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FLAGGING INTEREST

Ship Registration, Owner Anonymity, and Sub-standard Shipping

Michael Galley

Introduction

An unregistered ship, not flying the flag of any state, is a stateless entity, with no legal rights on the high seas. An owner may register a vessel in almost any state of his choosing, depending on his objectives and motivation; the choice of options is wide and each register may offer its own legal and commercial benefits. This paper examines the various types of shipping registers, the inducements that many offer, particularly in the way of owner anonymity and lack of regulatory interest, and the way in which this can lead to the prevalence of sub-standard shipping. From the outset however, it needs to be recognised that whilst a number of open registers may be worthy of the tag Flag of Convenience – and even use the term itself - this is by no means true of all open registers.

Shipping Registers

Shipping registers are traditionally divided into the “closed” registers of the more traditional maritime nations, and “open” registers of States, which may have a more relaxed regime of financial and regulatory controls and often with their minimal requirements of owner nationality. What might be termed the intermediate registers, the “second” or “international” registers, lie somewhere between the other two categories. Registering a vessel involves entering the details into a State’s public records¹ and is a crucial element of public international law. It confers nationality on a ship and establishes the jurisdiction of that State over the ship, which is the power

¹ According to international regulation, some ships may be excluded from a nation’s register on account of their small size. Ref. Middleton J., 2007. Admiralty Education 2007. Ship registration and the role of the flag. Federal Court of Australia at: www.fedcourt.gov.au/how/admiralty_papersandpublications20.rtf accessed: 23.3.2011.

to prescribe rules of conduct and threaten and enforce sanctions on the shipowners.² It also entitles the ship to fly the flag of the State, which thereby becomes the Flag State, as a symbol of its nationality and registration.³ The term “flag” is often used as a shorthand term for Flag State. Entry to a state’s register in turn places a responsibility on the State to ensure that the condition of the vessel, its manning, and its operation are in compliance with the State’s own national laws and standards, as well as with any international treaties to which it is a party. Other public law consequences may give access to cargoes, or coastal trading among others and the right to diplomatic and naval protection.⁴ In addition to transfers of registration for normal commercial reasons or transfer of ownership, owners may change registration to those of major naval powers in times of conflict in order to enjoy the protection that such States may offer. Ship registrations may also be changed if ships of a specific State are considered unwelcome in the ports of other nations.

A ship that has no entitlement to fly a flag of registration has neither nationality nor the right to protection under international law; this principle was tested in *Naim-Molvan v. Attorney-General for Palestine*⁵ when an unregistered ship flying the flag of Turkey was arrested by a British warship on the high seas off the Palestinian coast in 1948 whilst trying to land Jewish settlers, and was forfeit by a Palestinian court. The US Court of Appeals stated the situation somewhat more abruptly in *US v. Marino-Garcia* 1982, whereby “vessels without nationality are international pariahs. Flagless vessels...represent ‘floating sanctuaries from authority’ and constitute a potential threat to the order and stability of navigation on the high seas.”⁶ Recognition of the flag was basically codified under Articles 4 and 5 of the 1958 High Seas Convention (HSC), which grants the right to all States to sail ships under their flags on the high seas, whilst giving each State the

² Hosanee N.M., 2009. A critical analysis of flag state duties as laid down under article 94 of the 1982 United Nations convention on the law of the sea. Division of Ocean Affairs and the Law of the Sea, Office of Legal Affairs, the United Nations, New York.

³ Farthing B., M. Brownrigg. 1997. *Farthing on international shipping*. 3rd. ed. London, LLP Ltd.

⁴ *Ibid.*

⁵ *Naim-Molvan v. Attorney-General for Palestine* [1948] A.C.351. An appeal against the arrest and seizure of the ship was made on the grounds that the freedom of the high seas also applied to ships of no nationality. This appeal was rejected by the Privy Council, who upheld the court’s forfeiture of the vessel.

⁶ 679F.2d 1373.

right to determine the conditions under which that may take place. The recognition was subsequently incorporated into the 1982 United Nations Convention on the Law of the Sea (UNCLOS), Articles 90 and 91.

Closed or national registers have often imposed conditions as to the ownership, manning, and even construction of a ship within that State. Prior to its amendment in 1988, the 1894 UK Merchant Shipping Act defined a British ship purely by its ownership of British subjects or “bodies corporate established under and subject to the laws...of Her Majesty’s dominions,” subsequently being redefined simply as a question of registration.⁷ Until 1919, the right to allow ships to fly their maritime flags was a privilege granted only to maritime States (i.e. those that were not completely land-locked); only after the First General Conference of Communication and Transit held in Barcelona in 1921 was this right extended to all States, with or without sea coasts.⁸ Today, a vessel’s nationality is generally taken to relate to its inclusion in the register of a particular State, *R v. Bolden and Dean* (1997)⁹ providing case law.

Open Registers

Up until the period immediately following World War II, the majority of the world’s merchant fleet was registered with States operating closed registers; thereafter, there began a rapidly growing transfer of ships to the newly established open registers. The history of the growth of the Panamanian and Liberian registers is adequately documented over a range of sources, and only the briefest of outlines will be given here. Panama first established its open register in 1916 and increasingly became the target for American shipowners, who were subject to the restrictive regime – particularly with regard to manning - imposed at home by the USA maritime legislation, and who could benefit from the new register’s more relaxed manning and taxation regime. Panama was subsequently joined by Honduras. During the war, the transfer of ships from the Allies’ registers to

⁷ Ready N.P., 1998. *Ship registration*. 3rd ed. London, LLP Reference Publishing

⁸ Middleton J., 2007. *Op.cit.* The rights of a land-locked state to sail ships flying its flag on the high seas was reaffirmed in Article 4.1 of the 1968 United Nations Convention on conditions for registration of ships – see below.

⁹ *R v. Bolden and Dean (The Battlestar)* (1997) 2 Int. M.L. Plymouth Crown Court held that the yacht *Battlestar*, although owned by US citizens, with a certificate of American ownership and entitled to fly the American flag, was not, in fact, deemed to be registered in any country since its owners had not entered the vessel into the US public registration records.

Panama permitted war materials to be shipped under the flag of a non-belligerent. After the war, an upturn in trade and the entry of a large number of surplus war-time ships into the market both contributed to a growth in the number and sizes of open registers. The Liberian register was established in 1949, posing a challenge to the Panamanian register at a time when the latter was experiencing a temporary downturn in attractiveness to foreign (particularly American) shipowners. In the 1950s, open registers accounted for some 4% of the world's fleet, and by the mid-1980s, more than 30%. At the beginning of 2009, over 73% of the total merchant fleet were registered under foreign flags (mainly in open registers), with Panama accounting for 23.6% of the world's tonnage.¹⁰

The primary function of a number of open registers is primarily to develop an income stream for the State; a secondary function may be to develop related maritime economic activities.¹¹ Whilst requirements for registration differ between States, there are features that tend to be common amongst many of the open registers, including low taxation regimes, minimal ownership requirements, reduced manning requirements, an inadequate or absent maritime administration, and a general absence of regulatory observance – a State may be signatory to a range of international agreements, but that in itself does not necessarily equate to their strict observance and regulation. Whilst national registers tend to treat shipping companies in a manner similar to other types of organisations, some open registers may have specific and more favourable regimes for shipowners. Notwithstanding this more *laissez-faire* approach, some open registers may operate a system that is as professional as some of their closed register counterparts, if not more so. A number of major oil companies have registered their tanker fleets with open registers and maintained and operated those vessels to the highest of standards.¹² In order to be successful, open registers, as with others, have to be acceptable worldwide and to distinguish themselves from registers considered to be of lesser standing; and some open registers have established networks of worldwide ship inspections for vessels that may rarely visit their home ports. However, the less reputable of open registers may continue to be attractive to those operators who intend to restrict their operations to selected and less

¹⁰ Institute of Shipping Economics and Logistics, 2009. Shipping statistics and market review. 53 (7) 2009.

¹¹ Hosanee N.M., 2009. Op.cit.

¹² Farthing B., M. Brownrigg 1997. Op.cit.

regulated areas. Nevertheless, open registers in general have been associated with the pejorative tag of “Flags of Convenience” (FOC), and this continues to be the case from bodies or organisations that see open registers as a threat,¹³ such as the OECD and the European Union, which use the term freely in their documentation.

In a number of instances, the open register nations do not actually operate their registers as a national body, but are content to hand over the control of their maritime flag to a third party in exchange for a fixed sum – hence the Mongolian and Cambodian registers are operated from Singapore whilst International Ship and Aircraft Registries offers the services of the registers of Belize, Cambodia, Dominica, Vanuatu, and Georgia from Cyprus, as well as the Cyprian register itself.¹⁴ International Ship’s Register offers an even wider range of what it labels “Ships Registry in Flags of Convenience” from its base in the Canary Islands.¹⁵

Since its inception as recently as 1994, the Cambodian ship registry has had a chequered history. Operated initially by the Cambodian Shipping Corporation (CSC) based in Singapore, it grew rapidly, but soon became synonymous with ships of poor condition and ships engaged in their involvement in illegal activities such as oil and cigarette smuggling, drugs and human trafficking, and arms running, the latter being particularly associated with ships from North Korea.¹⁶ Adverse world opinion finally forced the Cambodian authorities to withdraw control of the register from CSC in 2002, passing it first to the Ministry of Public Works and Transport before allocating it six months later to the new International Ship Registry of Cambodia, based in South Korea. The Ministry describes the Cambodian ship registry as a Flag of Convenience in its website.¹⁷

The term Flag of Convenience is particularly associated with the International Transport Workers’ Federation (ITF), which, since 1948, has been waging a campaign against these registers. The ITF defines FOCs as “Where beneficial ownership and control of a vessel is found to lie

¹³ In an interesting twist, Ready uses the term Open Register as “a euphemism for Flag of Convenience.” Op.cit..

¹⁴ It is somewhat noteworthy that the website address for this organisation is www.flagsofconvenience.com.

¹⁵ Flags listed include Barbados, Belize, Canary Islands, Comoros Islands, Dominica, Honduras, Liberia, Marshall Islands, Panama, St.Vincent and Grenadines, Tuvalu, and Vanuatu. See www.internationalshipsregister.org/2html.

¹⁶ Neff R., 2007. Flags that hide the dirty truth. Asia Times 20.4.2007.

¹⁷ Ref: www.ciwn.mpwat.gov.kh/index.php?option=com_content&view=article&id=72 accessed: 18.4.2011.

elsewhere than in the country of the flag the vessel is flying, the vessel is considered to be sailing under a flag of convenience.” The ITF maintains a list of countries it considers to be FOCs – currently numbering some 32¹⁸- as well as a list of blacklisted companies closely associated with FOCs. The inclusion of states on this list is based upon the criteria as defined by the Rochdale Commission of 1970,¹⁹ - the “Rochdale Criteria” – whereby states allow easy access to their registers, permit ownership, control and manning of ships by non-citizens, impose low or nil taxes on revenues earned by the ships, and has no maritime administration with the power to impose national or international regulations on the ships so registered.²⁰ In an attempt to return ships to their own national flags (and hence back to national manning requirements), the ITF Congress in 1958 began a worldwide boycott of ships under open registry, using as a basis the ITF Collective Agreement on minimum wages, working hours, holidays, and special conditions. The campaign has had two objectives – the protection of seafarers on FOC ships from exploitation and the promotion of international governmental agreement on the need for a genuine link between the flag a ship flies and the nationality or residence of its owners, managers and seafarers – thereby aiming to eliminate FOCs entirely.²¹ The campaign has forced a number of owners to sign collective agreements, but in over 50 years, the net effect has been unsuccessful in driving ships back to their national flags, many ships still being owned by multinational organisations, operating with multinational crews and registered, managed, and mortgaged in a variety of countries; an ITF agreement (in some instances) merely allowing owners to carry on without union action.²² However, despite the liberal approach displayed by various open registers, there is a move amongst various Flag

¹⁸ The ITF lists the following as FOCs: Antigua and Barbuda, Bahamas, Barbados, Belize, Bermuda (UK), Bolivia, Burma, Cambodia, Cayman Islands, Comoros, Cyprus, Equatorial Guinea, French International Ship Register (FIS), German International Ship register (GIS), Georgia, Gibraltar (UK), Honduras, Jamaica, Lebanon, Liberia, Malta, Marshall Islands (USA), Mauritius, Mongolia, Netherlands Antilles, North Korea, Panama, Sao Tome and Principe, St. Vincent, Sri Lanka, Tonga, Vanuatu. Of these, 14 are targeted on one or more of the blacklists compiled by the Paris and Tokyo MoUs and the US Coast Guard – ref: MARISEC 2009, Shipping Industry Performance Table 2009.

¹⁹1970 Committee of Enquiry into Shipping – Report. Cmnd.4337. London, HMSO.

²⁰ Farthing B., M.Brownrigg, 1997. Op.cit.

²¹ ITF, 2010. Flags of convenience campaign. At: www.itfglobal.org/flags-convenience/sub-page.cfm accessed: 12.4.2011.

²² Özçayır Z.O., 2000. Flags of convenience and the need for international co-operation. *International Maritime Law*, 7 (4) May 2000, pp 111-117.

States to distance themselves from the label of Flags of Convenience by limiting the age of ships that they will accept into their registers; Liberia and Vanuatu have an age limit of 20 years, Cyprus uses 17 years and the Bahamas 12 years, although older ships may be accepted after special inspection.²³ In the case of bareboat charters, whereby the company hiring a ship has both technical and commercial management responsibilities for the ship, a vessel registered in one state is permitted to fly the flag of another State for the period of the charter. During this period, the operator can choose which register offers the greatest trading advantages, and the vessel is regulated by the charter registry; however, matters of title and ownership remain under the regulation of the underlying registry.²⁴

Genuine Link v. Sovereign's Right

A specific and contentious feature of open registers relates to the existence of a “genuine link” between the Flag State and the ship. Under domestic law, a direct link is the product of ownership, crew etc, whilst under international law, the link relates to the effective control over the administrative, technical and social matters that the State enacts over the vessel,²⁵ as defined under the HSC 1958 UNCLOS 1982,²⁶ but since no sanctions for the absence of a genuine link have been defined, the matter remains one for the individual State to interpret. The question of the need for a genuine link suffered a further setback in 1960 when the International Court of Justice (ICJ) gave an advisory opinion on the constitution of the Maritime Safety Committee of the Inter-governmental Maritime Consultative Organisation (subsequently the International Maritime Organisation),²⁷ which according to the Organisation's convention was to consist of 14 Members from the Member governments having an important

²³ Ready N.P. 1998. Op.cit..

²⁴ Frenco M., 2000. The future of open registers in the European Union. *Lloyd's Maritime and Commercial Law Quarterly* 2000 (3) pp.383-393.

²⁵ European Parliament, 1996. The common maritime policy, Chapter 2 The sea and navigation. Directorate-General for Research. Working Document Transport Series W14.

²⁶ Geneva Convention of the High Seas 1958, Article 5(1), United Nations Convention on the Law of the Sea 1982, Article 5.

²⁷ Advisory Opinion of 8th June 1960 on the Constitution of the Maritime Safety Committee of the Intergovernmental Consultative Organisation, International Court of Justice (ICJ Reports 1960).

interest in maritime safety, of which not less than eight shall be the largest shipowning nations. The question to be determined was which States were to be included under the term “largest shipowning nations” and it was the opinion of the Court that this was to be based purely in terms of tonnage registered, an opinion that was distinctly unappealing to the European shipowners.²⁸ Consequently, Panama and Liberia took their place on the Committee and as a result, international open registry flags were legitimised in international law.²⁹

Even the pronouncement of the ICJ did not precisely define the term ‘genuine link’, and it was not until the advent of the UN Convention on Registration³⁰ that the question was more fully addressed, with the Convention requiring an economic link between the Flag State and those that own, manage and man a vessel;³¹ this Convention, however, is not yet in force. Other case law has yielded differing interpretations, particularly in the case of fishing vessels being selectively registered to take advantage of fishing restrictions or quotas. In the *Factorama* case³² in which Spanish fishing companies set up companies in the UK in order to operate fishing boats under the UK flag and thereby fish under the UK fishing quota, in effect giving Spanish fishing boats a larger quota than they would otherwise enjoy,³³ the European Court of Justice (ECJ) took the view that registration alone was sufficient to establish nationality and a genuine link.³⁴ The Court took a similar viewpoint in subsequent cases, including *Commission v. Ireland*³⁵ where Ireland was trying to prohibit Spanish-owned British fishing vessels from operating in its waters, and in *Commission v. Hellenic*

²⁸ As a result of the advisory opinion, of the eight originally nominated Member states of USA, UK, Norway, Japan, Italy, the Netherlands, France and Germany, the latter two were replaced by Panama and Liberia.

²⁹ Stopford M., 1997. *Maritime economics*. 2nd ed. London, Rowledge.

³⁰ United Nations Convention on the Conditions for Registration of Ships 1986, Articles 7 to 10.

³¹ Middleton J., 2007. *Op.cit.*

³² Case C- 221/89 R v Secretary of State for Transport ex parte *Factorama*, [1991] ECR I-3905.

³³ A practice known as “quota hopping”.

³⁴ Churchill R.R., C. Hedley, 2000. *The meaning of the “genuine link” requirement in relation to the nationality of ships*. A study prepared for the International Transport Workers’ Federation. University of Wales, Cardiff.

³⁵ Case C-280/89, *Commission v. Ireland* [1992] ECR I-6185.

Republic³⁶ in which the Advocate General Stated that “Article 5 of the Geneva Convention cannot be interpreted as a rule requiring a genuine link between a State and a ship to be in a particular form as a necessary precondition for the grant of nationality.” In the *Anklgemyndigheden v. Poulsen and Diva Navigation*³⁷ case of a vessel beneficially owned and crewed by Danish nationals, but registered in Panama, and trying to land fish allegedly caught in contravention of European regulation, the ECJ determined that, “Under international law a vessel in principle has only one nationality, that of the State in which it is registered.”

The right of a sovereign (State) to determine who may fly its flag was pronounced by the Permanent Court of Arbitration in the *Muscat Dhows* case 1905,³⁸ which concerned the right of France to grant its flag to dhows owned by subjects of the Sultan of Muscat. Frendo³⁹ opines that “it is the novelty of the decision in the *Muscat Dhows* case that sets the scene for registration’s taking a judicial life independent of ownership,” a verdict that was more recently reiterated by the US Supreme Court in *Lauritzen v. Larsen* 1953.⁴⁰ Consequently, the loose interpretation of a genuine link is deemed to have contributed significantly to the growth of open registers.⁴¹

Second Registers

Before examining further the roles and attractions of open registers to shipowners, a short consideration of second or international registers and provisions for bareboat charters is appropriate. Positioned somewhere between closed and open registers, second or international registers have

³⁶ Case C-62/96, *Commission v. Hellenic Republic* [1997] ECR I-6725.

³⁷ Case 286/90, *Anklgemyndigheden v. Poulsen and Diva Navigation* [1992] ECR I-6019.

³⁸ *Muscat Dhows* case 1905 Hague Court Reports 1916. p63. The case concerned the right by France to grant the right to fly the French flag to dhows which were allegedly engaged in slave trading, this right only being valid prior to the signing of a treaty in 1892. Ref: Ready N.P. 1998. Op.cit.

³⁹ Frendo M., 2000. The future of open registers in the European Union. *Lloyd's Maritime and Commercial Law Quarterly* 2000 (3) pp.383-393.

⁴⁰ *Lauritzen v. Larsen* 1953 345 U.S.571 (1953), whereby a Danish seaman serving as part of a crew of a ship of Danish registry and owned by a Danish national sought damages in a New York district Court under the Jones Act for injury sustained whilst the ship was in Havana. It was held that the law of the flag governed all matters of discipline on board the ship.

⁴¹ OECD, 2003. Ownership and control of ships. Maritime Transport Committee, Directorate for Science, Technology and industry. March 2003. Paris, OECD.

usually been established as a response by certain of the more traditional flags to reverse the exodus of ships to open registers and away from their own national registers. Such registers have enabled states to maintain some control over their fleets, with effective maritime administrations able to secure adherence to appropriate regulations and standards, whilst allowing them to operate in a lower cost environment, at the same time safeguarding also some of their nationally-based businesses, skills and employment.⁴²

The first of these registers to be established was the Norwegian International Ship Register (NIS, 1987), under whose flag ships were able to sail with third world crews. Norway was followed by others, including France (Kerguelen Islands); Denmark (DIS); Germany (GIS); Portugal (Madeira); the Marshall Islands; and the Isle of Man (UK).⁴³ The opening of Singapore's second register was, unlike the others, an attempt to move away from the stigma of what previously had been regarded as just another open register.⁴⁴ The effect of the rise of these second registers is seen to somewhat blur the distinction between open and closed registers.⁴⁵

Promoting Anonymity

Whilst hiding the identity of ownership may be undertaken for valid (and quite legal) commercial reasons, it also facilitates those owners who do not wish to advertise their ownership of ships poorly maintained or crews poorly supported, or who have a history of ship detentions, as well as those with distinctly illegal or even terrorist intent. Although certain open registers seek openly to display their rebuttal of internationally accepted standards and legal instruments, it is not simply the operation of the registers themselves that can prove attractive to the more nefarious (as well as many upright) shipowners in masking the identity of beneficial ownership; it is also the manner in which they accommodate the various financial mechanisms that allow corporate identities to be obscured in a web of

⁴² Stevenson D.B., 2005. *Seafarers' rights*. ed. Fitzpatrick D., M. Anderson. Oxford, Oxford University Press.

⁴³ Others include China (Hong Kong, Macao); Netherlands (Antilles); New Zealand (Cook Islands). *Ibid.*

⁴⁴ Tenold S., 2000. *A most convenient flag – the development of the Singapore ship register, 1969-82*. SNF Report 69/00 SIOS – Centre for International Economics and Shipping, Foundation for Research in Economics and Business Administration, Bergen. December 2000.

⁴⁵ Alderton T., N. Winchester, 2002. *Regulation, representation and the flag market*. *Journal for Maritime Research*, September 2002. London, National Maritime Museum.

nominees and holding companies which might be spread across a range of jurisdictions. The OECD report of 2003⁴⁶ on ownership and control of ships concluded that it is “very easy, and comparatively cheap, to establish a complex web of corporate entities to provide very effective cover to the identities of beneficial owners who do not want to be known.” Whilst some registers try to establish the true ownership of a vessel, others promote anonymity as a major advantage.⁴⁷ Such registers may be deemed worthy of the title of Flag of Convenience.

The principal way in which an individual’s ownership may be hidden is through the use of bearer shares. Unlike normal registered shares, bearer shares do not carry the name of the owner and may be transferred from person to person without many changing hands or details of the transfer being registered. They thus facilitate a high level of anonymity, especially when issued to private limited companies, and their use is positively promoted by certain open registers.⁴⁸ When private companies, which are based upon ordinary (as distinct from bearer) shares, are initially registered, some details of shareholders are required. At this juncture, beneficial owners can hide their identity through the use of Nominee Shareholders who act on behalf of beneficial owners. Since corporate bodies require at least one Director nominally responsible for the operation of the company, the use of Nominee Directors acting as legal intermediaries can also hide the identity of beneficial owners since some jurisdictions cannot (or do not wish to) compel nominees to reveal the identity of true beneficial owners. Allowing corporations to act as Nominee Directors adds a further level of obfuscation.⁴⁹ In many instances, the use of trustees, trust companies, lawyers and company formation agents offers further anonymity for those wishing to establish private companies, especially in offshore locations, where their active role may be limited to the provision of a local address, providing nominee shareholders and directors, and acting as local agents, but all with limited or no real operational function,⁵⁰ lawyers and notaries in particular claiming professional confidentiality.

⁴⁶ OECD, 2003. Op.cit.

⁴⁷ Alderton T., N. Winchester, 2002. Op.cit.

⁴⁸ Ibid.

⁴⁹ OECD, 2003. Op.cit.

⁵⁰ Ibid.

In terms of corporate structure, anonymity is furthered by the use of private limited companies, International Business Corporations (IBCs), Trusts, and less frequently, Foundations and Partnerships. Private limited companies may easily be converted to shell companies, which have no assets or activities, but whose role is solely to hold legal standing as a corporate body. Such organisations are usually available easily and cheaply off-the-shelf, as are IBCs, which exist to facilitate international exchanges, but are barred from doing business in the country of incorporation, and therefore rarely pay taxes or are required to produce annual reports.⁵¹ The use of one-ship companies without other traceable assets protects any other assets of the beneficial owner from claims against a specific ship. Holding companies may be formed to hold the shares of the single-ship company, whilst the operation of the ships is undertaken by one or more management companies, shares in these operations being in the form of bearer shares held by the beneficial owner.⁵² By establishing a complex corporate web of organisations and nominees across a range of jurisdictions whose main interest may be merely the collection of registration fees whilst offering a high level of anonymity, the identity of beneficial owners can be hidden to the extent that might defy all but the most detailed and determined of investigations. Given that the USA is probably the State most focussed on the security of shipping arriving at its ports, there is a certain irony in the fact that the open register, which facilitates anonymity, was a creature of their creation.

As well as promoting their own ship registration services, many States also offer offshore company registration in parallel. Not untypical are the advantages offered by the Seychelles, which in addition to allowing up to 100% foreign ownership for ship registration, also offers incorporation of IBCs, with a high level of anonymity and privacy; no taxes of any sort, no ties to the EU; no accounting or reporting requirements; and no public register of company officers.⁵³ The tiny island of Kiribati in the Gilbert Islands (area 811sq. m. and a population of a little over 100,000) offers similar inducements, including no restriction on ownership of ships; not being mandatory to incorporate a company in Kiribati or to register through lawyers; trading profits and capital gains are not taxed; and there is no

⁵¹ Ibid.

⁵² Stopford M., 1997. *Maritime economics*. 2nd ed. London, Routledge.

⁵³ Ref: www.sfm-offshore.com accessed: 18.4.2011

restriction on the nationality of a ship's owners or crew.⁵⁴ At the same time, many of the traditional jurisdictions will allow local subsidiaries of foreign corporations to register their vessels under their flags, thereby allowing ownership to be concealed. By registering with overseas dependencies which operate their own registers but also hold close links with the traditional home jurisdictions, owners may also enjoy the benefits of naval protection and diplomatic representation that the home state provides. In such instances, recognised international representation or support, coupled with hidden ownership, may prove to be a dual advantage. A strong association with a traditional flag may also serve to deflect monitoring and port State inspection of vessels which might otherwise be among the more targeted groups.

The quest for anonymity often comes to the fore when ships are finally sent for disposal. Often when a ship is purchased for scrapping, usually by cash buyers, she will undergo a change of name and registry under her new owners. There are instances, however, when this change of identity happens whilst the vessel is actually at sea and en route to the breakers. In 2007, the former ferry Beni Ansa sailed from Almeira to Alang for scrapping. The vessel had been detained under advice from the European Commission, and a detailed inspection indicated the presence of hazardous materials on board. During that month, the ship changed its name and registration with different open registers, from Beni Ansar under the Moroccan flag, to Beni under the flag of Tuvalu, and then to Aqaba Express under the flag of the Comoros Islands.⁵⁵ After finally being allowed by the authorities to sail, ostensibly to Romania, for the purposes of refurbishment,⁵⁶ the ship then changed course, arriving to anchor off Alang under yet another name, the Al Arabia. Whilst it is conceivable for a ship to be re-registered in order to enjoy economic advantages, it is difficult to associate such a series of changes being undertaken for any purpose other than a simple hiding of identity (and hence of liability) once it had ended its operational life and was actually at sea and destined for the shipbreakers.

⁵⁴ Ref: www.kiribaship.com accessed: 18.4.2011.

⁵⁵ Since its completion in 1975, the ship had had several names prior to Beni Ansar, including Wisteria and Princess Maria Emerald.

⁵⁶ A repeat of the intended plan for the Sandrien – see above.

Using statistics of the top 25 Flags States as a proportion of the world's tonnage in 2008, a report⁵⁷ compiled for the European Commission showed that 42.8% of the operational tonnage traded under the four States of Panama (22.1%), Liberia (10.0%), the Bahamas (5.6%) and Marshall Island (5.1%). At the point of scrapping, however, whilst 28.2% of the ships arriving at the breakers were under the Panamanian flag and 13.6% under the Liberian flag, the remainder of the top 25 listing included states that did not appear in the operational list, and included Tuvalu (5.8%), St.Kitts-Nevis (4.2%), Mongolia (2.5%), the Comoros Islands (0.9%), Cambodia (0.9%) and Dominica (0.6%). The inclusion of Panama and Liberia as leading "scrapping States" could be answered by the size of the large fleets that they operate commercially; the inclusion of the other named States appears more of a function of the low fees, low crewing standards, high anonymity and short-term registration that these States offer as FOCs.

Sub-standard Shipping

One of the consequences of the way in which beneficial ownership and liability are so easily obscured and limited, particularly through single ship companies, lies in facilitating (if not directly encouraging) the prevalence of sub-standard shipping. Sub-standard shipping is manifest not only in minimal levels of ship maintenance, but also in low consideration for crews, both in terms of numbers and of basic provisions and in regard to internationally defined standards, as well as poor shore-based management etc. Writing in 2000, Özçayir⁵⁸ stated that we had "a globalised shipping sector...based on private enterprise (where) there are not many who are really dedicated to the safety of the ship, crew or the protection of the marine environment."

A report commissioned by the OECD⁵⁹ recognised the growing concern over the relationship between shipping casualties and sub-standard shipping in the 1970s. When trading conditions were poor, expenditure on ship maintenance was an easy target for owners, yet when conditions were good keeping a ship in full employment also tended to relegate upkeep to a low level of priority. Despite the introduction of various international

⁵⁷ COWI, 2009. Support to the assessment of a new legislative proposal on ship dismantling. Final report, December 2009 for the European Commission DG Environment.

⁵⁸ In 2000, Z O Özçayir was a maritime law consultant and member of the IMO Roster of Experts and Consultants. Op.cit.

⁵⁹ SSY Consultancy and Research, 2001. The cost to users of substandard shipping. Prepared for the OECD Maritime transport Committee.

treaties relating to the safety of ship operations, their uptake and enforcement has not always been to the forefront of some states' priorities.⁶⁰

The turn of the century witnessed a series of maritime accidents that demonstrated numerous parallels. In February 2001, the 27-year-old tanker *Kristal* broke in two and sank off the Spanish Atlantic coast in heavy weather. In 1999, the 24-year-old tanker *Erika* also broke in two and sank off the Spanish coast in heavy weather. Both of the ageing ships were registered in Malta and were in need of repairs to replace sections of corroded steelwork. Both ships had been classed by the Registro Italiano Navale (RINA). Following the loss of the *Kristal*, a meeting of the IMO's Marine Environment Protection Committee (MEPC) called for a review of Resolution A.744(18) on guidelines on the enhanced programme of inspections during surveys of bulk carriers and oil tankers in order to strengthen the effectiveness of the Enhanced Survey Programme requirements, with reference to surveys and repairs.⁶¹

It was, however, the breakup of the *Erika* and the oil pollution that resulted,⁶² reinforced by the similar loss of the *Prestige* some three years later, that triggered a number of legislative measures⁶³ from the EU aimed at removing such ships from European waters, but put the required action mainly in the hands of shipowners, Flag States, and classification societies. This left other bodies such as charterers, cargo owners and brokers free to pursue whatever cheap rates they could find from these old, sub-standard vessels which, in the case of tankers, often work at the dirty end of the product market. Even so, many parties were able to cover their risks by insurance unless wilful negligence or recklessness could be proven, owners also being protected from the penalties of extensive pollution occurrences

⁶⁰ Ibid.

⁶¹ IMO, 2001. Report to the Maritime Safety Committee. Sub-Committee on ship design and equipment, 44th session. DE44/19, 26 March 2001

⁶² The *Kristal's* cargo of molasses was dispersed at sea. In his description of the loss of the *Kristal*, Langewiesche describes the cargo as "a low value cargo carried on the cheap by ships that are typically one step removed from the grave." Ref: Langewiesche, 2004. *The outlaw sea*. New York, North Point Press.

⁶³ The *Erika I* measures were completed just three months after the loss of the vessel and included substantial amendments to the Port State Directive to increase the extent of port state inspections within the EU; measures to ban the employment of single-hulled tankers within EU waters; and a tightening of the Classification Society Directive, including suspending recognition of classification societies deemed to pay insufficient attention to enforcing ship safety standards. The *Erika II* package established an improved system of Community monitoring, control and info system for maritime traffic, a fund for the compensation of oil pollution damage in European waters and the formation of a European Maritime Safety Agency.

by the provisions of the Civil Liability Convention.⁶⁴ Ownership of the Erika was with a single-ship company registered in Malta, the beneficial ownership of which proved difficult to trace until the individual in question came forward to identify himself. The resultant court case in the Paris Tribunal⁶⁵ in 2008, arising from the loss of the Erika, overturned the status quo to the extent that parties which hitherto had enjoyed a general avoidance of penalties were now also deemed to be at fault; the charterer - Total SA - being included with the owner, managers and classification society RINA⁶⁶ as guilty parties. The group was collectively fined the sum of €192m, with Total SA receiving an additional €375,000 fine for failing to take into account the state and the age of the ship before chartering it.⁶⁷ Total SA also set up an Atlantic Coast Task Force with a budget of €200m to clean up the polluted beaches. Malta, as Flag State, escaped penalties. By comparison, the fines imposed on the owner, and the classification society, were relatively limited.

The OECD 2003 report contained a case study based on the consequences of the Erika oil spill and its impact on tanker and sale and purchase markets and commented on the wide differential in charter rates between modern ships (i.e. ships less than 15 years old), and older tonnage, that had resulted from the accident. Yet this widening of rates for vessels of differing quality may actually serve to promote the continued use of certain sub-standard ships precisely because of the attractiveness of their low rates

⁶⁴ 1969 International Convention on Civil Liability for Oil Pollution Damage. Ref: SSY Consultancy and Research, 2001. Op.cit.

⁶⁵ A subsequent review by the French *Court d'Appel* in 2010 upheld the earlier judgement, which 'breaks new ground' in that it was one of the few cases where the sinking of a vessel was tried under criminal law and that the classification society was among the accused. The Court also concluded that while the owner may benefit from civil compensation under the Civil Liability Convention, it is not protected for its role under criminal law. Further, the operator is not covered by the terms of the CLC, neither is the classification society, which had an equally independent role. The owner, who had been made aware of the need for repairs to the heavy corrosion on the ship by class, had obtained an Oil Pollution Compensation Fund certificate to be able to lease the vessel for further commercial operations. RINA, who expressed doubts about the state of the vessel, nevertheless allowed it to sail; RINA was deemed to have issued certificates of compliance without prior inspection on a number of occasions. Ref: Mink E., 2010. Erika process; French Appeal Court pronounced judgement. Mainbrace July 2010, No. 3 at: www.blankrome.com/index.cfm?contenID=37&itemID=2271 accessed: 3.10.2010.

⁶⁶ The role and liability of the American Bureau of Shipping (ABS) as classification society for the Prestige is still under legal process, Spain claiming that ABS had been "negligent, reckless, wilful and wanton" in its inspection of a sub-standard ship. Ref: Wene J., 2005. European and international initiatives due to the Erika and Prestige incidents. Maritime Law Association of Australia and New Zealand Journal 2005 (19).

⁶⁷ Hollinger P., 2008. France fines Total £143m over coastal damage from oil spill. Financial Times, 17.01.2008 p7.

to certain shippers. The report cites the European Commission's view that "the fact that ships of appalling condition continue to be employed for transportation of oil shows that charterers do not have sufficient disincentives to give up their intolerable practice of deliberately selecting low quality tonnage".⁶⁸

Meanwhile, ships that have reached the ends of their lives and are fit only for disposal can also present major problems when their owners seek to distance themselves from the liabilities of the hazardous materials contained within the structure of ships. The *Sandrien* was an early instance of a vessel being denied permission to sail directly from the port of Amsterdam to the breakers because of the hazards deemed to be contained within the structure of the ship. Previously operating as the *Maria S* under the Mexican flag and the ownership of the *Erika's* owner, the ship had spent a year under detention at the Italian port of Augusta.⁶⁹ Now as the *Sandrien* and under a new owner and the Bolivian flag, she required extensive pre-cleaning prior to scrapping, yet the owner proved difficult to trace, having set up offices in a number of different countries and communicating only through lawyers.⁷⁰ In 2002, the Court of First Instance in the Council of State, The Hague, ruled that an end-of-life vessel not properly emptied of hazardous material should be regarded as hazardous waste.⁷¹ This was the first legal recognition that a ship containing asbestos should be treated as hazardous waste,⁷² but since proving ownership was impeded, the vessel was ultimately scrapped in dry dock in Amsterdam, the €1.7 million cost being borne by the Netherlands Government and the city of Amsterdam. During the 18 months that the ship was impounded, some 20 Indian crew

⁶⁸ SSY Consultancy and Research, 2001. Op.cit.

⁶⁹ Ref. Basel Action Network, 2002. Greenpeace "most wanted" ship remains a thorn in port's side. London, *Lloyd's List* 11 February 2002.

⁷⁰ Greenpeace, 2002. Shipbreaking. News. Malpractice at ship-for-scrap *Sandrien* – crew and environment victim of ship dealers. At: www.greenpeaceweb.org/shipbreak/news14.asp. accessed: 1.10.2010. The owner was subsequently defined as Upperton, a Mauritius-based company who operating behind a post office box number in Mauritius. Ref: Vliero dam Wire Ropes Ltd., 2004. Dutch carry chem. Tanker scrap costs. Daily shipping newsletter 2004 – 237 At: www.biblio.org/maritime/Pdf/scheepvaartnieuws/2004/novem/237-16-11-2004.PDF accessed: 1.10.2010.

⁷¹ Council of State, The Hague, Upperton Ltd. v the Minister of Housing, Spatial Planning and the Environment. LNJ number AE4310 Case number 200105168/2.

⁷² Greenpeace, 2003. Comments on the report of the correspondence group: selected cases of decommissioning of vessels indicating the need for mandatory requirements. Submitted by Greenpeace International. IMO Marine Environmental Protection Committee, 49th session. Agenda item 3. MEPC49/3-2 9 May 2003. London, IMO.

members remained on board, without pay and unable to return home.⁷³ At the end of 2001, the International Transport Workers' Federation (ITF) arranged for the safe repatriation of the crew, but the owners merely replaced them with a new crew, even though the ship was unable to sail in its current condition.

The OECD report⁷⁴ on the cost of sub-standard shipping contains a detailed listing of the potential costs that may accrue to all involved with the employment of such ships. Amongst those costs are the costs to seafarers (and passengers), who may suffer loss of life or injury, inadequate remuneration or even non-payment, inadequate accommodation, off-duty time and, increasingly, the possibility of criminal prosecution. Shipowners may face the physical loss of their vessel – insurance may be deemed invalid if negligence can be proven – higher insurance premiums, compensation claims for pollution, and losses through detentions, among other outcomes. Other owners of more compliant and better maintained vessels may collectively suffer a general lowering of charter rates through the operation of sub-standard ships as well as a general rise in insurance costs and port inspections. Managers, operators, classification societies, charterers, shippers and cargo owners may all be increasingly accountable for the consequences of sub-standard shipping, as the cases of the Erika and the Prestige have demonstrated, and suffer losses through loss of cargoes, late deliveries resulting from port inspections and detentions, higher insurance costs, etc. The marine environment may also bear the cost of pollution resulting from accidents to shipping.

One of the consequences of inadequate Flag State control over the vessels over which they have jurisdiction has been the development of Port State control,⁷⁵ whereby Port States carry out inspections against the ships' various certificates and the relevant Flag State's own national requirements, thereby imposing standards upon ships which do not observe them

⁷³ Even though the crew received no pay, it was reported that the crew had themselves paid the ship's dealers for the maritime education that they were to receive while on board against the promise from the owners – a group of ship dealers – of work and a future despite the fact that the ship was unseaworthy. Ref: Greenpeace 2002. Op.cit.

⁷⁴ SSY Consultancy and Research, 2001. The cost to users of substandard shipping. Prepared for the OECD Maritime transport Committee.

⁷⁵ The establishment of Port State Control actually originates with the provisions of the 1929 Convention on the Safety of Life at Sea (SOLAS), reaffirmed in subsequent revisions 1960 and 1974 and in the provisions of the International convention for the Prevention of Pollution from Ships (MARPOL) and the ILO Minimum Standards Convention. Ref: Farthing B., M.Brownrigg, 1997. Op.cit.

voluntarily.⁷⁶ This acceptance of Port State Control has been portrayed as the acceptance by a Flag State of the direct intervention by another sovereign state into the matter of a ship being an extension of its home territory.⁷⁷ The growth of Port State Control has led to the formation of several groupings of Port States into regional operational agreements – Memoranda of Understanding (MOUs)⁷⁸ - to co-ordinate the inspection of vessels being identified as high risk in terms of their seaworthiness. As a natural development of association between States, similar coordination between different MOUs has started to develop and as a result of the shared results of monitoring and special inspection programmes, the potential operating areas for sub-standard shipping has started to shrink. As part of the European response to the loss of the Erika, the process of targeting sub-standard ships by a points system, but not necessarily requiring the ships to be inspected under the Port State Control system, was changed to one whereby such highlighted ships have to undergo mandatory detailed inspections; ships repeatedly failing such inspections ultimately being blacklisted from entering European ports.⁷⁹ However, the role of Port States and MOUs remains but a substitute for effective control by owners and Flag States. The OECD 2001 report sums up the regime with the comment that a combination of an accommodating Flag State and a lax classification society offers ample scope for the owners of sub-standard ships to contravene international conventions.⁸⁰

Attempts at Revision

⁷⁶ Özçayır Z.O., 2000. Flags of convenience and the need for international co-operation. *International Maritime Law*, 7 (4) May 2000, pp 111-117

⁷⁷ Ref: Farthing B., M.Brownrigg, 1997. *Op.cit.*

⁷⁸ The first of these arrangements, the Paris MOU, was formed in 1982 by the maritime authorities of 17 European States, Canada and the Russian Federation. Subsequently, some 8 other similar organisations have been established along similar lines to cover the Black Sea, Caribbean, Gulf Region, Latin America, West and Central Africa, Indian Ocean, Mediterranean and Asia-Pacific regions.

⁷⁹ Directive 2001/106/EC of the European Parliament and Council amending Council Directive 95/21/EC.

Ref: Wene J., 2005. *Op.cit.*

⁸⁰ See footnote 71.

The OECD's final report on transparency of ownership⁸¹ considered that improvements to transparency could result from a combination of changes to the corporate mechanisms that are directed at promoting anonymity, and the transparency of the shipping registers themselves. However it acknowledges that it is this very anonymity that is the attraction to users and the revenue they generate for the providers of the registers in question. A range of specific suggestions for improvements is offered, but the report recognises the many vested interests that are present and suggests that a way forward may be to promote confidentiality, as distinct from anonymity, which may be more acceptable to all parties than unilateral action by individual administrations. However, in the absence of any autogenesis of improvements from the administrations themselves, attempts have been made to regulate against some of the less reputable of the registries, both directly and indirectly.

In a move against open registers, a United Nations Convention for Registration of Ships was adopted in 1986,⁸² intending to bring order to the question of registrations - and ultimately to phase them out - by highlighting the need for efficient and competent maritime administrations through a genuine link between owners and Flag States.⁸³ This was the product of two studies undertaken by UNCTAD and authorised in 1979, on 'repercussions of phasing out open register fleets' and on 'legal mechanisms for regulating the operations of open registry fleets.'⁸⁴ The Convention requires that a Flag State shall have an effective maritime administration with appropriate arrangements for registration and enforcement, fix the conditions for granting nationality and ensure that the ships flying its flag complies with relevant international standards of manning, safety, "pollution control" etc. In addition, it seeks to ensure that those responsible for the management and operation of its ships are readily identifiable and accountable. The question

⁸¹ OECD 2004, Maritime security – options to improve transparency in the ownership and control of ships. Final report . June 2004. Directorate for Science, Technology and Industry.

⁸² Geneva, 7 February 1986.

⁸³ 1986 United Nations Convention for Registration of Ships. Article 1. Objectives. "For the purpose of ensuring, or...strengthening the genuine link between a State and ships flying its flag, and in order to exercise effectively its jurisdiction and control over such ships with regard to identification and accountability of shipowners and operators as well as with regard to administrative, technical, economic and social matters, a flag State shall apply the provisions contained in this Convention."

⁸⁴ Farthing B., M.Brownrigg, 1997. Op.cit. The studies were the result of pressure on UNCTAD from developing countries, who believed that the presence of open registers provided a barrier to them developing their own shipping fleets and obtaining cargoes.

of ownership proved to be a contentious issue, centred on the provisions deemed necessary for a Flag State to exercise adequate control and jurisdiction, whilst the subject of manning nationality was a polarising issue between the national and open register States.⁸⁵ The Convention also requires Flag States to ensure that the accountability of owners or their representatives be established in the State, and that they have legal and financial accountability. The Convention is still not in force, with only 24 of the necessary 40 States controlling 25% of the world's shipping having ratified or acceded to it.

A proposal was made in 1989,⁸⁶ and subsequently amended in 1991,⁸⁷ by the European Commission for the adoption of a Community fleet and a Community shipping register – EUROS - in an attempt to halt the move of ships from the registers of Member States to the open registers of non-Member States, and the spread of secondary national registers, which the Commission regarded as a distortion of competition.⁸⁸ Inducements included lighter and more flexible manning requirements, fewer Port State Control inspections in European ports, State aid and possible financial support for the training of seafarers.⁸⁹ The register was to work in parallel, rather than instead of, the national registers, and on a voluntary basis, a ship flying the Community flag alongside its own national flag to indicate its inclusion in both registers,⁹⁰ but the idea was rejected by the Council of the European Communities.⁹¹ The proposal was therefore replaced by “Regulation 613/91 on the transfer of ships from one register to another within the Community,” which was aimed at facilitating completion of the internal market and providing for the mutual recognition of certificates issued in accordance with international rules such as SOLAS and

⁸⁵ Ibid.

⁸⁶ COM(89)266, OJ C263 16.10.1989 p 11.

⁸⁷ COM(91)483, OJ C19 25.1.1992 p10.

⁸⁸ Ready N.P., 1998. *Ship registration*. 3rd ed. London, LLP Reference Publishing.

⁸⁹ Frendo M., 2000. *Op.cit.*

⁹⁰ Compare with Article 4, General Provisions of the 1986 United Nations Convention for Registration of Ships viz. 4.3 - Ships shall sail under the flag of one State only 4.4 - No ships shall be entered in the registers of ships of two or more States at a time, subject to the provisions of paragraphs 4 and 5 of article 11 and to article 12 (relating to bareboat charters).

⁹¹ Ready N.P., 1998. *Op.cit.*

MARPOL.⁹² The EU has sought to improve the overall state of shipping by stepping up the pressure for Port State Control inspections at its ports and by pressure on the open registers operated by States such as Cyprus and Malta, which were wishing to join the Union. The formation of the Paris MOU on Port State Control was an early manifestation of this process.⁹³

Conclusion

The international shipping industry fully operates as a global industry, whose fortunes have, at times, waxed and waned dramatically. “Traditional” registers, if in fact many of them can still lay claim to such a title, since they now themselves operate secondary or international registers with more relaxed regimes, have fought hard against the spread of open registers - and appear to have lost. Open registers now account for more than half of the world’s merchant fleet and although many open registers may operate a maritime administration that is able to register and regulate their vessels as well as (and in some instances, possibly better than) some closed registers, it is the more relaxed regulatory regime in relation to ownership, manning and taxation etc., requirements that have proved irresistible to shipowners, whilst any desire or even ability on the part of some Flag States to recognise and effectively regulate international standards being in direct opposition to their very *raison d’être*. Further, the well-publicised advantages of financial mechanisms designed specifically to hide the identity, and hence the liabilities, of ownership through offshore corporations, nominees, bearer bonds, shell companies, and the like, have doubtless encouraged many owners, especially those owners of single-ship companies, in the practice of minimal consideration both for the state of ships and regard for the crew and hence the prevalence of sub-standard shipping. In periods of a low trade cycle, expenditure on maintenance and the like is easily ignored; in times of a high trade cycle, it may also prove secondary (or very secondary) to the opportunity for profitable trading; either way, many ships are run on a totally profit maximisation/upkeep minimisation basis. Attempts at formal revision to the existing systems via UN Convention or EU Directives on registration have proved to be still-born and it has taken serious instances of ship losses - as demonstrated by the sinkings of the Erika and Prestige - to forward the improvement of sub-standard shipping.

⁹² European Parliament, 1996. The common maritime policy, Chapter 2 The sea and navigation. Directorate-General for Research. Working Document Transport Series W14.

⁹³ Frenco M., 2000. Op.cit.

Postscript

In 2009, the Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships was adopted - although it has yet to come into force. The Convention is founded upon a comprehensive system of documentation, surveys and inspections, approvals and certification for a ship destined for demolition. Given that a number of open registers are unlikely to have the maritime administration necessary to support such requirements, it will be interesting to observe how many such registers become party to the Convention, how many will be able, or even wish, to observe the requirements of this regime, and how their current clientele will regard such registers once the Convention enters into force.

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