry organizations, which represents a substantial proportion of global tonnage and a broad cross-section of shipping interests,<sup>1</sup> has recently developed a set of guidelines on flag State performance, available at [www.marisec.org/flag-performance](http://www.marisec.org/flag-performance). Obviously, these particular guidelines are aimed at the global ocean-going cargo shipping industry, but the concept itself is worthy of more detailed consideration. The stated objectives of the shipping industry guidelines are as follows:

(a) to encourage ship owners and cargo owners to examine whether a flag State has sufficient substance before using it; and

(b) to encourage shipowners and operators to put pressure on their flag administrations to effect any improvements that might be necessary, especially in relation to safety of life at sea, the protection of the marine environment and the provision of decent working and living conditions for seafarers.

4. The guidelines list the responsibilities that a shipping company might reasonably expect of a flag State. The intention is to provide indicators that might be used as criteria for determining whether a flag State is taking its responsibilities seriously. The responsibilities include such things as:

- Infrastructure
- Participation in international maritime treaties
- Implementation and enforcement record
- Port State control (results of inspections under the Paris and Tokyo MOUs)

- Supervision of surveys
- Compliance with International Safety Management Code
- Seafarers' competence standards
- Safe manning levels
- Casualty investigations
- Movement of ships between flags
- Self-assessment
- Participation at ILO and IMO meetings

5. The performance of flag States against these criteria is evaluated by the Round Table and a flag State performance table is issued. The most recent was issued in December 2004. The table does not attempt to rank flag States, but negative performance indicators are highlighted and the flag States with the highest number of negative performance indicators are indicated.<sup>2</sup> A similar audit scheme is operated on a commercial basis by the Seafarers International Research Centre at Cardiff University, UK, although that scheme is aimed primarily at auditing maritime safety requirements and labour conditions.<sup>3</sup>

6. The model could readily be applied to high seas fishing vessels. Setting and applying such standards would not only reinforce efforts to expose and deter IUU fishing but also would be consistent with the focus of the HSTF on defining and exposing irresponsible flag States. The aim must be to exert pressure to get all flag States to comply with their obligations regarding their registered fishing fleets.

7. A statement of best practice endorsed by the HSTF would provide criteria which could be used by HSTF members or by others to independently evaluate the performance of flag States and determine whether flag State administrations are taking their responsibilities seriously. It would enable all sectors involved in high seas fishing to make appropriate decisions: including flag State administrations themselves,<sup>4</sup> port States (which might adopt a policy of inspecting under-performing flags), RFMOs, NGOs, responsible fishing companies (which may not wish to be associated with certain flag States), responsible corporate buyers and consumers. These efforts could be supported by a broadly-based public education campaign to explain the problem of under-performing flag States and catalyse public support for action. This is an area where non-government organizations and industry groups have particular expertise and can be of significant assistance.

8. This is a proposal which could be implemented within a reasonable time frame and at low cost to HSTF members. It does not necessarily require broader multilateral agreement. A great deal of background work on defining the criteria for flag State responsibility in relation to fishing vessels has already been done<sup>5</sup> and it would be relatively straightforward to adapt these criteria for the purposes of the HSTF. In due course the proposal could be taken one step further and linked more explicitly to other HSTF proposals if HSTF members were also to agree on action to be taken against flag States that consistently failed to meet performance standards.

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<sup>1</sup> The Round Table of shipping industry organizations is an industry body which consists of the following: BIMCO, INTERCARGO, International Chamber of Shipping, International Shipping Federation and INTERTANKO. BIMCO's membership spans 123 countries and includes more than 2,550 companies, 1,500 brokers and agents and 100 club and associate members. Owner members alone control 65% of the world merchant fleet. INTERTANKO members represent 70% of the world's independent tanker fleet.

<sup>2</sup> In 2004 these were Albania, Bolivia, Cambodia, Costa Rica, Democratic Republic of Congo, Honduras, Madagascar, Mongolia, Sao Tome & Principe, Suriname and Syrian Arab Republic. See <http://www.marisec.org/flag-performance/> (latest available is based on data as of end of June 2004).

<sup>3</sup> See [www.sirc.cf.ac.uk/fsa.html](http://www.sirc.cf.ac.uk/fsa.html) Flag State Audit 2003 (Full subscription £190).

<sup>4</sup> Flag States for which fishing vessel registration represents a small fraction of registration income might well decide not to register fishing vessels at all if doing so could adversely affect their reputation.

<sup>5</sup> See, for example, the FAO Guidelines on implementation of the IPOA-IUU (Technical Guidelines for Responsible Fisheries No. 9, FAO, 2002) and the statement of flag State responsibilities appended to the Report of the UN Secretary-General's Consultative Group on Flag State Implementation, A/59/63.

## ANNEX

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### STATUS OF CURRENT FLAG STATE OBLIGATIONS WITH RESPECT TO HIGH SEAS FISHING VESSELS

The 1982 United Nations Convention on the Law of the Sea (LOSC) confirms the right of every State to sail ships flying its flag on the high seas, subject only to a general requirement to effectively exercise its jurisdiction and control in administrative, technical and social matters.

An essential prerequisite to operating a ship on the high seas is for that ship to acquire the flag of a State, usually through an act of registration. The conceptual basis for this requirement is that because the high seas are not subject to the jurisdiction of any State, in order to preserve public order in the oceans, the right to navigate on the high seas must be restricted to those vessels which, through their link to a State, are subject to its jurisdiction and can therefore be held to account for compliance with international rules. The law of the sea therefore provides that a ship must fly the flag of a single State only and shall be subject to the exclusive jurisdiction of that State on the high seas.

As a general proposition the flag State has primary responsibility under international law for controlling the fishing activities of its vessels. If the vessel is fishing in waters under the jurisdiction of the flag State, the responsibility of the flag State is exclusive and, as a general rule, no other State has the right to control the fishing activities of the vessel. The only general provision in the LOSC which purports to direct flag States to take responsibility for their vessels on the high seas is article 117 which imposes a duty on all States to take “such measures for their respective nationals as may be necessary for the conservation of the living resources of the high seas.” On the high seas therefore, the flag State has exclusive jurisdiction over vessels flying its flag, subject only to certain narrowly-defined situations of extraordinary jurisdiction, including piracy, terrorism, illicit traffic in narcotics and unauthorized broadcasting from the high seas. Some limited inroads have also been made into this principle through recent agreements which have given States other than the flag State the right to take action with respect to fishing vessels on the high seas,<sup>1</sup> but nothing in these agreements abrogates the fundamental principle of flag State responsibility.

Unfortunately, the international community of States has not been able to come to any agreement on whether the basic right of all States to grant nationality to a ship can be conditioned by requirements that specify the nature and content of the link between the vessel and the State. The LOSC characterizes the nature of the relationship between States and those authorised to fly their flags in minimal terms: there must be “a genuine link” (article 91). Article 94 requires every State to effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag. Apart from these provisions, determination of the criteria and establishment of the procedures for granting and withdrawing nationality to ships are matters for the exclusive jurisdiction of the flag State.<sup>2</sup> It may not be unreasonable to suggest that failure by a State to perform its duties under article 94 is evidence of the absence of any genuine link between that State and the vessel concerned under article 91 – although this is not a hypothesis that has been tested so far in any international court or tribunal.

The inadequacy of the current system of flag State responsibility is well-documented and widely recognized. Fisheries is in fact part of a much larger problem. Effective flag State control is also a vital factor with regard to safety of life at sea, reducing substandard shipping, protection of the marine environment through control of pollution and the welfare of seafarers. Two quotations sum up the present situation.

“In an ideal world flag States, whose flags are worn by the world’s shipping, would lay down and enforce upon their own shipowners, standards of design, maintenance and operation which would ensure a very high standard of safety at sea. ... The present system of flag State control falls well short of this ideal ... regrettably it is beyond argument that not all flag States live up to their responsibilities.”

“Ideally flag States which failed to live up to their internationally agreed obligations would face severe sanctions, including withdrawal of recognition of their authority.”<sup>3</sup>

Indisputably, we do not live in an ideal world!

## I. The “genuine link”

In the fisheries world, a great deal of hope has been pinned in recent years on a definition of the genuine link as a potential solution to the problem of irresponsible flagging of fishing vessels. Thus, in its annual resolution on oceans and the law of the sea for 2003, the UN General Assembly extended an invitation to the IMO and other relevant international organizations to study, examine and clarify the role of the genuine link in relation to the duty of flag States to exercise effective control over ships flying their flag, including fishing vessels.<sup>4</sup> The IMO’s response to this invitation, contained in a document submitted in to the UN Informal Consultative Process on Oceans and the Law of the Sea in June 2004 noted that whilst more work needs to be done on strengthening flag State implementation of existing international rules, “questions relating to the ownership of vessels should be considered as subject matters of an economic corporate nature that clearly fall beyond the purview of the law of the sea and the mandate of the international organizations as identified in the Convention on the Law of the Sea.” This seems to draw a very narrow distinction indeed between the technical aspects concerned and the broader principle of flag State responsibility.

Nevertheless, the IMO statement accurately reflects the reality of the global shipping industry, in which open registers predominate as the most efficient economic vehicle through which shipowners can do business. Statistics for the period 1999-2003 indicate that the 35 most important (in terms of tonnage) maritime countries accounted for 94 per cent of the world’s fleet. In 2003, 76.4 per cent of that was flagged out to the six major open-registry countries.<sup>5</sup>

Given the predominant economic interest in maintaining the system of open registries, it is hardly surprising that the only comprehensive, treaty-based attempt to define the genuine link failed. The UN Convention on Conditions for Registration of Ships, negotiated in UNCTAD in 1986, was supposed to spell out minimum requirements for economic links between a ship and the flag State and to require flag States to ensure that the owners and operators of ships on its register are “adequately identifiable for the purpose of ensuring their full accountability.”<sup>6</sup> After 20 years, only 11 countries (none of them major maritime powers or major flag States) have ratified the Convention, which must now be regarded as a dead letter.

## II. Enhanced security and safety measures

IMO and other competent international organizations recognize the need for greater transparency in the ownership and control of shipping. In the light of current global security concerns, as well as ongoing concern over the prevalence of substandard shipping, significant steps have been taken to encourage better compliance by flag States.

In 2003, the Secretary-General of the United Nations established a Consultative Group on Flag State Implementation.<sup>7</sup> The group has recently issued a comprehensive elaboration of the duties and obligations of flag States, including the potential consequences of non-compliance prescribed in the relevant international instruments.<sup>8</sup> The report of the Consultative Group is recommended as an up to date summary of the measures taken by IMO and others aimed at strengthening flag State

implementation. In IMO, these measures include the establishment of a Subcommittee on Flag State Implementation and the introduction of a voluntary audit scheme for member States.

As a result of the current emphasis on security IMO also introduced in 2002 an International Ship and Port Facility Security Code (ISPS Code). The Code contains detailed mandatory security requirements for governments, port authorities and shipping companies. It includes a requirement that ships carry an International Ship Security Certificate (ISSC) indicating compliance with the Code. The ISSC must be produced prior to entry into port and port entry may be denied in certain circumstances where there has been a violation of the provisions of the Code. Automatic identification systems will be mandatory for all ships over 500 gt from December 2004.

Already since 2002, merchant ships over 500 gt have been required to comply with the International Safety Management (ISM) Code. The ISM Code<sup>9</sup> establishes an international standard for the safe management and operation of merchant shipping. It requires a safety management system to be established by the person or entity that has assumed responsibility for the operation of the ship, which may be the shipowner, the manager of the ship or a bareboat charterer. The ISM code requires that this person or entity is issued with a document of compliance (DOC) to show that it complies with the requirements of the code. The DOC, which is issued by the maritime administration of the flag State (or a relevant classification society), must be carried on board the ship at all times.

Unfortunately, most of these recently-introduced security measures have no application to fishing vessels, the vast majority of which are under 500 gt. However, the situation is even worse because most of the earlier SOLAS requirements also do not apply to fishing vessels, which have historically been considered separately from other types of ships.<sup>10</sup> Although the safety of fishing vessels had been a concern to IMO since the Organization came into existence, the first ever international conference on the safety of fishing vessels did not take place until 1977. That conference led to the adoption of the Torremolinos Convention, setting out safety requirements for the construction and equipment of new seagoing fishing vessels over 24 metres in length. The Torremolinos Convention never entered into force and a replacement, in the form of a Protocol, was negotiated in 1993. The Protocol also applies to fishing vessels over 24 metres in length and was intended to encourage ratification by taking a more pragmatic approach to the requirements contained in the original convention. Despite this, the Protocol has failed to attract more than 10 signatories, representing a dismal 9.71 per cent of world tonnage.

### **III. Substandard shipping and transparency in ownership and control**

The Maritime Transport Committee (MTC) of OECD has over the past several years produced several substantive reports relating to the problem of sub-standard shipping. As a result of these studies, member countries of the MTC have adopted a *Policy Statement on Substandard Shipping* (2002) and an *Action Plan to Combat Substandard Shipping* (2002).

In June 2004, the MTC issued a major report on options to improve transparency in ownership and control of ships.<sup>11</sup> The report noted that all shipping registers are vulnerable to potential misuse by terrorists or organized crime, but that open registers are inherently far more vulnerable, especially those promoting the fact that they are committed to protecting the anonymity of beneficial owners of vessels. The report proposed a number of measures aimed at increasing transparency in the ownership and control of ships. These include, in relation to open registers:

- (a) scrutiny of ship-owning arrangements that involve foreign corporate vehicles to ensure that beneficial ownership details are available;
- (b) elimination of the use of devices such as bearer shares, nominee directors, office holders and shareholders; and
- (c) requiring a substantial and robust local presence by the shipowner in the jurisdiction.

The report also points out that the freely available corporate mechanisms that are used by the beneficial owners of corporations and other entities to conceal their identities are not unique to the shipping industry, but may also be used for other illicit activities such as money laundering. There are obvious links therefore with work being undertaken by the Financial Action Task Force on Money Laundering, the OECD Steering Group on Corporate Governance<sup>12</sup> and the OECD Forum on Harmful Tax Practices. If the measures promoted and recommended by these bodies were to be implemented and applied, and were to apply equally to ship-owning corporations, they would go a long way towards addressing concerns of lack of transparency.

Recognizing that, by the very nature of the problem, flag States that continue to promote anonymity are unlikely to voluntarily implement the above recommendations, the MTC also proposed a number of measures that may be taken against jurisdictions that provide corporate mechanisms that facilitate anonymity. These include relatively soft measures, such as encouraging flag States to address transparency of ownership, to more intrusive and disruptive measures such as targeting ships where beneficial ownership is obscure, or even ships from particular flag States, for intensive scrutiny and restricting port access to ships which offer full disclosure of beneficial ownership. We recommend these measures to HSTF members.

#### **IV. Measures applicable to fishing vessels**

We can see that, compared to the global merchant fleet, the global high seas fishing fleet suffers from a lack of regulation. Although many of the measures described above have been developed in response to specific concerns over the threat of international terrorism there seems to be no reason in principle why they should not apply equally to fishing vessels as well as to vessels engaged in maritime commerce. Indeed, given that lack of transparency in the ownership of fishing vessels is widespread, coupled with the fact that fishing vessels are exempt from many of the IMO conventions, it is arguable that ocean-going fishing vessels as a class are highly vulnerable to potential misuse by terrorists and organized crime and pose a specific threat for this reason. When considered in this way, the different treatment that is accorded to high seas fishing vessels as opposed to other merchant vessels seems difficult to justify or explain on any rational basis.

#### **V. Conclusions**

Because of the relative lack of regulatory measures aimed specifically at fishing vessels, a number of international fisheries instruments include provisions aimed at requiring flag States to exercise greater control over fishing vessels. There is a clear trend to require that (a) high seas fishing is expressly authorized by the flag State, (b) the flag State maintains records of all vessels to which an authorization has been issued and (c) these records are collated at regional and global levels by RFMOs and the FAO. Unfortunately, these obligations are reflected in different ways in different instruments, including UNFSA, the FAO Compliance Agreement and the FAO International Plan of Action on IUU Fishing (IPOA-IUU), and are not yet universally or consistently applied by States. They can, nevertheless, be viewed as part of an emerging corpus of international law and practice aimed at clarifying the duties of flag States in relation to fishing vessels under article 94 of the LOS Convention.

Despite increasing focus on the need for a better definition of the genuine link,<sup>13</sup> we are not wholly convinced that pursuit of a better definition of the genuine link in multilateral fora is likely to result in any leverage in the fight against IUU fishing. It is suggested that a more fruitful line of investigation for the HSTF is to further explore the implications of the hypothesis that failure by a State to perform its duties under article 94 provides evidence of the absence of any genuine link between that State and the vessel concerned under article 91. In the “*Grand Prince*” case,<sup>14</sup> the ITLOS declined to recognize the *Grand Prince* as having the nationality of Belize because of uncertainty as to whether the vessel was validly registered in Belize. This suggests that if States were prepared to be more questioning about whether vessels engaged in IUU fishing on the high seas are validly registered in the claimed flag State it might be discovered that there are more vessels fishing on the high seas that may be

considered stateless (and thus susceptible to arrest) than previously thought. In the case of such an arrest, if the flag State fails to act, at least one fishing vessel will have been removed from the high seas and other vessels registered under the same flag might decide to change registry. If the flag State does act, it might be further argued that its poor compliance record places it in breach of its international legal obligations with regard to conservation of high seas resources.

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<sup>1</sup> For example, articles 21 and 22 of UNFSA, which permit boarding and inspection of fishing vessels on the high seas.

<sup>2</sup> See the decision of the International Tribunal for the Law of the Sea in the *M/V Saiga* case (The *M/V Saiga* Case (No.2) (Saint Vincent and the Grenadines v. Guinea), Judgement of 1 July 1999; text at [www.itlos.org](http://www.itlos.org)) at par. 83. See also article 91 of the LOS Convention.

<sup>3</sup> Lord Donaldson, "Safer Ships, Cleaner Seas" (Inquiry into the loss of the tanker *Braer*, 1994).

<sup>4</sup> A/RES/58/240, paragraph 28. Request repeated in 2004 resolution. This is despite a joint IMO-FAO *ad hoc* working group on IUU fishing having swiftly ducked the issue in 2000 by blandly agreeing- without any elaboration - that there was little benefit in attempting to define the concept of a 'genuine link' between a vessel and the State whose flag it flies.

<sup>5</sup> UNCTAD data in A/59/63. The six major open registers are Panama, Liberia, Bahamas, Malta, Cyprus and Bermuda.

<sup>6</sup> Article 6.

<sup>7</sup> Comprises UN/DOALOS, IMO, FAO, ILO, UNCTAD, UNEP and OECD.

<sup>8</sup> UN Doc. A/59/63.

<sup>9</sup> International Code for the Safe Operation of Ships and for Pollution Prevention (mandatory since 1 July 2002 under the International Convention on Safety of Life at Sea (SOLAS) for all vessels over 500 gt).

<sup>10</sup> Thus vessels solely engaged in fishing are not even required to have an IMO Ship Identification Number.

<sup>11</sup> DSTI/DOT/MTC(2003)61/Rev.1.

<sup>12</sup> In particular the template recommended by the Steering Group on Options for Obtaining Beneficial Ownership and Control Information (2002).

<sup>13</sup> At the request of the UN General Assembly, IMO will convene an inter-agency consultative meeting of senior officials to discuss the issue of the genuine link in July 2005.

<sup>14</sup> The *Grand Prince* Case (Belize v. France), at [www.itlos.org](http://www.itlos.org)