

**FLAGS OF INCONVENIENCE:
FREEDOM AND INSECURITY ON THE HIGH SEAS**

TINA SHAUGHNESSY & ELLEN TOBIN

I. Introduction

The sea is the last place on the globe that remains free from control by government. Over 40,000 large merchant ships, and innumerable smaller coastal craft,¹ ply the seven interconnected oceans comprising nearly three-fourths of the earth's surface.² Each year approximately 7.5 million containers of cargo, containing the bulk of raw materials and finished goods that constitute global trade, are transported between markets by commercial traveling the high seas.³ The ships are manned by seafarers of differing quality, mixed together without reference to language or nationality. The ships they man embody the anarchy of the open ocean, arguably the most independent objects on earth, many without allegiance of any kind and frequently changing their identity to assume whatever flag suits them.⁴

Although merchant ships spend most of their lifetime outside the territorial waters of any state, the current international maritime legal regime is paradoxically ordered around a system of vessel nationality.⁵ According to international law, and to the admiralty laws of most states, every vessel engaged in international trade must register in a country and is subject to the

¹ William Langewiesche, *Anarchy at Sea*, THE ATLANTIC MONTHLY, Sept. 2003, at 50.

² International Marine Science and Technology, *The United Nations Convention on the Law of the Sea (UNCLOS)*, at <http://www.marine.gov.uk/unclos.htm> (last visited 1/10/04).

³ *ITF Annual FOC Report*, available at http://www.itf.org.uk/seafarers/foc/report_2001/pages/s05-01.html (last visited 1/10/04).

⁴ Langewiesche, *supra* note 1.

⁵ Deirdre M. Warner-Kramer & Krista Canty, *Stateless Fishing Vessels: The Current International Regime and a New Approach*, 5 OCEAN & COASTAL L.J. 227, 228 (2000); see also H. Edwin Anderson, III, *The Nationality of Ships and Flags of Convenience: Economics, Politics, and Alternatives*, 21 TUL. MAR. L.J. 139, 141 (1996).

regulatory control of the country whose flag it flies.⁶ Furthermore, any country, consistent with international law, has the right to allow a vessel to fly its flag and to therefore bestow its nationality upon that vessel.⁷ “When a vessel owner registers a vessel with a nation, the owner agrees to abide by that nation’s law and regulations- the so-called ‘flag state’⁸- in return for protection and the right of its vessel to be of that sovereign state.”⁹

A system commonly known as “flags of convenience” (“FOC”) has developed, in which commercial vessels register in a countries with “open registries”¹⁰ and consequently the ships contain virtually no link to the flag states in which they are registered. Since the 1920s the FOC system has proven to be extremely profitable not only for the vessel owners and shipping companies that utilize open registries, but also for the countries that operate the lax registry apparatuses. In the present day, the problems created by the FOC system, combined with the anarchical nature of the high seas and the highly advanced technology possessed by state and non-state actors alike, pose great dangers to the international community. In general, the practices of FOC states aggravate problems commonly associated with maritime trade and threaten vitally important transnational interests such as national security, environmental issues,

⁶ RESTATEMENT (THIRD) ON FOREIGN RELATIONS LAW OF THE UNITED STATES § 501 (1987).

⁷ See United Nations Convention on the Law of the Sea, Art. 91, Dec. 4, 1982, U.N. Doc A/Conf.62/121, 1833 U.N.T.S. 397 21 I.L.M. 1245 (1982) (entered into force Nov. 16, 1994) [hereinafter UNCLOS] (stating that ships possess the nationality of the state in which they are registered and are subsequently subject to the laws of that jurisdiction), available at http://www.un.org/Depts/los/convention_agreements/texts/unclos/closindx.htm (last visited Jan. 10, 2004).

⁸ A “flag state” is the country with whom a given vessel is registered. See Jeremy Firestone & James Corbett, *Combating Terrorism in the Environmental Trenches: Responding to Terrorism: Maritime Transportation: A Third Way for Port and Environmental Security*, WID. L. SYMP. J. 419,437 NOTE 15 (2003).

⁹ *Id.* at 419; see also Edwin Anderson, *The Nationality of Ships and Flags of Convenience: Economics, Politics, and Alternatives*, *supra* note 4, at 143.

¹⁰ “Open registries” are states that allow the registration of vessels with minimal regulatory requirements with respect to labor, safety, and ownership regulations. See Justin C. Mellor, *Missing the Boat: The Legal and Practical Problems of the Prevention of Maritime Terrorism*, 18 AM. U. INT’L L. REV. 341, 396 NOTE 13 (2002), citing Anderson, *supra* note 4, at 156-68; *Brassed Off – Flags of Convenience Under Threat*, THE ECONOMIST, May 18, 2002, at 65 (recognizing that although such open registries have long raised safety and labor concerns, they are now also identified as security risks), available at <http://www.globalpolicy.org/nations/flags/2002/0520.htm> (last visited 1/10/2004).

immigrant/refugee movement, and labor issues. Furthermore, the operations of the FOCs pose significant obstacles to the development of an effective international regime capable of compelling the various players in international maritime transport and trade to conform to international law.

This paper will illustrate how the FOC system, while operating under the color of international law, has worked to undermine the system of flag-state control and therefore exacerbate many troubles associated with international maritime trade. The paper will begin by presenting the background of the law of the high seas, UNCLOS, and flags of convenience. After establishing this framework, we will discuss several issues endemic to the maritime industry, focusing primarily on security concerns. We will then offer a multi-pronged solution encompassing the domestic, regional and international levels and conclude by discussing the future of the maritime industry. Recognizing the breadth and complexity of maritime law, this comment is merely an introduction to the current plight of the maritime industry and does not claim to be exhaustive in its discussion of the various topics and issues addressed within.

II. Freedom of the “High Seas”

The history of the law of the sea has been a constant struggle between states that asserted special rights with respect to areas of the sea and states insisting upon the freedom to use all ocean spaces.¹¹ Since at least as early as the Roman Empire, usage of the world’s oceans and maritime law has operated on the basic but unwritten principle of freedom of the seas, which provided unrestricted access for the common activities of fishing and navigation.¹² In 1608

¹¹ RESTATEMENT 3D ON FOREIGN RELATIONS LAW OF THE UNITED STATES (1987) PART 5 INTRODUCTORY NOTE.

¹² See *Marine Navigation: Freedom of the Seas*, available at <http://www.navis.gr/marinarav/freeseas> (last visited 12/03/03) (quoting Grotius’ book, *infra* note 13, as saying that since the sea cannot be occupied like the land it is “free to all nations and subject [to control by] none.”); see also David J. Mitchell, Philip A. Collier, Frank J. Leahy

Hugo Grotius, a Dutch scholar and employee of the Dutch East Indies Company, published Mare Liberum (The Freedom of the Seas), in which he codified the generally accepted principle of freedom of the seas, giving nations equal and unrestricted access to the oceans and the resources they contained.¹³ Freedom of the seas remained the dominant guiding force of the development of international maritime law until the beginning of the twentieth century. Following the Second World War, rapid technological developments and the increasing awareness of the finite nature of the oceans' resources highlighted the need for harmonization of maritime law and an updated codification of the law of the sea.¹⁴ The recognition of the need for a uniform international maritime regulatory regime led to the first UNCLOS Convention in 1958, UNCLOS II in 1960 and then UNCLOS III in 1970. The most recent UNCLOS convention was adopted by the United Nations General Assembly in 1982 and became the premier international agreement regulating the maritime industry. UNCLOS' entry into force in 1994 reflected the continuing evolution of the rules and regulations governing international maritime trade and travel, while also recognizing the keystone role of freedom of the high seas.

UNCLOS prescribes five separate jurisdictional zones to establish the extent of states' control over surrounding waters. UNCLOS defines the High Seas as the area of the ocean that falls beyond any one country's Exclusive Economic Zone ("EEZ"), the limit of a country's jurisdiction.¹⁵ The EEZ is the area beyond and adjacent to the territorial sea which does not extend more than 200 miles from the territorial sea baseline ("TSB"). Within the area of the High Seas all states, subject to the relevant international provisions, have equal rights to enjoy

& Brian A. Murphy, *The United Nations Convention on the Law of the Sea and the Delimitation of Australia's Maritime Boundaries*, MARZONE at 1.

¹³ See generally Hugo Grotius, *The Freedom of the Seas*, (Ralph Van Deman Magoffin, trans., Oxford University Press 1633) (1609).

¹⁴ Mitchell, *supra* note 12, at 2, 9.

¹⁵ UNCLOS, *supra* note 7, art. 86. For the full text of the convention see http://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf (last visited 12/09/03).

freedom of navigation, overflight, fishing, and scientific research. The high seas, as defined by UNCLOS, extends to the seabed, ocean floor and subsoil thereof, all of which is beyond the any state's territorial jurisdiction.¹⁶ All states, regardless of whether coastal or land-locked, have equal rights in the resources of this area, and equal lack of territorial jurisdiction.¹⁷

III. The International Legal Regime

The United Nations Convention on the Law of the Seas (“UNCLOS”)¹⁸ is an expansive piece of international legislation, intended to provide a “comprehensive regime dealing with all matters relating to the law of the sea . . . bearing in mind that the problems of ocean space are closely interrelated and need to be considered as a whole.”¹⁹ More than 150 countries contributed to the writing of the convention over a span of several years resulting in a universal document encompassing a wide range of political, geographical, and legal viewpoints.²⁰ UNCLOS was adopted on December 10, 1982²¹ and immediately signed by delegations from 119 countries. This unprecedented level of immediate international support is indicative of the universal agreement on the need for an international maritime regulatory regime.²² UNCLOS entered into force on November 16, 1994, and to date has been signed by 157 states and ratified by 145.²³ While the United States has not become a party to the treaty, however many provisions of UNCLOS are very similar to the maritime conventions which the US is a party to.²⁴

¹⁶ UNCLOS, *supra* note 7, art. 86.

¹⁷ Mitchell, *supra* note 12, at 4.

¹⁸ UNCLOS, *supra* note 7, 15.

¹⁹ INTERNATIONAL MARINE SCIENCE, *supra* note 2.

²⁰ *Id.*

²¹ UNCLOS, opened for signature Dec. 10, 1982, 21 I.L.M. 1261, 1267 (1982); *supra* note 7, 15.

²² J. S. Hobhouse, *Int'l Conventions and Commercial Law: The Pursuit of Uniformity*, 106 L.Q. REV. 530, 534 (1991).

²³ UNCLOS, *supra* note 7, 15.

²⁴ RESTATEMENT 3D, *supra* note 6. The Restatement goes on to note that “...by express or tacit agreement accompanied by consistent practice, the United States, and states generally, have accepted the substantive provisions

This paper will focus on UNCLOS as its point of reference for international maritime law because of its wide acceptance in the international community²⁵ and because of its standing as an “umbrella convention,”²⁶ embodying a multifaceted approach to the many problems relating to the oceans: environmental issues, fishery concerns, economic and commercial concerns, and problems related to the preservation of national sovereignty.²⁷ This paper will consider UNCLOS to be a convention, with standing as international law, which expresses the minimum guidelines of a regulatory regime encompassing the resources, uses, and protection of all ocean space and activity.²⁸ All other maritime conventions and organizations operate within the framework created by UNCLOS.

UNCLOS covers the use and allocation of ocean resources in a document that consists of 320 articles, divided into seventeen parts, and includes nine annexes.²⁹ Some of the areas of maritime law covered by the Convention are territorial jurisdiction, navigation rights, resource exploitation rights, marine research rights, marine environment protection obligations, and a dispute settlement process.³⁰ This paper will concentrate on the provisions contained in Part VII: *The High Seas*,³¹ regarding the provisions governing flag – and port- state control and vessel nationality, namely Article 91: Nationality of ships;³² Article 92: Status of ships;³³ and Article 94: Duties of flag states.

of the Convention, other than those addressing deep sea-bed mining, as statements of customary law binding upon them apart from the Convention.”

²⁵ Division for Ocean Affairs and the Law of the Sea, *20 Years of the United Nations Convention on the Law of the Sea: 1982-2002*, available at http://www.un.org/Depts/los/convention_agreements/convention_20years.htm (last visited 1/10/04).

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ Mitchell, *supra* note 12, at 3

³⁰ *Id.*

³¹ UNCLOS, *supra* note 7, 15.

³² *Id.*, Art. 91, emphasis added.

³³ *Id.*, Art. 92.

Other provisions of particular relevance to this paper include Article 217: Enforcement, requiring flag states to ensure their vessels only sail when in compliance with international rules and standards. The flag state is required to investigate any violation of international standards and to report the outcome to the international community. Article 218: Port state enforcement, allows investigations regarding “discharges” in violation of international rules and standards, outside of the port state’s territorial waters. Finally, Article 219: Measures relating to seaworthiness of vessels to avoid pollution, expands port state authority to include administrative proceedings initiated due to the violation of international standards regarding ship seaworthiness or pollution prevention. Ships may be detained until the causes of the violation have been removed, after which the vessel may continue on its way.³⁴

While UNCLOS has been successful in permeating “almost all aspects of contemporary international maritime law,”³⁵ the treaty also has serious flaws that must be noted at the outset. Firstly, the United States, one of the largest maritime countries and the largest monetary donor to the United Nations, is a non-signatory to the convention.³⁶ Fortunately, the United States has voluntarily integrated many of UNCLOS’ provisions into its domestic law, thus minimizing the impact of its non-party status.³⁷ Secondly, under the convention’s “optional clause” a signatory may choose among a variety of dispute resolution mechanisms and has the ability to exclude certain subjects from jurisdiction. The ability to use domestic legislation as a vehicle to exclude contentious maritime issues from mandatory dispute resolution greatly curtails the treaty’s

³⁴ *Id.*, Art. 219.

³⁵ International Marine Science, *supra* note 2.

³⁶ Patrick J.S. Griggs, *Obstacles to Uniformity of Maritime Law*, 34 J. MAR. L. & COM. 191, 207-08 (2003).

³⁷ See Peter D. Clark, *US Maritime Law Can Have Broad Interpretation in Arbitration Pact*, J. COM., AUG. 2, 1996, at 4B (explaining that most American contracts are subject to the General Maritime Law of the United States, which is a body of concepts, principles and rules, that is customary and international in origin, and provides the legal precedent in maritime court cases and arbitrations occurring the U.S., in the absence of pre-emptive legislation).

enforcement powers, and thus its overall effectiveness.³⁸ The existence of voluntary submission to jurisdiction of maritime disputes greatly curtails the efficacy of resolutions by the International Court of Justice (“ICJ”) and the International Tribunal for the Law of the Sea (“ITLOS”), even for matters considered “mandatory” dispute settlement matters;³⁹ this, in turn, dilutes the authority of the treaty as a whole.

Thirdly, UNCLOS only applies to states, thereby leaving the maritime activities of non-state actors (such as shipping companies) largely unregulated by international law. States involved in maritime activities fall into three, non-mutually exclusive categories—**flag-states**, **port-states**, and **coastal-states**, which form a compendium of three jurisdictions that, together, have a collective responsibility to ensure the maintenance of international standards at sea.⁴⁰ The flag-state’s primary role is to enforce the standards set in international maritime conventions, not only through incorporation into domestic legislation, but also through the implementation of adequate regulatory apparatus and maritime authority with enough staff to enforce the standards upon ships registered under its flag.⁴¹ Port states are the states in which ships arrive to deliver the goods and avail themselves of the services of one of the country’s ports. Port state authority “involves the powers and concomitant obligations vested in, exercised by, and imposed upon a national maritime authority by international convention or domestic statute or both.”⁴² Port state control grants national maritime authorities the power to board, inspect, and possibly detain

³⁸ See *Changes to International Dispute Resolution*, available at http://www.foreignminister.gov.au/releases/2002/fa039j_02.html; see also *Report, Australia Amends Policy on Setting Maritime Boundary Disputes*, BBC MONITORING INTERNATIONAL REPORTS (Mar. 28, 2002) (illustrating conflict over maritime borders between Australia and several of its neighbors).

³⁹ Tulio Treves, *Conflicts Between the International Tribunal for the Law of the Sea and the International Court of Justice*, 31 N.Y.U. J. INT’L L. & POL. 809, 811 (1999).

⁴⁰ John Hare, *Port State Control: Strong Medicine To Cure A Sick Industry*, 26 GA J. INT’L & COMP. L. 571, 571-72 (SUMMER 1997).

⁴¹ Dr. Z. Oya Özçayir, *Flags of Convenience and the Need for International Cooperation*, 7 INT’L MAR. L.J. 111 (2000), available at http://www.turkishpilots.org/DOCUMENTS/Oya_Ozçayir_Flags_Of_Convenience.htm (last visited 11/15/03).

⁴² Hare, *supra* note 40, at 571.

merchant ships that fly a foreign flag.⁴³ Coastal states are the states that have coast lines, near to which commercial ships often sail, and coastal states are also often port states. UNCLOS awards to coastal states full jurisdictional authority over the *territorial sea*, that is the band of ocean adjacent to the coastline, the outer limit of which does not exceed twelve miles from the TSB.⁴⁴ A State has full sovereign rights within its territorial sea, with the exception that under international law, it must allow foreign ships the right of innocent passage.⁴⁵ UNCLOS also gives a state the right to enforce its customs, fiscal, immigration, and sanitary laws and regulations over an additional twelve mile buffer zone beyond the territorial sea, named the *Contiguous Zone*.⁴⁶ Hence states have authority to assert their judicial jurisdiction over an area not exceeding twenty-four miles of ocean from the TSB.⁴⁷

Although each signatory is legally bound by all of the provisions in UNCLOS, the reality is that different states – port, flag, and coastal states - have different, and often contrary, interests in the ways in which maritime trade and law operate. While in principle each flag state is required to ensure that ships in its register adhere to international standards,⁴⁸ in practice states that operate as flags of convenience earn a great deal of money, usually from registration and maintenance fees and taxes, from the ships in its registries, but expend very little money to ensure that such ships meet international standards. Because many of the FOCs are not major port states, they therefore earn large profits by operating open registries but bear very little of the costs that result from the failures of ships to conform to international standards. On the other hand, coastal and port states bear a disproportionate burden of the costs of the FOC system, as

⁴³ *Id.* cited in Mellor, *supra* note 10, at 390.

⁴⁴ UNCLOS, *supra* note 7, art. 3.

⁴⁵ Mitchell, *supra* note 12, at 4.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ K. X. Li & Jim Mi Ng, *International Maritime Conventions: Seafarers' Safety and Human Rights*, 33 J. MAR. L. & COM. 381, 394 (2002), citing UNCLOS (1982), Art. 98(2).

delinquent flag states' failure to take responsibility for their ships force coastal and port states to fund such remedies as the rescue of stranded refugees and crew, the salvage of broken down substandard ships, and the clean up of large pollution spills.

Also problematic is the fact that the maritime legal regime created by UNCLOS does not apply to non-state actors, such as cargo owners and ship owners. The owner of a commercial vessel may be an individual, a group of individuals, or a corporation. It is the ship owner who decides in what country to register the ship and therefore, under what country's regulations the ships will be subject. "Brass plates in such places as Liberia, Panama, and the Bahamas, single-ship companies to limit liability and cats' cradles of ownership structures all create a wall of secrecy behind which the vessel's real owners can hide taxes."⁴⁹ Intelligence sources believe that terrorist groups, such as Osama bin Laden and Sri Lanka's Tamil Tigers, own fleets that fly flags of convenience.⁵⁰ Thus FOCs offer a cloak under which devious ship owners may hide so long as they pay the requisite registration fees and tonnage taxes, leading to dangerous consequences, such as the funding of terrorist activities and lack of liability for substandard ships sailing the high seas.⁵¹

Cargo owners are also excluded from the authority of UNCLOS. In the normal course of business, manufacturers hire shipping companies to move their goods from the location of production to the market for sale. The shipping company then uses a shipping vessel, acquired typically by way of a deal with the vessel owner, to actually transport the goods for the contracting party. During the voyage a crew, who usually have little connection to either the

⁴⁹ *Brassed Off*, *supra* note 10, at 1.

⁵⁰ *Id.*

⁵¹ David Heindel, *Vessel Operations Under "Flags of Convenience" and National Security Implications*: Hearing Before the House Comm. On Armed Services, 107th Cong. (2002), available at <http://www.house.gov/hasc/openingstatementsandpressreleases/107thcongress/02-06-13.html> (last visited 1/10/04) (testifying about the links between FOCs and dangers to national security).

shipping company or vessel owner other than that they were hired to work on the boat, controls the ship. While maritime crews technically fall under the protection of UNCLOS and other international agreements, their rights are often violated because the activities of their employers, the opaque shipping company and vessel owners, are largely unregulated.

Thus it is understood that vessel owners and cargo owners each have their distinct own interests, which may or may not differ from each other's, but often do differ from that of the primary interests of certain states. Because of the desire to hear as high profits as possible, both shipowners and cargo owners strongly favor the operation of FOCs, arguing that port states and the international community only need to know who is in day-to-day control of the ship, not the beneficial owner.⁵²

IV. Flags of Convenience

What is a flag state?

The nationality of ships is the basis upon which the international maritime regime is ordered. Article 91 of UNCLOS allows flag states to determine the conditions for ship registration and requires the existence of a genuine link between the ship and the state.⁵³ Article 92 requires ships to fly under the flag of only one nation⁵⁴; all ships must fly the flag of a single nation in order to notify the international community what state has jurisdiction over them. For

⁵² *Id.* (explaining the “chorus of protests” led by Greek shipowners in response to an American proposal to the International Maritime Organization to make ship ownership more transparent as part of antiterrorist precautions). “Beneficial owner” is the person/entity receiving the majority of the financial benefits from the ship’s activities.

⁵³ UNCLOS article 91, *supra* note 7. Article 91 reads as follows: “1. Every State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship. 2. Every State shall issue to ships to which it has granted the right to fly its flag documents to that effect.

⁵⁴ UNCLOS article 92, *supra* note 7. Article 92 reads as follows: “1. Ships shall 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. A ship may not change its flag during a voyage or while in a port of call, save in the case of a real transfer of ownership or change of registry. 2. A ship which sails under the flags of two or more States, using them according to convenience, may not claim any of the nationalities in question with respect to any other State, and may be assimilated to a ship without nationality.”

the shipowners and crews, it defines whose protection and benefits they may enjoy. The purpose behind flagging is to grant ships a nationality so they can be regulated; registering is the administrative formality that grants nationality.⁵⁵ The ship registration is an agreement between the ship owner and the flag state that the ship will abide by the flag state's laws and regulations in return for the flag state's protection of the ship. It is the role of the flag state to enforce standards set forth in international maritime conventions to which the state is a party. Application and enforcement is achieved not only through incorporation of international law into the domestic legal system, but also by ensuring an adequate regulatory apparatus and maritime authority with enough staff to effectively enforce standards.⁵⁶ In this way, flag states are the first and primary means of regulating and overseeing shipping standards promulgated on both the domestic and international levels.

Under Article 94 of UNCLOS, flag states are obligated to perform the following duties:

- 1) Assumption and effective exercise of jurisdiction over administrative, technical and social matters aboard its ships both at sea and through regular inspections
- 2) Maintenance of a ship register
- 3) Conformity with international regulations
- 4) Investigation of all reports of lack of proper jurisdiction and control by that flag state
- 5) Inquiries into all casualties and incidents on the high seas involving one of its ships and cooperation with inquiries held by other states regarding such incidents.

Genuine Link

⁵⁵ Firestone, *supra* note 8, at 419.

⁵⁶ Özcayir, *supra* note 41.

Generally, a state has a “genuine link” entitling it to register a ship and to authorize the ship to use its flag, in accordance with article 91 of UNCLOS.⁵⁷ If the ship is owned by nationals of the state (whether natural or juridical persons), exercises effective control over the ship, is manned by nationals of that state, and stops in the ports of that state with some degree of frequency, then the genuine link will be found to exist.⁵⁸ The lack of a genuine link does not justify another state in refusing to recognize the flag or interfere with the ship in question, but a state may reject diplomatic protection by the flag state in such a scenario.⁵⁹ If another state doubts the existence of a genuine link, its only recourse is to request that the flag state conduct an investigation and take appropriate measures to remedy the situation, in accordance with Article 94(6) of UNCLOS.⁶⁰

U.S. courts have upheld the principle that another state is not entitled to decide unilaterally that there is no genuine link between a ship and the flag state or refuse to recognize the flag on that basis.⁶¹ The U.S. Supreme Court addressed the issue in Lauritzen v. Larsen:

Each state under international law may determine for itself the conditions on which it will grant its nationality to a merchant ship, thereby accepting responsibility for it and acquiring authority over it. Nationality is evidence to the world by the ship’s papers and its flag. The United States has firmly and successfully maintained that the regularity and validity of a registration can be questioned only by the registering state.⁶²

Nine years later, in Empresa Hondurena de Vapores, S.A. v. McLeod, the Second Circuit stated that “it would be unreasonable to conclude that... other states do not owe some obligations of respect” to the flag state so long as it effectively exercises its jurisdiction and control.⁶³

⁵⁷ RESTATEMENT 3D, *supra* note 6.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*, at Reporter’s Note 8.

⁶² *Lauritzen v. Larsen*, 345 U.S. 571, 584 (1953).

⁶³ RESTATEMENT 3D, *supra* note 6.

What is a flag of convenience?

Flags of convenience (“FOCs”) are also referred to as “open registries” because they allow registration of ships that are owned and controlled by foreign nationals, either individuals or corporate entities. The Rochdale Report of 1970, which to date is the most widely accepted definition of FOCs,⁶⁴ listed six criteria to determine whether a ship is registered under a FOC.

- 1) Registration by non-citizens is allowed.
- 2) Easy registry access, usually with foreign consulates available and unrestricted transfer from the registry.
- 3) Minimal to nonexistent taxes.
- 4) The registry country is small, and tonnage charges may produce substantial effects on national income.⁶⁵
- 5) Ships are free to use non-national labor.
- 6) 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.⁶⁶

An examination of the ramifications of the above criteria indicates that in a business environment dominated by the desire to “minimize private costs and maximize private revenue,” the flag becomes an issue of fiscal advantage.⁶⁷ Some of the economic advantages, which may motivate FOC registration, are:⁶⁸

⁶⁴ Rt. Hon. The Viscount Rochdale, *Committee of Inquiry Into Shipping*: REPORT 172 (1970), cited by Mellor, *supra* note 9, at note 13.

⁶⁵ See J. Michael Taylor, *Evaluating the Continuing GATS Negotiation Concerning International Maritime Transport Services*, 27 TUL. MAR. L. J. 129, 131 (2002) (explaining that the increased revenue from fees associated with registration can contribute upwards of 5-10% of the national budgets of states that operate open registries).

⁶⁶ GEORGE C. KASOULIDES, *PORT STATE CONTROL AND JURISDICTION: EVOLUTION OF THE PORT STATE REGIME* 78 (Martinus Nijhoff Publishers, 1993).

⁶⁷ Özcayir, *supra* note 41.

⁶⁸ Jane Marc Wells, Note, *Vessel Registration in Selected Open Registries*, 6 MAR. LAW 221, 222-23 (1981).

- 1) Increased market value of the ship.
- 2) Easy currency conversion.
- 3) Decreased cost of repairs.
- 4) Reduced operating costs.⁶⁹
- 5) Owners may avoid national income taxation.
- 6) Owners are able to acquire new tonnage more easily from their increased earnings.
- 7) Owners may avoid home country governing the condition of the vessel.

In summary, the major motivating factors are the “low taxation levels for profits and incomes with the resultant free cash flow and the reduced operating costs due to lower crew wages.”⁷⁰ By lowering operating costs, the shipowners also “limit the financial consequences of the occasional loss of a ship.”⁷¹ There are also non-economic advantages to FOCs, such as decreased transparency of ownership for shipowners, decreased likelihood of vessel seizure during times of war or other emergencies, and (generally) stable political climates of the registering country that are conducive to business.⁷² The disadvantages of FOCs are potential increased port state inspection rates, less efficient or comprehensive consular services, as well as deficient diplomatic support for shipowners.⁷³

An officer of the first shipping company to transfer a U.S.-flagged ship to Panamanian registry quite presciently explained the appeal of the system of flags of convenience: “The chief advantage of Panamanian registry is that [vessel] owner is relieved of the continual . . . boiler and hull inspections and the regulations as to the crew’s quarters and subsistence,” pointing out that

⁶⁹ See <http://people.hofstra.edu/geotrans/eng/ch3en/conc3en/registships.html> (last visited 01/17/2004) (explaining that operating costs may be reduced by twelve to twenty seven percent, as compared with traditional registries, due to lower labor and safety costs).

⁷⁰ Wells, *supra* note 68, at 223.

⁷¹ Langewiesche, *supra* note 1, at 50-51.

⁷² Wells, *supra* note 68, at 225.

⁷³ *Id.*

as long as the ships pay the registry fee and yearly (low) tax, ‘we are under absolutely not restrictions.’”⁷⁴

History of FOCs

The practice of a ship flying a national flag other than that of its home country is has been used for several centuries for strategic reasons. Until the 19th Century ships carrying slaves for trade flagged outside of the United States and Latin American countries to avoid international anti-slave trade agreements. During the War of 1812 U.S. ships crossing the Atlantic Ocean flew under the Portuguese flag to avoid British harassment and detention.⁷⁵ During the Napoleonic Wars, British ships flew the flags of various minor German principalities to avoid the French blockade⁷⁶.

While modern international law governs war ships under its own set of laws, the phenomenon of flags of convenience lives on. The phenomenon, in its current form, was initially and remains driven by the desire of shipowners to avoid the high costs and onerous restrictions associated with registering ships in the major maritime states.⁷⁷ During the American Prohibition era of the 1920s, the owners of two U.S. flagged passenger ships registered their ships in Panama in order to be able to serve liquor onboard the ship. Shortly thereafter, Honduras entered into the FOC arena due to the United Fruit Company’s desire to ensure cheap reliable transportation of its bananas. Liberia’s entrance several decades later, was due to the

⁷⁴ Elizabeth DeSombre, *Convenient Fishing: Participation in International Fishery Management*, available at <http://www.isanet.org/noarchive/desombre.html>, quoting W.L. Comyn, of PACIFIC FREIGHTERS, quoted in RODNEY CARLISLE, *SOVEREIGNTY FOR SALE: THE ORIGINS AND EVOLUTION OF THE PANAMANIAN AND LIBERIAN FLAGS OF CONVENIENCE* 10-11 (Annapolis: Naval Institute Press, 1981).

⁷⁵ Özçayir, *supra* note 41.

⁷⁶ DeSombre, *supra* note 74.

⁷⁷ *Id.* at 4.

United State's desire to have a fleet of neutral ships to call upon during the Cold War, in the event of Soviet aggression. The return to all countries was a boost in their economy.⁷⁸

The states that run open registries enjoy many advantages at a low cost to their own welfare. For example, the fees Panama charges shipowners to enlist in the Panamanian registry constitutes five percent of the Panamanian national budget.⁷⁹ In Liberia, where revenue from the registry accounted for approximately ten percent of the national budget before the civil war, such revenue now contributes up to thirty percent.⁸⁰

V. The Inconveniences of Flags of Convenience

The Importance of Maritime Trade

The sea has continually provided a cheap, reliable method of shipping goods across the globe to this day. It is estimated that 95% of all goods shipped worldwide, by any means of transportation, move by water at some point during their journey from manufacturer to consumer.⁸¹ In 1998, the value of maritime transport services was estimated at \$4,020,000,000 in Canada, \$8,146,000,000 in France, \$13,983,000,000 in Denmark, \$14,408,000,000 in the UK, \$18,142,000,000 in the US, and \$33,954,000,000 in Japan.⁸² In the United States alone, 8,000 ships make approximately 51,000 port calls annually, delivering over 7.5 million containers of

⁷⁸ Jim Morris, *Lost at Sea: Flags of Convenience Give Owners a Paper Refuge*, HOUSTON CHRONICLE, Aug.22, 1996, at 15, available at <http://www.chron.com/content/interactive/special/maritime/96/08/220part5.html> (last viewed 12/27/03).

⁷⁹ *Id.*

⁸⁰ De Sombre, *supra* note 74, at 4, citing Aviva Freudman, *Liberia Taps DC Lawyers to Handle Registry*, J. COM., DEC. 21, 1998, at 2B.

⁸¹ Taylor, *supra* note 65, at 131.

⁸² *Id.* at 150.

goods.⁸³ FOC vessels account for over 20,000 ships worldwide, 23% of vessels over 100 gross tons in the world fleet, and 53% of the world's gross tonnage.⁸⁴

The importance of maritime transport to international trade and the global economy is evidenced by the amount of money spent on maritime transport services annually. The FOCs “race to the bottom” is a desire to be the recipient of as large a portion of that revenue as possible. Lax regulatory enforcement is “hook” that FOC countries use to gain such revenue. Unfortunately, the costs of the FOCs behavior are dispersed amongst all parties involved in international maritime trade. States with closed registries perceive “flags of convenience as nothing other than ‘unethical legal fictions designed to escape the safety controls, social legislation, taxation, and maritime policies required by other nations.’”⁸⁵

Pollution/Environmental

The system of flags of convenience is often considered to be a major obstacle to alleviating the problem of maritime pollution, due to the system's lack of regulatory enforcement and inexpensive, untrained crews.⁸⁶ In 2002, two oil spills by substandard FOC-flagged ships led to unprecedented levels of environmental damage. First, the *Prestige*, an aging oil tanker sank 130 miles off the Spanish coast, spilling 77,000 tons of oil into the sea, grossly polluting the ocean and diminishing the valuable fishing trade in Spain and Portugal.⁸⁷ The resulting slick was 150 miles long and fifteen miles wide and could have been reduced had any of the neighboring governments agreed to tow the ship into shallower waters to pump the oil from the ship. At the

⁸³ Mellor, *supra* note 10, at 342.

⁸⁴ *ITF Annual FOC Report*, *supra* note 3.

⁸⁵ *Id.* at 389-90, quoting Carlisle, *supra* note 74, at 11.

⁸⁶ Anderson, *supra* note 5, at 158-59, 162 (finding that the use of foreign labor as a means to control cost goes back to the mid 1900s and is a key reason for the proliferation of FOCs).

⁸⁷ Craig H. Allen, *Introduction to the Maritime Law Forum*, 12 PAC. RIM L. & POL'Y J. 97, 107 (2003).

time of the incident the *Prestige* was chartered by a Swiss-based Russian oil trader and was sailing under a Bahamas flag. However, the ship was registered under a Liberian owner and operated by a Greek shipping company. The *Prestige* incident is emblematic of the problems of ships sailing under flags of convenience for which no traceable party is liable, as at the time of its sinking it was well over the authorized age of oil tankers and did not have the necessary double hull.⁸⁸ In June 2002, the *Jessica* sank near the Galapagos Islands, creating a 117 square mile oil spill, thereby polluting one of the most unique ecological systems on the planet.⁸⁹ The *Jessica* was carrying 160,000 gallons of diesel fuel and 80,000 gallons of petroleum product.⁹⁰ The *Jessica* was an Ecuadorian flagged vessel operated out of the Marshall Islands, with a Master who was not qualified to operate oceangoing vessels.⁹¹ These are just two examples of that demonstrate that oil tankers registered under FOCs have a significantly worse safety record than their non-FOC counterparts.⁹²

[FOC] vessels are widely thought to be in poor condition, manned by underqualified crews, and free from meaningful regulation by the states in which they are registered. Consequently, flag-of-convenience (FOC) tankers are considered more prone to accidents and more likely to emit excessive operational discharges than oil tankers registered in the traditional maritime nations. This assessment of the FOC fleet, coupled with the fact that FOC tankers carry most of the world's oil, has led to a continuing attack on convenience registry as a major cause of oil pollution in the oceans.⁹³

⁸⁸ David Lunggren, *Ban ships with flags of convenience – Canada*, REUTERS NEWS SERVICE (Nov. 21, 2002), <www.planetark.org/avantaodailynewsstory.cfm?newsid=18695.p2>.

⁸⁹ *Oil Spill Off Galapagos Islands Threatens Rare Species*, available at <http://www.cnn.com/2001/NATURE/01/22/galapagos.spill/index.html> (last visited 12/11/03); see also *NOAA Scientists Provide Expertise In Galapagos Islands Oil Spill*, available at <http://www.noaaneews.noaa.gov/stories/s572.htm> (last visited 12/11/03).

⁹⁰ *Id.*

⁹¹ Centre de Documentation de recherche et d'experimentations sur les pollutions accidentelles des eaux, *Jessica*, available at <http://www.le-cedre.fr/uk/spill/jessica/jessica.htm> (last visited 3/30/04).

⁹² Andrew Schulkin, *Safe Harbors: Crafting an International Solution to Cruise Ship Pollution*, 15 GEO. INT'L ENVTL. L. REV. 105, 125 (2002).

⁹³ Mark L. Boos, *The Oil Pollution Act of 1990: Striking the Flags of Convenience?* 2 COLO. J. INT'L ENVTL. L. & POL'Y 407, 408 (1991).

The transnational nature of maritime environmental disasters necessitates that all states act to prevent the causes of maritime pollution. The pollution resulting from fuel or oil spilled from tankers is fatal for all living organisms, in the sea and along the coast. The financial costs of these maritime disasters, primarily in terms of cleanup and the adverse impact on public health and local economies, are rarely born by the flag states of the foundered vessel. Instead it is often the countries with the unfortunate proximity to the accident who pay the financial price, despite having played no role in creating the conditions that caused the accident to occur.

The unsafe practices followed by FOC flagged vessels are supported outside of the FOC community, further exacerbating the problem of substandard ships. In recent years it has become common practice for governments to charter substandard, FOC flagged ships when ships from its own, more expensive, fleet are unavailable. The British government recently admitted to chartering substandard ships that had failed several safety inspections, to transport troops and equipment to the Persian Gulf.⁹⁴ Actions such as this, which serve to reinforce the monetary bottom line rationale that undergirds the FOC system, are problematic because they appear to legitimize the regulatory shortcuts practiced by FOCs due to their financial support of the very system they have been trying to dismantle.

Human Rights (Labor/Refugees)

There are two different aspects to the human problems posed by FOCs. The first is labor conditions and the second is human smuggling. The lack of regulatory worldwide port inspection and domestic liability for violations of international rules drives shipping companies and their employees to act without regard for the law. Ill-trained crew, members of which often

⁹⁴ Paul Brown, *Rusting and Faulty: The Decrepit Fleet that Took Britain to War*, GUARDIAN, Aug. 29, 2003, available at <http://politics.guardian.co.uk/print/0,3858,4763096-111381,00.html>.

lack a common language, are commonly ill-prepared to deal with the unexpected problems that plague substandard ships. Poorly paid and with little to no benefits, some crew members, including officers, find ways to supplement their income by taking on illicit cargo. As many scholars have observed, this combination of substandard ships and poorly-trained crew leads to less safe oceans for all parties involved in maritime trade.⁹⁵

Some of the problems faced by crews on substandard FOC ships are abandonment, refusal of wages, and unsafe working and living conditions. An estimated 220,000 seafarers work on FOC ships, with a fatality rate 1.2 times higher than the world average and three times higher than that of English seafarers.⁹⁶ During the summer of 2001, seventeen crew members walked off the cruise ship *Ocean Glory I* (registered in Panama) while it was detained in Dover, England and contacted the International Transport Workers Federation (“ITF”), citing unsafe working and living conditions.⁹⁷ The ITF typically receives complaints from crew members such as these, regarding issues as varied as company’s anti-union activity, refusal to pay wages, refusal to reimburse for work-related injuries, and unsafe working and living conditions.⁹⁸

The use of containers in which to hide stowaways on board commercial vessels, in order to gain entry to Western countries, is a well-established trick in human smuggling.⁹⁹ This technique relies on the huge volume of maritime trade to penetrate inside of a country’s borders.

Each year in the United States alone, 8,000 ships . . . deliver approximately 7.5 million overseas containers. Of these 7.5 million containers, only 2% are actually inspected and each inspection takes an average of three hours per container. This inability to verify the contents of containers and the general lack of inspection suggests that containers could be used as an effective means to transport weapons

⁹⁵ Schulkin, *supra* note 92, at 115.

⁹⁶ Li, *supra* note 48, at 381.

⁹⁷ American Maritime Officer, *Scandals Taint Panama’s Reputation as Maritime Nation*, available at <http://www.amo-union.org/Newspaper/Morgue/8-2001/Sections/News/scandals.htm> (last visited 12/08/03).

⁹⁸ For further information on the ITF, see <http://www.itf.org.uk/seafarers> (last visited 12/28/03).

⁹⁹ Langewiesche, *supra* note 1, at 64.

of mass destruction into Western ports or even as a means for terrorists themselves to circumvent immigration control.¹⁰⁰

In October 2001, while performing a routine inspection of a cargo ship bound for Canada, Italian government agents found Amid Farid Rizk, a forty-three year old Egyptian national, hiding on the ship.¹⁰¹ Rizk had been smuggled on board the ship in Egypt, in a container outfitted with a bed, a toilet, a heater, and water supply. Rizk also had a false Canadian passport, a satellite phone, two laptop computers, cameras, forged security passes for airports in three countries, papers identifying him as an aircraft mechanic, and an airplane ticket from Montreal to Cairo. Despite such suspicious circumstances and Rizk's name being linked to terrorist organizations in Egypt, Rizk was released from Italian custody and disappeared.¹⁰² In the same vein, but of a less sinister design, are the multitude of stories of refugees and illegal immigrants that are discovered in containers aboard cargo ships, sometimes dead. One recent story in the United States involved a group of approximately sixty Chinese immigrants found in two cargo containers at the storage area of Long Beach Harbor, CA after having been unloaded from the ship *Maple River*.¹⁰³ It is estimated they had been in the container for at least three weeks before being found.

Maritime and Land Security

While the severity of the above-cited problems is not to be underestimated, the most pressing and far-reaching maritime issues today concern national and international security, both

¹⁰⁰ *Id.*

¹⁰¹ Tim Weiner, *U.S. Law Puts World on Notice*, N.Y. TIMES, Mar. 24, 2004, available at <http://www.nytimes.com/2004/03/24/international/americas/24PORT.html> (last visited Mar. 30, 2004).

¹⁰² Langewiesche, *supra* note 1, at 64; see also Preston Mendenhall, *Alert Highlights Air Cargo Risks*, MSNBC.com, at <http://www.msnbc.com/news/991238.asp?0bl=-0> (last visited Nov. 11, 2003) (reporting on similar risks on cargo planes).

¹⁰³ *Stowaways Found: Illegal Immigrants hid in cargo ship from China*, available at abcnews.go.com/sections/us/dailynews/stowaways10403.html (last visited 1/14/04).

on land and at sea. Dangerous cargo and a lack of transparency regarding ship ownership and crew members, combined with the lack of regulations by FOC states constitute a grave transnational threat. The transportation of weapons or terrorists by FOC flagged ships, or the use of those ships to implement an attack against maritime targets, are disasters which would not and could not be confined by political boundaries.

At the root of maritime security issues is the containerization of the industry. The above noted story about Amid Farid Rizk, the man who hid in a container on board a ship from Egypt to Italy, highlights how the use of shipping containers, while extremely efficient for the shipping industry, had almost eliminated transparency in shipping and demonstrates how a bomb could be brought inside almost any state's waters.¹⁰⁴ The industry's focus on temporal and monetary efficiency means that ships are loaded with as many containers as possible, making it difficult to access them for inspection. In the United States, only two percent of the six million containers are opened for inspection.¹⁰⁵ This new vulnerability in the maritime sector is, in many respects, a product of the success of free trade and liberalized economic policies that allow for the free movement of goods across international boundaries.¹⁰⁶

Containers are increasingly carrying dangerous cargo.¹⁰⁷ In the past, dangerous goods were carried in package form, as deck cargo, for easy identification and jettison if need be. Nowadays, dangerous goods are carried in containers, making it harder to locate and access them, especially without proper labeling or them being listed as dangerous goods in the

¹⁰⁴ Mellor, *supra* note 10, at 346-47, note 21, citing Michael Grey, *Security-Abandon Secrecy in Global Fight Against Terror Says Register*, LLOYD'S LIST INT'L, Jan. 31, 2001, at 3 (suggesting that a "love of secrecy exists within the the industry that lead to national governments' attempts to increase transparency), *available at* 2002 WL 8245570.

¹⁰⁵ Langewiesche, *supra* note 1, at 76.

¹⁰⁶ Mellor, *supra* note 10, at 353.

¹⁰⁷ Li, *supra* note 48, at 398.

manifest.¹⁰⁸ Technically the master aboard the ship may search the ship and if necessary break and open the box or package without being subject to any civil or criminal liability, *if* he has reasonable grounds for suspecting dangerous goods are concealed on board.¹⁰⁹ However, considering that containers are stacked high and tight together, access is difficult and the disincentive is great considering the pressure for ships to travel as quickly as possible to decrease cost. The focus on temporal and cost efficiency also impacts upon the navies and coast guards, who hold the power to intercept, board and inspect any ship in their territorial waters. Knowing that such an interception would result in a strong worldwide outcry from shipping companies, owners, and various businesses, only absolute intelligence leads to navies daring to infringe upon a company's profit margin.¹¹⁰

It is the very efficiency of the containerized systems that today makes them a potential security threat. The lack of transparency in modern multimodal systems helps immunize cargo from theft, but at the same time, it creates an enhanced security risk. The emphasis on speed means that cargo is rarely inspected and the only parties with true knowledge of the contents of the container are the shipper and the recipient. It may be argued that speed and security correlate in a type of inversely proportion relationship whereby increasing one variable decrease the other.¹¹¹

The United Nations General Assembly Resolution 61 urges all states to “unilaterally and in cooperation with other States, as well as relevant United Nations organs, to contribute to the progressive elimination of causes underlying international terrorism and to pay special attention to all situations . . . that may give rise to international terrorism and may endanger international peace and security.”¹¹² U.S. maritime officials suggest that U.S. ports could be struck in a variety of ways – “cargo ship filled with fuel oil and ammonium nitrate fertilizer could become a

¹⁰⁸ Mellor, *supra* note 10, at 353-54.

¹⁰⁹ *Id.*

¹¹⁰ Langewiesche, *supra* note 1, at 66.

¹¹¹ Mellor, *supra* note 10, at 348-49.

¹¹² Li, *supra* note 48, at 397; citing GAOR, 40th Sess., Res 651, UN Doc A/Res/40/61 (1985) at ¶ 9.

waterborne fireball; a ship could carry a radiological ‘dirty bomb’ into a harbor; a speedboat carrying explosives could blow up a tanker laden with oil or delivering liquefied natural gas.”¹¹³ In addition to the cost in lives and property damage, any such seaborne terrorist attack would most likely close major American ports and cost the world economy many billions of dollars in suspended world trade.¹¹⁴ Thus we see that that the security issues presented by that the lack of transparency and “the emphasis on speed over security”¹¹⁵ inherent in the containerization of the shipping industry, combined with the opaque system of ship ownership facilitated by the FOC system, create a system in which ports are wide open to several types of terrorist attacks. These loopholes in the system must be sewn shut.

VI. Decreasing the Freedom of the FOCs, Increasing the Security of High Seas

As illustrated throughout this paper, the inadequacies with the current international maritime system are several and complex. The problems involve a wide range of parties, including, port, flag, and coastal states, as well as ship owners, shipping companies, and manufacturers.¹¹⁶ Despite the multiple and often competing interests of these parties, “[t]he sea with its winds, its storms and its dangers never changes and this demands a necessary uniformity of judicial regime.”¹¹⁷ This section examines methods to improve the international maritime legal regime.

Any effort to improve the international maritime legal regime must aim to restore the “genuine link” between the shipping vessel and the flag it flies,¹¹⁸ as required by Article 91 of

¹¹³ Weiner, *U.S. Law Puts World on Notice*, *supra* note 101.

¹¹⁴ *Id.*

¹¹⁵ Mellor, *supra* note 10, at 349.

¹¹⁶ *Id.* at 387.

¹¹⁷ Griggs, *supra* note 36, at 192 (2003), quoting ALBERT LILAR & CARLO VAN DEN BOSCH, *LE COMITÉ MARITIME INTERNATIONAL 1897 – 1972*.

¹¹⁸ Heindel, *supra* note 51.

UNCLOS. However, because certain ship owners, countries that operate open registries, and other beneficiaries of the FOC system will undoubtedly mobilize vast resources to block any attempt by the international community to eradicate the FOC phenomena,¹¹⁹ the solutions must be shaped to create a system in which it is in all parties' best interests to operate under a more regulated maritime industry. In order to create such a system we suggest a two pronged approach, the creation of a dual incentive structure in which the benefits accrued by businesses and governments outweigh the costs of operating under increased regulation. The purpose is to make it more profitable and advantageous for businesses and governments alike to enact and enforce the pre-existing UNCLOS regulations and to provide for more stringent regulations of ships under their flag and in their ports.

A Stronger Regulatory Framework Based on UNCLOS

The first step is to work from the top-down, to develop a stronger regulatory framework capable of implementing the international law set forth in UNCLOS. UNCLOS should remain the centerpiece of this framework, as the “constitution for the oceans,”¹²⁰ in order to promote international uniformity, in both laws and regulations.¹²¹ However, UNCLOS, as the guiding force of uniform international maritime law, must be strengthened with effective enforcement mechanisms in order to maintain a viable international maritime legal order. Regulation and enforcement of the Convention's provisions should then be enacted and improved upon by regional organizations, as exemplified by the Paris Memorandum of Understanding on Port State

¹¹⁹ *Id.*

¹²⁰ Mitchell, *supra* note 12, at 3, citing A. BERNAERTS, BERNAERTS'S GUIDE TO THE LAW OF THE SEA (Fairplay Publications 1988).

¹²¹ William Tetley, Q.C., *Uniformity of International Private Maritime Law – The Pros, Cons and Alternatives to International Conventions – How to Adopt an International Convention*, 24 TUL. MAR. L.J. 775 (2000)

Control (“Paris MOU”).¹²² Finally, domestic governments would enact the regulations into law their domestic legal systems and provide for effective administration through maritime authorities and staff. We suggest that domestic enactment of international regulations include the creation of a private cause of action for violation of these regulations, with the judicial system acting as a way of rectifying unsatisfactory ship conditions when the maritime authority does not.

The operations of effective port and flag state control regimes require all countries to pass domestic legislation giving effect to and enforcement strategies for the provisions contained in UNCLOS. This has occurred, in some various ways, in many maritime states since the attacks of September 11th. As a result of the seeming ease with which the airplanes were hijacked, maritime states have realized the risks that the current lax maritime regulatory system could bring. “Since September 11 there has been a flurry of activity in both the executive and legislative branches of the U.S. government to fill the port security void.”¹²³ In July 2002 For example, on in November 2002 the President signed in the Maritime Transportation Security Act of 2002.¹²⁴ The law covers the entire maritime sector and required vessel owners to submit detailed security plans for their ships by December 31, 2003. The Coast Guard is currently reviewing such plans. The law requires that all ships and foreign ports create institute sufficient

¹²² See *infra* note 136 (discussing the Paris Memorandum of Understanding on Port State Control [hereinafter Paris MOU]).

¹²³ Firestone, *Combating Terrorism in the Environmental Trenches*, *supra* note 8, at 431.

¹²⁴ The Maritime Transp. Antiterrorism Act of 2002, H.R. 3983, 107th Cong. (2002). A parallel global code was adopted shortly after by the IMO, see International Ship & Port Facility Security Code, *available at* www.imo.org/home (last visited 3/30/04).

counterterrorism systems by July 1, 2004.¹²⁵ Penalties for non-compliance include \$25,000-per-day fines and the possibility of having an operation shut down.¹²⁶

Increasing Port State Control

The second prong of the new system would be a bottom-up approach, with the creation of a Port State control regime as its centerpiece. A crucial part of this bottom-up approach requires the traditional maritime states, such as the United Kingdom, Canada and the United States to set better examples of the beneficial nature of effective regulatory regimes. The first step in this would be for the major maritime states to become parties to all relevant treaties and agreements, particularly UNCLOS, to which the United States is not a party to date.¹²⁷

The goal of creating a port state control regime would be to ensure commercial vessels' compliance with all international and domestic safety requirements.¹²⁸ An effective system would drive sub-standard shipping out of the commercial marketplace through costly detentions for non-compliance with international regulations.¹²⁹ Port states can conduct more inspections of vessels with a view toward citing them for infractions of international regulations.¹³⁰ If port states detain particular vessels for cited infractions, or issue citations which prevent vessels from calling at the port state again until the infraction is corrected, then vessel owners lose profits.

¹²⁵ See Maritime Security Act of 2003, P.L. 108-136 [H.R. 15881], Nov. 24, 2003; see also Weiner, *U.S. Law Puts World on Notice*, *supra* note 100; Brock N. Meeks, *Deadline Nears on Maritime Security*, MSNBC.com, at <http://msnbc.msn.com/id/3540826> (last visited 1/16/04).

¹²⁶ *Id.*

¹²⁷ At the time of publication of this article, the U.S. Senate Committee on Foreign Relations unanimously voted to send to UNCLOS to the floor of the Senate. See The U.N. Convention on the Law of the Sea (T. Doc 103-39), available at <http://foreign.senate.gov/hearings/2003/hrq031014a.html> (last visited 3/30/04). The bill that would ratify UNCLOS in the U.S. is supported by the President, although strongly opposed by certain, primarily Republican, members of Congress. It is awaiting a vote by the entire Senate. See Carolyn Skorneck, *Despite White House Backing, U.N. 'Law of the Sea' Treaty Hits Growing GOP Resistance*, CQ WEEKLY – FOREIGN POLICY, Mar. 27, 2004, at 761.

¹²⁸ Hare, *supra* note 40, at 571.

¹²⁹ Mellor, *supra* note 10, at 390.

¹³⁰ Anderson, *supra* note 5, at 167

For example, in the ports belonging to the twenty Paris MOU states, officials conduct more than 18,000 inspections of foreign ships annually, to ensure that all ships docking in their ports meet international safety and environmental standards, and that crew members have adequate living and working conditions.¹³¹ Evidence suggests that recent efforts by port states to increase inspections of vessels flying FOCs are effective. Observers report that “the growing number of inspections now required by a variety of interests are becoming a significant cost item, both in terms of fees and lost revenue-earning days.”¹³²

While increased detentions of delinquent ships by port states are costly and may erode the desirability of using open registries, the lack of transparency of ship ownership remains a contentious issue in the continued existence of FOCs. The current anonymity of FOCs allows the *beneficial* shipowners, whose true identities are rarely known, to escape liability and prosecution of violating international standards.¹³³ In order to increase the transparency of ownership, flag states and port states must work together to increase the transparency of the corporate structure and ownership of vessels within their own fleets. Experts cite this lack of transparency, which is enabled by the operations of FOCs, as a facilitator of transaction criminal activities and terrorism.¹³⁴

The port state control regime could be created on a regional basis, based largely on the existing Memorandums of Understanding (“MOUs”), such as the Paris and Tokyo MOUs, which are regional agreements between maritime states.¹³⁵ The Paris MOU is an organization consisting of twenty maritime Administrations, which aims to “eliminate the operation of

¹³¹ The Paris MOU on Port State Control, Home, at <http://www.parismou.org> (last visited 3/30/04).

¹³² Anderson, *supra* note 5, at 167, citing *Open Registries Tighten Up On Safety*, MARINE LOG, Mar. 1992, at 20.

¹³³ Anderson, *supra* note 5, at 167.

¹³⁴ Heindel, *supra* note 51.

¹³⁵ Mellor, *supra* note 20, at 390; *see also* Özcayir, *supra* note 42, at 14-15 (explaining that the MOUs represent the best models around which to base port state control agreements).

substandard ships through a harmonized system of port state control.”¹³⁶ The MOUs could be used to set and enforce environmental, safety and security standards.¹³⁷ First, the port state control system could require that vessels meet certain international standards for security of crew, goods, and vessels. As part of this program, certain documents detailing the beneficial and effective ownership of the vessel should be available at all times.¹³⁸ A vessel’s failure to comply with such security regulations would result in that vessel not being allowed to depart a port, thus creating a delay in the shipment of goods and costly monetary losses for the shipowners and cargo owners. In some cases, the port state could deny delinquent ships future access to its ports. Port states would also have the authority to detain any vessel that refused to provide information on cargo being carried on board the ship or the employment of crewmembers that had not undergone an enhanced reliability check.¹³⁹ The basic idea is that:

Port states must work together to create a strong system of port state control, as port state control has come into its own as the most effective means of ridding the world’s ports and oceans of sub-standard, unseaworthy and dangerous ships. This is not to say that international pressure on flag states, owners and classification societies to do their jobs properly and responsibly should in any way be relaxed. The reality, however, remains that there are good and bad shipowners. There are good and bad classification societies. And there are good and bad ship registers. Let the international message of port state control be loud and clear: bad ships, bad owners, bad flag states and bad classification societies are pariahs for which there should be no place in the shipping industry of the future.¹⁴⁰

V. Conclusion

It is only through a combination of tightening controls over flag states, increasing the authority of port states, and creating a truly international political discourse through the United Nations that the international community can create a more effective international maritime legal

¹³⁶ The Paris MOU on Port State Control, Home, *supra* note 131.

¹³⁷ Hare, *supra* note 40, at 578.

¹³⁸ Heindel, *supra* note 51.

¹³⁹ Mellor, *supra* note 10, at 390.

¹⁴⁰ Hare, *supra* note 40, at 593-94.

regime. In order to accomplish this, the major maritime countries must lead the way in creating and enforcing pertinent domestic legislation, as well as providing resources, training, and infrastructure to developing maritime nations. As such, it is the hope of the authors that the United States Legislature will soon ratify UNCLOS. In return, developing countries can better enforce international standards, and bring delinquent ships, shipowners and shipping companies into line. The creation of a workable maritime system will take a tremendous amount of resources, both human and monetary, as well as a great deal of strategy and compromise among states. Nonetheless, the expenditure will be well worth the effort, for the safety of workers and travelers, the valuable cargo being shipped, the wellbeing of the oceans and most of all, the safety and security of the people of the world.