

HAS THE EXCEPTION BECOME THE RULE? - EXAMINING THE GROWING DOMINANCE OF FLAGS OF CONVENIENCE IN INTERNATIONAL SHIPPING*

Abstract

As a rule of international law, every ship must be registered to one state at a time the flag of which it becomes entitled to fly and the nationality of which it thereby acquires. Each state is also left to fix the conditions upon which it may register a ship. While some states fix strict rules and impose stiff conditions in this regard, and rigidly enforce maritime laws and regulations, others impose light conditions and make enforcement rather lax and perfunctory in order to attract shipping companies, register more and more ships and boost national revenue. Over time, the latter countries have registered much more ships at the expense of the former countries and accordingly earn more revenue from ship registration. Their critics have accused them of registering all manner of substandard ships which have largely been responsible for pollution of the oceans, sea mishaps, poor crew working conditions, illegal fishing, smuggling and maritime insecurity. This paper critically examines the continuously growing dominance of this category of vessels in the international shipping business and seeks to determine whether, due to this dominance, they have become the rule rather than the exception. It argues that considering the important role these vessels play in international shipping, and their wide acceptance by shippers, they have come to stay and that it is more profitable to bring them to play by the rules than to continue to denigrate them. The paper then makes prescriptions on how this could be done.

Keywords: Dominance; Flags of Convenience; International Shipping; Exception; Rule

1. Introduction

The bulk of the world's international trade is facilitated through sea transportation,¹ by ships carrying raw materials and manufactures from nations where they are available to nations where they are needed. Over 40,000 large merchant ships and countless smaller coastal crafts² ply the seven seas that comprise three-fourths of the surface of the earth.³ But like all other modes of transportation, the seas are perilous. Navigating them requires the use of ships built to international standard and so maintained as well as crews that possess requisite training and qualification. Vessel unseaworthiness or crewing vessels with unqualified men or both have been significantly responsible for most maritime accidents that have resulted in loss of lives and property as well as pollution of the marine environment.⁴ This makes it imperative that ships should be subject to the jurisdictions of states the duty of which shall be to ensure that standards are maintained and maritime laws and regulations enforced. It is for this reason that under international law every ship must have a nationality, and ships have the nationality of the state whose flag they are entitled to fly.⁵ All ships plying the seas must, therefore, be registered to one country at a time⁶ to ensure effective jurisdictional oversight and to "notify the international community what state has jurisdiction over them."⁷ But the legal regime of ship registration varies from state to state. While

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¹United Nations statistics shows that maritime transport handles over 80% of the volume of global trade and accounts for 70% of its value since 1970. See United Nations, 'International Trade' <<http://www.un.org/en/2012chapter2.pdf>> accessed 12 July 2020.

²W Langewiesche, 'Anarchy at Sea, *The Atlantic Monthly*, September, 2013, p. 50.

³International Marine Science and Technology, 'The United Nations Convention on the Law of the Sea (UNCLOS)' <<http://www.marine.gov.uk/unclos.htm>> accessed 8 July, 2020; E Holmina, 'Common Heritage of Mankind in the Law of the Sea (2005) 1 *Acta Societas Tis Martenis*, 187; E E Essien, *Essays on International Law of the Sea* (Golden Educational Publishers, Uyo 1994) 108.

⁴See generally, N Akten, 'Shipping Accidents: A serious Threat for Marine Environment' (2006) 12 *J. Black Sea/Mediterranean Environment*, 269-304.

⁵Article 91(1) United Nations Convention on the Law of the Sea, 1982 [hereinafter 'UNCLOS']; Article 4(2) United Nations Convention on Conditions for Registration of Ships, 1986.

⁶A ship is not permitted to be registered in two or more states at a time and shall not change its flag while on a voyage or while in a port of call, except in the case of transfer of ownership or change of registry. See article 92(1) UNCLOS, 1982; article 4(5) United Nations Convention on Conditions for Registration of Ships, 1986.

⁷T Shaughnessy and E Tobin, 'Flags of Convenience: Freedom and Insecurity on the High Seas' <<http://www.law.upenn.edu.pdf>> accessed 11 June 2020.

some countries insist on absolute disclosure of ship owners' identity as a requirement for registration, others do not. While some states insist on high ship building standards and requisite crew qualification and adequate crew welfare, others do not. While some strictly enforce maritime laws and regulations, others do so only perfunctorily. For states that require high standards, the paramount consideration is safety, while for those that do not, it is revenue from ship registration. While the former are called closed registries, the latter are referred to as open registries. At the very extreme of open registries are countries with the least requirements for vessel registration which, like the vessels they register, are referred to as Flags of Convenience (FoC).

Since the 1950s, FoC have been subjects of denigration in the shipping world for the poor standard of shipping they are generally associated with. As shall be shown presently, they have been blamed for all the evils that occur on the seas such as pollution of the marine environment,⁸ illegal/pirate fishing,⁹ maritime terrorism,¹⁰ poor ship labour conditions,¹¹ and maritime insecurity.¹² Traditionally, FoC is considered the exception in international shipping while standardised shipping characterised by an insistence on standard ship-building, use of qualified crews in ships, effective flag state control and stringent enforcement of maritime laws and regulations is considered the rule. This paper considers whether, in view of the present dominance of international shipping by FoC, the patronage and support received by such vessels by shippers from all over the world (including the traditional closed registry nations) and the role they have played in international trade, they have not become the rule rather than the exception.

2. Flags of Convenience

Traditionally, ships flew the flags of their owners' nations because they were regarded as floating pieces of their home countries on ungovernable seas.¹³ The phrase, "flags of convenience" is used to refer to ships registered in countries other than those of their owners for various advantages which such ship owners expect to obtain by avoiding registration in their own national registries. It is a system by which commercial vessels register in countries which operate open registries, the ship usually having no link with the country of registry.¹⁴ Historically, the practice of FoC shipping is said to date back to the Roman Empire.¹⁵ Before the 19th Century ships of American origin engaged in the slave trade flew flags of convenience for the purpose of avoiding anti-slave trade agreements to which the U.S. was party.¹⁶ U.S. ships crossing the Atlantic Ocean were reported to have flown Portuguese flags of convenience during the war of 1812 to avoid being harassed and detained by the British.¹⁷ British ships also flew the

⁸Cases usually cited in support of this claim are pollution of the seas involving the *M/V Torry Canyon*, the *M/V Argo Merchant*, the *M/V Amoco Cadiz*, the *Jessica*, the *Nordic Empress* and the *Erika*, among others, all of which were FoCs, in which large swathes of sea were polluted.

⁹See generally, M Gianni and W Simpson, *The Changing Nature of High Seas Fishing: How Flags of Convenience Provide Cover for Illegal, Unreported and Unregulated Fishing*, Australian Department of Agriculture, Fisheries and Forestry, International Transport Workers' Federation, and WWF International, 2005.

¹⁰United States House of Representatives, Armed Services Committee Hearing, Vessel Operations under Flag of Convenience and their Implications on National Security, <http://www.commdocs.house.gov/committee/security/has164220.000.164220_of.htm> accessed 12 August 2020; M Richardson, 'Cambodia-Listed Ship was Carrying Cocaine: Raid at Sea Highlights Flag Abuses' <http://www.nytimes.com/2002/06/24/news/24iht-a5_64.html> accessed 10 August 2020.

¹¹E Bonacich and J B Wilson, *Getting the Goods* (Cornell University Press, New York 2008) 80; E R DeSombre, *Flagging Standards: Globalization and Environmental Safety and Labour Regulations at Sea* (MIT Press, Cambridge 2006) 72.

¹²It is claimed that intelligence exists to the effect that Al Qaida terrorist network and Sri Lanka's Tamil Tigers own and operate FoC vessels, suggesting a high possibility of maritime terrorism. See *Brassed Off – Flags of Convenience Under Threat*, *The Economist*, 18 May 2002, at 65.

¹³C F L Negret, 'Pretending to be Liberian and Panamanian: Flags of Convenience and the Weakening of the Nation State on the High Seas' (2016) 47(1) *Journal of Maritime Law and Commerce*, 4; R. George, 'Flying the Flag, Fleeing the State' *New York Times*, 24 April 2011, at 2.

¹⁴W. R. Gregory, 'Flag of Convenience: The Development of Open Registries in the Global Maritime Business and Implications for Modern Seafarers' (M. A. Thesis, Georgetown University, 2001) at 2.

¹⁵Z. O. Ozcayir, 'Flags of Convenience and the Need for International Co-operation' (2000) 7(4) *International Maritime Law*, 111.

¹⁶Shaughnessy and Tobin (n 7).

¹⁷Ibid

flags of certain German principalities during the Napoleonic Wars to avoid the French blockade.¹⁸ It was, however, after the Second World War, a time that witnessed a rising need among states to be competitive in international shipping, that there was a noticeable increase in the use of FoC.¹⁹ The need to recover from the economic challenges of the post-World War II era engendered fierce competition among states to appropriate for themselves sizeable portions of the global shipping market. The phrase ‘Flag of Convenience’ was used for the first time in 1958 at a U.S. Senate Committee on Interstate and Foreign Commerce hearing. At the hearing, a representative of the United Fruits Company admitted that its company registered and carried on business in the U.S. but flagged its ships to Honduras because ‘... it is a flag of convenience.’²⁰ The Rochdale Report²¹ of 1970 identified six characteristics that show that a ship is registered to a flag of convenience state. These are:²²

- i. registration by non-citizens is allowed;
- ii. easy registration access, usually with foreign consulates available and unrestricted transfer of registration from the registry;
- iii. minimal or nonexistent taxes;
- iv. the registry country is small, and tonnage charges may produce substantial effects on national income;
- v. ships are free to use non-national labour; and
- vi. the country of registry has neither the power nor the administrative framework to effectively impose domestic or international regulations, nor does it wish to exert control over the companies.

A country with these attributes identified by the Rochdale Report with regard to ship registration is certain to operate an open registry.

A flagged-out ship usually has a multinational character, the nationality of the owners differing from that of the shipmaster, and possibly, from that of the crew members. In extreme cases, there is usually no link whatsoever between the shipowner, the shipmaster and the crew to the country of registry. Ships can thus be registered in an open registry country without the owners ever stepping their feet on the country.²³ Flag of Convenience registration is predicated on the freedom of shipowners to establish and register their vessels in any country of their choice. There are today many countries offering FoC registration, with Panama²⁴ and Liberia²⁵ said to be in the lead. Although a few FoC countries may claim otherwise,²⁶ the main motivation for the proliferation of FoC registries, especially in the developing world, is to boost national income.²⁷ Fees receivable for vessel registration, issuance and renewal of permits, licences and approvals, searches, registration of mortgages, taxes and penalties charged on ship companies for defaults all aggregate to substantial revenue for developing FoC countries. On the part of shipowners, the attraction to FoC registries is the benefit of low operating cost

¹⁸R. P. Carlisle, *Sovereignty for Sale: The Origins and Evolution of the Panamanian and Liberian Flags of Convenience* (The United States Naval Institute, Annapolis 1981) 142.

¹⁹ Ozcayir (n 15) 111.

²⁰ Carlisle (n 18) 142.

²¹The Committee of Inquiry into Shipping was set up by the British Government in 1970 under the chairmanship of the Rt. Hon. Viscount Rochdale. The Committee submitted its Report in May, 1970.

²² Report of the Committee of Inquiry into Shipping (The Rochdale Report). HMSO London, May 1970 Cmnd 4337, at 16, para. 62.

²³For example, the Liberian registry which is regarded an open registry remained in operation, registering thousands of ships throughout the period of the country’s civil war. See C.F.L. Negret, ‘Pretending to be Liberian and Panamanian: Flags of Convenience and Weakening of the Nation State on the High Seas’ (2016) 17(1) *Journal of Maritime Law & Commerce*, 8.

²⁴Panama operates the leading open registry in global shipping as a result of which it has the largest shipping fleet in the world, greater than that of the United States and China combined. About 8,600 ships fly the flag of Panama. See NBC News LATIN AMERICA & CARIBBEAN, ‘Why so many Shipowners find Panama Flag Convenient’, 4 August 2014 <<http://www.bbc.com/news/world/latin-america-28558480>> accessed 12 August 2020; Negret (n 13) 4.

²⁵Liberia is the second largest open registry after Panama with about 4,000 foreign ships flying her flag: The Liberian Registry, ‘Liberian International Ship and Corporate Registry Brochure’ <<http://www.liscr.com/liscr/portals/0/LISCRmaritimebrochureweb.pdf>> accessed 24 August 2020.

²⁷ R Payne, ‘Flags of Convenience and Oil Pollution: A Threat to National Security’ (1980) 3 *Houston Journal of International Law*, 69.

they stand to enjoy arising from low registration fees charged by FoC registries, little or, in some cases zero taxes charged by those countries on profits of shipping companies, and cheap shipboard labour which they are at liberty to source from anywhere in the world.²⁸ Another is the fact that, in most open registries, safety standards are more relaxed and environmental policy less likely to be rigorously enforced.²⁹ Shipowners therefore prefer to operate under such flags where regulatory enforcement is relatively lax. Flag of convenience is, in this sense, generally considered a responsibility-avoidance device.³⁰

3. The Law of the Flag

As pointed out in the introduction, every ship must be registered to one country at a time, the nationality and, therefore, protection of which it becomes entitled to. Registration is the administrative process that connects a ship to a country.³¹ Stateless ships are not entitled to the protection of any state but are subject to the jurisdiction of all states. They have no right to freedom of navigation because they are ‘international pariahs’ that constitute a threat to the order of the seas.³² While international law requires every ship to have the nationality of one state whose flag it is entitled to fly, it leaves states to determine the conditions under which they would grant nationality to ships. Each state is therefore at liberty to lay down the rules guiding the registration of ships at its ports. Once registered to a state, a ship comes under the regulation and jurisdiction of the state of registry wherever it goes. Thus, except in a few cases recognised by international law, ships on the high seas are subject to no authority except that of the state whose flag they fly.³³ The freedom of a state to determine the conditions for the registration of ships in its registry, and the exclusivity of its jurisdiction over ships flying its flag is what is referred to as the ‘law of the flag’. The exclusivity of flag state jurisdiction derives from the historical concept that vessels are floating parts of the flag-country’s territory.³⁴ It follows, therefore, that any exercise of jurisdiction over a foreign ship would amount to an infringement of the sovereignty of the ship’s state of nationality. This international law principle is now codified in article 92 of UNCLOS which provides that ships ‘... sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas.’

The freedom of states to determine the conditions for grant of their nationalities to ships without external interference resulted in a multiplicity of registration systems among States. There is, therefore, a lack of uniformity in the requirements and conditions for registration of ships among members of the international community. It is this autonomy of States to exclusively determine their ship registration regimes that made possible the practice of flag of convenience. No State is permitted to interfere with the conditions under which another State decides to grant nationality to ships through registration. As such, no state can question the legality of another state’s registration of a ship; only the state of registry can question the registration of such ship. This point could be illustrated by the 1873 incident involving the vessel *The Virginus*, a U.S.-registered ship. The ship was arrested on the high sea by Spanish agents because, in breach of U.S. law, the vessel was owned by Cubans. The U.S. responded that Spain must recognise the registration documents carried by the ship and that only the U.S. could question them. Agreeing with the U.S. position, and recognising the ship’s registration documents, Spain returned the vessel.

4. Problems Associated with Flags of Convenience

Vessels flying flags of convenience have over the years become subjects of serious denigration in the shipping world because they are thought to be the exception and not the rule. Their traducers accuse them of constituting threats to life at sea and the marine environment. They are also accused of being

²⁸ Bonacich and Wilson (n 11) at 72.

²⁹ J B Buckley, *The Business of Shipping*, (8th ed., Cornell Maritime Press 2008) 28.

³⁰ L F E Goldie, ‘Environmental Catastrophes and Flags of Convenience – Does the Present Law Pose Special Liability Issues?’ (1991) 3(1) *Pace International Law Review*, 61-62.

³¹ B A Boczek, *Flags of Convenience: An International Legal Study* (Harvard University Press, 1962) 92.

³² *United States v. Marino-Garcia*, 679 F.2d 1382 (11th Cir. Fla. 1982).

³³ *S. S. Lotus (France v. Turkey)* 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7).

³⁴ Negret (n 13).

responsible for most of the illegal fishing that occur on the sea, poor labour conditions, smuggling, etc. It is for these reasons that flag of convenience vessels have in recent times been pejoratively referred to as 'rust buckets', 'pirate flags', 'free boosters' and 'runaway ships'.³⁵

Pollution of the Marine Environment

While maritime mishaps cut across both flags of convenience and ships registered to closed registries, what is in evidence shows that flags of convenience are more likely to cause problems to navigation and the marine environment. Their critics assert that they have low standards for ship work and life,³⁶ and fail to enforce even those.³⁷ Many of the most serious maritime mishaps in history in which lives had been lost and large areas of sea polluted involved vessels flying flags of convenience. It is generally believed that oil tankers registered under flag of convenience have a significantly worse safety record than their counterparts registered under closed registers.³⁸

Poor Labour Conditions

Among closed registry countries, legislation are not only enacted but vigorously enforced respecting the working condition of Shipboard workers. Non-compliance by shipowners with such legal regime is usually penalised. In Nigeria, for example, the Merchant Shipping Act³⁹ (Nigeria's flag-ship maritime legislation) contains copious regulations aimed at ensuring that crewmen are provided proper living conditions on board ships.⁴⁰ In line with the right to freedom of association, shipboard workers are in those countries allowed the freedom to form unions and become members of international union federations such as the International Transport Workers Federation (ITF). The case is different with respect to countries that offer flag of convenience vessel registration. Under flag of convenience registration, flag states generally allow shipowners the freedom to source for shipboard labour from anywhere in the world and little or nothing is done to ensure that crew members possess necessary qualification and training to carry out shipboard duties and that their working conditions meet international standard. Salaries of crew members are usually far lesser than those of their counterparts working in ships registered in the traditional, closed registries and are often delayed. Annually, the ITF receives complaints from crew members working in flag of convenience vessels over such issues as employer's anti-union activities, refusal to pay wages, refusal to reimburse for work-related injuries and unsafe living and working conditions.⁴¹ As a result, there have been cases of mistreatment of crewmen working in flags of convenience over the years which in some cases resulted in the abandonment of such vessels at ports by crewmen. In the summer of 2001, for example, 17 crew members abandoned the cruise ship *Ocean Glory I* at a port in Dover, England and made a complaint to the ITF protesting unsafe working and living conditions which they had endured working in the ship.⁴² The *Ocean Glory I* flies the Panamanian flag of convenience.

Illegal Fishing

Another challenge posed by flags of convenience is what has come to be known as Illegal, Unreported and Unregulated (IUU) fishing. 'Illegal' refers to fishing by large fishing vessels in ways and in waters inconsistent with laws and regulations. It is fishing conducted by vessels in waters under the jurisdiction of a state without the permission of that state or in contravention of state laws and regulations or obligations under international law. Fishing could be illegal, unreported and unregulated if carried out in waters where the vessel has no right or permission to fish, or in waters where it is permitted to fish but in contravention of conservation and management measures adopted for fishing in the particular

³⁵ R S Toh and S-Y Phang, 'Quasi Flag of Convenience: The Wave of the Future' (1993) (33)(2) *Transportation Journal*, 21.

³⁶ Shaughnessy and Tobin (7).

³⁷ W Tetley, 'The Law of the Flag, 'Flag Shopping', and Choice of Law' (1993) 17 *TUL. MAR. L. J.*, 158.

³⁸A Schulkin, 'Safe Harbours: Crafting an International Solution to Cruise Ship Pollution' (2002) 1 *GEO. INT'L ENVTL. L. REV.* 125; M L Boos, 'The Oil Pollution Act of 1990: Striking the Flags of Convenience?' (1991) 2 *Colo. J. Int'l Envtl. L & Pol'y*, 408.

³⁹ Cap. M11, LFN 2004 (Revised in 2010)

⁴⁰ *Ibid.*, sections 175- 188.

⁴¹ Shaughnessy & Tobin (7).

⁴²American Maritime Officer, 'Scandals Taint Panama's Reputation as Maritime Nation' <<http://www.amo-union.org/Newspaper/morgue/8-2001/Sections/News/Scandals.htm>> accessed 26 October 2020.

fishery.⁴³ ‘Unreported’ means that the fishing activity is not reported to relevant authorities to which it ought to be reported in contravention of national laws and regulations; while fishing activity is ‘unregulated’ if it is carried out without regard to conservation and management measures put in place to ensure fish yield sustainability. IUU fishing is a global problem and threatens oceans ecosystems and fisheries sustainability. It also poses threats to the economic security and the natural resources that are critical to global food security, and puts law-abiding fishermen and seafood producers in the affected states at a disadvantage.⁴⁴ The net effect of IUU fishing is the disruption of fishing rights and efficient fisheries management. A study commissioned in 2005 by the Australian Department of Agriculture, the ITF and the World Wild Fund for Nature (WWF) shows that large-scale IUU fishing are carried out by vessels flying flags of convenience.⁴⁵ The study also found that identifying these vessels proved difficult as most of them kept hopping from one flag of convenience to the other.

Smuggling

As noted earlier, shipboard workers serving in flags of convenience are poorly paid relative to their counterparts in vessels registered and flying the flags of closed registry countries where regulations relating to crew welfare are enforced. Poorly paid, such crew members try to supplement their earnings by taking on illicit cargo, especially humans trying to enter other countries for some sinister purpose and those escaping their countries with plans to enter other countries illegally in search of greener pasture. In October 2001, Italian Government agents discovered one Amir Farid Rikz an Egyptian hiding in a cargo ship bound for Canada. It was found that he had been smuggled into the ship in Egypt in a container outfitted with a bed, a toilet, a heater, and water supply.⁴⁶ The Egyptian was equipped with a satellite phone, laptop computer, cameras, forged security passes for airports in three countries, a flight ticket from Montreal Canada to Cairo, Egypt and a specious certificate identifying him as an aircraft mechanic. Similarly, in 2014, about 60 Chinese nationals were found in two cargo containers at Long Beach Harbour, California. Investigations showed that they had been offloaded as cargo from the ship *Maple River* to illegally enter the U.S. At the time they were found, they had been in the container for weeks. Critics have adduced a few reasons for the apparent lack of concern exhibited by flag of convenience countries with respect to enforcement of maritime laws and regulations aimed at averting the evils attributed to flag of convenience vessels. First, it is perceived that these countries (a lot of which are not coastal countries) are not affected by sea pollution and maritime accidents as coastal states.⁴⁷ They, as a result, have little reason to regulate risky maritime behavior.⁴⁸ Similarly, a state has no paternalistic incentive to protect its nationals when a ship’s officer corps and crew are all foreign.⁴⁹ Equally, those states as much as possible avoid the cost of enforcement which require, among others, operating a coast guard with its necessary administrative structure.⁵⁰ In fact, a 1989 study found that flag states acted on only 17 percent of foreign referrals to them for standard violations by ships flying their flags.⁵¹

⁴³See FAO, ‘Illegal, Unreported and Unregulated (IUU) Fishing’ <<http://www.fao.org/iuu-fishing/background/what-isiuu-fishing/en>> accessed 18 October, 2020.

⁴⁴NOAA, ‘Understanding Illegal, Unreported and Unregulated Fishing’ <<http://www.fisheries.noaa.gov/insight/understanding-illegal-unreported-and-unregulated-fishing>> accessed 18 October 2020.

⁴⁵See M. Gianni and W. Simpson, *The Changing Nature of High Seas Fishing: How Flags of Convenience Provide Cover for Illegal, Unreported and Unregulated Fishing*. Australian Department of Agriculture, Fisheries and Forestry, International Transport Workers’ Federation and WWF International, 2005.

⁴⁶T Weiner, ‘U.S. Law Puts World on Notice’ *New York Times*, 24 March, 2020 <<http://www.newyorktimes.com/2004/03/24/international/americas/24PORT.html>> accessed 12 January 2020.

⁴⁷ See Shaughnessy and Tobin (7).

⁴⁸ Ibid.

⁴⁹E Duruigbo, ‘Multinational Corporations and Compliance with International Regulations Relating to the Petroleum Industry’ (2001) 7 *Annual Survey of International & Comparative Law*, 108.

⁵⁰ Ibid.

⁵¹ R B Mitchell, *Intentional Oil Pollution at Sea: Environmental Policy and Treaty Compliance* (MIT Press, Cambridge 1994) 163.

5. The Dominance of Flags of Convenience

Traditionally, national flags dominated international shipping before the 1950s. By then, FoC accounted for only some 4% of the world's fleet.⁵² By the mid-1970s, however, economic crisis reduced world trade as a result of which there were fewer cargoes and severe shipping overcapacity.⁵³ This resulted in freight rates dropping across the globe. Ship owners realised that national labour, taxes and regulations constituted their largest operational costs and that this could be substantially cut down if they abandoned the national flags and reflagged their ships to FoC which had, for the survival of their businesses, become flags of necessity. By mid-1980s, the shipping world saw a tremendous increase in the use of FoC for moving cargo around the world with those vessels accounting for more than 30% of global fleet.⁵⁴ In early 2009 more than 73% of total world merchant ships plying the high seas flew FoC.⁵⁵ And by 2016, flag of convenience dominance of world fleet had increased to 70.2 percent.⁵⁶ Today, nearly three-quarters of the world's commercially trading ships is flag-of-convenience-registered.⁵⁷ All these point to the fact that although flags of convenience are not clearly accepted or regulated in maritime international convention legislation, the shipping community has come to endorse them as a normal practice in their business.⁵⁸

Today, at least one-third of global merchandise trade occurs within the Tran-National Companies (TNCs) and FoC carry most of this.⁵⁹ As Anthony has observed, flags of convenience have 'increasingly replaced national flags and have become dominant as the legal and regulatory basis of the shipping system.'⁶⁰ The more ship owners get lured to the economy of flagging their vessels to FoC countries, the more new cargo, tanker and container vessels are registered in those countries and old ones equally reflagged to them. The increasing use of flags of convenience for seaborne trade is attributable mainly to the fact that contemporary businesspeople see them as providing cheaper and more efficient shipping and profits than possible under their national flags.⁶¹ For example, the oil giant Exxon estimated that it would cost 78% less to operate a 28-man tanker from the Philippines than one from the United States.⁶² As competition intensifies in international shipping, investors in the sector continue to shift their investments to places of lower costs and higher profits as a result of which registered tonnage in national registers continues to dwindle in favour of countries offering FoC registration. Ironically, most countries of the world that operate the closed ship registry model and denigrate FoC shipping hire mostly the services of FoCs.⁶³ Though a closed registry itself, the U.S., for example, was instrumental to the development and flourish of both the Panamanian and Liberian open registries.⁶⁴

In the case of Panama, the U.S. Government even agreed to provide assistance to Panama in the form of vessel registration at American consulates in locations in the U.S. where there were no Panamanian satellite consulates.⁶⁵ In return, Panama was to assist the U.S. in policing the running and smuggling of rum in Panamanian-flagged vessels during and after the prohibition.⁶⁶ With the bashing and

⁵²M Galley, 'Flagging Interest: Ship Registration, Owner Anonymity, and Sub-Standard Shipping' (2013) (14)(1&2) *Mountbatten Journal of Legal Studies*, 3.

⁵³ V F Anthony, 'Flags of Convenience and Global Capitalism' <<http://www.hdl.handle.net/10072/99637>> accessed 26 October 2020.

⁵⁴ Ibid

⁵⁵ Ibid

⁵⁶ UNCTAD, *Review of Maritime Transport*, (United Nations Publications 2016) 44.

⁵⁷J Reed, 'Ship Registration: Steady Source of Funds' <<http://www.ft.com/content/66601d-1ab3-11e1-bc34-00144feabdc0>> accessed 11 March, 2018.

⁵⁸R B Rodriguez, 'Flags of Convenience Regulation within the European Union and its Future on International Trade' (2011) 11 *Revista Republicana*, 29.

⁵⁹ Anthony (n 73).

⁶⁰ Ibid., at 5.

⁶¹ Ibid., at 7.

⁶²Duruigbo (n 69) 109-110; J Mertus, 'The Nationality of Ships and International Responsibility: The Reflagging of the Kuwait Oil Tankers' (1988) 17 *Denver Journal of International Law & Policy*, 207.

⁶³Many oil companies operating in closed registry states, including the traditional maritime states, have registered their tanker fleets in open registries. See Galley (n 72) at 3.

⁶⁴ Gregory (n 14) 52.

⁶⁵ Carlisle (n 18). Vessels could be registered to fly the Panamanian flag from any Panamanian consulate anywhere.

⁶⁶ Gregory (n 14) 52.

accusations that have come the way of these vessels and their countries of registry from national registers and transport unions, there has been a gradual shift by a couple of otherwise FoC countries to stricter and more effective flag-state control and regulation. These countries have gradually improved on their oversight responsibilities over ships flying their flags by enacting and vigorously enforcing domestic merchant shipping laws and regulations as well as international maritime conventions. While doing so, they have developed tax regimes that either completely exempt incomes of ship companies from taxation or levy only minimal rates of taxation on them. They also allow the anonymity of shipowners and ensure that their investments are protected. This practice is what is now known as Quasi Flag of Convenience (QFoC). Thus, while enforcing internationally approved shipping standards with respect to navigational safety, crew training, qualification and welfare, and protection of the marine environment, these countries at the same time incentivize ship owners to register ships in their registries by providing them tax havens. In some cases, double taxation agreements are entered by these countries with other countries so that ship companies do not pay the same taxes to different countries. This emerging shipping practice is a departure from the lax flag-state regulation that characterizes typical FoC shipping. Singapore is today considered the leading QFoC state.⁶⁷ The Singaporean ship registry developed essentially as an open registry but was motivated by considerations different from those of the most prominent open registries. Rather than a need to boost national earnings through the attraction of foreign shipowners with perfunctory regulation, the main objective was to utilise the shipping industry “as a tool for economic development of *other sectors*”, boost employment, limit the amount of foreign exchange used for international shipping, develop a national shipping line, and increase the transport of domestically produced export products.⁶⁸ This objective was accomplished by Singapore through tax rebates for shipping companies that were ready to flag their ships to Singapore and employ seafarers of Singaporean nationality, and charging low ship registration fees.⁶⁹ Over a ten-year period, Singapore’s fleet had grown so much to become the 15th largest in the world.⁷⁰ Though Liberia is still classified by many as a FoC country, a close scrutiny of the Liberian shipping registry and its current rating by reputable classification societies and port state control authorities may not support that classification.⁷¹ Through sound shipping policies and efficient management, the Liberian shipping registry could be said to have metamorphosed from FoC to QFoC.⁷² The registry is administered by the Liberian International Ship & Corporate Registry (LISCR), a private U.S. owned company headquartered in Dulles, Virginia. Today, Liberia is reputed to employ a large team of ship inspectors and has earned a reputation for safety.⁷³ The registry generates an estimated 50-75% of Liberia’s annual revenues.⁷⁴

Thus, without compromising shipping standard, some FoC have continued to attract shipping companies through well thought-out national fiscal policies. Such nations no longer need to register all manners of ships, or allow vessels flying their flags to employ unqualified, poorly paid crew members. They are now able to enforce national maritime laws and regulations without the apprehension of losing tonnage through possible decline in ship registration. They, accordingly, remain attractive to shipping companies who are prepared to practice standard shipping while enjoying the tax incentives made available to them to aid their businesses.

⁶⁷ Toh & Phang, (n 35) 21.

⁶⁸ Gregory (n 14) 56.

⁶⁹ Ibid

⁷⁰ Ibid., at 57.

⁷¹The International Maritime Organisation (IMO), the US Coast Guard, as well as the Paris and Tokyo regimes rate the Liberian registry high. See Liberian Registry, ‘About the Liberian Registry’, <<http://www.liscr.com/about-liberian-registry>> accessed 12 June, 2017.

⁷²Though low tax is still used as incentive and shipowner anonymity is still guaranteed, the registry has made tremendous progress with regard to ship inspection and quality control.

⁷³E R Desombre, *Flagging Standards: Globalisation and Environmental Safety and Labour Regulations as Sea* (The MIT Press, Cambridge 2006) 98; J A Perkins, ‘Ship Registers: An International Update’ (1997-98) 22 *TUL. MAR. L. J.*, 198.

⁷⁴E Powell, ‘Taming the Beast: How the International Legal Regime Creates and Contains Flags of Convenience (2013) (19)(1) *Annual Survey of International & Comparative Law*, 12.

6. Defence of Flags of Convenience

As the nature of FoC continues to change from substandard shipping towards standardised shipping, their perception as rust buckets and runaway ships is beginning to change in shipping circles. Already, various arguments are being advanced in their defence in the face of relentless attacks from their critics. Firstly, their supporters have argued that FoC is a functioning system that provides cheap transportation and that available data does not actually suggest that FoC countries are racing to the regulatory bottom.⁷⁵ The relatively reduced cost of transporting cargo using FoC, they argue, translates to cheaper goods for consumers. Secondly, it is argued in support of FoC that many of the concerns of their critics are largely ameliorated by international mechanisms. For example, flags of convenience are, like other vessels, subject to approvals by respected classification societies which will not grant approval if they pose a danger to navigation and the marine environment. In fact, an empirical study found that vessels approved by the respected classification societies are more likely to fly flags of convenience.⁷⁶ On the widely held view that shipowners rush to register old, decrepit vessels in open registries where standards are low, they argue that data exists which shows that open registries have, on average, younger vessels than closed registries.⁷⁷ And since older vessels tend to be in greater state of disrepair, they argue, it could not be correct that shipowners flock to Flag of Convenience states in pursuit of low safety standards. Thirdly, accidents in which Flags of Convenience had been involved could not invariably have resulted from substandard ship construction or the use of unqualified officers and crew members. Defenders of Flag-of-Convenience point in this regard to the 1978 *Amoco Cadiz* mishap which they argue was not attributable to poor ship construction or manning the vessel with unqualified crew members. Though registered to Liberia (which is generally classified as a Flag of Convenience country), Amoco the owners of the ship hired a premier classification society to oversee its construction and carry out periodic checks on the ship, and employed licenced and well-trained seamen.⁷⁸

7. Conclusion and Recommendations

Traditionally, flags of convenience vessels are the exception in international shipping and not the rule. This is borne, however, not out of present-day realities in the maritime industry but out of an entrenched tradition that vessels being little parts of states floating on the oceans ought, inexorably, to be connected or linked to their states of nationality. But as trade continues to grow with increasing globalisation and the attendant competition, shipping companies will continue to seek out tax heavens and affordable labour while shippers (including those in the traditional maritime states) will continue to be attracted to cheaper freights. Thus, ships will continue to be flagged-out and shippers will not stop to patronize FoC. The perceived inconveniences posed by flags of convenience would appear to be gradually discountenanced by the economy they offer to both shipowners and shippers. Their higher frequency of sea mishaps may not be unconnected with their continuously growing dominance of international shipping: the more their presence on the oceans carrying cargo around the world, the higher the probability of mishaps. Regardless of ship-building standard and the training and efficiency of crewmen, acts of God and human error in navigation cannot be ruled out, making occasional sea accidents inevitable.

The role flags of convenience have come to play in the global economy and their preference by shippers in all parts of the world (including shippers in the traditional maritime nations of the world) despite strictures that have been ranged against them over the years, indicate their ever-growing acceptance as an essential component of the international shipping industry. If they are truly evil as their traducers claim, they have become a necessary evil. While the theoretical postulate of the primacy of national flagging of vessels will not wane in the near future, the flagging out of ships to foreign jurisdictions for the economic advantages it offers will continue to dominate in practice. Rather than continue to vilify FoC (something that has produced no result so far), the international mechanisms for checking their activities such as control by port states whose ports they call in thousands every year could be put to

⁷⁵ United Nations Conference on Trade and Development, *Review of Maritime Transport*, UNCTAD/RMT/2011, at 41.

⁷⁶ J Hoffman, R J Sanchez, and W K Talley, 'Determinants of Vessel Flag', in Kevin Cullinane, ed., *Shipping Economics*, Research in Transportation Economics, 2005, 185.

⁷⁷ United Nations Conference on Trade and Development (n 95) at 41; Desombre (n 93) at 46.

⁷⁸ Powell (n 94) at 18.

good use. While in a foreign port, flag state jurisdiction continues to prevail over the ship but the port state can exercise some degree of jurisdiction if the national interests are implicated. It can carry out visual inspection of the general condition of the ship and examine the ship's documents to ensure compliance with international agreements, valid registration, current classification and valid insurance.⁷⁹

Apart from port states, all coastal states can also, in appropriate situations, check the activities of FoC within their coasts. Every coastal state has jurisdiction over ships within its territorial waters to enforce safety of navigation, fisheries laws and regulations of the coastal state and the preservation of the coastal state's environment.⁸⁰ A coastal state may inspect and even detain a vessel navigating its territorial seas if there is 'clear ground for believing' that the vessel violated international environmental regulations while in its territorial seas.⁸¹ International agreements can also be employed to ensure that FoC comply with accepted international shipping practices. Through agreement, a state can confer jurisdiction over ships flying its flag on a port state, enabling the port state to take all enforcement actions which the flag state could itself take over the ship.⁸² In deserving cases, the courts of a port state should not hesitate to lift the veil of incorporation and go for the individuals behind the façade of registration where such individuals are within jurisdiction. That way, though the ship may well be beyond reach by reason of foreign registration, the individuals shielded by registration could be identified and proceeded against. In the American case of *Hellenic Lines v. Rhoditis*,⁸³ for example, the court ignored the façade of Greek registration of a ship entirely owned by persons domiciled in Connecticut and operated out of New York, and which operated mostly in America. Similarly, in *Rainbow Line Inc v. M/V Tequila*, it was held that American ownership of a ship 'overshadowed' British registration and nominal British ownership.⁸⁴

⁷⁹ Desombre (n 93) 92.

⁸⁰ Art. 21 UNCLOS.

⁸¹ Ibid., art. 220(3).

⁸² See Powell (n 94) at 297.

⁸³ 398 U.S. 306 (1970).

⁸⁴ 480 F.2d 1024, 1027 2d Cir. N.Y. 1973.