

**The New Role of Open Registries as Flag States:
The Battle for a Better Image in an
Increasing Competitive Shipping Industry**

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October 2003

A thesis submitted to the Faculty of Graduate Studies and Research in partial
fulfillment of the requirements of the degree of Master of Laws (LL.M.)

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ISBN: 0-612-98822-8

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ISBN: 0-612-98822-8

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ACKNOWLEDGMENTS

First of all, I would like to dedicate this thesis to all my family, specially to my parents Camilo and Yolanda. I want to express my thankfulness to them for their unconditional and invaluable support and help throughout my studies at McGill University.

I would also like to express my gratitude to Professor William Tetley for his guidance and permanent availability in the supervision of this thesis. Definitely, it has been a real privilege to work with a worldwide renowned professional of Maritime Law such as Professor Tetley.

Furthermore, I would like to thank all my dear friends who always expressed me words of kindness and encouragement. Specially, I want to express my gratitude to Jessica which helped me in searching some sources of this research.

Definitely, this great experience at McGill University would not be the same without the presence of all my dear friends of the LL.M. Thanks to all of them for their invaluable friendship and for making easier my time here in Montreal.

I really appreciate the help of Miss Martha Evans in the edition of this research and the translation of the abstract. Finally, I would like to thank the staff of McGill University and all those who, in one way or another, helped me to reach this new achievement in my professional career.

Thanks a lot to everybody!!!

María Isabel Valdés Mora
October 6, 2003
Montreal, Canada

ABSTRACT

Under international law, every state has the sovereign right to establish the conditions under which it will grant its nationality to a vessel. By consequence, different schemes for ship registration have been developed, traditionally the nationalist and open system. While the nationalist system imposes strict requirements regarding national ownership and manning, along with burdensome fiscal regimes for the shipping industry, the open system offered flexible requirements and a friendly taxation environment, that help shipowners to minimize their operation costs.

Open registries have been criticized for not complying with international accepted shipping standards in safety, environmental, and labour aspects. However, some of them have made great efforts to raise these standards, mainly obliged by the new demands of the shipping industry. Nonetheless, the shift to a new culture of quality shipping is not only a responsibility of flag states, but of all the actors of a maritime scenario.

RÉSUMÉ

En vertu du droit international, chaque état a le droit souverain d'établir les conditions dans lesquelles il accordera sa nationalité à un navire. En conséquence, différents arrangements pour l'enregistrement des bateaux, traditionnellement le système nationaliste et le système ouvert, ont été développés. Tandis que le système nationaliste impose des conditions strictes concernant la propriété nationale et l'équipement des navires, avec des régimes fiscaux onéreux pour l'industrie d'expédition, le système ouvert offre des conditions flexibles et un environnement amical d'imposition qui permet à des armateurs de réduire au minimum leurs coûts d'opération.

Des enregistrements ouverts ont été critiqués pour ne pas se conformer aux normes d'expédition internationalement admises à propos d'issues de sûreté, d'environnement, et de travail. Cependant, les nouvelles demandes de l'industrie d'expédition ont causées certains d'eux de faire des grands efforts de soulever ces normes. Néanmoins, le décalage à une nouvelle culture de l'expédition de qualité est non seulement la responsabilité des états de drapeau, mais de tous les acteurs dans un scénario maritime.

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INTRODUCTION

Ship registration has been constrained by international law to the discretion of every country, being considered a public function of each flag state under their national laws. However, the registration of vessels has become an international issue due to the nature of the shipping industry itself. Through this research I intend to give a theoretical review of the basic legal concepts of the grant of the nationality of vessels and ship registration, while considering, at the same time, practical implications and recent developments of these topics, without entering into the detail of the process of ship registration itself. This general framework will allow me to introduce the main topic of this research which is the open scheme for registration of vessels, its characteristics, concerns, and realities.

The first chapter is devoted in detail to the development of the principal elements of ship registration in order to make a general overview about the main topic of this thesis. I consider the main features of the theory of the nationality of vessels, followed by the main considerations of ship registration such as the genuine link issue, the conditions for registration, and the duties of flag states, making reference to international conventions which contain provisions regarding these aspects and relevant jurisprudence.

Considering that countries have followed mainly two main criteria to grant nationality to vessels, traditionally, the nationalist and open systems, through the second chapter I present in detail these systems explaining their main characteristics, stressing the most important elements of each one of these schemes such as ownership, manning and the fiscal regimes policies. Taking into consideration that today these two options are not the only alternatives available for the registration of vessels, I also review a third criterion, recently considered as a new tendency for the registration of vessels, the so- called balanced system through the second or international and offshore registers. In order to illustrate each one of these systems for ship registration, I review the domestic legislation of certain countries with the purpose of having a solid background to address and discuss the polemic surrounding open registries. Finally, I address the relevant factors that shipowners usually take into consideration to make their choice of flag, selecting the system under which they will register their vessels.

The role of open registry countries as flag states has been full of criticism. They have been the target of several campaigns against, obtaining a poor reputation worldwide. In the third chapter, I analyze in detail the main concerns regarding the large controversy that presents the operation of vessels flying the flags of open registries, particularly on safety, environmental, and labour aspects. Furthermore, I review some of the responses and alternatives that have been implemented at international, regional, and national levels, in order to counteract the impact of open registries in the shipping world, specially since they have been considered by some international organizations as totally negative for the international shipping order; and by some countries, specially traditional maritime countries, as prejudicial to their national shipping industries.

Through the fourth chapter, I make reference to the common responses adopted by some countries, specially traditional maritime countries, in trying to alleviate the strong economical impact that open registries have caused to their national shipping industries. Some international alternatives adopted to improve quality shipping through the strengthening of the roles of flag and port states are also considered because their direct impact to open registry shipping.

In order to reevaluate the negative image which open registries have had in the shipping world and to reconsider if it is still justified in today's maritime scenario, I review through individual examples of selected open registries, specially the leading ones, the main developments that several of these states have achieved in recent times, in improving and raising their national shipping standards according to accepted international standards.

In addition, a consideration on the future of the open system for registration of vessels will help me reach conclusions on what should be the new position that these countries will have to adopt, in order to improve their deteriorated image as flag states. In order to do so, they will have to consider the new demands of the maritime industry, where quality shipping must be the primary objective.

CHAPTER 1 – SHIP REGISTRATION

I. The Ship

The “ship” and the “vessel” are two fundamental terms in maritime law. They are found throughout the text of every maritime regulation, at both a national and international level. However, it is important to consider that even though these terms are used interchangeably in several maritime regulations,¹ they have been treated in some legislations as two different things.²

The ship could be considered the object of maritime law,³ and one of the basic elements used in addressing the different maritime issues. It has been *par excellence* the means of transportation commonly used for international commerce and also the physical medium for the development of the shipping industry throughout history.

Taking into consideration the above, it is important, for a better understanding of ship registration, and specifically of open registries, to briefly review the notion of the ship in order to determine which ships should be considered vessels.

A. Definition

The definition of vessel has been largely regulated by both domestic legislation and international law; however, there is no uniform definition of ship. On the contrary, the definition varies depending on the subject matter regulated by each national law or

¹ In almost all maritime regulations, either domestic or international, the terms vessel and ship are not used in a uniform way and they could be interpreted sometimes as synonyms. For the purposes of this research, they will also be used interchangeably.

² Tetley, William. *International and Admiralty Law*. Éditions Yvon Blais, Montréal, 2002, at p. 42. It is interesting to address this distinction in the United Kingdom Merchant Shipping Act 1894, Section 742, which although now repealed, made a clear differentiation between a vessel and a ship, defining the former as any ship or boat, or any other description of vessel used in navigation, while the latter was considered every description of vessel used in navigation not propelled by oars.

³ Ruiz Soroa, J.M. *Manual de Derecho Marítimo*. Instituto Vasco de Administración Marítima, Bilbao, 1990, at p. 14. He explains that the ship was considered the main protagonist of the maritime economy; however, that parameter has changed, and the shipowner has taken that role, replacing the main position that the ship had. He also states that the ship is currently only viewed as the object of maritime law.

international document. In consequence, the notion of the ship should be the starting point from which is defined the scope and development of any maritime regulation.

1) At an International Level

Regarding the international nature of maritime law, almost all aspects are regulated by international documents.⁴ This fact is evidenced by the draft, signature, and ratification of international maritime conventions in a wide range of topics, including private and public maritime issues.⁵ The purpose of these international documents is to reach a unification and harmonization of maritime topics, serving as models for national laws. However, the ship has not been part of this harmonization, especially because its definition has been adapted to the regulatory needs of the different international maritime conventions.

With the aim of making an illustrative exemplification of the diverse definitions of ship contained in some international maritime conventions, the most representative international agreements in the maritime field in relation to ship registration will be considered.

For the purposes of this research, it is important to consider the definition provided by article 2 of the Convention on Registration of Ships 1986 which expresses that a ship is “any self-propelled sea-going vessel used in international seaborne trade for the transport of goods, passengers or both with the exception of vessels of less than 500 gross registered tons.”⁶

⁴ Schoenbaum, Thomas. *Admiralty and Maritime Law*. West Publishing Co., Minnesota, U.S., 1987, at p. 1. He establishes that maritime law is international by nature, basically because its essential concepts and institutions are remarkably similar all over the world.

⁵ Almost all aspects of maritime law are regulated by international conventions which cover a broad range of issues, either public or private matters, such as: the law of the sea, the regime of the high seas, tonnage, carriage of goods by sea, limitation of liability, maritime liens and mortgages, arrest of ships, marine pollution, collision, and salvage, among other topics.

⁶ United Nations Convention on Conditions for Registration of Ships 1986, adopted at Geneva, February 7, 1986, but not yet in force, art. 2 (hereinafter Convention on Registration of Ships)

Furthermore, the International Convention for the Prevention of Pollution from Ships 1973/1978, in its article 2 (4), gives a more detailed definition of ship, with the intention of pursuing compliance with the environmental policies, stating that “a vessel of any type whatsoever operating in the marine environment and includes hydrofoil boats, air-cushion vehicles, submersibles, floating craft and fixed or floating platforms, is considered as a ship.”⁷

Following environmentalist parameters, the International Convention on Civil Liability for Oil Pollution Damage 1969, as amended by its 1992 Protocol, contains a mention of vessel in its article I (1) which defines a ship as “any sea-going vessel and any seaborne craft of any type whatsoever constructed or adapted for the carriage of oil in bulk as cargo.”⁸

Although the term ship is not defined in all of the international maritime conventions, it is indeed a key term for all of them. Some of these conventions simply mention the term ship or vessel but do not explain their meanings. This is the case in the Maritime Liens and Mortgages Convention 1993, which makes reference to ships solely as sea-going vessels.⁹ In the same sense, the title of the Ships Arrest Convention 1952 suggests that the convention simply covers sea-going ships.¹⁰

Having all these definitions in mind, it could be said that, in general, the word ship serves mainly as a generic term for a movable property which is suited for navigation.¹¹ This broad concept has been taken into consideration when defining a vessel as “any ship or craft, or any structure capable of navigation”, which is the definition offered by article

⁷ International Convention for the Prevention of Pollution from Ships 1973, adopted at London, November 2, 1973 and its Protocol, adopted at London, February 17, 1978 (hereinafter MARPOL 1973/78). This convention states rules for the protection of the marine environment and the control of pollution caused by ships, art. 2 (4)

⁸ International Convention on Civil Liability for Oil Pollution Damage, adopted at Brussels, November 29, 1969, and in force June 19, 1975, as amended by the 1992 Protocol, adopted at London, November 27, 1992 and in force May 30, 1996 (hereinafter CLC Convention 1992), art. I (1) See also the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, adopted at Brussels, December 18, 1971, and in force October 16, 1978, as amended by 1992 Protocol, adopted at London, November 27, 1992 and in force May 30, 1996 (hereinafter Fund Convention 1992), art. I (2) makes reference to the definition given by the CLC Convention 1992.

⁹ Maritime Liens and Mortgages Convention 1993, adopted at Geneva, May 6, 1993, not in force, art. I

¹⁰ International Convention for the Unification of Certain Rules Relating to the Arrest of Seagoing Ships 1952, Adopted at Brussels, May 10, 1952, and in force as of February 24, 1956 (hereinafter Ship Arrest Convention)

¹¹ Meyer, H. *The Nationality of Ships*. Martinus Nijhoff, The Hague, 1967, at p. 8.

1 (b) of the International Convention on Salvage 1989¹²; or as “every description of water craft, including non-displacement craft and seaplanes, used or capable of being used as a means of transportation on water” which is the definition given by Rule 3 (a) of the Collision Regulations 1972.¹³

2) At a National Level

Domestic legislations have also largely regulated the definition of vessel. National laws have taken into account different elements when defining the term ship; as a result, several definitions have been developed. Following the international practice, every national law has its own definition of ship, depending on its particular regulatory purposes. However, in addition to the legislative work, in common law jurisdictions, the interpretation of courts also plays an important role.

The term ship will only be reviewed in the context of ship registration, including a discussion on the domestic laws of some traditional maritime countries as well as countries possessing large merchant maritime fleets.

Section 313 (1) of the United Kingdom Merchant Shipping Act 1995, states that a ship includes “every description of vessel used in navigation.”¹⁴ Even though this section provides a short and very general definition of ship, it is noteworthy that the same statute in its Section 1 (1) describes what should, for practical purposes, be considered British ships, but mainly offers the definition in terms of the ownership of the vessel.¹⁵ Regarding the decision rendered by British courts in this respect, although in England the terms vessel and ship have different connotations¹⁶, a water craft is still considered a ship or a vessel if it is used or intended for use in navigation.¹⁷

¹² International Convention on Salvage 1989, adopted at London, April 28, 1989 and in force July 14, 1996, art. 1 (b)

¹³ International Regulations for Preventing Collisions at Sea 1972, adopted at London, October 1972 and in force on July 15, 1977, with amendments on November 4, 1993 and in force on November 4, 1995 (hereinafter COLREGS), rule 3 (a).

¹⁴ U.K. 1995, c. 21, sect. 313 (1)

¹⁵ Ibid, sect. 1 (1)

¹⁶ The distinction between these two concepts was based basically in the fact that the term vessel had been interpreted as a wider concept than the term ship, which was considered merely a boat. This difference was clearly evidenced by

In the United States, a general definition of ship is given by Section 3 of the Rules of Construction of Federal Statutes, which states that a ship is “every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water.”¹⁸ However, the U.S. Documentation Vessels Act in its Section 46, paragraph 12102, states which vessels are eligible for registration in the US system, stating that their ownership is the main parameter.¹⁹ With respect to the interpretation of American courts regarding the concept of vessel, it could be said that they have focused the criteria to considering a water craft as a ship, taking into account the purposes for why it was built and the uses that were given to it, specifically the type of business in which it is engaged.²⁰

Furthermore, Section 2 of the Canada Shipping Act 2001, gives a clear explanation of what should be considered a ship, establishing that “a vessel is a boat, ship or craft designed, used or capable of being used solely or partly for navigation in, on, through or immediately above water, without regard to method or lack of propulsion, and includes such a vessel that is under construction. It does not include a floating object of a prescribed class.”²¹ However, the same statute in its Section 46 (1) also regards ownership as the parameter for the registration of ships in order to state what ship should be considered a Canadian vessel.²² Regarding the interpretation of Canadian courts, they have recognized that a water device is a ship when it is used for navigational purposes.²³

On the other hand, regarding the Liberian Code of Laws, Title 22, its Section 51 (2) gives a very practical definition, stating that ships are seagoing vessels of more than 1600

decisions rendered, especially, before the enactment of the Merchant Shipping Act 1995. Also see Tetley, *supra* note 2, for the definition of each term in the United Kingdom Merchant Shipping Act 1894.

¹⁷ See Tetley, *supra* note 2, at p. 42 for a complete explanation in this respect.

¹⁸ 1 U.S.C. 3 (2002), available at the US Maritime Administration homepage at <http://www.marad.dot.gov/publications/complaw03/Miscellaneous.htm> (last visit July 25, 2003)

¹⁹ 46 U.S.C. 12102 (2002), available at US Maritime Administration homepage at <http://www.marad.dot.gov/publications/complaw03/Documentation%20of%20Vessels.html> (last visit July 25, 2003)

²⁰ For a detailed explanation in respect of the U.S. case law regarding the definition of ship, see Schoenbaum, *supra* note 4, from pp. 81 to 85 and see also Tetley, *supra* note 2, at pp. 36 and 37.

²¹ S. C. 2001, c. 26, sect. 2

²² *Ibid*, Sect. 46 (1)

²³ See Tetley, *supra* note 2, at p. 40 where a comprehensive explanation is given in respect to the interpretation of the term vessel by Canadian courts.

net tons, engaged in foreign trade.²⁴ This definition is considered basically for the purposes of the registration procedure, but gives us a new element to consider, which is that vessels must be used for foreign trade purposes.

Finally, the Panamanian concept of ship could be found in article 1 of the Law No. 8 of 1925 which contains a very clear and broad definition stating that what “are considered merchant ships, for the purpose of registry, [are] those destined to the carriage of cargo and passengers, pontoons, dredges, floating docks or any other hulls made of wood, cement, steal, steel, or mix, and of any other material that is destined or could be destined to the service of maritime commerce.”²⁵ This definition was also drafted for registration purposes, but it is still the basis for all the other narrow definitions of ship contained in the Panamanian maritime legislation.

After having reviewed several definitions of ship contained in domestic and international legal documents, we find that there is a diversity of definitions to be taken into account, some of them very broad and technical, others more simple and narrow. Considering this fact, it would be impossible to find a uniform definition of ship suitable to address every maritime topic.

On the contrary, each document, at both the international and national level, defines the concept of ship or vessel depending upon its regulatory purposes. However, in general terms, the basic criteria that international and national law, as well as courts in common law jurisdictions, use to determine when they are dealing with a vessel is if the water craft is used for the purposes of navigation.

²⁴ Liberian Code of Laws 1956 as amended, Title 22, sect. 51 (2)

²⁵ Law 8 of June 12, 1925, Republic of Panama, art. 1, last paragraph. Actually, the same definition could also be found in art. 3 (c) of a recent enacted Decree Law No. 8 of February 26, 1998, Republic of Panama, which states some labor measures at sea and other navigable waters.

B. Legal Interpretation of the Term Ship

The word ship could have various meanings when it is used in a regulatory system.²⁶ For instance, the most common interpretation given to the term is to make reference to an object. In this sense, a water craft suitable for navigation is generally considered a ship.

In addition, the term ship is also used to make reference to those persons who have interest over the vessel, specifically the shipowners. Consequently, any person which has rights, duties, and obligations related to the vessel and which is in direct connection to the vessel's maritime activities, becomes responsible for acts in which the ship is involved.

Finally, the term ship could be interpreted in some legal texts as taking into account the country of registration of the ship, better known as the flag state. It has been stated in the past that the vessel is part of the territory of that state, following the floating island theory;²⁷ however this consideration of the territoriality of ships has been contradicted and is no longer supposed to be valid in international law.²⁸

Regarding the different connotations of the term ship, it is important to ascertain whether the word ship in a legal text refers to specific persons or to the flag state in order to determine the rights and duties of those who use a ship for maritime navigation.²⁹

A last point that should be stressed regarding the interpretation of the term ship is that in maritime law, even though a ship is considered simply an object, it has certain rights and responsibilities, as could have any other legal person. Furthermore, a ship could usually be seen as a party in a maritime claim, commonly considered a defendant in

²⁶ See generally Meyers, supra note 11, from pp. 8 to 23. He gives a comprehensive explanation of the different connotations of the term ship.

²⁷ Tetley, William. *International Conflicts of Law; Common, Civil and Maritime*. Éditions Yvon Blais, Montréal, 1994, at p. 184 for a good explanation about nationalism and the law of the ship's flag. (hereinafter Tetley, Int. C. of L.)

²⁸ Ray, Jose Domingo. *Derecho de la Navegación*. Editorial Abeledo-Perrot, Buenos Aires, 1992, at p. 269. See also generally supra note 12, at p. 14 for further considerations about the interpretation of ships as parts of the territory of a state. See also Tetley, Int. C. of L., supra note 27, at p. 184.

²⁹ See Meyers, supra note 11, at p. 9.

claims brought against it. These are the reasons why a vessel has occasionally been personified, considered a *sujet de droit*.

C. Characteristics

Ships are considered to be a special kind of property, specifically movable property, but with different characteristics. Vessels, for example, have the attribute of mobility because they are not situated within the borders of a specific state; they can go beyond that, passing through the territory of other states or even going into international territories, such as the high seas.³⁰ However, even though vessels are in fact objects, rules similar to those applicable to immovable properties are also occasionally applicable to them.³¹

The different components of a ship cannot be considered individual properties by themselves; on the contrary, they form part of a unified property that is the vessel itself. In this sense, all the components of the vessel are also owned by the person who owns the ship.

Some other characteristics of ships are more directly related to ship registration, being key elements in the registration procedure. Each ship has some exclusive and unique information that differentiates it from any other vessel in the world; as a consequence, that information could not be granted to any other vessel. Ships, therefore, are individualized properties which have their own particularities that help to identify them anywhere, such as a name or any other unique information, for communication purposes. Regarding the name of the vessel, it is the first and usually the most useful identification mark to be found in any ship registration process, which gives the vessel its individual

³⁰ García-Correa, Liborio. *National Tonnage Registry v. Open Registry: A Unique Opportunity for Panama*. Thesis submitted for the Degree of Doctor of Philosophy. University of Southampton, Southampton, 1994, at p. 1

³¹ This situation is clearly evidenced regarding issues such as ownership of vessels and ship mortgages. In the case where a person wants to obtain property over a ship, he will have to comply with similar formalities with respect to immovable properties, such as the registration of the ownership title in a public registry to assert that registration as a proof of that ownership against third parties.

and unique character as a maritime transport unit.³² On the other hand, every ship is provided with exclusive radio code call letters, which the vessel requires for the purposes of communication; no identical call letters can be given to more than one vessel, under any registry worldwide.³³

There are other elements granted to the ship and which characterize it once it is officially registered in the public records of a specific country, such as its number of registration, legal domicile and national character. All these elements that are consequences of the procedure of the registration of a vessel are considered throughout this research and will be explained in detail later.

II. Nationality of Ships

Because the term nationality refers specifically to the legal relationship that exists between individuals and their state of origin, it has been considered an inaccurate term to use in naming the legal relationship between a state and a vessel.³⁴ This idea is grounded in the belief that what really ascribes the vessel when registered in the public registry of a particular state is a national character rather than a nationality. However, despite this belief, the word nationality has been largely used, and is still in use, at a national and international level, when the national character of a vessel is referred to.

The ascription of nationality for ships is one of the most important means by which public order is maintained at sea, as well as in indicating what rights a ship enjoys and to what obligations she is subject.³⁵ Indeed, nationality of ships serves primarily to ensure public order and control in the high seas, specifically because, being the high seas, an international space where there is no international authority, the law is observed by those

³² See García-Correa, *supra* note 30, at p. 5

³³ *Ibid*, at p. 6

³⁴ Pinto, Roger. "Flags of Convenience". 87 *Journal du Droit International* 344, 350 (1960) He states that the concept of nationality is inapplicable to ships and creates unnecessary difficulties.

³⁵ Churchill, R. R. and A.V. Lowe. *The Law of the Sea*. Third edition, Manchester University Press, Manchester, 1999, at p. 257.

traversing the high seas. Consequently, states themselves must perform that duty of public order.³⁶

Taking into account the above considerations, nationality is definitely a key element for ship registration, mainly because of the important legal implications that could be relevant to the vessel. The most important of these legal implications is that the nationality of the ship determines its national character, giving a clear indication of the jurisdiction under which the ship will be governed.

Furthermore, nationality indicates which state is responsible in international law for a specific vessel, specifically in cases where an act or omission of a ship is attributable to the state. It also clarifies which state is entitled to exercise diplomatic protection on behalf of the vessel.³⁷ Consequently, when knowing the nationality of a ship, it can be easily ascertained which law will be applicable to the vessel and all the acts which occurred onboard.

A primary rule in international law is that a registered ship will be under the exclusive jurisdiction and control of the flag state. This main principle has been regulated in several international documents, but it is clearly contained in the 1958 Geneva Convention on the High Seas³⁸, in the 1982 United Nations Convention of the Law of the Sea³⁹, and in the 1986 Convention on Registration of Ships.

Regarding the nationality of ships, it is important to consider first of all the Geneva Convention. This is the primary document that codifies the rules of international law relating to the high seas, recognizing that it is open to all nations.⁴⁰ In this sense, any

³⁶ See Meyers, *supra* note 11, at p. 26

³⁷ See Churchill, *supra* note 35, at p. 257

³⁸ Convention on the High Seas 1958, adopted at Geneva, April 29, 1958 in force September 30, 1962 (hereinafter Geneva Convention)

³⁹ United Nations Convention on the Law of the Sea 1982, adopted at Montego Bay, Jamaica, December 10, 1982 and in force November 16, 1994 (hereinafter UNCLOS)

⁴⁰ See Geneva Convention, *supra* note 38, art. 2.

country is free to exercise all the rights that comprise the freedoms of the high seas.⁴¹ The Geneva Convention clearly expresses in its article 4 that every state, whether coastal or not, has the right to sail ships under its flag on the high seas,⁴² meaning that vessels of any nationality will enjoy these freedoms.

Consequently, the fundamental basis for the rights to freedoms of the high seas and to navigation under international law is the concept that a vessel has a nationality which has been conferred upon it by a state.⁴³

It is recognized that flag states have, under international law, exclusive jurisdiction and control over vessels flying their flags, regardless of the location of the ship.⁴⁴ This rule of international law is contained in article 5 (1) of the Geneva Convention which states the following:

“Article 5:

1. Each 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 be a genuine link between the State and the ship; in particular, ***the State must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.***

2. Each State shall issue to ships to which it has granted the right to fly its flag documents to that effect.” (Emphasis added)⁴⁵

The Geneva Convention clearly expresses that the vessels which are officially registered in the public registry of a country are nationals of that state, being subject to

⁴¹ The freedoms of the high seas are listed, in a non-exhaustive way, by art. 2 of the Geneva Convention. They are comprised by the freedom of navigation, freedom of fishing, freedom to lay submarine cables and pipelines; and the freedom to fly over the high seas. However, these freedoms were enlarged by art. 87 of UNCLOS which added the freedom to construct artificial islands and other installations permitted under international law, and the freedom of scientific research

⁴² See the Geneva Convention, *supra* note 38, art. 4.

⁴³ Mandaraka-Sheppard, Aleka. *Modern Admiralty Law*. Cavendish Publishing Limited, London, 2001, at p. 285, and see also Schoenbaum, *supra* note 4, at pp. 46 and 47.

⁴⁴ Molenaar, Erik Jaap. *Coastal State Jurisdiction over Vessel-Source Pollution*. Kluwer Law International, The Netherlands, 1998, at p. 95.

⁴⁵ See the Geneva Convention, *supra* note 38, art. 5

that state's jurisdiction and control. It further explains that the control that a flag state must have over their ships is in respect to not only administrative matters, but also to technical and social matters.

In addition, article 6 of the same document reinforces the relationship between nationality of ships and the effective jurisdiction and control of the flag state, adding some ideas to the previous provision as follows:

“Article 6:

1. ***Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in these articles, 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 ...” (Emphasis added)⁴⁶

Consequently, when referring to ships, the word nationality invariably designates an exclusive extraterritorial jurisdiction of the flag state, the laws of the country of registration of the vessel being the ones that will govern it.⁴⁷ However, the exclusiveness of the flag state's jurisdiction is not absolute,⁴⁸ and international law has recognized that exclusive jurisdiction could be shared with the jurisdiction of other states, such as coastal and port states.⁴⁹

So, if a vessel is located within the ports, or navigating through the internal waters or territorial sea of another state, concurrent jurisdiction will exist and will be shared by the flag state and the state in question, either port or coastal state, it being impossible for the

⁴⁶ Ibid, art. 6.

⁴⁷ See Meyers, supra note 11, at p. 25 He explains that jurisdiction could be divided into the jurisdiction of the state within its geographical boundaries and the jurisdiction with which the state is vested outside them. The latter is the extraterritorial state jurisdiction and is the one that applies to vessels.

⁴⁸ See Churchill, supra note 35, at p. 209

⁴⁹ It is important to consider that international law allocates jurisdiction to states acting in different capacities: as flag, port or coastal states. In this sense, coastal state jurisdiction is primarily exercised over its maritime zones such as territorial sea, contiguous zone, economic exclusive zone (EEZ) and the continental shelf. On the other hand, port state jurisdiction is in principle exercised based upon the vessel's voluntary presence within its ports. For a good explanation of the differences among the flag, port and coastal jurisdictions, see Molenaar, supra note 44, from pp. 91 to 95.

flag state to enforce its jurisdiction over the vessel without the consent of the other state.⁵⁰

Finally, another important consideration is the one regarding vessels without nationality, also called stateless vessels.⁵¹ With respect to them, the Geneva Convention is clear when it states in its article 6 (2) that when a vessel is flying two or more flags, it does not have a specific national character and is not entitled to ascribe any nationality.⁵² Consequently, vessels with no nationality do not enjoy any protection in international law. The statelessness of vessels does not permit them to be under the jurisdiction of a specific state when they are in the high seas. However, regarding the principle of territoriality, jurisdiction over stateless vessels could clearly be asserted when they are located in the maritime zones of a coastal state.⁵³

Another point that should be taken into consideration is that private vessels that are employed on the official service of an inter-governmental organization⁵⁴ are not subject to those provisions regarding the nationality of ships, as expressed by article 7 of the Geneva Convention.

In addition, another important international document that states specific provisions in respect to the nationality of ships is UNCLOS. However, being the most comprehensive multilateral agreement on the international Law of the Sea,⁵⁵ it recodifies the provisions of the nationality of ships contained in the Geneva Convention, following exactly its same parameters. The text of article 91 of UNCLOS is almost identical to the text of article 5 of the Geneva Convention.

⁵⁰ See Molenaar, *supra* note 44, at p. 95

⁵¹ In respect to stateless vessels the 1948 British case of *Naim Molvan vs Attorney General of Palestine* ruled that such types of ships enjoy the protection of no state in international law. For a more detailed explanation of this case, see Churchill, *supra* note 35 at p. 214. See also Molenaar, *supra* note 44, at p. 213. However, it is important to make the differentiation between stateless ships and vessels not registered; in this sense, they clarify that there could exist the possibility that because of their size some ships are exempted by states to be registered in their public records. But rather than be considered vessels without nationality, they will ascribe the nationality of their shipowners.

⁵² See the Geneva Convention, *supra* note 38, art. 6 (2)

⁵³ See Molenaar, *supra* note 44, at p. 214

⁵⁴ See the Geneva Convention, *supra* note 38, art. 7

⁵⁵ Reuland, Robert. "Interference with Non-national Ships on the High Seas: Peacetime Exceptions to the Exclusivity Rule of the Flag-State Jurisdiction", 22 *Vand. J. Transnat'l J.* 1161, 1166 (1989).

As the Geneva Convention prescribes, UNCLOS in its article 92 (1), also recognizes the exclusive jurisdiction and control of the flag state over all those vessels registered under its flag.⁵⁶ Likewise, it also contains exceptions to the general rule of the exclusiveness jurisdiction and control of the state of registration in certain circumstances.⁵⁷ Finally, UNCLOS also makes reference to the statelessness of vessels in its article 92 (2)⁵⁸ and to ships flying the flag of the United Nations and its specialized agencies in its article 93.⁵⁹

The Convention on Registration of Ships had the intention of reaching an international unification regarding rules governing the conditions for ship registration, having among its primary purposes the promotion of competent and adequate national maritime administrations.⁶⁰ However, even though it was signed by some countries, it has not yet been adopted by the necessary number of states to be enforced.⁶¹

On the nationality of ships, this convention also had some elements that were obviously based on provisions of the previous international documents that have addressed this topic in the past.⁶² In its article 4, which contained general provisions, the Convention on Registration of Ships stipulates regarding the nationality of vessels the following:

“Article 4: General Provisions

1. Every State, whether coastal or land-locked, has the right to sail ships flying its flag on the high seas.

2 Ships have the nationality of the State whose flag they are entitled to fly.

⁵⁶ See UNCLOS, supra note 39, art. 91 (2)

⁵⁷ See generally Reuland, supra note 55, for a detailed explanation of the exceptions to the exclusive jurisdiction of the flag state.

⁵⁸ See UNCLOS, supra note 39, art. 92 (2)

⁵⁹ Ibid, art. 93. In this respect, it gives the same idea that is contained in the Geneva Convention regarding vessels at the official service of an inter-governmental organization.

⁶⁰ See the Convention on Registration of Ships, supra note 6, Preamble

⁶¹ Ibid, art. 19 (1). This article states the mechanism to the entry into force of the convention, clearly stating that it will enter into force 12 months after the date on which not less than 40 states, the combined tonnage of which amounts to at least 25 per cent of world tonnage, have become contracting parties to it.

⁶² These conventions are the Geneva Convention and UNCLOS.

- 3. Ships shall sail under flag of one State only.**
- 4. No ships shall be entered in the registers of ships or two or more States at a time, ...**
5. 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.” (Emphasis added)⁶³

It is evidenced that this document also recognizes that the national character of a ship will be determined according to the flag which it is flying. Regarding the provision which says that vessels are allowed to sail under the flag of only one country, the convention confirmed the rule of exclusive jurisdiction and control of the flag state over those ships registered under its flag. Reinforcing that exclusiveness, the convention stated that a ship could not be registered under the flag of two or more states at the same time. Consequently, it purported that a vessel could not have two or more nationalities and could not be subject to the laws of two or more countries concurrently.

However, because the Convention on Registration of Ships was a document specifically drafted with the main purpose of setting international standards for conditions on ship registration, it did not deal with the issue of coastal and port jurisdiction and control as UNCLOS does.⁶⁴

III. Ship Registration

A. Notion

To register means to enter into a public registry.⁶⁵ Keeping this basic definition in mind, I will introduce what should be considered ship registration, giving special attention to its legal consequences.

⁶³ See the Convention on Registration of Ships, *supra* note 6, art. 4

⁶⁴ UNCLOS deals with coastal states in a general way in arts. 24 and 25. However, in a specific way regarding the protection of the marine environment, art. 220 states provisions for the enforcement of coastal state jurisdiction and art. 218 for the enforcement of port state jurisdiction.

⁶⁵ Garner, Bryan A. *Black's Law Dictionary*. Seventh Edition, West Group, Minnesota, 1999, at p. 1287.

In trying to give a notion of ship registration, it could be said that expressions closely related to it, such as nationality, flag and documentation are often used as if they were conterminous terms.⁶⁶ Because of the difficulties that exist in separating them in a clear way and addressing the individual meaning of each of these terms, it has been considered that these terms are generally used in an imprecise way,⁶⁷ having them as synonyms in the wording of international maritime conventions and domestic laws. However, even though the meaning of each one of them could be in some sense different, their main intention is certainly to mean just one idea -- ship registration.

In order to give a short explanation about the differences that exist between these interconnected expressions, I should say that the term nationality has been primarily linked to when registering a vessel in the public registry of a specific state. These expressions, nationality and registration of a ship, should always be considered together. Once a ship is officially registered in the ship registry of a particular country, the vessel acquires the nationality of that state and is subject to its jurisdiction, and thus is entitled to rights and subject to obligations that I will address later in this research. Summarizing what has been stated, registration is generally, but not always, not only a precondition for, but also the test of a vessel's nationality.⁶⁸ However, in some cases, the situation is a little bit different; in some countries, nationality is temporarily granted to a vessel, prior to the final registration, simply by issuing a provisional certification.⁶⁹

With respect to the expression of flag, it is internationally recognized that the practice of a vessel in flying the national flag of a state becomes the visual evidence of a ship's nationality, the flag being the symbol of that nationality.⁷⁰

Finally, when the expression "documentation of the ship" is used, it means that the flag state has issued the official documents given to a vessel evidencing that the ship is

⁶⁶ Coles, Richard. *Ship Registration: Law and Practice*. LLP, London, 2002, at p. 3.

⁶⁷ Ibid

⁶⁸ Ibid, p. 6

⁶⁹ Berlingieri, Francesco. *Arrest of Ships*. Lloyd's of London Press Ltd., London, 1992, at p. 18

⁷⁰ See Coles, supra note 66, at p. 5 and see also Mandaraka-Sheppard, supra note 43, at pp. 285 and 286.

properly registered in that state's registry and, consequently, that it has the right to fly the national flag of that country.

Although there is an evident and close relationship between the expressions registration and documentation, there is also a precise distinction between them that should be addressed. Registration mainly involves the recognition and protection of the shipowner's title to the vessel as well as the conferment of nationality, while documentation is merely the evidence of the national character of the vessel for a period of time.⁷¹

It could be said that the official documentation which evidences the registration of a ship is not considered a document of title. On the contrary, it is only the proof of the nationality of the ship. In consequence, documentation granted to a ship is the only allowable evidence of its registration and proves the right to fly the flag of the state where the vessel is registered.

Taking all of this into consideration, a simple and general definition of ship registration could be summarized as the official entry of a vessel into the public records of a state, evidenced by the issuance of official documents that attribute her national character and the right to fly the national flag of that state for the specific period of registration.

B. Legal Nature

The duty of ship registration is mainly considered the public function of a state; however, it is interesting to realize that ship registration has some private legal implications. Because all the international conventions and national laws that rule or, at least, have some relationship with the topic of ship registration are considered rules of

⁷¹ See Coles, *supra* note 66, at pp. 4 and 5.

public maritime law,⁷² it is not easy to think about the private implications of ship registration; however, there are some that should be considered.

In order to make a distinction between the private and public functions of ship registration,⁷³ there is a fine line drawn between public and private maritime rights, that result from the registration of vessels.

When registering a ship in its public registry, the state is granting its nationality to the vessel. Along with that nationality, the ship is ascribing the right to fly the national flag of the state and the right to engage in certain activities within the territorial waters of the country, such as fishing, trading, entering into its ports, and others.⁷⁴ Consequently, when the vessel is navigating in foreign territorial waters or in the high seas, the single jurisdiction that will govern the vessel is the one of the state of registration. However, this exclusive jurisdiction of the flag state must be shared, in specific cases, with some other states. Furthermore, the state of registration will grant other rights to the vessel, such as the right of naval protection and diplomatic protection and consular assistance.⁷⁵

With respect to the private functions of states in registering a ship, the flag state will also grant some prerogatives in the private area, such as protection of the title of the shipowner and protection of the title and preservation of priorities between persons holding security interests over the vessel, which is the case with ship mortgages.⁷⁶

⁷² It must be considered the distinction between public and private maritime law, either in the national and international level. At the national level, in respect to maritime issues, public law governs the domestic legal relationships between a state and its individuals, contrary to the private law which rules the relationship among private individuals. For a better explanation see Coles, *supra* note 66, at p. 10. He explains that public law considers the vessel a floating community carrying the sovereignty of the flag state; meanwhile, private law considers the ship a moveable property over which specific persons have rights that are subject to the protection of the law. At the international level, see also Tetley, *supra* note 17, at pp. 625 and 626. He states that public international maritime law deals with the legal relationship between sovereign states, as opposed to the private international maritime law which governs the relationships between private parties of different sovereign states, where choice of law or jurisdiction are the basic issues.

⁷³ See Coles, *supra* note 66, at pp. 6 and 7 for a very detailed explanation of the public and private function of ship registration.

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*

C. Genuine Link

The root of this expression is found in the decision rendered in 1955 by the International Court of Justice in the *Nottebohm* case,⁷⁷ not precisely regarding the nationality of a vessel, but the nationality of an individual.⁷⁸

Basically, the question at issue in this case was if the nationality of an individual presupposed the existence of a substantive connection between that individual and the state whose nationality he claimed.⁷⁹ What was stated by the ICJ in this respect was the consideration that even though it is for every sovereign state to settle by its own legislation the rules relating to the acquisition of its nationality, nevertheless a state cannot claim that its rules are entitled to recognition by another state, unless there is a genuine connection in existence and a real and effective link between the individual and the country.⁸⁰

After the decision in the *Nottebohm* case was rendered, the need for a genuine link between an individual and its state of origin began to be considered a subject matter of international discussion, with respect to the possibility of adapting the idea of the relationship between a ship and its flag state. However, it was expressed that the real intention of introducing a genuine link as a legal requirement for the registration of ships was the proliferation of a very flexible system regarding conditions for ship registration, called open registries. This type of system was adopted by some states, mainly developing countries, specifically after the 1950's, impairing in a severe degree the shipping industry in the developed world, which showed a fast reduction of the national merchant marine fleets of its countries.⁸¹ In this sense, the inclusion of a required link between a ship and her flag state reflected concern, mainly among states with an

⁷⁷ *Liechtenstein v. Guatemala, The Nottebohm Case* (1955) I.C.J. Rep. 4. The *Nottebohm Case* was ruled by the International Court of Justice (hereinafter ICJ).

⁷⁸ See Coles, *supra* note 66, at p. 10.

⁷⁹ *Ibid.*

⁸⁰ Kasoulides, George. "The 1986 United Nations Convention on the Conditions for Registration of Vessels and the Question of Open Registry", 20 *Ocean Dev. & Int'l L.* 543, 551 (1989)

⁸¹ See Mandaraka-Sheppard, *supra* note 43, at p. 286

established maritime industry, because of the growing competition from fleets registered in states whose legislation and shipping policies were more convenient.⁸²

Several studies were prepared, mainly by the United Nations Committee of Trade and Development, in respect to the implementation of the genuine link requirement, in order to introduce the concept as mandatory to flag states considering the existence and growth of open-registry fleets.⁸³ It was considered that the genuine link was an essential element in ship registration because of the open registry issue and because of the need of international agreement in stating rules for the existence of economic links between a vessel and her flag state, in order to control shipowners and key shipboard personnel.⁸⁴

The requirement of a genuine link influenced to a great extent the drafting of the relevant provisions in the Geneva Convention regulating conditions for the grant of nationality to vessels.⁸⁵ This convention was the first international document to introduce in treaty law the necessity for a genuine link between a ship and its flag state as an important element in registering a ship. This genuine connection was mentioned in article 5 (1) of this international convention, but as an undefined term.

Following this parameter, UNCLOS in its article 91 repeated the expression of a genuine link as a requirement for registration of vessels like the Geneva Convention did, but also in an undetermined way. The wording of the convention was poor in its attempt to introduce the genuine link issue, in the sense that it didn't specify what was meant by the genuine link in terms of the preconditions of the grant of nationality, and neither did it introduce a description of any sanction for those cases where nationality was granted in the absence of that genuine connection between the ship and the flag state.⁸⁶

⁸² McConnell, Moira. "Business as usual": An Evaluation of the 1986 United Nations Convention on Conditions for Registration of Ships", 18 J. Mar. L. & Com. 435, 436 (1987).

⁸³ Ibid. The United Nations Committee of Trade and Development (hereinafter UNCTAD) was established in 1964 as a body of the UN with the primary aim of contributing to the integration of developing countries into the world economy working as a forum for intergovernmental discussions and a provider of technical assistance to these states. See generally UNCTAD homepage at <http://www.unctad.org>.

⁸⁴ Ibid, p. 438

⁸⁵ See Kasoulides, *supra* note 80, at p. 551

⁸⁶ See Coles, *supra* note 66, at p. 11

Furthermore, the Convention on Registration of Ships tried to strengthen the argument for a genuine link for the registration of vessels by introducing the concept. However, unlike the Geneva Convention and UNCLOS, this document presented the idea that the genuine link should be an economic linkage between the flag state and the vessel, regarding specific aspects such as management and crew and the shipowner's nationality.⁸⁷ These requirements were evidenced by the wording of articles 8 and 9 respectively, which argue for a national participation in the ownership and manning of the ship, both elements considered crucial for the flag state in order to exercise effective jurisdiction over those vessels registered under its public records.⁸⁸ However, in its article 7, the convention seems to offer an opposed idea, being flexible in respect to the implementation of the genuine link, allowing the flag state to comply with only one of the above mentioned elements, either ownership or manning, although it may comply with both.⁸⁹

At the end, even though the Convention on Registration of Ships gave more explanation on how to address the genuine link concept, it remains an unsuccessful effort in introducing the genuine link requirement as mandatory, because it is a document that is still not yet in force.

Considering that the existence of a genuine link between the vessel and the state of registration has been one of the most polemic issues on the subject of ship registration, it was deliberately introduced in treaty law with the intentions to phase out open registries. Because of its importance, this subject will be addressed in more detail further in this research.

⁸⁷ See McConnell, *supra* note 82, at p. 438

⁸⁸ See the Convention on Registration of Ships, *supra* note 6, arts. 8 and 9

⁸⁹ *Ibid*, art. 7

D. Conditions for Registration

The principle of conferring nationality to ships is today considered a sovereign right granted to any state, regardless of whether it is a coastal or land-locked country.⁹⁰

This sovereign right of conferring nationality to vessels was recognized by international jurisprudence in 1905 through the decision rendered in the Muscat Dhows case.⁹¹ In this case, the Permanent Court of Arbitration pronounced that “it belongs to every sovereign to decide to whom he will accord the right to fly his flag and to prescribe the rules governing such grants.”⁹²

The same principle was taken into account in 1953 by the US Supreme Court in *Lauritzen v. Larsen*, when it said that: “each state under international law may determine for itself the conditions on which it will grant its nationality to a merchant vessel.”⁹³

The principle that was originally considered customary international law was codified in some international conventions such as the Geneva Convention, UNCLOS, and lately the Convention on Registration of Ships, all of them following the idea proclaimed in the Muscat Dhows Case and *Lauritzen v. Larsen*, which are decisions rendered years before, of that international codification process.⁹⁴

Today, the sovereign right to confer nationality to a ship is a largely recognized rule of international law; however, the rules determining the conditions for registration of ships were contained in the domestic legislations of countries around the world long ago.

⁹⁰ Sohn, Louis B. and Kristen Gustafson. *The Law of the Sea in a Nutshell*. West Publishing Co., Minnesota., 1984, at p. 3. However, only after World War II was the right of a land-locked state to have vessels sailing under its flag recognized, subsequently codified in art. 4 of the Geneva Convention and art. 90 of UNCLOS. Basically, this right was granted to land-locked states based on the principle of the freedom of the high seas to every state.

⁹¹ France v. Great Britain, Muscat Dhows Case (1916) Hague Court Reports 93, Permanent Court of Arbitration, 1916. See also Coles, supra note 66, at pp. 8 and 9 for a detailed explanation of the Muscat Dhows case.

⁹² Ibid.

⁹³ *Lauritzen v. Larsen*, 345 U.S. 571 (1953)

⁹⁴ Matlin, David. “Re-evaluating the Status of Flags of Convenience under International Law”, 23 Vand. J. Transnat’l J. 1017, 1031 (1990). He explains that the Muscat Dhows case and *Lauritzen v. Larsen* are compelling precedents for the notion that each state shall determine whether it will grant its nationality to a ship.

Article 5 of The Geneva Convention is a key provision in this respect because the sovereign right of conferring jurisdiction over a vessel could be inferred from its wording. It reads as follows:

“Article 5:

1. Each 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 ...”⁹⁵

Once again, UNCLOS, through the wording of its article 91, follows the same trend as the Geneva Convention concerning the conditions for registration of vessels, conferring to each state the prerogative to fix by themselves the requirements that vessels registered under its flag must comply with.⁹⁶ Furthermore, in the preamble of the Convention on Registration of Ships, it is reaffirmed that each country is free to set the requirements that are considered necessary for the registration of vessels under its flag.⁹⁷

E. Duties of the Flag State

Having explained that a ship ascribes the nationality of the state whose flag it is flying, due to registration, it is important to make reference to the role that the flag state plays in this equation. The principle of the exclusive jurisdiction of the flag state involves not only rights, but also responsibilities and obligations that the country of registration must comply with. These duties, initially considered customary international law, were however not totally uniform due to the differences among national legislations.

As a consequence of the development and codification of the Law of the Sea, the duties of the flag state were incorporated and codified into treaty law in a general way through the text of the Geneva Convention, and then, in a more precisely way, in UNCLOS. Also, the Convention on Registration of Ships, seeking for harmonization,

⁹⁵ See the Geneva Convention, supra note 38, art. 5 (1)

⁹⁶ See UNCLOS, supra note 39, art. 91

⁹⁷ See the Convention on Registration of Ships, supra note 6, Preamble

introduced the specific obligations of the flag state; they are not however applicable since that convention has not yet been enforced.

The text of the Geneva Convention does not have a provision specifically contemplating the duties of a flag state; however, it is implied by the general mandate contained in its article 5 (1) that the flag state indeed has to comply with some legal responsibilities. Consider the following:

“Article 5:

1. Each 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 be a genuine link between the State and the ship; in particular, *the State must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag...*” (Emphasis added)⁹⁸

The exclusive sovereignty of the flag state over a ship and its users implies the exclusive mandate of an effective application by the state of that sovereignty on board the vessel in order to comply with international rules.⁹⁹ As the previous consideration establishes, compliance with the legal duties of the flag state is mandatory and should be effective in the sense that states are legally responsible for the non-fulfillment of their duties in international law.¹⁰⁰

Regarding the duties of the flag state, the country of registration must exercise its jurisdiction properly, enforcing its domestic law in an effective way with the main objective of maintaining total control over those vessels flying its flag, including the administrative, technical and social aspects.

⁹⁸ See the Geneva Convention, supra note 38, art. 5 (1)

⁹⁹ See Meyers, supra note 11, at p. 108

¹⁰⁰ Ibid, p. 109. He explains that states are bound to comply with their international responsibilities.

The duties of the flag state are not limited to the vessel itself as a movable property;¹⁰¹ the flag state should take into account other important elements. It is important to consider that when the Geneva Convention makes reference to technical matters, it is referring to measures taken with respect to the ship itself, its seaworthiness being a crucial element.¹⁰² On the other hand, when the provision makes reference to social matters, it is referring to the manning of ships and labour considerations in relation to the master, officers and crew.

Along with article 5 (1), article 10 has a specific mandate that could also be considered a duty of the flag state.¹⁰³ Through this provision, the Geneva Convention summarized the most important responsibilities with which a flag state must comply. The article asks for measures ensuring safety at sea, which is a primary aim in the shipping world, being an aspect largely regulated in international law.¹⁰⁴ With the purpose of maintaining safety at sea, the article also considers technical aspects such as the seaworthiness of ships, their construction and equipment, as well as the prevention of collisions. Furthermore, the article takes into consideration social aspects such as manning and labour conditions for crews. The final paragraph of the article states that each flag state must make its domestic legislation conform with international standards accepted with respect to these topics, insisting on the observance of international rules.

The duties of flag states are also related to the performance of the duties of those which represent it on board the ship, such as the master. The Geneva Convention, therefore, does give some responsibilities to the master.¹⁰⁵

¹⁰¹ Ibid, p. 110

¹⁰² See Tetley's Glossary of Maritime Law, Abbreviations, Definitions, Terms, Links and Odds'N Ends (hereinafter Tetley's Glossary), at Prof. William Tetley's homepage at http://tetley.law.mcgill.ca/maritime/glossarymaritime.htm#letter_s (last visit July 24, 2003) Regarding seaworthiness, it is important to recall Prof. Tetley's words in stating that it is a basic theme in maritime law running like a thread through all maritime fields. Consequently, the exercise of seaworthiness has implications in all maritime issues. In respect to ship registration, it could be said that it is also important because vessels must be seaworthy in order to navigate properly at sea complying with all the requirements and obligations stated by the flag state.

¹⁰³ See the Geneva Convention, *supra* note 38, art. 10

¹⁰⁴ The issue of safety at sea is mainly covered by the International Convention for the Safety of Life at Sea, amended 1974, in force May 25, 1980. (hereinafter SOLAS 1974)

¹⁰⁵ See the Geneva Convention, *supra* note 38, art. 12

The Geneva Convention also contains provisions related to the prevention and punishment of slaving and piracy.¹⁰⁶ These should also be considered duties of the flag state.

Finally, the Geneva Convention introduces specific provisions in relation to the prevention of pollution of the seas by the discharge of oil from ships and from the dumping of radioactive waste.¹⁰⁷ Topics regarding the protection of the marine environment are of the utmost importance for the shipping world and are also closely connected with ship registration in the sense that the flag state is the one that must take provisions that ships flying under its flag are in compliance with the rules for the protection of the marine environment.

Article 94 of UNCLOS has a very detailed list of the flag state's responsibilities. Following the wording contained in article 5 (1) of the Geneva Convention, this international document gives a general statement as follows:

"Article 94: Duties of the Flag State

Every State shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag..."¹⁰⁸

This article gives a detailed explanation that covers different aspects of the registration of vessels. In order to maintain administrative control over all vessels flying its flag, the flag state must keep a register of ships, including information such as the names and particulars of those vessels registered.¹⁰⁹

The main responsibility of the flag state is perhaps established in article 94 (2) (b) with respect to the assumption of jurisdiction, under its internal law, over each ship flying its flag, over its master, and over its officers and crew on administrative, technical and

¹⁰⁶ Ibid, arts. 13 and 14

¹⁰⁷ Ibid, arts. 24 and 25

¹⁰⁸ See UNCLOS, supra note 39, art. 94 (1)

¹⁰⁹ Ibid, art. 94 (2) (a)

social matters concerning the ship.¹¹⁰ This jurisdictional duty is performed when the flag state fixes in its own domestic legislation all the regulations regarding registration of ships, concerning all its practical aspects, including, as UNCLOS says, administrative, technical and social matters.

Using the same wording as the Geneva Convention, UNCLOS in its article 94 (3) establishes the duties of the flag state regarding safety at sea,¹¹¹ listing the main aspects that should be taken into account regarding this important maritime issue. UNCLOS clarifies those duties by prescribing the measures that should be followed by the flag state in order to ensure the safety at sea. These measures are contained in article 94 (4) which includes the practice of regular surveys of the ships, to check mainly the seaworthiness of the vessel, and the proper manning of the ship, taking into account the qualification of the master, officers and crew of the ship, in a vast number of maritime issues that are crucial to marine safety, such as prevention of collisions and marine pollution.¹¹² Finally, article 94 (4) (c) and (5) is very clear in stating that the ship and its crew must comply with and manage all the applicable international conventions in those topics related to safety at sea.¹¹³

The principle of international cooperation between states is present in some articles of UNCLOS in the Law of the Sea, another important element for ship registration and a complementary element for the exercising of the duties of the flag state. It could be inferred from article 94 (6) that any country could issue a report to the flag state in respect to vessels over which it believes that jurisdiction and control have not been properly exercised. Consequently, by the issuance of the mentioned report, the flag state is bound to initiate an investigation and take necessary measures.¹¹⁴

According to article 94 (7) of UNCLOS, the flag state must also be responsible for conducting an inquiry when a ship flying its flag is involved in any marine casualty or

¹¹⁰ Ibid, art. 94 (2) (b)

¹¹¹ Ibid, art. 94 (3)

¹¹² Ibid, art. 94 (4)

¹¹³ Ibid, art. 94 (4) (c) and 5.

¹¹⁴ Ibid, art. 94 (6)

incident of navigation, especially in those situations where there is a loss of life or serious injury to nationals of another state, serious damage to ships or installations of state, or serious damage to the marine environment.¹¹⁵ Once again, by the wording of this article, it is clear that international cooperation between states involved in any marine incident should be of primary importance in conducting such an investigation.

Articles 211(2) and 217 of UNCLOS contain specific responsibilities for the flag state regarding marine pollution. The convention seeks the adoption by flag states of domestic laws and regulations for the prevention, reduction, and control of the polluting of the marine environment from vessels flying their flag or of their registry and to ensure enforcement of those regulations.¹¹⁶ In this sense, the document establishes that those regulations introduced in the domestic legislations of flag states should be in accordance with international rules related to marine pollution. However, since the introduction of domestic policies in this respect is not enough, the convention lists other duties for flag states in respect to the enforcement of those regulations, regardless of the place where the vessel is situated or where a violation occurs. More specifically, the flag state must ensure that vessels flying its flag comply with international regulations regarding the design, construction, equipment and manning of vessels. This includes carrying on board all the certificates required, and making periodical inspections to vessels in order to verify if the certificates issued are in accordance with the actual conditions of the ships.¹¹⁷

In addition to the above, the flag state has the responsibility of conducting an investigation in the case of a violation of international rules, standards, laws, or regulations concerning pollution to the marine environment committed by a vessel flying its flag. Furthermore, UNCLOS affirms the principle of international co-operation among states as a tool for the prevention, control and reduction of marine pollution.¹¹⁸

¹¹⁵ Ibid, art. 94 (7)

¹¹⁶ Ibid, art. 211(2)

¹¹⁷ Ibid, art. 217

¹¹⁸ Ibid.

The flag state must discourage violations to international rules, standards, laws and regulations regarding marine pollution by applying severe penalties for any violation, regardless of where those violations occur.¹¹⁹

Even though provisions of the Convention on Registration of Ships are not mandatory, it is important to consider that it also had some articles regarding the responsibilities of the flag state. Its article 5 expressed some of the administrative tasks concerning ship registration that the flag state should comply with. The most important of these tasks is the establishment of a competent and adequate national maritime administration for the registration of vessels that will be subject to the jurisdiction and control of the flag state.¹²⁰ Following this idea, article 5 (3) enumerates some of the priorities that any national maritime administration should take into consideration, including compliance with international rules, standards, laws and regulations on safety at sea and persons on board the vessel, prevention of pollution, periodic surveys, and the carrying on board of mandatory documents and certificates that allow the ship to sail and fly its flag of registration, including those documents that are required by international conventions to which the flag state is a party, and should ensure that shipowners are in compliance with the international rules and its own domestic laws regarding the registration of ships.¹²¹

Finally, the flag state should maintain in its public records enough information about vessels flying its flag for complete identification and accountability of all vessels registered. In addition, article 10 of the Convention on Conditions for Registration describes the role of the flag state with respect to the management of shipowning companies and ships.¹²²

¹¹⁹ Ibid.

¹²⁰ See the Convention on Registration of Ships, *supra* note 6, art. 5 Regarding the role of national maritime administrations, see also Hubbard, Michael and Heike Hoppe, "Possible Framework for a Model Maritime Administration" (2001), online: IMO homepage at <http://www.imo.org/includes/blastDataOnly.asp/data-id%3D3935/modeladministration.pdf> (Last visit July 16, 2003)

¹²¹ Ibid, art. 5 (3)

¹²² Ibid, art. 10

F. Reasons for Registration of Vessels

There are several reasons to proceed with the registration of a vessel within the public records of a specific state. One of these reasons is the intention of ascribing a nationality to a vessel. So, the procedure of ship registration is mainly a legal requirement in order to obtain certain rights that the state will grant to vessels registered in its registry. When a ship obtains a national character, some other consequences, such as the right to fly the flag of the country of registration as well as protection under international law, are implicit.

Each state has not only the faculty, but the obligation to establish the national character of its merchant marine fleet,¹²³ as could be inferred from the international conventions reviewed. Registration of vessels as a legal requirement and its conditions seem to reside solely with the state to which the vessel belongs, since she is sailing under the flag of that state.¹²⁴

One very important reason for shipowners to register their vessels in a specific ship registry is the registration of their ownership title over a vessel, in order to serve as proof against third persons. In other words, ship registration serves as *prima facie* evidence of ownership of the vessel.¹²⁵ Also, ship registration is important regarding ship mortgages, since they must be registered in accordance with the law of the flag state of the vessel that will govern provisions regarding the ranking between mortgages, their effects with regard to third parties, and all the procedure of their enforcement.¹²⁶

¹²³ See García-Correa, *supra* note 30, at p. 2.

¹²⁴ *Ibid.*

¹²⁵ Hill, Christopher. *Maritime Law*. Fifth Edition, LLP, London, 1998, at p. 24.

¹²⁶ See the Maritime Liens and Mortgages Convention, *supra* note 9, arts. I (a) and II.

CHAPTER 2 – CHOICE OF FLAG

Countries have followed two main criteria in ascribing nationality to vessels; traditionally, these were the nationalist system and the open system. These options are, however, no longer the only alternatives available for the registration of vessels. A third criterion, called the balanced system, has recently become a tendency for the registration of vessels.¹²⁷ This chapter deals mainly with the basic characteristics of the two traditional options for ship registration, while also not failing to consider the main features of the balanced system. In order to illustrate each one of these systems for ship registration, the domestic legislation of certain countries will be reviewed, with the purpose of having a solid background, in order to address and discuss the polemic surrounding open registries.

After reviewing the main elements of each system, the relevant factors that shipowners take into consideration when deciding under which system they will register their vessels will also be discussed.

I. Systems for Ship Registration

After the *Muscat Dhowns* case and *Lauritzen v. Larsen*, which set out the principle that states are free to fix the conditions for the registration of vessels flying their flags, also recognized by article 5 of the Geneva Convention and article 91 of UNCLOS, ship registration has been considered the sovereign right of states, which is exercised according to their exclusive discretion. Registration of vessels, which is a public function of states, is also regarded as an issue of national interest. Consequently, domestic laws ruling the registration of vessels are drafted according to the “economic, political, and military interests” of the specific country conferring nationality to ships.¹²⁸

¹²⁷ See Matlin, *supra* note 94, at p. 1027

¹²⁸ Boczek, Boleslaw A. *Flags of Convenience: An International Legal Study*. Harvard University Press, Cambridge, 1962, at p. 39

Efforts to seek harmonization for standard conditions for the registration of vessels were attempted with the drafting of the Convention for Registration of Ships; however, the lack of uniformity in national policies with respect to these requirements still remains. The element that prevented the establishment of a uniform statement on the conditions for the registration of vessels was the diverse state practices that are a consequence of the sovereignty of states.¹²⁹ As a result, several systems for the registration of vessels have been adopted by states in order to grant nationality to ships, applying “remarkably different criteria.”¹³⁰

The nationalist and open systems have been the two approaches commonly adopted by states in their domestic legislations directed at granting nationality to ships. Recently, a new criterion has been developed as a third alternative for ship registration, which contains a number of different considerations.

A. Nationalist System

1) Origins

Some practices of ship registration, such as the record of “the name, the owner and the tonnage of vessels”, were contained within the laws of imperial Rome.¹³¹ These practices were applied throughout history and lately disseminated to states.¹³² Even though ship registration was not totally developed until the seventeenth and eighteenth centuries, the prerequisite of national ownership of vessels was originated based on the criterion that ships were “precious and jealously guarded assets” of the national economy of states,¹³³ being considered nationals of the country itself, rather than mere properties of their citizens.¹³⁴

¹²⁹ See McConnell, *supra* note 82, at p. 439

¹³⁰ Anderson, H. Edwin. “The Nationality of Ships and Flags of Convenience: Economics, Politics, and Alternatives”, 21 Tul. Mar. L. J. 139, 140 (1996) (Lexis Nexis)

¹³¹ See Coles, *supra* note 66, at p. 2 and see also Boczek, *supra* note 128 at p. 110

¹³² See Coles, *supra* note 66 at p. 2

¹³³ See Boczek, *supra* note 128, p. 41

¹³⁴ *Ibid.*

The Navigation Acts of England are good examples of the first stage in the development of the nationalist system. These statutes were enacted with the intention of granting protection to the British merchant marine fleet through the application of special rules to prevent other nations and foreign ships from taking advantage of the privileges granted to British vessels.¹³⁵ Nevertheless, these statutes had a clear nationalist approach when they asserted the use of the British flag exclusively for those vessels built within the British dominions.¹³⁶

During the nineteenth and early twentieth century, total ownership of vessels by nationals was almost the universal rule, being adopted within the laws of several maritime states.¹³⁷ Consequently, the concept of the nationality of ships became an important one for the shipping industry,¹³⁸ the nationalist criterion being the only one applicable to confer that nationality. However, this scheme began to change with the recognition that states were sovereign in adopting their own policies regarding requirements for the registration of ships. This principle of international law allowed the introduction of new schemes for the registration of vessels, and the nationalist approach lost its exclusiveness as the main criterion to grant nationality to vessels.

Although the national tonnage registry, also known as the closed registry, is no longer the only approach for vessel registration, it was the first scheme used by states in order to confer nationality to vessels.¹³⁹

This system has been implemented by the majority of states, mainly by those with several interests in maritime activities and where shipping industries are well-developed. These states, usually called traditional maritime countries,¹⁴⁰ have always highly valued

¹³⁵ See Coles, *supra* note 66, at pp. 2 and 9 and see also Anderson *supra* note 130, at pp. 144 and 145

¹³⁶ See Coles, *supra* note 66, at p. 2

¹³⁷ See Bozcek, *supra* note 128, at pp. 41 and 42

¹³⁸ See García-Correa, *supra* note 30, at p. 30 and see also Boczek *supra* note 128, from pp. 94 to 97.

¹³⁹ See García-Correa, *supra* note 30, at p. 17

¹⁴⁰ See Coles, *supra* note 66, at p. 43. The expression traditional maritime countries (hereinafter TMCs) is commonly used to refer specifically to countries where the shipping industry is well established and developed such as the UK, the US, Japan, Norway, Spain, and Sweden, among others.

control over their national merchant marine fleets,¹⁴¹ in order to maintain effective jurisdiction and control, not only over their vessels, but also over the owners, managers and crews of ships flying their flags.¹⁴² Another important reason why TMCs have a registry of commercial vessels “is to provide protection to those ships in times of conflict.”¹⁴³

2) Characteristics

The process for the registration of vessels in countries with closed registries is performed primarily by maritime administrations, which are a part of the government structure. These maritime administrations are authorities that have adequate control over vessels registered under their flags. The reason for maintaining a strict level of government regulation in shipping is because vessel operations are regarded as dangerous activities if they are not subject to specific governmental controls, especially regarding safety conditions.¹⁴⁴

These factors make the nationalist system different from other schemes for ship registration; however, other elements, such as the economic implications, are also important characteristics of this system.

a) Requirements for Registration

The national tonnage registry system imposes certain requirements for the registration of ships that are more stringent and burdensome than the ones contained in other systems. In this sense, a vessel which wants to be registered under a closed registry must comply with all the conditions prescribed in this type of system, those related to the ownership, control, and manning of vessels being the most relevant.

¹⁴¹ Grime, Robert. *Shipping Law*. Second Edition, Sweet & Maxwell Limited, London, 1991, at p. 29

¹⁴² See McConnell, *supra* note 82, at p. 438.

¹⁴³ See Anderson, *supra* note 130, at p. 144

¹⁴⁴ Harrington, Matthew P. “United States Shipping Policies and the World Market” (Book Review), 21 Tul. Mar. L. J 243, 252 (1996) (Lexis Nexis)

Even though countries which have adopted the closed system follow quite a uniform criterion regarding the requirements for granting their nationality to ships, based on the principle that each state has the right to introduce their policies and set their own conditions for the registration of vessels, there could be differences in their national laws.

a.1) Type of Vessels

The type of vessels that are allowed to register in countries with a nationalist system could vary depending on the national laws of each state; however, in general terms, most of these countries usually permit registration of any vessel used for navigational purposes. There are no specific restrictions on the age, size, or type of vessel, except that ships must be seaworthy. Likewise, ships must comply with certain criteria on conditions for navigation, such as proper equipment, compliance with safety and marine environment policies, and the qualifications of the crew.¹⁴⁵

It is important to consider that, in some states with closed registries, it is also required that vessels be built or manufactured in the flag state, in order to be registered and entitled to fly its flags. In addition, all repairs to these vessels would be done in national ports, except in cases of emergency.¹⁴⁶ This practice was followed mainly by the US¹⁴⁷ and had as its main purpose the protection of the national shipbuilding industry. However, in some of these countries, this strict requirement has been changing.

a.2) Ownership and Control of Vessels

The national tonnage registry system, as its name suggests, is based on nationalist considerations for granting of the national character of vessels, the nationality of their

¹⁴⁵ See Coles, *supra* note 66, at pp. 261 and 162. For example, in the UK, there is a central registry for vessels which is divided into four special registries for the registration of specific types of ships, such as vessels owned by qualified persons, fishing vessels, small vessels, and bareboat chartered vessels. Because of the existence of these four options for the registration of vessels, the eligibility of ships may vary, and some restrictions according to the type of vessel could be imposed.

¹⁴⁶ "OECD Study on Flags of Convenience", 4 J. Mar. L. & Com. 231,245 (1972-1973). This study was originally published as Part V of "Maritime Transport 1971" A Study by the Maritime Transport Committee of the Organization for Economic Co-Operation and Development (hereinafter OECD).

¹⁴⁷ See Anderson, *supra* note 130, at pp. 224 and 225.

shipowner being the basic criterion needed for the registration of ships under the laws of a country which follow this system. Thus, the closed approach for the registration of vessels is regarded as the system of the shipowner's country of origin.

In principle, countries with a closed registry only grant nationality to vessels that are wholly owned by their nationals. Therefore, in order to be considered for registration under a state with this system, a vessel must be owned by a national of the country in question, either an individual or a company organized in accordance with the laws of that country.

Along with the national ownership of vessels, the control of ships by nationals is another important element to consider. However, ownership of vessels performed by an individual or a company could have extremely important implications over their control; therefore, the exact definitions of a national individual and a national company become key elements in ship registration.

Any individual who is a citizen or, at least, is a permanent resident of a country with a closed registry may own a ship and ask for its registration under the public records of its state of origin. As a consequence, the nationality of the shipowner is of paramount importance when registering a vessel¹⁴⁸ in the sense that the shipowner, being a solitary individual, will be the only one in control of the operation of the vessel. This is a case where effective control of a ship is performed solely by a national of the flag state because all the decisions regarding the operation of the vessel are taken by an individual from the country in question.¹⁴⁹

The legal implications about the control of a vessel are less evident when a legal entity is a corporation. For a better understanding of this issue, it is important to ask two main questions. The first question is, who are the persons actually in control of a

¹⁴⁸ See García-Correa, *supra* note 30, at p. 148

¹⁴⁹ *Ibid.*

company? The second one is, where is that control exercised?¹⁵⁰ The answers to these questions will clarify the issue of control over vessels owned by a corporation. As for the first question, the members of the Board of Directors of a company are the persons responsible for taking effective control of the company.¹⁵¹ The answer to the second question is a consequence of the first, because the place where the control of the company will be exercised will be the place where the board meetings are held.¹⁵²

Consequently, control of the ship is exercised by the company's Board of Directors. In this case, considerations regarding the legal domicile or place of residence of the company and its directors acquire an important implication because countries with nationalist systems require domiciles within the territory of the state in question.¹⁵³

At this point, it is important to make the distinction between the terms "beneficial owner" and "manager of vessels." While the first term refers to the person or company that gains the pecuniary benefits from the shipping operations of a vessel,¹⁵⁴ for example the shareholders of a company, the second term is the person or company responsible for the daily activities of the vessel,¹⁵⁵ such as the directors of the company. However, nothing prevents a person or company from being beneficial owner and manager of a ship at the same time.

A very good example of a model of absolute ownership and control of vessels by nationals of the flag state is provided by the US scheme, which contains very strict requirements for the registration of ships;¹⁵⁶ the scheme provides that the vessel be wholly owned by a US citizen, association, trust, joint venture, or other legal entity, such as a partnership or corporation organized under US laws, or the laws of any state.¹⁵⁷

¹⁵⁰ Ibid, at p. 149

¹⁵¹ Ibid.

¹⁵² Ibid.

¹⁵³ Ibid.

¹⁵⁴ See Kasoulides, *supra* note 80, at p. 561

¹⁵⁵ Ibid.

¹⁵⁶ See Matlin, *supra* note 94, at p. 1039. He stated that US has the stricter requirements for the registration of ships.

¹⁵⁷ See generally 46 U.S.C. 12102 (2002), *supra* note 19 and see also Matlin, *supra* note, at p. 1040

Furthermore, US legislation expresses that the control of vessels must also be undertaken by a US citizen.¹⁵⁸

However, strict requirements for the ownership and control of vessels by nationals of the flag state can vary among countries with a nationalist system. A more relaxed approach to closed registries is the so-called “hybrid” approach,¹⁵⁹ which is considered a “modified version” of the nationalist system¹⁶⁰ and could be found in the legislation of some countries that are traditionally considered a part of this nationalist approach.

Canada is a clear example of this hybrid system. Even though it could be seen as a similar, but more flexible, scheme of ownership and control of vessels than the one required by the US, ownership of vessels under the Canadian scheme is still reserved mainly for vessels wholly owned by qualified persons, which are Canadian citizens or permanent residents and corporations organized under the laws of Canada or one of its provinces.¹⁶¹ Furthermore, every Canadian vessel must have an authorized representative who will be responsible for acting with respect to all matters relating to the vessel. That representative should be the owner of the vessel.¹⁶²

Canadian legislation, however, also permits the registration of a vessel owned by a foreign corporation, if it maintains a connection with Canada, if an authorized representative that could be a subsidiary of the foreign corporation is organized under the laws of Canada or a province, if a branch office of the foreign corporation is carrying on business in Canada, or if the ship is managed by a company organized under the laws of Canada or a province.¹⁶³

¹⁵⁸ See generally 46 U.S.C. 12102 (2002), *supra* note 19. In this sense, the statute expresses that all the members of any association, trust, joint venture, or other legal entity which owned a ship must be US citizens. In respect to partnerships, its general partners must be US citizens and the controlling interest in the partnerships must be owned by US citizens as well. Finally, in respect to corporations organized under US laws or any State, the statute explains that the president of the corporation and the chairman of its Board of Directors must also be US citizens, allowing foreign citizens to be part of the Board of Directors, but only in a number less than the one required for the constitution of a quorum.

¹⁵⁹ Tache, Simon W. “The Nationality of Ships: The Definitional Controversy and Enforcement of Genuine Link” 16 *Int’l Law* 301, 304 (1982)

¹⁶⁰ *Ibid.*

¹⁶¹ See S. C. 2001, c. 26, *supra* note 21, sect. 46 (b) and sect. 1 for the definition of qualified person.

¹⁶² *Ibid.*, sect. 14 (1) and (2)

¹⁶³ *Ibid.*, sect. 4

A different scheme is provided by the UK legislation, supplying a very large list of qualified persons which have a British connection and are entitled to own a British vessel.¹⁶⁴ Among these qualified persons, aside from British citizens and corporations organized under UK law, are those persons that are British subjects, citizens of British dependent territories, British overseas citizens, citizens and corporations of other European Union member states that are established in the UK,¹⁶⁵ corporations organized under the laws of any British possession that have its legal domicile in that territory or in the UK territory, and any European economic interest grouping which are registered in the UK.¹⁶⁶

Furthermore, even someone who is not considered a qualified person could also own a British vessel if he has a major interest¹⁶⁷ in the ship, and it is duly registered in the British registry. In addition, the person or company must be a resident or have its principal place of business within the UK or, if not, a representative person must be appointed.¹⁶⁸

British ships could be registered under these considerations, taking into account a very broad criterion of ownership, but mainly that the domicile of the shipowner should be within UK territories. However, when referring to the control of ships, UK law ignores

¹⁶⁴ This only makes reference to ownership requirements regarding merchant vessels registered in the UK registry.

¹⁶⁵ For information about the European Union (hereinafter EU), see the treaty establishing the European Community (hereinafter the Treaty of Rome), signed in Rome, March 25, 1957, art. 52, available at the EU homepage at http://europa.eu.int/abc/obj/treaties/en/entr6d03.htm#Article_52 (last visit August 19, 2003). See also Hill, *supra* note 125, at p. 7, where he explains the Factortame Case (1991) that also applies in respect to the nationality of vessels in the UK. In this case, the European Court of Justice held that: "it was for the Member State to determine in accordance with general rules of international law, the conditions which had to be fulfilled in order for a vessel to be registered in their registers and granted the right to fly their flag but in exercising that power the Member State has to comply with the rule of Community Law."

¹⁶⁶ See Coles, *supra* note 66, at p. 262. He explains that the European economic interest groups are formed according to art. 1 of Council Regulation EEC No. 2137/85

¹⁶⁷ See U.K. 1993, c. 22, rule 8 (9)(a) states that a person or company must have a legal title of 33 or more shares of the ship in order to have a majority interest over a UK vessel. Basically, most countries with a closed registry like the US, the UK, and Canada have adopted the policy that ownership over vessels is divided into 64 shares.

¹⁶⁸ *Ibid*, rules 7 (2) and 8 and see also rule 18 (2), a representative person must be an individual resident in the UK or a body corporate organized in an EU member state and having place of business in the UK.

the nationality of shareholders when granting the registration of vessels, because that is not considered a specific requirement.¹⁶⁹

UK law has been adopting a more relaxed approach compared to the policies maintained in other countries within the nationalist system. Hence, the UK ship registration system has been considered a “middle of the road approach.”¹⁷⁰

The genuine link issue becomes important for the nationalist system, considering the requirement of ownership and control of vessels by nationals of the flag state. Countries with a closed registry have firmly believed that a clear and effective connection between the flag state and their ships must be present in order to grant nationality and allow ships to fly their flags. Ownership and control of vessels by nationals of the flag state are not the only criteria which establish a genuine link, although they are the most commonly considered.

The criterion followed by countries with a closed registry is basically the same that the Convention for Registration of Ships tried to make mandatory, by establishing the obligation of an effective link between the vessel and her flag state, as indicated in its article 8. This article established that flag states should adopt in their domestic legislation specific provisions to assert the total ownership of vessels by their nationals, or at least, assure a level of participation of those nationals in the ownership of vessels.¹⁷¹

The intention of introducing this requirement into domestic legislations was to facilitate the compliance of some of the important duties of the flag states, specifically the effective exercising of their jurisdiction and control over their merchant marine fleet.¹⁷² This genuine link is supported by the idea that compliance of the flag state with these tasks does not depend only on registration, but also on ownership.¹⁷³

¹⁶⁹ See Matlin, *supra* note 94, at p. 1042

¹⁷⁰ See Hill, *supra* note 125, at p. 21

¹⁷¹ See the Convention on Registration of Ships, *supra* note 6, art. 8 (1)

¹⁷² *Ibid.*

¹⁷³ See Kasoulides, *supra* note 80, at p. 564

Two elements that could be regarded as consequences of ownership and control of vessels are the identification and accountability of ships and their shipowners. Countries with the nationalist approach for ship registration insist upon a clear identification of vessels and their shipowners or a representative that they must appoint for the registration process.

This topic was also addressed in article 6 of the Convention for Registration of Ships. One basic duty of flag states was to keep in its official records enough information about the registered ships and shipowners and operators in order to obtain easy and adequate identification of them for ensuring their full accountability.¹⁷⁴

This issue was also addressed in article 10 of the Convention for Registration of Ships, which regulated the accountability of shipowners, requiring that flag states ensure that shipowning companies or their subsidiaries were established or had their principal place of business within their territories. If this were not the case, flag states must then ensure that shipowning companies or their subsidiaries had, at least, a representative or management person within their territories, duly empowered to act on the shipowner's behalf and account.¹⁷⁵

A final thought about ownership of vessels in countries with a national tonnage system is that the shipowner's nationality could be regarded as an "overriding consideration" for the registration of vessels,¹⁷⁶ where shipowners and their vessels "should have the same nationality."¹⁷⁷ The country of origin of the shipowner, therefore, is a key element in clearly determining the national character that will be granted to a vessel.

¹⁷⁴ See the Convention on Registration of Ships, *supra* note 6, art. 6

¹⁷⁵ See Convention on Registration of Ships, *supra* note 6, art. 10 and see also Kasoulides *supra* note 80, from pp. 562 to 565.

¹⁷⁶ See García-Correa, *supra* note 30, at p. 12

¹⁷⁷ *Ibid*, at p. 11

a.3) Manning of Vessels

Another requirement for the registration of ships by a country with a national tonnage system is that the manning of vessels must be primarily performed by nationals of the flag state. In general terms, the master, officers and crew of the vessel must be nationals of the country of registration; nevertheless, this is not an absolute criterion, and some countries, even though they follow the nationalist approach, are flexible with this requirement, allowing foreign seafarers to be part of the crew, at least in a small percentage. The position of master and officers, however, are usually reserved for their nationals.

Regarding the manning of ships, the US scheme requires the exclusive employment of US citizens for performing the positions of master and officers in US vessels for reasons of “national security and national economic interest”;¹⁷⁸ however, this criterion changes in respect to the employment of the crew. US legislation obliges shipowners to hire, for their US ships, primarily US citizens, but allows 25% of the crew to be citizens of another nation.¹⁷⁹

The UK had a restriction on foreign seafarers in regards to holding the positions of master and officers on British vessels.¹⁸⁰ However, the recent entry of the UK into the EU varies its national legislation regarding the nationality of the crew, as it must adapt its domestic laws to be in accordance with European Community Law. According to the Treaty of Rome,¹⁸¹ there must be free movement of workers between member states without any kind of discrimination,¹⁸² a policy that is also applicable to seafarers; consequently, any EU seafarer could be hired to work on board a British vessel.

¹⁷⁸ See Anderson, *supra* note 130, at p. 152

¹⁷⁹ See 46 U.S.C. 8103 (a) and (b) (2002), available at the US Maritime Administration homepage at <http://www.marad.dot.gov/publications/complaw03/Manning%20of%20Vessels.html> (last visit August 19, 2003)

¹⁸⁰ See *supra* note 66, at p. 265. He makes reference that this requirement was established by the Aliens Restriction (Amendment) Act 1919, sect. 5; however, it is now repealed by the Merchant Shipping Act, 1970.

¹⁸¹ See *supra* note 165, arts. 48 and 49, available at the EU homepage at <http://www.europa.eu.int/abc/obj/treaties/en/entr6d03.htm#113> (last visit August 19, 2003)

¹⁸² See García-Correa, *supra* note 30, at p. 171

The Canadian scheme does not clearly state a specific provision regarding the nationality of the crew. However, because only a Canadian citizen or a permanent resident may hold a certificate of competency,¹⁸³ shipowners of Canadian vessels should primarily hire Canadian citizens for their crew. Furthermore, no master of a Canadian vessel shall operate that vessel unless it is staffed with a crew that is sufficient and competent for the safe operation of the vessel.¹⁸⁴

Manning of vessels is the other criterion that has always been considered fundamental for the existence of a genuine link between a vessel and its flag state. In countries with a closed registry, vessels registered under their public records must recruit seamen nationals of the flag state in order to maintain an effective nexus. Following the same parameters as the domestic legislations of countries with closed registries, the Convention for Registration of Ships, in its article 9 (1), made an attempt to introduce an obligation for shipowners to hire citizens or permanent residents of the flag state, at least as a satisfactory portion of the officers and crew.¹⁸⁵

The convention did not require that vessels be manned solely by nationals of the flag state; it stated specifically that not all of the employees of the vessels must be nationals of the flag state, but only a satisfactory part of them. This same idea is contained in the legislations of some flag states which follow the nationalist approach. The possibility of a multinational crew, evidenced by the wording of the convention, gives an opportunity to shipowners to hire seafarers from countries other than the flag state,¹⁸⁶ reinforcing the statement that the manning of vessels by nationals is not the only approach.

In addition to the nationality of seamen, there are other requirements related to the training and certification of seamen serving on board ships flagged in closed registries. In these countries, the competency of seafarers is held to very high standards. They follow international standards provided by the International Convention on Standards of

¹⁸³ See S.C. 2001, c.26, supra note 21, sect 88 (1)

¹⁸⁴ Ibid, sect. 82 (2)

¹⁸⁵ See the Convention on Registration of Ships, supra note 6, art. 9 (1)

¹⁸⁶ Ibid, art. 9(4)

Training, Certification and Watchkeeping for Seafarers,¹⁸⁷ that have been ratified by the majority of states worldwide.

3) Fiscal Regime for the Shipping Industry

With respect to the fees for the registration of vessels, the general rule is that shipowners have to pay to flag states an initial registration fee and a renewal fee, both based on the tonnage of vessels, regardless of the type of system that they follow. Nevertheless, in countries with a national tonnage system, those fees are almost insignificant because they are cheap and affordable.¹⁸⁸

Vessels are subject to the fiscal regime of their flag state.¹⁸⁹ States with a closed approach are traditionally regarded as countries with very strict and burdensome fiscal regimes, and ships registered under their flags will be subject to paying large amounts of income taxes on their shipping operations. The basic taxation principle followed by countries with the nationalist system is grounded in a residence-based approach where shipping income is generally taxed¹⁹⁰ if the ship is owned by a national of the flag state, regardless of where the shipping activities of the vessel were performed. A clear example of this type of taxation to the shipping industry is provided by the US, where a domestic corporation operating a ship anywhere in the world would be taxed by the US on its net income.¹⁹¹ This scheme is also followed by Canada, which, in general, taxes the shipping income of its nationals on a worldwide basis according to the residence-based principle.¹⁹²

A direct consequence of the requirement prescribed by countries with a closed registry, where ownership and control of vessels must be performed by their nationals,

¹⁸⁷ International Convention on Standards of Training, Certification and Watchkeeping for Seafarers 1978, adopted July 7, 1978, brought into force April 24, 1984. This convention has been fully revised by amendments adopted July 7, 1995, brought into force February 1, 1997, (hereinafter STCW 78/95 Convention).

¹⁸⁸ See García-Correa, *supra* note 30, at p. 173

¹⁸⁹ See Coles, *supra* note 66, at p. 43

¹⁹⁰ See García-Correa, *supra* note 30, at pp. 173 and 174

¹⁹¹ Blum, Cynthia. *US Taxation of Shipping: Anchored to a Flawed Policy*. 33 J. Mar. L. & Com. 461, 471 (2002)

¹⁹² *Ibid*, at p. 479, n. 94

and who must also have their legal domicile within the territory of the flag state, is to ensure that shipping income from their vessels will always be taxed and collected.¹⁹³

The situation changes when a ship is flagged in a foreign country and owned by a foreign shipowner, who is not a national of the state with the closed registry. In this case, the shipowner will be taxed only on shipping income earned within the territory of that country, reflecting a source-based approach. Once again, the US scheme is a good example in this respect because all foreign corporations will be taxed in the US only on shipping income from US sources, rather than on worldwide income.¹⁹⁴

The taxation approach for shipping operations is generally the same in most countries with a closed system, especially in developed states, and is also similar to the way other commercial activities are taxed.¹⁹⁵ However, some countries with a nationalist system have adopted more liberal attitudes regarding their fiscal regime for the taxation of shipping activities performed by non-residents that have a national source.¹⁹⁶ This is the case in Canada, which has liberalized the taxation of the foreign shipping earnings of foreign companies. Canada has adopted special rules, ignoring the management and control of foreign corporations by Canadian citizens if organized outside Canada, where the income from shipping operations derives from a source outside Canadian territory.¹⁹⁷

The principle in the UK for the taxation of shipping income earned from maritime activities in the UK is based on the residence-source approach, where UK nationals are obliged to pay taxes on their profits, regardless of the place where they were produced. Furthermore, with respect to foreign corporations that earned their shipping income within UK territory through a branch, the UK also follows the source-based approach, where those foreigners are obliged to pay taxes on that income.¹⁹⁸ Nevertheless, the UK has recently introduced into its legislation a more flexible approach called the tonnage tax

¹⁹³ See García-Correa, *supra* note 30, at p. 174

¹⁹⁴ See Blum, *supra* note 191, at p. 474

¹⁹⁵ See Coles, *supra* note 66, at p. 43

¹⁹⁶ See Blum, *supra* note 191, at p. 479

¹⁹⁷ *Ibid.*, at p. 479, n. 94, and p. 480

¹⁹⁸ See Coles, *supra* note 66, at p. 268

regime.¹⁹⁹ Through the Finance Act 2000, UK has adopted a tonnage tax regime where national and foreign companies, which perform business in the UK through a branch or agency, and own qualified ships²⁰⁰ strategically and commercially operated from the UK, have the option to pay taxes on the tonnage of the ship, rather than on the income earned by the shipping activities performed by the vessel during a period of 10 years.²⁰¹

B. Open System

Some states have introduced in their domestic legislation a different system of ship registration called an open registry. This type of system is considered the *antithesis* of the traditional national tonnage registries,²⁰² having sharply different characteristics from those which could be found in the nationalist system.²⁰³

Some of the expressions used to refer to open registries have been flags of necessity, flags of attraction, flags of accommodation, flags of opportunity, free flags, free registry, cheap registry, runaway flags, flags of refuge, tax-free flags, pirate flags, bogus maritime flags, freebooters, cheap flags, shadow flags, and fictitious flags;²⁰⁴ however, today this system of ship registration is commonly known as *flags of convenience*.

The expression “flags of convenience” has never been defined in any international instrument,²⁰⁵ however, it was coined basically to refer to open registries because countries with this type of system offer more advantages to shipowners than the traditional national tonnage registries. In truth, there is no uniform definition of “open registry,” although, in one of the UNCTAD’s reports, a short definition is offered as “the

¹⁹⁹ Ibid.

²⁰⁰ See Coles, *supra* note 66, at p. 268 for an explanation of qualified ships that are able to be under the United Kingdom Finance Act 2000 tonnage tax regime. These vessels are defined as sea-going ships of over 100 gross tons used for the carriage of passengers by sea, the carriage of cargo by sea, towage, salvage or other marine assistance or transport in connection with other services of a kind necessarily provided at sea.

²⁰¹ See generally *supra* note 66, from pp. 268 to 270 for a better explanation of the taxation system on shipping in the UK.

²⁰² See Matlin, *supra* note 94, at p. 1027

²⁰³ Ibid.

²⁰⁴ See Li K.X. and J. Wonham. “New Developments in Ship Registration”, 14 *International Journal of Marine and Coastal Law* 137, 139 (1999).

²⁰⁵ See Kasoulides, *supra* note 80, at p. 546

conferment of national character upon ships, regardless of ownership, control, and manning.”²⁰⁶

A comprehensive definition of open registries could be the one that defines a flag of convenience as “the flag of any country allowing the registration of foreign-owned and foreign controlled vessels under conditions which, for whatever the reasons, are convenient and opportune for the persons who are registering the vessels.”²⁰⁷

Several countries, mainly developing states, have adopted this system for the registration of vessels,²⁰⁸ seeking the enlargement of their national merchant maritime fleets and the growth of their maritime industries; however, the most popular open registries are in Liberia and Panama.

1) Origins

The registration of vessels under the flag of a state different from the shipowner’s country of origin is not a new practice. Since the sixteenth and seventeenth centuries, shipowners have been flagging their ships under the flag of different states based on reasons of convenience.²⁰⁹ Amongst the primary reasons that would have been taken into consideration are to avoid political or military conflicts that would create problems for the maritime activities of national vessels,²¹⁰ the discrimination of some states against vessels flying specific flags when entering into ports, and restrictions that some countries have imposed onto their nationals to trade with other states.²¹¹ In this sense, the element of convenience has always been present in the practice of registering vessels under the

²⁰⁶ Ibid.

²⁰⁷ See Coles, *supra* note 128, at p. 2 and see also Li, *supra* note 204, from pp. 140 to 144, for several definitions of flags of convenience given by scholars and organizations.

²⁰⁸ Countries usually considered open registries are: Antigua and Barbuda, Aruba, Bahamas, Barbados, Belize, Bermuda, Bolivia, Burma/Myanmar, Cambodia, Cayman Islands, Comoros, Cook Islands, Cyprus, Equatorial Guinea, Gibraltar, Honduras, Jamaica, Lebanon, Liberia, Luxembourg, Malta, Marshall Islands, Mauritius, , Panama, Sao Tome and Principe, Sri Lanka, St. Vincent and the Grenadines, Tonga, Tuvalu and Vanuatu.

²⁰⁹ See Boczek, *supra* note 128, at p. 8

²¹⁰ Ibid. He explains that in time of war, shipowners usually registered their vessels under the flag of states that are neutral to the conflict in order to avoid the capture of the vessel by any belligerent country.

²¹¹ See Coles *supra* note 66, at p. 28 and see also Matlin, *supra* note 94, at p. 1019. See also Boczek, *supra* note 128, from pp. 6 to 9, for an historical explanation of the practice of registering vessels under foreign flags.

flags of foreign states. Evidently “shipowners who deemed it advantageous did not hesitate to attach their vessels to foreign merchant fleets.”²¹²

However, the implications of the term “convenience” have evolved regarding the registration of vessels, and although the above stated examples remain to a lesser extent good reasons for the practice of registration of vessels under foreign flags, today there are different connotations. In present times, the main reason that shipowners flag their vessels under the flag of states other than their own is to obtain direct economic benefits that certain flag states grant to vessels registered within their public records.

“The widespread use of flags of convenience is a twentieth century phenomenon.”²¹³ Open registries have their origin right after World War I,²¹⁴ specifically in 1919, when the vessel *Belen Quezada* was transferred from the Canadian to the Panamanian registry, through procedures enacted by the Panamanian consulate in Vancouver.²¹⁵ Furthermore, in 1922, two US cruise liners, the *SS Reliance* and the *SS Resolute*, were transferred from the American to the Panamanian registry, with the intention of circumventing the regulation that banned the sale and transportation of alcoholic beverages on board US ships.²¹⁶ Nevertheless, to a lesser extent, other vessels were transferred to the Honduran and Costa Rican registries for specific reasons of convenience.²¹⁷

²¹² See Boczek, supra note 128, at p. 6

²¹³ See Coles, supra note 66, at p. 18

²¹⁴ Carlisle, Rodney. *Sovereignty for Sale: The Origins and Evolution of the Panamanian and Liberian Flags of Convenience*. US Naval Institute Press, Annapolis, 1981, at p. 1.

²¹⁵ See Coles, supra note 66, at p. 18 and see also Carlisle, supra note 211, from pp. 6 to 9 for a detailed explanation of the transfer of the vessel *Belen Quezada* to the Panamanian registry. He explained that the principal reason for this transfer was the intention of the shipowners to use it for running liquor into the US according to the prohibition of that time by American laws, specifically contained in the Volstead Act.

²¹⁶ See Boczek, supra note 128, at pp. 9 and 10 and see also Coles, supra note 66, at p. 18 For a complete explanation of the transfer of the US cruise lines *SS Reliance* and *SS Resolute* to the Panamanian registry, see also Carlisle from pp. 14 to 18. Also see Carlisle, at pp. 2 and 3 for the different attractions of the Panamanian registry for US shipowners.

²¹⁷ See Coles, supra note 66, at p. 18, and see also Boczek, supra note 128, at p. 10. US vessels owned by the United Fruit Co., which had specific interests in Honduras, were transferred also for reasons of convenience to this country.

It is noteworthy that the Panamanian flag, during the 1930s, especially in Europe, and later on during War World II, was used to avoid political and military conflicts, rather than for economic advantages exclusively.²¹⁸

The other important stage in the development of open registries is the origin of the Liberian flag. Due to growing dissatisfaction for some aspects of the Panamanian procedure for the registration of vessels²¹⁹ and due to the increasing American interest in Liberia,²²⁰ the US considered it useful to develop a similar registry of ships to the Panamanian scheme, but in Liberia.²²¹ Likewise, the Liberian government enacted the Liberian Maritime Law, along with a Liberian Corporate Law in 1948,²²² and established the Liberian Registry with its administrative offices located in New York City, which functioned as a private business organization, rather than as the public Panamanian administration with a consular network abroad.²²³

The controversial impact that open registries have had on the international shipping industry is centered mainly on the economic aspects of the system of registration of ships.²²⁴ Now, with the consolidation of Panama and Liberia as today's leading open registries, other countries have started adopting the same type of flexible scheme, the flags of convenience.

²¹⁸ See Coles, *supra* note 66, at pp. 18 and 19 and see also Boczek, *supra* note 128, at pp. 10 and 11.

²¹⁹ See Coles, *supra* note 66, at p. 19. He states that the main dissatisfactions regarding the Panamanian registry were concerns for instability in the Panamanian government and the high consulate fees that the government was charging to shipowners for the registration of vessels.

²²⁰ See Carlisle, *supra* note 211, from pp. 115 to 124 for a comprehensive explanation of US interest in Liberia, especially demonstrated through the intervention of a former US Secretary of State Edward R. Stettinius Jr. which had several personal interests in Liberia.

²²¹ See Coles *supra* note 66, at p. 19 and see also Boczek, *supra* note 128, at p. 14

²²² See Carlisle, *supra* note 211, at p. 129. He explained that the drafting of the Liberian Corporation Law was written carefully, by American corporate officers, to conform to American needs.

²²³ See Coles, *supra* note 66, at p. 19 and see also Carlisle, *supra* note 211, from pp. 115 to 133 for a detailed explanation of the origins of Liberian registry. See also Carlisle, *supra* note 211, at pp. 129 and 130 for the main features of the Liberian registry at the time of its creation.

²²⁴ See Boczek, *supra* note 128, at p. 9

2) Characteristics

In most open registries, the administrative procedure for the registration of vessels is considered to be “easy and fast to accomplish.”²²⁵ Usually, most countries which have adopted the open approach have established maritime administrations within their territory while also having a certain presence abroad. This is the case with Panama, which has established its national maritime administration with main offices located in Panama City, but allowing, at the same time, the registration of vessels by a network of consulates abroad, known as the exclusive consulates of the merchant marine fleet.²²⁶

However, a different approach has been practiced by other open registries, such as Liberia, that entails a national register managed by a private corporation called the Liberian International Ship & Corporate Registry LLC (LISCR),²²⁷ which has its main headquarters outside Liberia, specifically located in Virginia, US, with the main vessel’s registration office in New York City.²²⁸

²²⁵ See Matlin, *supra* note 94, at 1039. He quoted that the process of registration in open registries is fast and easy to accomplish from the Report of the Committee of Inquiry into Shipping (hereinafter the Rochdale Report) Cmnd. No. 4337, that pointed out the main 6 characteristics of open registries.

²²⁶ The Panamanian Maritime Authority (hereinafter PMA), located at Panama City, Republic of Panama, is the Panamanian public entity in charge of the registration of vessels in this country. However, this public function is also performed by several Panamanian exclusive merchant marine consulates around the world, specifically those located in the following cities: Antwerp (Belgium); Bangkok (Thailand); Barcelona (Spain); Barranquilla (Colombia); Buenos Aires (Argentina); Cairo (Egypt); Caracas (Venezuela); Colombo (Sri Lanka); Dubai (United Arab Emirates); Geneva (Switzerland); Genova (Italy); Guayaquil (Ecuador); Hamburg (Germany); Ho Chi Ming (Vietnam); Hong Kong; Houston, Texas (US); Istanbul (Turkey); Jakarta (Indonesia); Kailua, Honolulu, Hawaii (US); Kobe (Japan); La Coruña (Spain); La Habana (Cuba); Las Palmas, Gran Canaria (Spain); Lima (Peru); Limassol (Cyprus); Lisbon (Portugal); London (UK); Los Angeles, California (US); Manila (Philippines); Maracaibo (Venezuela); Marseilles (France); Mexico D.F. (Mexico); Miami, Florida (US); Montreal, Quebec (Canada); Moscu (Russia); Mumbai (India); Naples (Italy); Nice (Italy); New Orleans, Louisiana (US); New York, New York (US); Paris (France); Philadelphia, Pennsylvania (US); Piraeus (Greece); Pretoria (South Africa); Rio de Janeiro (Brazil); Rome (Italy); Rotterdam (The Netherlands); San Francisco, California (US); San Juan (Puerto Rico); Santo Domingo (Dominican Republic); Santos (Brazil); Sao Paulo (Brazil); Seoul (Korea); Shanghai (China); Singapore; Stockholm (Sweden); Sydney (Australia); Taipei (Taiwan); Tampa, Florida (US); Tanger (Morocco); Tokyo (Japan); Valencia (Spain); Valleta (Malta); Valparaiso (Chile); Vancouver (Canada); Venice (Italy); Washington D.C. (US); and, Zurich (Switzerland). This information was obtained at the PMA homepage at <http://www.autoridadmaritima.gob.pa>.

²²⁷ The Liberian International Ship & Corporate Registry LLC (hereinafter LISCR), with main offices located in Virginia and New York, US, is the private entity in charge of the registration of vessels in this country; however, the Liberian government is supposed to be in charge of all the national policies regarding this process. It also has regional offices located in Monrovia (Liberia); Hong Kong; Piraeus (Greece); London (UK); Tokyo (Japan); and Zurich (Switzerland). This information was obtained at the LISCR homepage at <http://www.liscr.com>.

²²⁸ This same parameter of a maritime administration with features of a private entity managed abroad has also been followed by some other open registry countries such as Vanuatu through Vanuatu Maritime Services Ltd. homepage at <http://www.vanuatuships.com>, and the Marshall Islands through International Registries, Inc. homepage at <http://www.register-iri.com>.

The way that countries with an open registry have been managing the registration of their merchant marine fleet is part of the polemic surrounding the open approach to registering vessels, especially because most of these countries are considered not to have proper “maritime administrative machinery” to impose effective control over vessels flying their flag.²²⁹ However, the most controversial issue about the open registry system is their requirements for the registration of vessels.

a) Requirements for Registration

Open registries are mainly known for their lax terms for registration,²³⁰ specifically about the ownership, control and manning of vessels. These three basic requirements for the registration of vessels are considered in detail as they are contained in the majority of open registry states; however, reference to specific states, mainly to Panama and Liberia, is done in order to illustrate each requirement.

a.1) Type of Vessels

Open registries allow the registration of any size and type of vessel, especially sea-going ships engaged in foreign trade, but they have specific requirements with respect to the age of the ships which differ from registry to registry; nevertheless, the common consideration is that vessels with more than 20 years should be subject to a safety inspection in order to check whether they comply with the conditions for registration.²³¹

There are some conditions for ship registration that are uniform within open registries. However, in certain registries, floating structures²³² and vessels under construction²³³ are considered ships for the purposes of registration.

²²⁹ Wells, Jane Marc. “Vessel Registration in Selected Open Registries”, 6 Tul. Mar. L. J 221, 222 (1981) (Lexis Nexis)

²³⁰ See Kasoulides, *supra* note 80, at p. 543

²³¹ See generally Coles, *supra* note 66.

²³² *Ibid*, at p. 237. This is the case of the Panamanian registry.

²³³ *Ibid*, at p. 159. This is the case of the Jamaican registry.

Finally, most open registries allow the registration of bareboat chartered vessels.²³⁴ This procedure of registration, commonly known as parallel or dual registration,²³⁵ occurs when a ship that is under a bareboat charterparty, but is already registered by her owners under the flag of a specific state, is permitted to be registered at the same time in a second state by her charterers for a fixed period of time, basically for the same duration as the charterparty.²³⁶ Usually, during the period of dual registration, the primary registration in the original flag state is cancelled or suspended, while the second registration is effective; however, when the specific period of the dual registration expires, the primary registration recovers its validity.²³⁷

The practice of flagging a bareboat chartered vessel in an open registry is a very attractive practice today because it offers several economic advantages to shipowners and charterers. However, this dual registration could be considered troublesome, taking into account that vessels must possess only one nationality, and that it is the duty of flag states to exercise their exclusive jurisdiction and control over their vessels.

The rules for the practice of parallel registration are left to the discretion of the states based on the right of every country to establish their national policies regarding registration; nevertheless, the practice could vary in those states which permit it.²³⁸ Even though there is no international uniformity regarding this dual registration, the Convention for Registration of Ships contained provisions dealing with this practice in articles 11(5) and 12. The convention established that the original flag state must ensure

²³⁴ Davis, Mark. *Bareboat Charters*. LLP Professional Publishing, London, 2000, at p.1 He defines bareboat charter as where the charterers become, for the duration of the charter, the de facto owners of the vessel, the master and crew act under their order, and through them they have possession of the ship. See also Tetley's Glossary at Prof. William Tetley homepage, supra note 102, at http://tetley.law.mcgill.ca/maritime/glossarymaritime.htm#charterparty_demise (last visit August 14, 2003) where it defines a bareboat charter as a demise charter whereby the bareboat charterer names, pays, and controls the master and the crew.

²³⁵ See Coles, supra note 66, at p. 35

²³⁶ See Coles, supra note 66, at p. 35 and see also Davis, supra note 234, at p. 141

²³⁷ See Davis, supra note 234, at pp. 141 and 142

²³⁸ See Coles, supra note 66, at p. 38 for an explanation of the different practices of dual registration in some countries. He explains that in some countries, a bareboat registration has the same effects as a new registration because of the suspension for a specific time of the former registration, while other countries permit the bareboat registration at the same time as the original registration remains operative.

that the right of the vessel to fly its flag is suspended while the registration in the other country is in effect.²³⁹

Mortgages are governed by the law of the state where the vessel is registered; however, problems may arise in the case of a bareboat registration, where the vessel is registered under the laws of two countries simultaneously. The issue of temporary change in the flag of a vessel was addressed in article 16 of the Convention on Maritime Liens and Mortgages 1993, with the main purpose “to protect the position of mortgagees.”²⁴⁰ This convention states that the laws of the state of registration²⁴¹ are determinative for the recognition of ship mortgages,²⁴² and the state must ensure a cross-reference entry in its register specifying the state that permitted the parallel registration of the vessel, and at the same time, that the state where the vessel is temporarily flagged shall specify in the record of the vessel the original state of registration.²⁴³ In this sense, special attention must be paid to the wording of the following provision:

“Article 16. Temporary change of flag

...

(d) No state party shall permit a vessel registered in that State to fly temporarily the flag of another state unless *all registered mortgages, “hypòtheques” or charges on that vessel have been previously satisfied or the written consent of the holders of such mortgages, “hypòtheques” or charges has been obtained...*”²⁴⁴
(Emphasis added)

a.2) Ownership and Control of Vessels

Perhaps the main characteristic of open registries is that shipowners do not need to be nationals or residents of the flag state in order to be authorized to register their vessels.

²³⁹ See the Convention on Registration of Ships, *supra* note 6, art. 11

²⁴⁰ See Coles, *supra* note 66, at p. 35

²⁴¹ See the Maritime Liens and Mortgages Convention, *supra* note 9, art. 16 (a). It is important to consider the definition that the convention offers of the state of registration, making reference to the state in which the vessel was registered immediately prior to the change of flag.

²⁴² *Ibid.*, art. 16 (b)

²⁴³ *Ibid.*, art. 16 (c)

²⁴⁴ *Ibid.*, art. 16 (d)

Countries that follow this system grant their nationality mainly to vessels owned by foreign citizens. In this sense, the nationality of the shipowner is not the principal criterion for registration purposes; as a result, countries with open registries accept the registration of vessels regardless of the country of origin of the shipowner.²⁴⁵

However, the absolute criterion of lack of ownership and control of vessels by nationals of the flag states could vary in some open registries. This is the example in Liberia, whose domestic legislation requires that vessels under its flag must be owned by a Liberian national, either by an individual or a corporation organized under the laws of Liberia. However, the policies for the incorporation of Liberian corporations are also extremely flexible, where the nationality of the shareholders²⁴⁶ and directors²⁴⁷ is “immaterial.”²⁴⁸ It is clear that the real control of a Liberian company is in the hands of foreign nationals. Nonetheless, Liberian law permits foreign corporations to register vessels under its flag if those corporations are registered in Liberia as a different juridical person, a so-called foreign maritime entity.²⁴⁹

In contrast, the Panamanian scheme, which has been considered a totally open registry, is more flexible than the Liberian scheme regarding ownership and control of vessels, since it does not impose any kind of restrictions; it allows any Panamanian or foreign individual or company to be shipowner of any vessel flying the Panamanian flag.²⁵⁰

²⁴⁵ See Coles, *supra* note 66, at p. 43.

²⁴⁶ *Ibid.*, at p. 175. In this way, the identification of shareholder is basically impossible because the shares of the company are commonly issued in bearer form, although they can also be issued in a nominated way with the proper name of each shareholder.

²⁴⁷ Because the Board of Directors of a company is the corporation entity that makes the decisions of the company, directors are the persons deemed to be in control of a corporation for practical purposes.

²⁴⁸ See Coles, *supra* note 66, at pp. 174 and 175. A Liberian corporation that has its place of business outside the country must have its registered office at the Monrovia address of the LISCOR Trust Company which acts as a registered agent for all such Liberian corporations.

²⁴⁹ *Ibid.*

²⁵⁰ *Ibid.*, at p. 237. Law No. 32 of January 26, 1927, Republic of Panama, is the law for the incorporation of the Panamanian companies so-called *Sociedades Anónimas*. These companies have certain similarities with the Liberian corporations because the nationality of directors and shareholders is also immaterial. However, in respect to the registration of a Panamanian company, the law obliges the company to have a registered agent with a legal domicile within the Panamanian territory.

Similar policies about the requirements of ownership and control of vessels and the incorporation of companies are also found in the national laws of most open registries, where the genuine link regarding these requirements is absent.

The issue of identification and accountability of shipowners has been considered a serious problem because, in certain cases, it could be extremely difficult to identify the directors and shareholders of a shipowning company, due to the lax terms of ownership and control of vessels in open registries and their liberal corporation laws.²⁵¹

a.3) Manning of Vessels

This type of system allows the participation of non-citizens in the manning of vessels, without any restrictions. The master, officers, and crew of vessels in countries with open registries can be foreign seamen. These flexible terms regarding the recruitment of crew in open registries have led to the proliferation of vessels manned by multinational crews. However, it must be considered that almost all open registries have ratified the STCW 78/95 Convention that imposes international standards with which seamen have to comply in order to obtain their certificates of competency.

For example, Liberian law does not contain restrictions regarding the nationality of a crew for vessels registered under the Liberian flag; however, with respect to the manning conditions, Liberia requires duly licensed masters and officers to be responsible for the navigation of the vessel.²⁵² Liberia issues certificates of competency for officers hired on board Liberian vessels, and the crew must possess a valid seaman's identification.²⁵³ Furthermore, Liberia, through its maritime administration, has the authority and

²⁵¹ See Tetley, *Int. C. of L.*, supra note 27, at p. 219. He explains that the lifting and piercing of the corporate veil are two judicial devices to solve problems arising from the principle that one could not look past the incorporated entity to pursue the shareholders or persons who control a company. However, regarding the structure of Liberian or Panamanian corporations, these devices could sometimes be, in a certain way, successful enough for the identification of directors, but not for the identification of shareholders, especially if they possess bearer shares.

²⁵² See generally Liberian Maritime Regulations, Chapter X.

²⁵³ See Coles, supra note 66, at pp. 176 and 177

responsibility to establish the number of seafarers that each vessel flying its flag needs as crew for her safe operation.²⁵⁴

On the other hand, although Panama originally had a minimum requirement on the nationality of the crew, in which 10% of any registered Panamanian vessel's crew had to be Panamanian,²⁵⁵ that requirement is no longer in force today.²⁵⁶ Panama has no current restrictions on the nationality of crews on board Panamanian vessels; however, every officer working on board a ship with the Panamanian flag has to obtain a certificate of competency issued by the Panamanian maritime authority that will permit him to perform his duties on board.²⁵⁷ Finally, regarding the manning conditions on Panamanian ships, officers need a safe manning certificate issued by the Panamanian Ship Inspection Office.²⁵⁸

3) Fiscal Regime for the Shipping Industry

One of the main attributions of the open registries seems to be the extremely favorable tax treatment granted to shipowners of vessels registered in states with this type of system. Some of these countries have taxation systems with source-based considerations, where all the shipping activities performed by vessels within their territories are charged with income tax; nonetheless, ships in open registries usually perform their economic activities and earn income out of the territory of their flag state. Consequently, they usually pay either low income taxes or no income taxes at all to their

²⁵⁴ Ibid, at p. 177

²⁵⁵ Panamanian Labour Code, art. 266. See also Coles, *supra* note 66, at p. 240. However, it must be said that this provision regarding the nationality of crew on board Panamanian vessels was not applied in a strict way because hiring of Panamanian seafarers has always been a difficult issue because of the shortage of them in that country. Consequently, that provision was not insisted upon.

²⁵⁶ This provision was repealed by the Decree Law No. 8 of February 26, 1998, Republic of Panama, which introduces some labor measures at sea and other navigable waters and states in its article 4 that shipowners should recruit preferably Panamanian citizens and permanent residents as seafarers, but it not a mandatory provision.

²⁵⁷ Ibid, art. 7

²⁵⁸ The Panamanian Ship Inspection Office (hereinafter SEGUMAR), a special branch of the Panamanian maritime administration, located in New York City, US, is exclusively engaged to attend to technical and security issues of the huge Panamanian fleet, having as its main responsibility the worldwide application of the Panamanian registry safety program

countries of registration, because they are mainly engaged in maritime activities outside of their flag state.²⁵⁹

However, even though shipowners with vessels registered in open registries may avoid national income taxation on their shipping activities, it would be incorrect to assume that they are entirely free of taxation,²⁶⁰ because if those ships are owned by foreign nationals, either individuals or companies, they will pay taxes on their shipping income to their country of origin, even if their activities are performed outside that country's territory.²⁶¹

As a consequence, shipowners are only subject to pay to the flag state some charges in order to register the vessel and maintain her in its public records. These payments are an initial registration fee and an annual renewal fee, both based on the tonnage of the ship.

C. Balanced Systems

The balanced system for the registration of vessels is an approach located somewhere in between closed and open registries. Being a mixed system, this approach offers some of the advantages of open registries, but maintains some of the basic characteristics of closed registries.

As a direct consequence of the existence of flags of convenience, some TMCs have created during the last years of the twentieth century special ship registries, separate but complementary to their principal national registries. The origin and proliferation of these relatively new registries have the main purpose of stopping "the decline of the merchant fleets of the traditional maritime powers."²⁶²

²⁵⁹ See Wells, *supra* note 229, at p.223

²⁶⁰ *Ibid*, at p. 224

²⁶¹ As it was already explained, countries with a closed registry taxed their nationals worldwide, applying a residence-source criterion.

²⁶² See Coles, *supra* note 66, at p. 26

Even though these registries may have different forms and characteristics, they pursue the same interests, which are to maintain a link with the national flag of the country of origin of the shipowner, to preserve the status, prestige, and jurisdiction of the TMCs, and, at the same time, to give shipowners some of the advantages that open registries offer, particularly the economic benefits.²⁶³

1) National Offshore Registers

This type of ship registry was introduced by several TMCs, basically through their overseas territories, which are still colonies and under their jurisdiction. Some examples of offshore flags are the registration system offered by the Isle of Man, whose territory is still under control of the UK,²⁶⁴ the Netherlands Antilles, which are under the jurisdiction of the Netherlands, and the registration system provided by the Kerguelen Islands, which are part of the French territory.²⁶⁵

2) Secondary Registers

Secondary registers, also known as international registries, are offered by some other TMCs as a second scheme of registration of vessels aside from their national registries. Clear examples of these registries are provided by Norway through the Norwegian International Ship Register (NIS) and Portugal through the Madeira Shipping Register (MAR).²⁶⁶

²⁶³ Ibid. See also Li, *supra* note 204, n. 47.

²⁶⁴ Ibid, at p.149. This is not the case of the Bahamas and Barbados which, although part of the UK commonwealth, are independent nations. In the case of Bermuda, the Cayman Islands, and Gibraltar, although they are still British colonies and are officially considered British overseas territories, they are self-governing territories.

²⁶⁵ Ibid, at p. 26

²⁶⁶ Ibid. Some other examples of countries with international registers are Brazil through its Registro Especial Brasileiro (REB), Denmark through its Danish International Register (DIS), Germany through its German International Register (GIS), Italy through its Italian International Ship Register (IIS), South Korea through its Korean International Ship Register (KIS), and Spain through its Canary Islands Register (CNR). See also Li, *supra* note 204, where he states that other countries currently considering the implementation of a secondary register are France, Finland, and Turkey.

II. Choice of Flag

A. Notion

After a detailed explanation of the different systems available for the registration of ships, it is important to consider the notion of the choice of flag. This expression is frequently used in maritime law to refer to the decision faced by shipowners when selecting the country in which they will register their ships.²⁶⁷ Choice of flag acquires importance when the basic purpose of every shipowner is generally “to provide a reliable shipping service in the most efficient and profitable manner.”²⁶⁸

Because the shipping industry is a real international and competitive activity, the decision that shipowners must take in order to register their vessels is crucial because it will have direct consequences on their commercial activities in various aspects, but mainly in the economic one. The choice of flag, therefore, is an extremely important decision for shipowners because it will represent the difference between continuing to be competitive²⁶⁹ providers of maritime services and being displaced in the business, if one keeps in mind that the shipping activity is an expensive activity. This decision could be crucial or an “essential question of survival”²⁷⁰ for those shipping companies with not one but many merchant fleets, where the main goal of “minimizing costs and maximizing profits”²⁷¹ is a key element in the shipping business.

In summary, there are several alternatives available to shipowners when they are selecting the country of registration for their vessels; these options lie in the closed, open, and balanced systems. The existence of these options is a direct consequence of the principle of international law which recognizes that flag states are free to introduce in their domestic legislations the maritime policies that they consider appropriate regarding the conditions for the registration of ships. In this respect, some states impose very strict

²⁶⁷ Ibid, at p. 43

²⁶⁸ See García-Correa, *supra* note 30, at p. 20

²⁶⁹ See García-Correa, *supra* note 30, at p. 21 and see also Coles, *supra* note 66, at p. 27

²⁷⁰ See García-Correa *supra* note 30, at p. 135

²⁷¹ See Kasoulides, *supra* note 80, at p. 565

requirements for the registration of ships, such as those with a closed registry, while others are more flexible, also identified as an open registry.²⁷² Also, several countries have adopted a mixed criterion which contains characteristics of both systems, such as the second registries and offshore registries. Indeed, the large spectrum of options for the registration of ships goes from extremely conservative to very liberal, and it is a fact that new ship registries have, to a great extent, become more popular than the traditional ones, given that they offer more flexible choices to shipowners.

Considering that the effects of the registration of a vessel upon a shipowner are different from state to state,²⁷³ the options for shipowners are even more different, if one takes into consideration the fact that amongst the various systems, especially the open system, there are several countries offering diverse options. During the last few years, there has been a proliferation of new open registries and international registries, and several countries have introduced liberal policies for ship registration.

The increasing free market, following the parameters stated by the new liberalized economic order, has made of ship registration a service provided by states to shipowners,²⁷⁴ acquiring a profitable connotation. Likewise, “it would be unrealistic to pretend that the maritime community would restrict itself to only one option when it can receive the advantages of many options in such a competitive market as today’s world.”²⁷⁵

Consequently, competitiveness between systems of ship registration has become a new element in the flag issue, clearly influencing the decision of shipowners when making their selection. As a result, ship registration “is becoming an increasingly competitive activity of states due to the international nature of the shipping industry.”²⁷⁶

²⁷² See Grime, *supra* note 141, at pp. 30 and 31

²⁷³ *Ibid.*, at p. 30

²⁷⁴ See García-Correa, *supra* note 30, at p. 7

²⁷⁵ *Ibid.*, p. 22

²⁷⁶ *Ibid.*, p. 21

a) Elements of Choice of Flag

Shipowners must take into account important factors before deciding where to register their vessels. These crucial elements must briefly be considered. First of all, shipowners must ensure that “the proposed flag has a system providing good and immediate evidence of registration of the ship and of encumbrances (including mortgages) over the ship”;²⁷⁷ however, there are some other factors to consider that are mainly economic, operational, and political in nature.²⁷⁸

Perhaps the most important element that will influence shipowners in their decision of where to flag their vessels is the fiscal regime for the shipping industry offered by different states. Taking into account that ships flying the flag of a specific state are under its jurisdiction, the fiscal regime of that country will apply to ships and shipowners. “The importance of not taxing income or capital gains derived from ships registered under the flag of the jurisdiction in which the owning companies are incorporated is readily apparent”;²⁷⁹ in this sense, countries with open registries are more attractive regarding taxation for shipping activities performed outside their borders because they are usually exempted, or the taxes are lower than those paid in countries with closed registries.

However, this is a relative consideration because the domicile of the beneficial owner of the shipowning companies will decide whether or not the income on shipping activities of the vessel will be taxed.²⁸⁰ This is particularly important if shipowners have their vessels registered in an open registry, but are also nationals and have their legal domicile in a country with a closed registry. In the end, they will be obliged to pay taxes to their countries of origin because of the residence-based approach, no matter where their vessels perform their maritime activities.

²⁷⁷ Goldrein, Iain. *Ship Sale and Purchase*. Second Edition, Lloyd's of London Press Ltd, London, 1993, at p. 230

²⁷⁸ See generally Coles, *supra* note 66, from pp. 43 to 48 for a comprehensive analysis of the factors governing the choice of flag.

²⁷⁹ See Goldrein, *supra* note 277, at p. 227

²⁸⁰ *Ibid.*

Because some open registry states require a national of that country to be the shipowner, usually a company organized under its laws, shipowners will presumably prefer to flag their vessels in an open registry because countries with that type of system offer several facilities for the incorporation of national companies that also have the advantages of confidentiality and the anonymity of the real beneficial owners of the company.²⁸¹ The structure of these corporations is very attractive to shipowners because they will have a national status; consequently, they will not be subject to pay taxes on their shipping gains, if those incomes are produced as a consequence of their shipping activities performed outside the territory of those countries, or at least, they will pay lower taxes than those paid in a closed registry country.

Other economic factor that must be considered by shipowners is access to capital markets in order to obtain the funds for the acquisition of vessels, where systems with any restriction on loans by banks or other financial institutions are an advantage.²⁸² Closely related is the issue regarding ship mortgages. Shipowners should consider whether flag states have an effective system for registration of mortgages with clear mechanisms to establish priorities between mortgagees.²⁸³

Another factor in the choice of flag that is extremely important to shipowners is the operating costs of the vessel, mainly with respect to manning, but also with respect to fuel and capital costs.²⁸⁴ The wages for the master, officers, and crew are considered to be some of the most expensive operating costs of a ship.²⁸⁵

Policies regarding wages and working conditions for seamen vary from country to country, depending on the national laws of flag states and the type of ship registry

²⁸¹ See Coles, *supra* note 66, at p. 44 for an explanation of some other important benefits of these corporations to shipowners, and also see Goldrein, *supra* note 277 at pp. 228 and 229. These characteristics are confidentiality and flexibility of corporate structures commonly found in Liberian corporations and Panamanian *Sociedades Anónimas*.

²⁸² See Goldrein, *supra* note 277, at p. 230. He explains the situation that exists in some countries where lenders have to obtain approval from their central banks to lend money to a person or company interested in buying a ship

²⁸³ *Ibid.*

²⁸⁴ See Coles, *supra* note 66, at p. 46

²⁸⁵ See Coles, *supra* note 66, at p. 46. He gives specific statistics about the operating costs in some countries and he explains that manning represents by far the largest item in the direct operation costs of a vessel registered in a developed country. See also Goldrein, *supra* note 274, at p. 226

selected. It is important to consider the crewing requirement, which in countries with closed registries is primarily the employment of nationals as crew. This opposes the crewing requirements in countries with open registries where there are no restrictions about the nationality of the crew, giving the opportunity to shipowners to hire individuals of any nationality.²⁸⁶

Because the salaries of seamen vary greatly between TMCs and crew-supplying nations,²⁸⁷ it is extremely important for shipowners to pay attention to labour costs. A flag in a closed registry will involve high labour wages, manning levels, conditions, benefits, and negotiations with trade unions on fixed rates of payment to seamen. Seafarers in developed countries are very well-protected because they are labour organized. Consequently, “highly paid seafarers have been seen for many shipowners as a sort of disadvantage within a particular flag.”²⁸⁸

On the other hand, in open registries, seafarers’ wages are not fixed, and shipowners do not have the obligation to agree on rates of pay with trade unions because seamen are not usually labour organized.²⁸⁹ It is said that shipowners usually contact a manning offshore agency that will recruit seamen from several countries.²⁹⁰ In this sense, “lower rates of wages and the weakness or non-influence of maritime unions in labour-supply countries have attracted shipowners”,²⁹¹ in detriment to seafarers of TMCs in the labour market.

To a lesser extent, political and military reasons are also taken into account by shipowners in their choice of flag, because in some cases the internal situation of a specific country or measures adopted by its government could create certain conditions

²⁸⁶ See García-Correa, *supra* note 30, at p. 170

²⁸⁷ See Coles, *supra* note 66, at p. 46. He states that shipping labour supplying countries are mainly China and other countries of the third world such as India, Korea, Pakistan, Philippines, Indonesia, Turkey, Sri Lanka and some former socialist states of Europe such as Russia and Ukraine

²⁸⁸ See Coles, *supra* note 66, at p. 46

²⁸⁹ Couper, Alastair. “Implications of Maritime Globalisation for the Crews of Merchant Ships” (2000), online: *Journal of Maritime Research* homepage at <http://www.jmr.nmn.ac.uk/site/request/setTemplate:singlecontent/contentTypeA/conJmrArticle/contentId/8/viewPage/2> (last visit August 9, 2003)

²⁹⁰ *Ibid.*

²⁹¹ See García-Correa, *supra* note 30, p. 171

that will have repercussions to its national merchant fleet. Sometimes these political considerations could be regarded by shipowners as disadvantages, but in other cases, they are advantages.

Regarding some disadvantages that result from political measures, ships which are nationals of a specific state could be targets of discriminatory practices by other states, such as not being able to obtain specific rights or not being able to perform certain activities. The concept of flag discrimination must be taken into account.²⁹² The most common example of flag discrimination regarding political factors is the prohibition to national vessels of trading with ships registered under specific flags. This situation could be clearly illustrated with measures such as economic embargoes or boycotts imposed against other countries, where national ships are not able to trade with those states against whom the political measures are being imposed.²⁹³

However, political reasons could sometimes bring advantages to shipowners. This would be the case with ships registered in TMCs, which provide naval protection to their national merchant fleet, especially at times of war.²⁹⁴ This could be important to shipowners, as they are offered special protection, not generally granted by other flag states, simply because they are nationals of their state or because they do not have a navy to offer such protection.

Finally, a factor that must also be considered in the choice of flag is cabotage trade activities. Since cabotage²⁹⁵ is a maritime activity exclusively reserved for national vessels of a specific state, if shipowners register their vessels in a country where cabotage

²⁹² Ibid, at p. 17. He quoted from a pamphlet brought out by the International Chamber of Commerce (ICC), May 1964, a definition of flag discrimination that in my opinion is very precise. In this sense, flag discrimination could be regarded as any action by governments which restrict the freedom of traders to choose the ships in which cargo may be carried and thus places impediments in the path of the free flow of international trade.

²⁹³ See Coles, *supra* note 66, at p. 47

²⁹⁴ Ibid, at pp. 48 and 49

²⁹⁵ See Black's Law Dictionary, *supra* note 65, at p. 194 where cabotage is defined as the transport of goods or passengers from one port or place to another in the same country. In addition, the privilege to carry on this cabotage trade is usually limited to vessels flying the flag of that country.

activities are not well developed, they will lose the opportunity to perform these activities in their countries of origin.²⁹⁶

Other reasons that could be considered as factors in deciding the country of registration of vessels are related to shipbuilding and ship repairs. Shipowners prefer to flag their vessels in countries where they are free to build ships according to international standards, rather than build them while subject to specific national standards imposed by countries such as TMCs, which require such standards to protect their national shipbuilding industries.²⁹⁷ In addition, shipowners will prefer to flag their ships in a country where they will have the right to repair their vessels anywhere, rather than in the national shipyards and ports of the flag state.²⁹⁸

²⁹⁶ See Coles, *supra* note 66, at p. 48

²⁹⁷ *Ibid.*

²⁹⁸ *Ibid.*

CHAPTER 3 – CONCERNS ABOUT OPEN REGISTRIES

The role of open registry countries as flag states has been highly criticized. They have been the target of several campaigns, obtaining a poor reputation worldwide. In this chapter, the main concerns regarding this controversy will be analyzed.

Furthermore, some of the responses and alternatives that have been implemented at international, regional, and national levels in order to counteract the impact of open registries in the shipping world will be reviewed, especially since they have been considered by some international organizations to be completely negative for the international shipping order,²⁹⁹ and by some countries, especially TMCs, as prejudicial to their national shipping industries.

The practice of transferring vessels originally registered in countries following the nationalist approach to countries with open registries, based on different reasons of convenience, began years after the end of World War I, when several ships, especially American ships, were transferred, mainly, to the Panamanian and Honduran registries. Nevertheless, at that time, the practice of flagging out to open registries was of “little practical significance.”³⁰⁰

By 1939, the countries with the biggest merchant marine fleets were the UK, the US, Japan, Germany, and Italy respectively, all of them TMCs with closed registries.³⁰¹ Nonetheless, that year the only two open registries that appeared as part of the biggest world merchant marine fleets were Panama and Honduras, both having only a small

²⁹⁹ See McConnell, *supra* note 82, at p. 438

³⁰⁰ See OECD, *supra* note 146, at p. 233

³⁰¹ See Boczek, *supra* note 128, at p. 14 for the largest merchant marine fleets in 1939 by country of registration. The five biggest fleets were the UK with 2,850 vessels accounting for 16,027 deadweight tons (hereinafter dwt); the US with 1,379 vessels registered accounting for 8,126 dwt; Japan with 1,180 vessels accounting for 5,102 dwt; Germany with 854 vessels accounting for 2,678 dwt; and Italy with 667 vessels accounting for 3,916 dwt. The main source of these statistics is the ABS Bulletin of June 1960, June 1961, and November 1961.

percentage of vessels flying their flags compared to the leading flag states of that period.³⁰²

The practice of flagging out ships to open registries was intensified after World War II, when its relevance began to be more appreciated through gradual, but considerable, changes in the distribution of the world merchant fleets within flag states.³⁰³ These changes were clearly seen after the creation of the Liberian registry in 1948. By consequence, the statistics of the world's merchant marine fleets by country of registration during the 1950s showed that especially Liberia, and to a lesser extent Panama, experienced a significant growth in their merchant marine fleets, even though the leading countries in the registration of ships remained the TMCs.³⁰⁴

The tendency of registering vessels within the open system was the common rule in shipping after the second half of the last century, and it still remains so to this day. Ships today are still concentrated under the flags of relatively few states,³⁰⁵ the majority being open registry countries. This is supported by actual statistics which express that in 2003, the five largest merchant marine fleets in the world are, respectively, the ones in Panama, Liberia, Greece, the Bahamas, and Malta, all of them open registries except for Greece.³⁰⁶

The increasing growth of merchant marine fleets in open registry countries became a real threat, provoking “a storm of protest at both national and international levels from groups which, for one reason or another, were harmed by their existence.”³⁰⁷ Therefore, the open registry scheme for the registration of vessels has been considered “long

³⁰² Ibid. In 1939, Panama had just 130 vessels registered accounting for 719 dwt and Honduras 27 vessels accounting for 82 dwt.

³⁰³ See OECD, *supra* note 146, from pp. 233 to 237 for a detailed explanation of the growth of open registries until 1971.

³⁰⁴ See Boczek, *supra* note 128, from pp. 14 to 18 for yearly statistics from 1950 to 1959 of the largest merchant marine fleets in the world.

³⁰⁵ See Churchill, *supra* note 35, at p. 255

³⁰⁶ As of January 1, 2003, the top 20 merchant fleets of the world, by country of registration, are: Panama, Liberia, Greece, Bahamas, Malta, Cyprus, Singapore, Norway (NIS), Hong Kong, and China. This information is available at the US Maritime Administration homepage at http://www.marad.dot.gov/Marad_Statistics/MFW-01-03.htm (last visit August 25, 2003), but the main source of these statistics is the Lloyd's Register World Fleet Statistics 2003.

³⁰⁷ See Boczek, *supra* note 128, at p. 64

overdue for eradication”,³⁰⁸ because, ever since the acceleration of the registration of ships in open registries, the problems that they created seem to have taken on a new dimension.³⁰⁹

The criticism against open registries had its main roots in the consideration that they have adversely affected the emergence of merchant marine fleets of countries with normal registries, especially developing states which have been deprived of the opportunity to develop their own national merchant fleets.³¹⁰ However, the existence and gradual growth of the open registry phenomenon have affected more TMCs due to the decrease of their merchant marine fleets to minimum percentages, consequently producing negative repercussions in the employment of their national seafarers.

The impact of open registries on the shipping industry has been largely studied and discussed at an international level. Their negative effects have been presented through numerous reports drafted by the Shipping Committee of UNCTAD, during the 1970s and 1980s.³¹¹ These reports had the intention of encouraging the gradual phasing out and, finally, the abolition of open registries.³¹² As a result, several concerns have arisen surrounding open registries, and the phenomenon is considered by many to be a major problem in several aspects of shipping, but mainly in aspects regarding safety, environmental, and labour issues.

In a real maritime scenario, all of these concerns are interconnected, and their effects would be seen all together; however, in order to obtain a better view of the problem and how it has been evolving, they will be analyzed separately.

³⁰⁸ See Coles, *supra* note 66, at p. 19

³⁰⁹ See OECD, *supra* note 146, at p. 231

³¹⁰ Sinan, I.M. “UNCTAD and Flags of Convenience”, 18 J. World Trade 95, 99 (1984)

³¹¹ See McConnell, *supra* note 82, at p. 438

³¹² *Ibid*, at pp. 440 and 441. She explains that the original intention of the UNCTAD campaign against open registries was the phasing out of the open system for the registration of ships. Phasing out meant not only the abolition of shipping registers of countries offering open registry facilities, but rather a gradual tightening of the conditions on which those countries will accept new registrations by way of insisting upon the existence of a genuine economic link between the country and the vessel.

I. Adoption and Enforcement of International Maritime Conventions

Taking into account that the shipping industry is considered the most international of the world industries,³¹³ there has always been the need for the harmonization of maritime rules at an international level.

A. Uniformity of International Shipping Standards

It has been largely recognized by international law that every flag state has the sovereign right to determine within its own discretion the national policies for the registration of vessels under its flag and for the establishment of practical measures that it will impose in order to exercise effective jurisdiction and control over its merchant marine fleet, including the standards that will rule its shipping activities.

Because international law permits every country to state its own national standards for shipping activities as part of its internal legal order,³¹⁴ the establishment of common standards for shipping activities at an international level has always been a primary aim of the shipping community in general.

Even though shipping standards have been shaped according to the needs and demands of the shipping industry, in order to avoid extremely different policies from state to state that would make shipping a very difficult activity, the importance of the harmonization of shipping standards at an international level led to the development of a vast international maritime legislation, thanks mainly to the guidance and cooperation of certain international bodies that have been promoting the unification of all aspects of maritime law, such as the Comité Maritime International³¹⁵ and the UN,³¹⁶ mainly through UNCTAD.³¹⁷

³¹³ See generally the International Maritime Organization (hereinafter IMO) homepage, at http://www.imo.org/Safety/mainframe.asp?topic_id=59 (last visit September 15, 2003)

³¹⁴ See Schoenbaum, *supra* note 4, at p. 1

³¹⁵ The Comité Maritime International (hereinafter CMI) is a non-governmental organization formally established since 1897 with the main objective of helping to reach unification of maritime law in all its aspects. For the perfil, origin and complete history of the CMI, see generally the CMI homepage at <http://www.comitemaritime.org/home.htm>.

The most important legislative tasks in the maritime field at an international level have been mainly performed by the International Maritime Organization,³¹⁸ regarding technical and legal matters, and to a lesser extent, by the International Labour Organization,³¹⁹ regarding labour matters.

The existence of common maritime policies within the domestic legislation of states has been a fundamental key for the growth and development of shipping as an industry, and for the practical performance of shipping activities worldwide.

(last visit September 15, 2003) For the list of CMI Conventions see CMI homepage at <http://www.comitemaritime.org/ratific/brus/brurat.html> (last visit September 20, 2003)

³¹⁶ UN has contributed to the drafting of some maritime international conventions, more successfully regarding the Law of the Sea, but also in respect to other maritime aspects. For information and the text of the UN conventions in the maritime field, see generally UN homepage, regarding the Law of the Sea at <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXXI/chapterXXI.asp> (last visit September 20, 2003), regarding Navigation at <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXII/chapterXII.asp> (last visit September 20, 2003); and regarding Maritime Transport at <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXI/subchapD/chapXID.asp> (last visit September 20, 2003)

³¹⁷ UNCTAD has also addressed some maritime issues leading to the draft of some international conventions regarding private and public aspects of maritime law, even though its purposes are not expressly directed just at the improvement of maritime activities. For more information about UNCTAD, see generally UNCTAD homepage at <http://www.unctad.org/Templates/Page.asp?intItemID=1530&lang=1>. (last visit September 15, 2003). The international maritime conventions under the auspices of UNCTAD have been the UN Convention on Liner Conference Code 1974, which entered into force in October 5, 1983, the UN Convention on Multimodal Transport 1980, and the UN Convention on Registration of Ships 1986, both not yet in force.

³¹⁸ IMO was originally known as the Inter-Governmental Maritime Consultative Organization (hereinafter IMCO). It was established in March 6, 1948 by the IMCO Convention adopted in Geneva and entered into force in March 17, 1958. However, the name of the convention was changed to IMO Convention in Nov. 14, 1975, in force May 22, 1982 when the organization was re-named as IMO. Currently, it is a UN specialized agency which has been devoted to the drafting of conventions and other non-formal treaty instruments, such as codes, guidelines or recommendations, in specific maritime topics with the main purpose of reaching uniformity in the national laws of its member states. It is composed of an Assembly, a Council and four main Committees which are the Maritime Safety Committee (hereinafter MSC), the Marine Environment Protection Committee (hereinafter MEPC), the Legal Committee; and the Technical Co-operation Committee. Also, there is a Facilitation Committee and 9 Sub-committees that support the work of the 4 main Committees. For more information about the origins, structure and mission of IMO, see generally the IMO homepage at http://www.imo.org/About/mainframe.asp?topic_id=3 (last visit September 15, 2003). Currently, IMO counts with the participation of 162 member states and 3 associate members which are listed in IMO Member States and year of joining at http://www.imo.org/About/mainframe.asp?topic_id=135&doc_id=840. (last visit September 15, 2003)

³¹⁹ The International Labour Organization (hereinafter ILO) is a UN specialized agency since 1946, but was originally created in 1919 by the Treaty of Versailles. It was created with the main purpose of promoting social justice and internationally recognized human and labour rights. The ILO has a unique tripartite structure where the governments of its member states and representatives of workers and employers have equal participation. The basic task of ILO is the establishment of international labour standards through the drafting of international conventions and recommendations, a duty which is also performed with respect to shipping labour standards. For more information about the origins, structure and mission of ILO, see generally the ILO homepage at <http://www.ilo.org/public/english/about/index.htm> (last visit September 15, 2003) Currently, ILO counts on the participation of 176 member states which are listed at <http://www.ilo.org/public/english/standards/relm/country.htm> (last visit September 15, 2003) For more information about the different ILO conventions, see <http://www.ilo.org/public/english/support/lib/howto/internatleg.htm#conventions> (last visit September 18, 2003)

This uniformity of maritime law accomplished by the adoption and implementation of international conventions, especially the ones promoted by IMO, has proved to be, in the domestic laws, the best solution to overcoming incompatibility of national legislations in some maritime aspects, especially technical aspects such as those concerned with safety issues.

Formerly, IMO was viewed solely as a permanent technical and consultative body; nevertheless, its role in the maritime scenario has evolved, and today it is considered an organization with legislative duties that has been fundamental to the development of a large group of maritime international regulations, not only in the public field of shipping, but also in private aspects of the industry.

IMO has become an international forum mainly devoted to the encouragement and facilitation of the development of regulations seeking the international harmonization of standardized maritime national policies. The efforts of IMO have proved that the international discussion of maritime aspects has been the best solution for the uniformity of maritime law.

In this respect, IMO should encourage and facilitate the participation of private actors with interests in shipping activities to help in the achievement of its goals.³²⁰ However, IMO does not provide for the participation of other kinds of entities aside from states with a status other than observers,³²¹ even though the participation of private groups, such as shipowners, underwriters, financing groups, amongst others, as well as intergovernmental and non-governmental organizations is limited with respect to the decision-making process within IMO. Indeed, it is crucial for the practical application of the measures adopted.

³²⁰ See García-Correa, *supra* note 30, at p. 40

³²¹ Today, some private actors within the shipping world have a more important role within IMO, especially non-governmental and inter-governmental organizations. Some non-governmental organizations have been granted consultative status within IMO and for a complete list in this respect, see generally IMO homepage at http://www.imo.org/About/mainframe.asp?topic_id=135&doc_id=851. (Last visit September 15, 2003) Additionally, some inter-governmental organizations have concluded agreements of cooperation with IMO, and a complete list in this respect is available at http://www.imo.org/About/mainframe.asp?topic_id=135&doc_id=846. (Last visit September 15, 2003)

B. Case of Open Registries

The criticism against open registries has its roots in the adoption and implementation of international maritime conventions, and all other concerns, such as safety, environmental, and labour aspects are derived from them.

In theory, the commitment of a serious and responsible flag state would be the signature, ratification, and implementation of most of the international conventions.³²² This process should be done according to the size of the merchant marine fleet of flag states; consequently, the bigger the fleet of the country, the more international conventions it should sign, approve, and implement.³²³ Nonetheless, the reality of the shipping world has proven that this is not an easy task to accomplish for all flag states.

Taking into account that the adoption and ratification of international conventions is a matter entirely within the discretion of each state, open registries have been largely blamed because of their slow adoption and improper implementation of international maritime conventions, due mainly to the lack of interest.

Ship registration has been considered a very profitable business for open registry countries,³²⁴ where stringent shipping regulations are deemed to be incompatible with the open scheme. The accusation against open registries has always been their enactment of liberal registration laws with the effect of making business through the attraction of world shipping.³²⁵ Consequently, strict shipping regulations will make those countries lose their attractiveness as flexible registries, and as a result, they will not receive all the revenues derived from that public service which is significant income in their national budgets.

³²² See supra note 30, at p. 29

³²³ Ibid, at p 32. For information about the actual status of adoption and ratification of IMO Conventions by member states, see generally IMO homepage at http://www.imo.org/includes/blastDataOnly.asp/data_id%3D7735/status.xls (last visit September 15, 2003)

³²⁴ See supra note 82, p. 449. She cites the phrase of E. Gold, *Maritime Transport, The Evolution of International Maritime Policy and Shipping Law* 267 (1981), which make reference that, for international shipping, the operation of open registries is considered business as usual.

³²⁵ See Sinan, supra note 310, at p. 99

In addition, the fact that open registry states are developing countries has exacerbated the notion that they are incapable of having a good maritime administration, because they do not come with the proper infrastructure, personnel, and economical resources to introduce international shipping standards into their national legislations and strengthen their application in order to satisfy the necessities of their huge merchant fleets, mainly engaged in international trade.

These main criticisms against open registries were summarized in one of the main criteria that the Rochdale Report established for the identification of flags of convenience. The report stated that “the country of registration has neither the power nor the administrative machinery effectively to impose any government or international regulations, nor has the country the wish or the power to control shipowners of the vessels flying their flags.”³²⁶

The difficulty of open registries in adopting and enforcing international shipping standards has resided not only in the lack of commitment to open registries, but also in the lack of economical resources, unavailability of proper technology, and inadequate administrations.

Indeed, it must be recognized that the very nature of open registries complicates the adoption and enforcement of maritime regulations as compared to countries with closed registries.³²⁷ However, although there could be factors that make difficult the improvement of shipping policies according to international standards in open registries, is not an impossible task for these states.

It has to be admitted that open registries have had an unsuccessful history in the signature and ratification of international maritime conventions compared to other states, especially those with closed registries; however, they have ratified the basic international documents.

³²⁶ See Coles, *supra* note 66, at p. 16 where he cites the criteria of the Rochdale Report for distinguishing when a flag state is an open registry.

³²⁷ See García-Correa, *supra* note 30, at p. 29

Nonetheless, it has been largely discussed and accepted that adopting treaties is not enough, because the only way to improve the quality of shipping is through effective implementation of international conventions. Consequently, enforcement of international shipping standards has been considered the key to improving the quality of flag states,³²⁸ an area where open registries have shown several failures.

II. Safety and Environmental Concerns

“Transportation in international trade is overwhelmingly dominated by shipping”,³²⁹ being always a fundamental pillar of the “infrastructure of international trade, without which it cannot proceed.”³³⁰

By consequence, since navigation by sea has remained the method of transportation *par excellence*, mainly for the carriage of goods by sea, and to a lesser extent for the transportation of passengers, the maritime industry has faced the necessity of adapting itself to the increasing demands of international trade.

International trade, which nowadays is almost completely performed by sea, has brought along with its development noticeable changes in the maritime industry. The quantity of ships traversing the seas has been increasing considerably, thus creating traffic problems; the size and technology of ships have been improved, thus making maneuverability of vessels a more demanding task for their masters and crews; the nature of transported goods has been varying radically; therefore, it is common today to see vessels not carrying only traditional goods, but dangerous and sometimes ultra-hazardous cargoes.³³¹

³²⁸ See Winbow, A. “Implementation of IMO Conventions – The Key to the Quality Flag State”, paper presented at Mare Forum 2002, Athens, Greece, (2002), online: IMO homepage at http://www.imo.org/includes/blastDataOnly.asp/data_id%3D7014/awinbow1.doc (last visit September 15, 2003)

³²⁹ Juda, Lawrence. “World Shipping, UNCTAD, and the New International Economic Order”, 35 Int’l Org. 493 (1981)

³³⁰ Ibid, at p. 515

³³¹ See Churchill, *supra* note 35, at p. 256

Although it is true that many other types of activities also involve risks, the risks confronted by the shipping industry have a different connotation, because they can take on tremendous dimensions when casualties at sea occur. Consequently, shipping has been considered a very dangerous business.

The fact that shipping is a risky activity has obliged the maritime industry to strengthen shipping regulations at the national and international level, especially with respect to safety at sea, and most recently, with respect to the protection of the marine environment.

A. Importance of Safety at Sea

The idea that “transportation of passengers and goods by ships should be made as safe as possible”,³³² has placed safety as the cornerstone of the shipping industry. Safety at sea has been and should remain the primary aim of the maritime community, and cooperation to improve it should be obtained from all the important links in the maritime chain,³³³ including not only public participants such as flag, port, and coastal states, but also private actors, mainly shipowners, operators, and seafarers.

It is important to remember that safety at sea has been considered a prime duty of flag states. As was previously discussed, the responsibility to maintain safety at sea has been recognized by international law in a general way by the Geneva Convention, and in a more detailed way, by UNCLOS. These conventions obliged countries to take all the necessary steps, while applying their own standards, to ensuring safety at sea.³³⁴ However, in practice, the individual discretion of states is subject to generally accepted international standards.³³⁵

³³² Ibid, at p. 264

³³³ Hadjieleftheriadis, Gregory. “Erika – Eureka – EurOPA Will Quality Shipping Ever be Truly Rewarded?”, speech delivered at the Shipping Risk Management Forum 2000, Athens, Greece, (2000), online: International Commission on Shipping (hereinafter ICONS) homepage, at <http://www.icons.org.au/images/MAREFORUM.PDF> (last visit August 26, 2003)

³³⁴ See the Geneva Convention, supra note 38, at art. 10 (1) and see also UNCLOS, supra note 39, at art. 94 (3) and (4)

³³⁵ See the Geneva Convention, supra note 38, at art. 10 (2) and see also UNCLOS, supra note 39, at art 94 (5)

From a practical point of view, the mandate of these conventions is extremely important because harmonization of safety standards is a key element for the safe development of shipping. Navigation would be a chaotic activity if these safety standards were completely incompatible due to wide differences between states,³³⁶ especially when taking into account the risky nature of the shipping industry.

A group of uniform international standards for the promotion of safety measures on shipping has been developed throughout the twentieth century and exists nowadays mainly through the work of IMO. Maritime safety has been the principal objective of IMO since its origins, and it has shaped the nature of the organization itself. This consideration is clearly evidenced in article 1 (a) of the IMO Convention as follows:

“Article 1: The purposes of the Organization are:
(a) To provide machinery for co-operation among Governments in the field of governmental regulation and practices relating to technical matters of all kinds affecting shipping engaged in international trade; *to encourage and facilitate the general adoption of the highest practicable standards in matters concerning maritime safety, efficiency of navigation and prevention and control of marine pollution from ships*; and to deal with legal matters related to the purposes set out in this Article;...” (Emphasis added)³³⁷

Considering that improvement on maritime safety measures obtained a more crucial relevance since the marine environment began to be threatened by shipping operations, the protection of the marine environment from pollution caused by ships was considered another of the main objectives of IMO, and was subsequently added to the wording of article 1 (a) of the IMO Convention.³³⁸

³³⁶ See Churchill, *supra* note 35, at p. 265

³³⁷ The Convention on the International Maritime Organization (IMO), adopted at Geneva on March 6, 1948 and entered into force in March 17, 1958, art. 1 (a) available at IMO homepage at http://www.imo.org/Conventions/mainframe.asp?topic_id=771 (last visit September 15, 2003)

³³⁸ The phrase regarding the marine environment contained in art. 1 (a) of the IMO Convention was added by amendments in 1975 which entered into force in 1982. See generally IMO homepage at http://www.imo.org/Conventions/mainframe.asp?topic_id=771#1 (last visit September 15, 2003)

The growth and improvement of the shipping industry have been facilitated through IMO, whose promotion of safety and marine environmental policies is clearly summarized in the organization's slogan: "**SAFER SHIPPING, CLEANER OCEANS**".³³⁹

Although some international conventions were considering safety at sea before IMO was created,³⁴⁰ the primary mission for IMO was the revision and updating of the SOLAS Convention, and to a lesser extent COLREGS, both documents comprising the majority of technical features for the safe operation of vessels. However, the emergence of pollution as a new concern in the maritime field became a complementary concern of IMO through the drafting and adoption of international conventions regarding this issue. IMO's work has been extremely decisive in the maintenance and improvement of maritime safety measures, thus preventing marine pollution caused by ships.

1) SOLAS Convention

The first time that shipping safety rules were discussed at an international forum and inserted into an international document was in the SOLAS Convention, which is the most important of all international treaties relating to the safety of merchant ships.³⁴¹

The SOLAS Convention was originally drafted as a result of the sinking of the famous liner cruise *Titanic* in the North Atlantic Sea in 1912. Its first version,³⁴² mainly concerned with the protection of human life,³⁴³ has served as the basis for all future developments of safety shipping policies.

³³⁹ For the slogan of IMO, see generally IMO homepage at <http://www.imo.org/index.htm>

³⁴⁰ Mendoza García, Marylena. *The ISM Code: A Reexamination of Certain Maritime Law Principles*. Thesis submitted for the Degree of Masters in Law (LL.M.), McGill University, Montreal, Canada, 2001, at p. 6

³⁴¹ See generally IMO homepage at http://www.imo.org/Conventions/contents.asp?topic_id=257&doc_id=647#1 (last visit September 15, 2003)

³⁴² Ibid. The SOLAS Convention was adopted on January 20, 1914; however, it unfortunately never came into force because of the beginning of the World War I.

³⁴³ Ibid. The first version of the SOLAS Convention was mainly devoted to the protection of human lives due to the devastating consequences of the *Titanic* disaster which accounted for the loss of more than 1,500 lives among passengers and crew.

Since its origin, the principal purpose of the SOLAS Convention has been to establish minimum safety standards for the construction, equipment, and operation of vessels;³⁴⁴ however, these standards have gradually been improved through the years by the needs of the shipping industry, which demand stricter safety measures at sea as a result of the development of new technologies in the maritime field and the occurrence of more and more casualties at sea, which cause the convention to be under constant review and changes.³⁴⁵

Regarding the inconvenience of constant amendments to the SOLAS Convention and delays in the process of enforcing regulations, a new SOLAS Convention was adopted in 1974,³⁴⁶ containing all the previous amendments and introducing the tacit acceptance procedure.³⁴⁷ This last version of the SOLAS Convention has also been reviewed constantly³⁴⁸ since its entry into force, but its changes have been enforced by states in an acceptably short period of time.³⁴⁹

The SOLAS Convention currently covers in great detail a wide range of technical aspects of safety at sea, such as the construction of different types of ships, including nuclear ships, fire fighting devices, life saving equipment, radiocommunications, navigational safety, and the carriage of different kinds of cargoes, paying special attention to dangerous goods and the way surveys and certificates should be issued.³⁵⁰

³⁴⁴ Ibid.

³⁴⁵ Ibid. The second version of the SOLAS Convention was adopted in 1929 and entered into force in 1933. The third version of the SOLAS Convention was adopted in 1948. The fourth version of SOLAS was adopted in 1960 and entered into force in 1965, considered a very important step in the modernizing of safety measures because its provisions were mainly devoted to cargo shipping that was an important technical development at that time.

³⁴⁶ The actual version of the SOLAS Convention was adopted in November 1, 1974, and entered into force May 25, 1980. (hereinafter the SOLAS Convention 1974)

³⁴⁷ See Mendoza García, *supra* note 340, at p. 18. See also generally IMO homepage at http://www.imo.org/Conventions/contents.asp?topic_id=257&doc_id=647#1 (last visit September 20, 2003). The tacit acceptance procedure was designed to ensure that changes could be made within a specified, and acceptably short, period of time and by it will be assumed that member states are in favour of the amendments unless they take any positive action to make their objection known.

³⁴⁸ See generally IMO homepage at http://www.imo.org/Conventions/contents.asp?topic_id=257&doc_id=647#1 (last visit September 15, 2003). The SOLAS Convention 1974 has been amended as needed and the enforcing of those modifications have been achieved without problems or delays as before thanks to the tacit acceptance.

³⁴⁹ Ibid.

³⁵⁰ Ibid. The SOLAS Convention 1974 is comprised by twelve chapters and several protocols, annexes and codes.

The SOLAS Convention has always been focused on the establishment and improvement of safe operational practices exclusively applicable to the “hardware aspect”³⁵¹ of shipping, which is the vessel itself. The safe shipping trend experienced a large step forward when the “software aspect”³⁵² of shipping, which is the human element that manages the operation of vessels, became an important factor to consider, after the occurrence of several incidents at sea in the 1980s deemed mainly to be caused by improper management.

2) ISM Code

The *Herald of the Free Enterprise* incident in 1987³⁵³ was the decisive factor for changes in safety measures concerning management, when the official investigation into the casualties revealed that their cause was some major errors on the part of the manager of the ship.³⁵⁴ This accident was the basis for a revision in 1994 of the SOLAS Convention 1974, which introduced in its Chapter IX the mandatory application of the International Management Code for the Safe Operation of Ships and for Pollution Prevention, abbreviated as the International Safety Management Code.³⁵⁵

The ISM Code is mainly intended to improve the safety of international shipping and to reduce pollution from ships “by impacting on the way shipping companies are managed and operated.”³⁵⁶ It has been considered an important device for “safe

³⁵¹ Seng Kong, Lee. “Human Element in Shipping Accidents”, paper presented on behalf of the Maritime and Port Authority of Singapore to ICONS, (2000), online: ICONS homepage at http://www.icons.org.au/images/maritime_PA.pdf (last visit August 26, 2003)

³⁵² Ibid.

³⁵³ The *Herald of the Free Enterprise* was a British ferry which capsized and sank off the coast of Belgium, accounting for the loss of several lives; approximately 189 persons died in the incident. For a better explanation of this incident, see SafetyLine Institute homepage at http://www.safetyline.wa.gov.au/institute/level1/course13/lecture40/140_05.asp (last visit September 21, 2003)

³⁵⁴ See supra note 341, from pp. 20 to 22

³⁵⁵ The International Management Code for the Safe Operation of Ships and for Pollution Prevention, known as the International Safety Management Code (hereinafter ISM Code) was adopted by IMO in November 1993 by the Assembly resolution A.741(18). Then it was introduced by the 1994 amendments as the new Chapter IX to the SOLAS Convention 1974 and was entered into force in 1998. The complete text of the ISM Code is available at IMO homepage at http://www.imo.org?HumanElement/mainframe.asp?topic_id=287 (last visit September 15, 2003)

³⁵⁶ See generally IMO homepage at http://www.imo.org/Safety/mainframe.asp?topic_id=157 (last visit September 15, 2003)

operational practices afloat, but ashore as well”,³⁵⁷ which imposes an “international standard of seaworthiness.”³⁵⁸ Even though it was initially a recommended measure, the Code was made mandatory with the 1994 amendments to the SOLAS Convention 1974 through a two-stage period for its entry into force. The first stage was on July 1, 1998, for passenger ships, high-speed crafts, oil tankers, chemical tankers, gas carriers, and bulk carriers; the second one, on July 1, 2001 were for other cargo ships and mobile offshore drilling units of 500 gross tonnage and upward.³⁵⁹

The principal mandate of the ISM Code is directed mainly to those companies involved in the operation of ships, including shipowners, bareboat charters, or operators, being obliged to develop, implement, and maintain a Safety Management System³⁶⁰ for their operation. However, for the purposes of the research, the ISM Code came to be of the utmost importance because flag states play an active role in the practical application of this measure, where certification was deemed to be a crucial element in the ISM system.³⁶¹ In this respect, flag states, either through their maritime administration or classification societies,³⁶² are responsible for the approval of SMSs that companies will apply for the safe operation of their ships. If companies are in full compliance with the ISM Code, the process of certification is done by the issuance of two important certificates that are the Document of Compliance³⁶³ to the company and a Safe Management Certificate³⁶⁴ to the ship.³⁶⁵

³⁵⁷ See Mendoza García, *supra* note 340, at p. 27

³⁵⁸ See Tetley, *supra* note 2, at p. 466

³⁵⁹ See generally IMO homepage at http://www.imo.org/Conventions/contents.asp?topic_id=257&doc_id=647#28 (last visit September 15, 2003)

³⁶⁰ The Safety Management System (hereinafter SMS) is a structured and documented system enabling the personnel of the manager company of the ship to effectively implement the company's safety and environmental protection policy which must be in compliance with the mandatory rules and regulations.

³⁶¹ See Tetley, *supra* note 2, at p. 466

³⁶² See Tetley's Glossary at Prof. William Tetley's homepage, *supra* note 102, at http://tetley.law.mcgill.ca/maritime/glossarymaritime.htm#letter_c (last visit September 20, 2003), according to Prof. Tetley, classification societies are organizations which survey and classify ships as to their conditions, for insurance and other purposes. All classification societies have jealously guarded their independence while they act on behalf of shipowners, charterers, underwriters, and even governments. In respect to ship registration, classification societies acquired a more relevant role since the ISM Code has increased the extent of classification society duties and reports. The ISM Code permitted them to survey and classify ships on behalf of national maritime administrations when they have to issue the appropriate certificates to managers and ships complying with the provisions of the ISM Code.

³⁶³ The Document of Compliance (hereinafter DOC) of the ISM Code is issued every five years to the company in charge of the management and operation of the ship.

³⁶⁴ The Safe Management Certificate (hereinafter SMC) of the ISM Code is issued to the ship if it complies with the requirements of the code.

The most important feature of the ISM Code is that the flag state has the obligation to make annual inspections to their vessels in order to verify the proper functioning of ships and to determine whether their SMS are in compliance with the ISM Code.³⁶⁶

The ISM Code will have “far-reaching effects on the international shipping community and will inevitably lead to the need for a greater sense of responsibility on the part of operators regardless of the flags under which their vessels fly.”³⁶⁷

B. Importance of the Protection of the Marine Environment

The marine environment has become a primary focus of protection ever since the increase in transportation of hazardous products. This is the case with cargoes such as oil, liquefied natural gas, toxic chemicals, and lately ultra-hazardous materials, such as radioactive substances, that pose different threats and risks to the environment and human beings, having obliged flag states in general to review their safety policies and introduce stricter ones.

Marine pollution has different sources, such as land activities, sea bed activities, dumping at sea, and shipping activities.³⁶⁸ Because of the great media coverage surrounding casualties at sea, such as groundings, strandings, explosions, and collisions involving large tankers carrying huge amounts of oil or other dangerous substances, accidental spills have commonly been considered an important source of marine pollution caused by ships. Nevertheless, discharges of oil and other dangerous substances to the marine environment are usually done during routine shipping operations rather than by casualties at sea,³⁶⁹ proving that deliberate acts performed by vessels are also deemed to be important causes of marine pollution.

³⁶⁶ See Tetley, *supra* note 2, at p. 466

³⁶⁷ See Coles, *supra* note 66, at p. 32

³⁶⁸ See Churchill, *supra* note 35, at p. 329 and also see Matlin, *supra* note 94, at p. 1052.

³⁶⁹ See Matlin, *supra* note 94, at p. 1052

These deliberate acts do not depend on the good or bad administration of specific flag states;³⁷⁰ instead, they fall more on the responsibility of shipowners, mainly because flag states are usually unaware of these acts. In this respect, it is the responsibility of flag states to encourage shipowners not to continue doing these practices, mainly through the proper application of sanctions, a key element in decreasing their damaging effects.

The International Convention for the Prevention of Pollution of the Sea by Oil,³⁷¹ the first convention regarding marine pollution, was adopted after the *Torrey Canyon*³⁷² incident, the first major spill in the history of oil transportation. This environmental disaster marked a new era in the development of several important international conventions for the protection of the marine environment.

1) MARPOL Convention

The MARPOL Convention is the main international instrument which regulates pollution from ships in a very detailed, complex, and technical way. It was adopted with the intention of dealing with all forms of intentional pollution of the sea from ships, other than from dumping, and is concerned especially with the carriage of oil, noxious liquid substances in bulk, harmful substances carried by sea in packaged forms, sewage, garbage, and air pollution.³⁷³

However, the convention also contains provisions with respect to the avoidance of accidental pollution from ships, mainly through casualties at sea. In this way, it has

³⁷⁰ See García-Correa, *supra* note 30, at p. 32

³⁷¹ International Convention for the Prevention of Pollution of the Sea by Oil, adopted in 1954 and entered into force July 26, 1958 (hereinafter OILPOL 1954)

³⁷² The *Torrey Canyon* was a Liberian oil tanker which ran aground while entering the English Channel and broke up, spilling her entire cargo of 120,000 tons of crude oil into the sea. This incident caused massive local pollution and resulted in the biggest oil pollution incident ever recorded up to that time. The incident raised questions about measures then in place to prevent oil pollution from ships and also exposed deficiencies in the existing system for providing compensation following accidents at sea. This accident led to the creation of the CLC and the Fund Convention where, for the first time, shipowners became strictly liable, rather than liable only through proven negligence. For more details about this disaster, see generally IMO homepage at http://www.imo.org/Environment/mainframe.asp?topic_id?=231#2 (last visit September 21, 2003)

³⁷³ See Churchill, *supra* note 35, at p. 339.

prescribed limitations on the size of the tanks in an oil tanker and the requirement for double hulls or equivalent protection.³⁷⁴

The only provisions of the MARPOL Convention that are currently mandatory are the provisions related to oil and noxious liquid substances in bulk, while the others are still considered optional.³⁷⁵

Considering that flag states are mainly responsible for exercising judicial jurisdiction with respect to violations committed by ships flying their flags, regardless of where they are,³⁷⁶ the MARPOL Convention has prescribed specific provisions in order to initiate criminal proceedings against any suspected violation. Furthermore, it also addresses the protection of the marine environment, not only from flag states, but from coastal and port states as well. It is important to recall that UNCLOS followed this same trend.

Finally, as a complement to the MARPOL Convention, other important international conventions addressed the issue of liability from pollution damages, like the CLC and FUND Convention. These documents are extremely important in the sense that they facilitate the bringing of compensation claims from marine pollution and “may well encourage shipowners to take more care in observing standards which are designed to prevent pollution.”³⁷⁷

³⁷⁴ The 1992 amendment to the MARPOL Convention was adopted on March 2, 1992 and entered into force on July 6, 1993. These changes to the convention made mandatory the double hull requirement applicable for new tankers built after 1996 as well as existing ships built before that date, with a phase-in period. However, this measure has been implemented slowly because of the difficulties of the introduction of this change, and alternative solutions have been applied; meanwhile, the implementation of the double hull is totally accomplished. Nevertheless, it is worth stating that the 2001 amendment to the MARPOL Convention, adopted in April 27, 2000 and entered into force in September 1, 2002, established a new global timetable for accelerating the phase-out of single-hull oil tankers by the year 2015 or earlier. Double-hull tankers will be the only ones allowed to navigate, offering a greater protection to the environment from pollution, especially where certain types of accidents occurred. For more information about the 1992 amendments, see generally IMO homepage at http://www.imo.org/Conventions/contents.asp?doc_id=678&topic_id=258#25 (last visit September 18, 2003) and the 2001 amendments at http://www.imo.org/Conventions/contents.asp?doc_id=678&topic_id=258#2001 (last visit September 18, 2003). For more information about the requirement of double hull and the timetable for the phasing out of single hull vessels, see also generally IMO homepage at http://www.imo.org/Safety/mainframe.asp?topic_id=155#double (last visit September 18, 2003).

³⁷⁵ See Churchill, *supra* note 35, at p. 340.

³⁷⁶ *Ibid.*, at p. 345.

³⁷⁷ *Ibid.*, at p. 358.

C. Case of Open Registries

The major criticism against vessels flying flags of countries with open registries has always been the consideration that their merchant marine fleets have substandard conditions for navigation and high casualty records.³⁷⁸

In general terms, a ship is regarded as substandard if the hull, machinery, equipment, or operational safety is below or in noncompliance with the relevant specifications and standards prescribed for navigation.³⁷⁹ Commonly, the main cause for vessels to be substandard is substantial deterioration in their equipment due to poor maintenance. However, as will be considered further, these are not the only reasons for a ship to be considered substandard.

The obvious solution to eliminating substandard vessels has been the strengthening of safety standards in the domestic laws of flag states; however, the contradictory issue regarding open registry countries has always been about whether the raising of national safety measures would be a disadvantage to them, and would represent a loss in their attractiveness as flag states. The common answer to this question has been that these flag states demand only minimum safety conditions for their registered vessels because if they implemented more stringent measures, they would lessen their leading position in the registration of vessels.

Consequently, competitiveness has been considered the cause that makes it so difficult for open registries to raise national safety measures, because it usually involves additional costs for shipowners. Because shipping is very competitive, most states are reluctant to impose stricter safety legislations on their shipowners than other states impose upon theirs;³⁸⁰ they are afraid that shipowners will transfer their vessels to other countries.

³⁷⁸ Wittig, Edith. "Tanker Fleets and Flags of Convenience: Advantages, Problems, and Dangers", 14 *Tex. Int'l L. J.* 115, 137 (1979)

³⁷⁹ See generally Winbow, *supra* note 328

³⁸⁰ See Churchill, *supra* note 35, at p. 265

Although flag states undoubtedly play a crucial role in the safety of their merchant marine fleet because they have the responsibility of ensuring the adoption and enforcement of these policies, the obligation of the maintenance of vessels flying the flag of a country in proper conditions for navigation does not reside solely with the flag states. It has been recognized that, in the end, “the primary responsibility for quality shipping rests with the owner or operator of the ship.”³⁸¹ Consequently, adequate safety standards in vessels are also an obligation of shipowners, who are ultimately the ones who decide how much they are willing to invest in the management and maintenance of their ships. Thus, along with flag states, shipowners are an important element in improving safety measures at sea and eliminating substandard vessels.

Furthermore, based on the consideration that “the safer a ship is, the less likely it is to be involved in an accident”,³⁸² substandard vessels are deemed to have a direct link with casualties at sea. Open registries have largely been blamed because ships registered in these countries have been involved in several maritime incidents. However, it should be noted that since countries with open registries have bigger merchant marine fleets, where the majority of larger ships are registered, it is obvious to expect that vessels flying the flags of these countries would have a higher probability of being part of an accident at sea³⁸³ than vessels registered in countries with smaller fleets, and that it is not simply because their vessels are substandard. It must be noted here that the top five countries with the biggest number of ships lost in 2001 were Panama with 15, Cyprus with 8, St. Vincent and the Grenadines with 8, Cambodia with 7, and Malta with 5; all of them open registries. However, other open registries such as Liberia and Bahamas had a very low rate of ships lost in casualties at sea.³⁸⁴

In addition, since the *Torrey Canyon* incident, open registries have been blamed for marine pollution from ships, especially because several severe oil spills which have

³⁸¹ See generally Winbow, *supra* note 328

³⁸² See generally IMO homepage at http://www.imo.org/Safety/mainframe.asp?topic_id=155 (last visit September 18, 2003)

³⁸³ See García-Correa, *supra* note 30, at p. 32

³⁸⁴ The positions in the casualty statistics for 2001 are available at the International Workers Federation (hereinafter ITF) Flag of Convenience Campaign Annual Report 2001-2002 at the ITF homepage at http://www.itf.org.uk/seafarers/foc/report_2001/pages/s15-07.html (last visit September 18, 2003)

occurred involve vessels registered in open registries. Amongst some of these incidents which were highly publicized, thus raising a public concern worldwide, were the *Argo Merchant*³⁸⁵, the *Amoco Cadiz*³⁸⁶, the *Scandinavian Star*³⁸⁷, the *Sea Empress*,³⁸⁸ the *Erika*,³⁸⁹ and more recently, the *Prestige*.³⁹⁰

Also, the occurrence of other serious casualties at sea that also ended in terrible oil spills threatening the marine environment and accounting for loss of lives were caused by vessels not registered under open registry countries, such as the *Atlantic Empress*,³⁹¹

³⁸⁵ The *Argo Merchant* was a Liberian ship which broke apart and ran aground off Massachusetts, US, in 1976. It was a small tanker, carrying 27,000 tons of oil, but caused a huge public concern as the oil slick threatened New England resorts and the Georges Bank fishing ground. See generally IMO homepage at http://www.imo.org/Environment/mainframe.asp?topic_id=231#3 (last visit September 21, 2003)

³⁸⁶ The *Amoco Cadiz* was a Liberian ship which ran aground off Brittany, France, in 1987, causing a severe oil spill. The tanker, filled with 223,000 tons of crude oil, lost its entire cargo, covering more than 130 beaches in oil. See generally IMO homepage at http://www.imo.org/Environment/mainframe.asp?topic_id=231#5 (last visit September 21, 2003)

³⁸⁷ The *Scandinavian Star* was a Bahamian ferry cruising between Norway and Denmark. In 1990, the ship had two fires which claimed the lives of 158 people on-board. This tragedy illustrates how important it is to detect a fire quickly, to start fighting it immediately and implement properly organised evacuation procedures supervised by properly trained people. According to the official report, the knowledge of the ship by the crew, its emergency equipment, and the emergency plan were not adequate. For more information about this incident, see generally the Socialstyrelsen homepage at <http://www.sos.se/SOS/PUBL/REFERENG/9303003E.htm> (last visit September 21, 2003)

³⁸⁸ The *Sea Empress* was a Liberian tanker which in 1996 ran aground on the south-west coast of Wales and released 72,000 tons of crude oil and 480 tons of fuel oil into the sea. See generally Fairplay, "Milford Haven: safer haven", March 14, 2002, at p. 31.

³⁸⁹ The *Erika* was a Maltese tanker which in 1999 broke in two in heavy seas off the coast of Brittany, France, while carrying approximately 30,000 tons of heavy fuel oil. Although the crew was saved, some 14,000 tons of oil were spilled and more than 100 miles of Atlantic coastline were polluted. As a result of the *Erika* disaster, proposals were submitted to the MEPC to accelerate the phase-out of single-hull tankers contained in the 1992 MARPOL amendments. The investigations into the *Erika* incident carried out by the French government and the Maltese maritime authority concluded that age, corrosion, insufficient maintenance and inadequate surveys were all strong contributing factors to the structural failure of the ship. There was a wide consensus that the *Erika* and other the recent accidents involving oil tankers pointed to a need for additional international measures to eradicate substandard vessels, particularly substandard oil tankers, given the catastrophic impact such ships may have on the marine environment in the case of an accident. See generally IMO homepage at http://www.imo.org/Safety/mainframe.asp?topic_id=155#erika (last visit September 18, 2003)

³⁹⁰ The *Prestige* was a 26 years old Bahamian tanker which in 2002 cracked up and broke in two during a heavy storm off Cape Finisterre on the Spanish and Portuguese coast where 20,000 tons of heavy fuel oil was spilled into the seas, washing up on the Galician coast. The *Prestige* incident of November 2002 led to further calls for amendments to the phase-out schedule for single hull tankers. See generally IMO homepage at http://www.imo.org/Safety/mainframe.asp?topic_id=155#prestige (last visit September 18, 2003) For more information about this incident, see also Sea Companion homepage at <http://www.seacompanion.com/index2.htm> (last visit August 26, 2003)

³⁹¹ The *Atlantic Empress* was a Greek tanker which collided with the tanker *Aegean Captain* in 1979 around the coast of Trinidad and Tobago. As a result of this collision, more than 200,000 tons of crude oil were spilled into the Caribbean Sea. For more information about this accident, see generally Centre De Documentation De Recherché Et D'experimentations Sur Les Pollutions Accidentelles Des Eux (CEDRE) homepage at http://www.le-cedre.fr/fr/accident/atl_emp.html (last visit September 21, 2003)

Express Samina,³⁹² and the *Exxon Valdez*.³⁹³

After these accidents, it was proven that substandard vessels could be found in any flag state, and that it is not an inherent and exclusive characteristic of ships registered under open registries.³⁹⁴ Undoubtedly, open registry vessels have been responsible for marine pollution from ships to a higher extent than closed registry ships, taking into account their higher casualty rates, but the notion that they are the only source of this pollution became debatable due the fact that ships registered under closed registries have also been involved in accidents resulting in severe damage to the marine environment,³⁹⁵ and that the main cause of marine pollution caused by ships are their routine operations, which are difficult to measure. It seems clear that open registries are not the only cause; consequently, their elimination is not the solution to the problem of marine pollution.

The relationship between lax terms in safety standards and the casualty records of vessels registered under open registry states was a reality confronted by these countries, thereby earning them their poor reputations.³⁹⁶ However, the advancement of technology in the maritime field and the new demands on the shipping industry itself are dictating new trends in safety and in the reduction and control of marine pollution from ships, obliging flag states in general, especially open registries, to keep pace in improving their national policies and bringing them in accordance with international standards, but not simply to alleviate their worldwide negative image. Consequently, all the measures taken to improve the quality of flag states have led to a considerable reduction in their casualty rates, compared to the performance they had years before.

³⁹² The *Express Samina* was a Greek ferry carrying 550 persons, both passengers and crew, which sank in the Aegean Sea in 2000, accounting for the loss of least 82 people. The official report blamed the stormy seas and possible human error. See generally Lloyd's List, "Klironomos faces charges on "Express Samina" tragedy", March 13, 2002, p. 1.

³⁹³ The *Exxon Valdez* was an American tanker which in 1989 ran aground in the northeastern portion of Prince William Sound in Alaska, US, spilling about one-fifth of its cargo of crude oil. This incident was the largest oil spill to date in US waters and probably the one which gained the biggest media coverage. After this incident, the US introduced its Oil Pollution Act of 1990 (OPA 90), making it mandatory for all tankers calling at US ports to have double hulls. The US also came to IMO, calling for double hulls this time to be made a mandatory requirement of the MARPOL Convention. The implications of the *Exxon Valdez* spill helped to initiate discussion in the MEPC on how the US proposals could be implemented. See generally IMO homepage at http://www.imo.org/Environment/mainframe.asp?topic_id=231#6 (last visit September 21, 2003)

³⁹⁴ See Matlin, *supra* note 94, at p. 1052

³⁹⁵ *Ibid.*

³⁹⁶ *Ibid.*, at p. 1053

Even though environmental and safety regulations are often expensive and usually have repercussions on competitiveness³⁹⁷ between shipowners, IMO continues to work on the formation of a new attitude, where demands for safety have become *de facto* mandatory for shipping activities, rather than optional to improve the image of a specific country as a flag state.

III. Labour Concerns

A. Importance of International Shipping Labour Standards

The growth of the shipping industry has not resided solely in the development of technology in the maritime field that has obligated the industry to adopt measures for the improvement of shipping safety operations at sea and protecting the marine environment. On the contrary, the shipping industry has been developing thanks to the participation of human actors on board ships such as masters, officers, and crews which are responsible for their daily shipping activities.

Because seafarers are key factors in the development of the shipping industry, a promotion of international shipping labour standards has taken place through the work of ILO. This organization has addressed several aspects of seafaring, taking into account mostly the establishment of minimum labour conditions and standards for seamen through the drafting and adoption of international conventions and recommendations.³⁹⁸ However, the role of ILO as a legislative body for labour regulations in the shipping industry has not been fully successful because its documents have not been widely adopted by shipping nations.

The majority of the international documents of ILO are concerned with the improvement of seafarer's rights regarding basic issues such as wages, hours of work, social welfare, and safe working conditions, complemented by some other more technical

³⁹⁷ See Molenaar, *supra* note 44, at p. 32

³⁹⁸ See generally ILO homepage at <http://www.ilo.org/public/english/about/index.htm> (last visit September 15, 2003)

issues such as the prevention of accidents on board ships, the prevention of crimes against seamen, the establishment of sufficient manning, adequate training, and the issuance of professional certificates.³⁹⁹

“The best standard-setting achievement in the field of maritime affairs”⁴⁰⁰ adopted by ILO has been the Convention Concerning Minimum Standards in Merchant Shipping No. 147,⁴⁰¹ because it states minimum acceptable standards with respect to safety, social security, shipboard conditions of employment, and living arrangements. The umbrella convention has “substantially strengthened the international will to eliminate the operation of substandard ships.”⁴⁰² However, this document, currently in force, has not been ratified by a representative group of shipping nations.⁴⁰³ In addition, a Protocol to the umbrella convention was adopted in 1996 with the objective of raising the minimum standards provided by the original document; it is not yet in force.⁴⁰⁴

The decisive factor that has deterred the achievement of international harmonization in respect to labour rights and conditions for seafarers has been the shipping industry itself. Most of the labour matters regarding shipping are left to the regulation of each flag state, thus varying widely from country to country. Shipping, as a very expensive and competitive business, has obliged shipowners to seek out flag states that offer flexible policies regarding labour matters in order to save operational costs, where manning is commonly considered its largest expense.⁴⁰⁵

³⁹⁹ Li, K.X. and Jim Mi Ng. “International Maritime Conventions: Seafarers’ Safety and Human Rights”, 33 J. Mar. L. & Com. 381, 400 (2002)

⁴⁰⁰ Ibid, at p. 400

⁴⁰¹ The ILO Convention Concerning Minimum Standards in Merchant Shipping No. 147, hereinafter ILO’s umbrella convention, was adopted in Geneva in 1976 and entered into force November 28, 1981.

⁴⁰² See Li and Ng, supra note 399, at p. 400

⁴⁰³ Ibid, at p. 399. Open registry countries which have adopted the ILO’s umbrella convention are the Bahamas, Barbados, Cyprus, Liberia, and Luxembourg.

⁴⁰⁴ Ibid, at p. 400

⁴⁰⁵ See Coles, supra note 66, at p. 46

Because seafarers are also found to be responsible for navigational and other errors resulting in casualties at sea,⁴⁰⁶ ships with incompetent crews, even if under the best safety conditions for shipping, are deemed to be potential maritime disasters.⁴⁰⁷

Substandard vessels have been described as being in noncompliance not only with technical safety policies but with labour regulations as well. Consequently, the adequate training, competency, and proficiency of crews have been considered crucial factors for the safe operation of vessels, and policies regarding the manning of vessels and the competency of seafarers have become more relevant in international discussions, which are focused more and more on the human element on board vessels.

Because operating a ship is not simply about having knowledge of the equipment and systems, but also about having skills in the proper execution and performance of that knowledge,⁴⁰⁸ skilled seafarers are key elements for quality shipping, in order to ensure safety at sea and protect the marine environment.

Nonetheless, IMO has successfully supported the gap that the non-adoption of ILO conventions has produced with respect to technical matters regarding international standards for sufficient manning, adequate training, and the issuance of professional certificates for seafarers, by addressing these issues in some of its conventions.

1) STCW 78/95 Convention

The STCW Convention, originally adopted under the auspices of IMO in 1978, was the first international convention to address the issue of minimum standards of competence of seafarers,⁴⁰⁹ achieved mainly through the training and certification of seamen. However, the original STCW Convention was completely revised and updated in 1995 to clarify the standards of competence required and to provide effective

⁴⁰⁶ See Matlin, *supra* note 94, at p. 1050, n. 214 where he cites B. Metaxas, *Flags of Convenience* 5, 8 (1985)

⁴⁰⁷ See generally Hadjieleftheriadis, *supra* note 333

⁴⁰⁸ See generally Seng Kong, *supra* note 351

⁴⁰⁹ See generally IMO homepage at http://www.imo.org/Conventions/contents.asp?topic_id=651&topic_id=257#1 (last visit September 15, 2003)

mechanisms for the enforcement of its provisions.⁴¹⁰ The main difference between the original STCW Convention and its later version is that the first document focused mainly on the knowledge of seamen rather than on their competence.⁴¹¹ The 1995 amendments to the convention were enforced on February 1, 1997, but in order to allow flag states the chance to take appropriate measures in enforcing the new provisions of the convention, it was really only applicable beginning February 1, 2002.⁴¹²

Parties to the convention are required to give to IMO all the specific details of the measures that they will implement in the enforcement of the provisions of the STCW 78/95 Convention, ensuring that they use the necessary administrative, training, and certification resources for its proper enforcement.⁴¹³ Thus, the STCW 78/95 Convention “seeks to establish a baseline standard for the training and education of seafarers throughout the world.”⁴¹⁴

B. Case of Open Registries

The practice of flagging out vessels from TMCs to open registries helped the decrease of their merchant marine fleets, radically changing the scenery of the labour market of seafarers in these countries. As a result, “open registry shipping thus involves the transfer not only of ships, but also of the jobs in developed countries to developing countries.”⁴¹⁵

Even though the practice of recruiting a fixed number of foreign seafarers, especially as crew, was performed by shipowners of vessels registered in countries under the

⁴¹⁰ Winbow, A. “The Work of IMO on the Human Element”, paper presented at the Copenhagen Quality Shipping Conference, (2003), online: IMO homepage at http://www.imo.org/includes/blastDataOnly.asp/data_id%3D7016/awinbow2.doc (last visit October 1, 2003)

⁴¹¹ See generally IMO homepage at http://www.imo.org/newsroom/index.asp?topic_id=70 (last visit September 15, 2003)

⁴¹² See generally IMO homepage at http://www.imo.org/HumanElement/index.asp?topic_id=288 (last visit September 15, 2003)

⁴¹³ See Coles, *supra* note 66, at p. 33

⁴¹⁴ See generally IMO homepage at http://www.imo.org/Newsroom/index.asp?topic_id=70 (last visit September 15, 2003)

⁴¹⁵ Northrup, Herbert and Peter Scrase. “The International Transport Workers’ Federation Flags of Convenience Shipping Campaign: 1983-1995”, 23 *Transp. L. J.* 369, 374 (1996)

nationalist system,⁴¹⁶ the actual practice of hiring multinational crews was imposed by the phenomenon of open registries, due to the absence of nationality restrictions for the recruitment of crews in the domestic laws of these states.

Shipowners from TMCs seeking cost reductions in labour aspects have commonly shifted their operations from the national system to open registries, to take advantage of the recruitment of multinational crews, especially from developing countries, at lower rates of pay⁴¹⁷ than in TMCs.

The opposition movement against open registries began with the first transfer of US vessels to the Panamanian and Honduran registries back in the 1930s; a well-organized and strong movement against such transfers was developed after World War II, when the practice of flagging out ships to open registries became the leading rule in the shipping industry.⁴¹⁸

The opposition against open registries due to labour issues could be summarized in the aspects of low wages for seafarers, poor working conditions, and incompetent and untrained crews. In this sense, seafarers serving on board vessels registered under the open registry system are deemed to be “unpaid, undervalued and unprotected.”⁴¹⁹

Furthermore, the problem of professionalism, proficiency, and competency of seamen serving on board ships registered in open registries has always been a strong criticism against them, because these seafarers have been considered to be substandard due to less preparation and competitiveness than seamen serving on board ships of other registries.

⁴¹⁶ The policies of flag states that follow the nationalist system vary, but they are obliged to recruit, in their majority, national seafarers for the operation of their registered ships, mainly in the posts of master and officers. However, some countries within this system have the flexibility to hire, at least in a minimal percentage, a fixed number of foreign seafarers as crew, which also varies from country to country.

⁴¹⁷ See García-Correa, *supra* note 30, at p. 78

⁴¹⁸ See Coles, *supra* note 66, at p. 23

⁴¹⁹ See generally the ITF homepage at <http://www.itf.org.uk> (last visit September 18, 2003)

C. The International Transport Workers' Federation Campaign against Open Registries

The International Transport Workers' Federation⁴²⁰ initiated the first public campaign against flags of convenience⁴²¹ in 1948. The expression "flags of convenience" is used by the ITF to label its campaign against any vessel flying the flag of an open registry. The campaign was implemented through the adoption of a resolution approving a boycott action against all ships transferred to the Panamanian registry.⁴²² Even though Panamanian ships were the original targets of the campaign, it was widened in 1958, obtaining a worldwide application against all ships registered in open registry countries.⁴²³

These boycotts were mainly performed with the cooperation of seafarers, tugboat, longshore, and other dock workers as part of those unions affiliated to the ITF in ports visited by flags of convenience vessels by refusing to load and discharge these vessels.⁴²⁴

The ITF FOC campaign comprised the main concerns regarding labour aspects for crews serving on board ships registered in open registries; however, it could be summarized in its principal objectives, which are the elimination of the flags of convenience system and the establishment of a regulatory framework for the shipping industry, the attack on substandard shipping and the obtaining of ITF acceptable standards on all ships irrespective of flag, the assurance that all maritime workers are protected from exploitation by their employers and their conditions of employment

⁴²⁰ The ITF was founded in 1896 in London by European seafarer's and dockers' union leaders who realized the need to organize internationally against strike breakers. Today, the ITF organizes workers in ships, ports, railways, road freight and passenger transports, inland waterways, fisheries, tourism and civil aviation. The ITF's role is to support its member trade unions and find ways of defending the interests of transport workers in the global economy. The ITF represents transport workers at a world level and promotes their interests through global campaigning and solidarity, and its primary aim is the defence of fundamental human and trade union rights. However, its oldest and most famous campaign is against Flags of Convenience shipping. For more information about the origin, mission and campaigns of the ITF, see generally the ITF homepage at http://www.itf.org.uk/general/section_brochures/english/what_is_the_ITF.htm (last visit September 18, 2003)

⁴²¹ For more information about the ITF FOC campaign see generally the ITF homepage at <http://www.itf.org.uk/seafarers/foc/foc.htm> (last visit August 26, 2003) and its 2001-2002 Annual Report at http://www.itf.org.uk/seafarers/foc/report_2001/index.html (last visit September 18, 2003)

⁴²² The ITF FOC campaign was originally targeted only against vessels transferred from TMCs to the Panamanian register because, by that time, Panama was the most important open registry fleet within the top ten world merchant marine fleets.

⁴²³ See Coles, *supra* note 66, at p. 24

⁴²⁴ See Coles, *supra* note 66, at p. 24 and see also Northrup, *supra* note 415, at p. 377.

enhanced, and the strengthening of affiliated unions in order to ensure a greater degree of solidarity in the campaign.⁴²⁵

The ITF FOC campaign, which began 55 years ago, has been considered to be partially unsuccessful because the principal aim of the campaign, which is the total elimination of the open registry phenomenon, has not been accomplished at all. On the contrary, the campaign has been “kept and reinforced through the years while new open registries have been created and developed unhindered.”⁴²⁶

However, the ITF FOC campaign had a certain amount of success as a measure of pressure, while its main achievement has been the signature by some shipowners with vessels registered in open registries of ITF Collective Agreements,⁴²⁷ where the ITF imposes unilaterally the terms and conditions of employment of seafarers according to higher rates of pay based on European average standards.⁴²⁸ After the signature of these agreements, the ITF issues the so-called Blue Certificates which are required by ITF inspectors worldwide when investigating ships that they consider suspicious because of the application of low labour standards. If vessels do not have a Blue Certificate, ITF inspectors will report them, consequently becoming the target of any number of ITF measures against them, such as boycotts.⁴²⁹ Blue Certificates have been the decisive criterion in whether or not to boycott a particular ship.⁴³⁰

The chief motivation of the ITF FOC campaign was the avoidance and prevention of loss of work opportunities for seafarers in TMCs,⁴³¹ through the growing practice of flagging out to open registries. However, the loss of maritime employment opportunities for seamen in TMCs has not been solely the result of the growing practice of the flagging

⁴²⁵ See generally the ITF homepage for generalities, detailed objectives and yearly reports of the ITF FOC campaign at <http://www.itf.org.uk/seafarers/foc/foc.htm> (last visit August 26, 2003)

⁴²⁶ See García-Correa, *supra* note 30, at p. 79

⁴²⁷ Panama, Liberia, the Bahamas, Malta and Cyprus respectively are the flag states with more vessels covered with ITF Collective Agreements, according to the ITF FOC Campaign Annual Report 2001-2002 at http://www.itf.org.uk/seafarers/foc/report_2001/pages/s15-05.html (last visit September 18, 2003)

⁴²⁸ See Northrup, *supra* note 415, at p. 378

⁴²⁹ See Coles, *supra* note 66, at p. 24

⁴³⁰ See García-Correa, *supra* note 30, at p. 88

⁴³¹ See Coles, *supra* note 66, at p. 24

out of vessels from those countries to open registry countries, but also a result of technological advances and changes in the shipping industry, where modern ships require fewer crew members for their efficient operation.⁴³²

Undoubtedly, the ITF campaign against the open registry system affects all countries that have adopted this liberal approach, because they are classified by the ITF as flags of convenience registries, through a yearly list that the ITF makes public.⁴³³ Indeed, this targeting of the ITF through its long campaign against open registries “has been seen and endured by shipowners as an unavoidable disadvantage”⁴³⁴ of the system.

It is also important to consider that the total eradication of open registries will cause a worse impact on labour-supplying countries, because, since they are the biggest labour market for seafarers, their elimination will represent the unemployment of all these seamen.⁴³⁵

The ironic consideration about the ITF FOC campaign is that on one hand, ITF’s main objective is the total abolition of open registries, but that, on the other hand, ITF obtains economic support for its campaign from shipowners whose vessels are operated under open registries and have signed ITF Collective Agreements.⁴³⁶

IV. Economic Concerns

Open registries have also been blamed for the creation of economic distortions in TMCs economies due to their liberal fiscal regimes, where low or non-fiscal obligations

⁴³² See Matlin, *supra* note 94, at p. 1051

⁴³³ As of July 1, 2003, the ship registries labeled as flags of convenience registers according to the ITF FOC Campaign are Antigua and Barbuda, the Bahamas, Barbados, Belize, Bermuda, Bolivia, Burma/Myanmar, Cambodia, Cayman Islands, Comoros, Cyprus, Equatorial Guinea, Germany (GIS), Gibraltar, Honduras, Jamaica, Lebanon, Liberia, Malta, Marshall Islands, Mauritius, Netherlands Antilles, Panama, Sao Tome and Principe, Sri Lanka, St. Vincent and the Grenadines, Tonga and Vanuatu. This list could be found in the ITF FOC Campaign Annual Report 2001-2002 at http://www.itf.org.uk/seafarers/foc/report_2001/pages/s17-01.html (last visit September 18, 2003)

⁴³⁴ See García-Correa, *supra* note 30, at p. 92

⁴³⁵ *Ibid.*

⁴³⁶ *Ibid.*, at p. 79

for shipping companies with vessels registered in their systems is the common approach.⁴³⁷

In order to minimize the economic impact of the very attractive fiscal regimes granted by open registries to shipowners with vessels registered under their flags, TMCs have been offering different types of economic incentives to their shipping sector.⁴³⁸ Basically, these governmental economic incentives are translated into tax concessions, such as tax rebates or deferrals, investment grants, accelerated writing-off of assets on account of depreciation, regimes of tonnage taxation, and government subsidies.⁴³⁹

The final purpose of the granting of all of these incentives is to prevent the continued decline of national merchant marine fleets in TMCs⁴⁴⁰ through the attraction of shipowners, with these liberal economic policies, in order to encourage the re-flagging of ships beneficially owned by their nationals, but registered under open registry schemes.

The economic impact of open registries is another issue addressed by UNCTAD which expresses, in respect to TMCs, that “there is no doubt that the existence of open registries is the major cause of the distortions that governments have been forced to make to their fiscal regime.”⁴⁴¹

Greece is the best example of a place where these governmental economic incentive policies have been granted with successful results, considering that this country currently ranks third in the list of biggest merchant marine fleets in the world. This country has had a virtually tax-free environment for shipping companies since the 1950s, removing the shipping sector from the Greek fiscal regime.⁴⁴²

⁴³⁷ See Nothrup, *supra* note 415, at pp. 422 and 423

⁴³⁸ See Coles, *supra* note 66, at p. 25

⁴³⁹ *Ibid.*, at p. 45

⁴⁴⁰ *Ibid.*

⁴⁴¹ *Ibid.*, at p. 25

⁴⁴² *Ibid.*

Most recently, the UK has also granted governmental economic incentives to shipping companies through the establishment of a tax tonnage regime, which gives them “the option of paying tax calculated by reference to the tonnage of vessels rather than by reference to actual business results.”⁴⁴³

The granting of similar governmental economic incentives to the shipping industry has also been granted in several other TMCs.⁴⁴⁴ Nevertheless, a regional incentive has been introduced by the EU with the objective of halting the competition of open registries and promoting the re-flagging of vessels to EU member states. This proposal deals basically with the establishment of guidelines on state aid to the maritime transportation sector with respect to different matters, but specifically addresses fiscal matters as being the critical factors affecting the competitiveness of flags.⁴⁴⁵

Finally, the UNCTAD report concludes that “the effects of fiscal regimes in influencing shipowners to operate under open registry flags appear to be relatively minor”;⁴⁴⁶ however, even though the effect of all of these incentives has been positive for certain countries like Greece, the economic advantages of open registries have proved to be more interesting and beneficial for the shipowners of TMCs.

V. Lack of Genuine Link

The previously explained concept of the genuine link between a ship and its flag state has been “one of the main tactics used by opponents of the open registries.”⁴⁴⁷ It was introduced in order to be imposed as a legal requirement for the granting of nationality to

⁴⁴³ Ibid. Greece introduced its flexible taxation policies through Law 2687/53 for the Protection of Foreign Capital and ministerial decisions issued pursuant to that law.

⁴⁴⁴ Ibid. at p. 46 and also from pp. 268 to 270. The tonnage tax regime in the UK was introduced by the Finance Act 2000

⁴⁴⁵ Ibid, at pp. 45 and 46. He gives a good explanation of some measures taken in other countries in respect to benefits and incentives, especially taxation and financial measures, to promote national shipping industries.

⁴⁴⁶ Ibid, at pp. 30 and 31. He gives a complete explanation of the EU State aid to shipping proposal through some guidelines developed by the EU Commission originally drafted in 1989. However, this proposal was not successfully applied because of the difficulties presented in its practical application; consequently, new guidelines were recently introduced in 1997.

⁴⁴⁷ Ibid, at p. 45

ships with the main objective of controlling and gradually eliminating the open registry system.

Open registry countries are deemed to lack a direct and authentic relationship with the vessels flying their flags, basically because they are owned by foreign nationals, and foreign seafarers are employed on board them. In the end, this lack of a real connection with their vessels is translated into a lack of power to control them. Another important concern regarding the absence of a genuine link in open registries is with respect to the identification and accountability of shipowners, which are deemed to be impossible to assert, especially when a “foreign shipowning company places the operation of its ships in the hands of another company.”⁴⁴⁸

By consequence, UNCTAD decided that knowledge of open registry countries with respect to the ownership of their merchant marine fleets “does not extend far beyond the owners appearing on the registers, who are in many instances merely nominal owners.”⁴⁴⁹

The genuine link requirement has been codified in the Geneva Convention and UNCLOS, treaties that, although currently in force, could not impose a practical application of the concept because the concept was never truly defined. It was also introduced in the Convention for Registration of Ships, under the auspices of UNCTAD, which in a more specified way established that the effective jurisdiction and control of the flag state over their vessels was “only possible if there is an economic link”⁴⁵⁰ between them. However, it was not only unsuccessful because it left the concepts of genuine link and beneficial ownership “nebulous and controversial”,⁴⁵¹ but also because it is not yet in force, and it appears, perhaps, that it will never be in force. Consequently, it failed to achieve its stated objective.⁴⁵²

⁴⁴⁸ See McConnell, *supra* note 82, at p. 435

⁴⁴⁹ See Kasoulides, *supra* note 80, at p. 563

⁴⁵⁰ See Sinan, *supra* note 310, at p. 102

⁴⁵¹ McConnell, Moira. “...Darkening Confusion Mounted Upon Darkening Confusion”: The Search for the Elusive Genuine Link”, 16 J. Mar. L & Com. 365, 389 (1985) (hereinafter McConnell, Darkening Confusion)

⁴⁵² See Kasoulides, *supra* note 80, at p. 567

“The genuine link policy is difficult to apply and to enforce amongst sovereign states, ..., because there is no system of effective sanctions.”⁴⁵³ The genuine link issue has been considered an infringement upon the discretion of flag states to grant its nationality to their vessels recognized in international law as the sovereign right of each country. As a result, the unsuccessful application of the genuine link requirement for the registration of vessels seems to have legitimized the practice of registering vessels under open registries.⁴⁵⁴

Finally, the relationship between the genuine link and the nationality of ships and the nationality of individuals was rejected when it was addressed indirectly by the ICJ in 1960 through an advisory opinion with respect to the composition of the, at that time, IMCO’s MSC.⁴⁵⁵ This opinion was a consequence of the exclusion of Liberia and Panama for participation in Category A of the IMCO’s Council under the consideration that they were not real maritime countries because of the lack of a genuine link between them and their merchant marine fleets.⁴⁵⁶ According to IMO’s rules, it must be noted, Liberia and Panama had every right to be part of this category in the Council since they were, respectively, the countries with the third and eighth largest merchant marine fleets in the world at that time.⁴⁵⁷

Consequently, the fact that “the real proof of a ship’s nationality lies in its registration in the flag state”,⁴⁵⁸ evidenced by the documentation that this country issues to the vessels, has been the prime consideration in asserting the nationality of a ship rather than the application of the genuine link requirement.

⁴⁵³ See McConnell, *supra* note 82, at p. 449

⁴⁵⁴ See Hill, *supra* note 125, at p. 21

⁴⁵⁵ See McConnell, *supra* note 82, at p. 449

⁴⁵⁶ See Tetley, *Int. C. of L.*, *supra* note 27, at p. 215

⁴⁵⁷ See Carlisle, *supra* note 124, at pp. 155 and 156 and see also Li, *supra* note 204, at p. 138, n. 12. Currently, the IMO Convention establishes that the member states of the IMO Council, Category A, are the ten states with the largest interest in providing international shipping services. See generally IMO homepage at http://www.imo.org/About/mainframe.asp?topic_id=312#3 (last visit September 18, 2003) The council members, category A, for the period 2002-2003 are China, Greece, Italy, Japan, Norway, Panama, Republic of Korea, Russian Federation, the UK, and the US, this information was obtained at the IMO homepage at http://www.imo.org/About/mainframe.asp?topic_id=312#3 (last visit September 18, 2003)

⁴⁵⁸ See Boczek, *supra* note 128, at p. 102

CHAPTER 4 – THE ROLE OF OPEN REGISTRIES IN THE SHIPPING INDUSTRY

After reviewing the various concerns regarding open registries, the negative image that they have had must be reevaluated and reconsidered, to ascertain whether it is still justified in today's maritime scenario, in light of the improvements that several states with open registries have achieved in recent times.

This chapter deals with the common responses adopted by some countries, especially TMCs, in trying to alleviate the strong economic impact that open registries have had on their national shipping industries. Some international alternatives adopted to improve quality shipping through the strengthening role of flag and port states are also considered.

Finally, a summary regarding the most important developments of open registries in improving and raising their national safety, environmental, and labour shipping standards according to accepted international standards is explained, giving examples on an individual basis. In addition, the future of the open system for the registration of vessels must be considered, to help us reach conclusions on what new position these countries should have to adopt, in order to improve their deteriorated image as flag states, considering the new demands of the maritime industry in which quality shipping must be the primary objective.

I. Common Responses to Reducing the Impact of Open Registries

Developed countries, and to a lesser extent developing countries, have thought of the growth of open registries as a negative factor which deters the development of their national shipping industries. In order to decrease the impact of the open registry scheme, some states have introduced special policies, in order to retain the national tonnage registered under their national registries.

A. Bareboat Charter Registration

Several countries which follow the nationalist system allow shipowners to bareboat out vessels under their flag⁴⁵⁹ to a second country for a fixed period of time. As previously explained, this practice is possible when vessels are under a bareboat charterparty. This dual registration is usually done in a country with a more flexible scheme for the registration of vessels than the national system, such as open registries or countries with a “low-wage economy”,⁴⁶⁰ in order to take advantage of the scheme, particularly the economic benefits with respect to crew wages and taxation policies.

The dual registration, whether flagging in or flagging out vessels under a bareboat charterparty to a second country, has been considered one of the most relevant, but controversial, developments in the ship registration field.⁴⁶¹ It has been adopted by the legislation of several countries under the nationalist system, by both developed and developing countries.⁴⁶² Some TMCs which have introduced the practice of flagging out vessels are Australia, France, Germany, Italy, and Spain.⁴⁶³ On the other hand, other TMCs, such as the UK and Canada, allow the parallel registration, but only the practice of flagging in vessels to their registries.⁴⁶⁴

Even though vessels under a bareboat charterparty will be transferred temporarily to a foreign register by the parallel registration in order for their charterers to obtain specific economic benefits and saving costs for a specific period of time, the general consideration of TMCs is that this practice is preferable for the definite transfer of vessels to foreign registers because they still retain control over the beneficial ownership of the vessel after the dual registration has ended.

⁴⁵⁹ See Coles, *supra* note 66, at p. 26

⁴⁶⁰ *Ibid.*, p. 36

⁴⁶¹ *Ibid.*, p. 35

⁴⁶² *Ibid.* Countries whose legislation permits bareboat registration, either by flagging in or flagging out, are Antigua and Barbuda, Australia, the Bahamas, Cyprus, France, Germany, Italy, Liberia, Mexico, Panama, Philippines, Poland, St. Vincent and the Grenadines, the former Soviet Union, Spain, Sri Lanka, and Vanuatu.

⁴⁶³ *Ibid.*, from pp. 37 to 39

⁴⁶⁴ The registration of foreign vessels under a bareboat charterparty in the UK is permitted by the UK 1995, c. 21, sect 17. In Canada this practice is permitted by the S. C. 2001, c. 26, sect. 48

B. Government Incentives

A common solution to alleviate the impact of open registries in TMCs has been the granting of “shipping friendly policies”⁴⁶⁵ through increasing government incentives. These governmental measures have been used by almost all developed countries⁴⁶⁶ in order to offer attractive incentives for retaining vessels under their national flags and for preventing the practice of flagging out, especially to open registries.

The most important of these benefits has been the creation of a favorable tax treatment for the shipping sector, such as tax and depreciation benefits.⁴⁶⁷ In addition, some other financial incentives have been granted by the government, such as subsidies for the operation and construction of vessels, governmental aid for export, restructuring, research and development, and marine insurance aids.⁴⁶⁸

Although the main purpose of granting these government incentives was to encourage the growth of the shipping business in TMCs, shipping is declining.⁴⁶⁹ These incentives alone, therefore, were deemed to be only part of the solution, and some other measures were considered, such as radical changes to labour and tax policies, and “the elimination of unnecessary regulations.”⁴⁷⁰

C. Emergence of New Ship Registers

The most common and successful response adopted to ameliorate the impact of open registries has been the creation of new schemes for the registration of vessels, with the main purpose of preventing the flagging of national vessels to open registries “by

⁴⁶⁵ See Harrington, *supra* note 144, at p. 246

⁴⁶⁶ *Ibid.*, at p. 247

⁴⁶⁷ *Ibid.*, at p. 262

⁴⁶⁸ *Ibid.*, at p. 247

⁴⁶⁹ *Ibid.*

⁴⁷⁰ *Ibid.*, at p. 248

reducing costs to levels that are reasonably competitive”⁴⁷¹ to those offered in the open system.

This practice has been accomplished at a national level and has been followed by TMCs through the creation of balanced schemes for the registration of vessels, such as the second or international registers as well as the offshore national registers that were previously explained. Through these new ship registers, these countries are giving advantages to shipowners usually obtained by open registries, especially those economic in nature, but at the same time are “retaining a link between beneficial ownership or management and the national flag.”⁴⁷²

Although the development of these balanced schemes has been successful, and several countries with the nationalist approach have followed this trend, opposition has arisen, especially by the ITF. The ITF does not support second or international registers because they are considered, with respect to labour, to be too similar to a flag of convenience system. Consequently, some of them, such as the CSR, have been labeled flags of convenience registries; the only current second or international register in the list of flags of convenience registries, however, is the GIS.⁴⁷³ Also treated as targets of the ITF FOC campaign, these registers disagree with ITF’s view that they are flags of convenience registries, because they allege that their national laws, which permit the existence of these balanced schemes, let them have control of the terms and conditions of employment, which is far superior for them than to have shipowners in their countries flag out to one of the existing flags of convenience registries.⁴⁷⁴

⁴⁷¹ See Northrup, *supra* note 415, at p. 387

⁴⁷² See Coles, *supra* note 66, at p. 26

⁴⁷³ The only second or international registry which is currently considered by the ITF to be a flag of convenience register is the GIS. See generally ITF website, ITF FOC Campaign Annual Report 2001-2002, at http://www.itf.org.uk/seafarers/foc/report_2001/pages/s17-01.html (last visit September 20, 2003)

⁴⁷⁴ See Northrup, *supra* note 415, at p. 388

A general consensus seems to be that the registration of vessels to second or international and offshore registers is preferable to the increase of the flagging out of ships of TMCs to open registries.⁴⁷⁵

Another attempt at the creation of a new ship register has been, at a regional level, attempted by the EU. The Commission of the EU, concerned about the the reduction of national merchant marine fleets in its member states not only by open registries, but also by the increasing proliferation of second registers adopted by some countries within the EU, presented in 1989 a proposal for the creation of a European Community Ship Register,⁴⁷⁶ as an additional system to the national ship registry of each member state.⁴⁷⁷

The aim of EUROS was to introduce more flexible policies regarding the manning of vessels than those required by the national schemes of EU member states, especially through the recruitment of all officers and at least half of the crew by nationals of any EU member state. It has been deemed that “the success of the EUROS proposal depends upon the offer of a package of incentives sufficient to attract shipowners away from”⁴⁷⁸ open registries and second or international and offshore registries. However, the proposal did not have the necessary support, and it was abandoned.

II. Alternatives for Quality Shipping

International cooperation of the maritime community as a whole, including public and private components, is required in order to raise the standards for shipping that, in the end, will mean “more business that helped the industry growth, rather than saving costs.”⁴⁷⁹

⁴⁷⁵ Coghlin, John. “Common Maritime Transport Policy for the EEC: The Commission Does Battle With Flags of Convenience”, 13 B. C. Int’l & Comp. L. Rev. 447, 448-449 (1990). See also Coles, *supra* note 66, at p. 29

⁴⁷⁶ *Ibid*, at pp. 456 and 457

⁴⁷⁷ *Ibid*, at p. 449

⁴⁷⁸ See Coles, *supra* note 66, at p. 30.

⁴⁷⁹ See García-Correa, *supra* note 30, at p. 56

Participation within IMO, especially by flag states, is a decisive element for quality shipping. Open registry states and other developing countries, which are mainly unsuccessful in their role as flag states, should focus on obtaining technical assistance and support through the exchange of information, in order to overcome and repair their flaws in the real practice, flaws which are mainly the result of lack or improper implementation and enforcement of international conventions and other documents, based not only on economic difficulties, but also on a lack of technology and proper administrative organization.

Although flag states are primarily responsible for ensuring that their ships comply with international regulations regarding safety, environment, and labour issues, the increasing participation of other states has proven to be a helpful remedy when certain flag states have not been successful enough in exercising proper control over their merchant marine fleets.

The unwillingness or inability of some flag states, mainly countries with open registries, and developing countries in general,⁴⁸⁰ has been considered the main reason that the proper control over ships flying their flags has been not successfully exercised. As flag states are deemed to be unable to detect and eliminate substandard shipping on their own, the development of initiatives to improve the proper control of flag states over their vessels has been developed for the purposes of enhancing quality shipping, either by the participation of other states, such as coastal and port states, or simply by themselves.

A. Port State Control

Port state control⁴⁸¹ consists of the inspection of foreign ships in national ports with the purpose of verifying whether they are manned and operated in compliance with applicable international maritime conventions, and whether their conditions and

⁴⁸⁰ See Coles, *supra* note 66, at p. 21

⁴⁸¹ Port State Control (hereinafter PSC) is a mechanism of control where the maritime administration of the participating states are willing to inspect foreign ships calling at their ports for compliance with the most important international maritime conventions.

equipment are in accordance with international shipping standards.⁴⁸² The main purpose of PSC, in short, is to determine whether the operation of a vessel is performed according to international standards.⁴⁸³

At an international level, PSC has been established in some of the most important maritime conventions, such as UNCLOS, SOLAS, MARPOL and STCW. However, the effective application of PSC has been pursued at a regional level through the coordination of port states located in specific regions through agreements called Memoranda of Understanding.⁴⁸⁴

The states that are part of MOUs are required to adopt a system of inspection and control of vessels visiting their ports with a non-discriminatory approach regarding the flag of ships inspected.⁴⁸⁵ PSC is performed by the maritime authority of each port state through a first visit on board ships, in order to check whether they possess the valid certificates required by the specific MOU. If vessels do not have the appropriate documentation, or if the condition, crew, or equipment of vessels clearly show that they do not meet international standards, a more detailed inspection is performed. After these inspections are carried out, if vessels are still deemed to be unsafe and dangerous to the health of the crew and the marine environment, they may be detained by the port state.⁴⁸⁶

The effective application of PSC depends on consultation, cooperation, and exchange of information⁴⁸⁷ among port states of the same region, where the data of detained vessels, including their flag states, is published periodically through lists.

The first regional agreement on PSC was the 1982 Paris MOU.⁴⁸⁸ Due to its successful results, especially with respect to uniformity of PSC rules on a regional basis,

⁴⁸² Hoppe, Heike. "IMO website Port State Control – An Update on IMO's Work", (2000), online: IMO homepage at http://www.imo.org/InfoResource/mainframe.asp?topic_id=406&doc_id=1079 (last visit September 20, 2003)

⁴⁸³ See Coles, *supra* note 66, at p. 21

⁴⁸⁴ See Black's Law Dictionary, *supra* note 65, at p. 916 and 998. Memoranda of Understanding (hereinafter MOUs) are written statements detailing the preliminary understanding of parties who enter into an agreement.

⁴⁸⁵ See Coles, *supra* note 66, at p. 21

⁴⁸⁶ *Ibid*, at pp. 21 and 22

⁴⁸⁷ *Ibid*, at p. 22

it has served as a model for the development of other agreements on PSC signed in other regions. Other MOUs are the 1992 Latin American MOU, the 1993 Tokyo MOU, the 1996 Caribbean MOU, the 1997 Mediterranean MOU, the 1998 Indian Ocean MOU, the 1999 Abuja MOU, and the 2000 Black Sea MOU.⁴⁸⁹

Through the existence of these different MOUs, a global application of PSC has almost been established;⁴⁹⁰ these agreements cover specific and important regions all over the world, particularly areas with ports usually visited by several merchant vessels from a the majority of states, and especially vessels of open registries, which are mainly devoted to international trade.

Even though PSC was originally conceived as an action on the part of port states to eradicate sub-standard vessels from entering into their ports, it could serve today as a successful alternative to raising shipping standards in open registry fleets, since detention by port states is a disadvantage of the open registries that in the end will result in a loss of business for shipowners.

The detention of substandard vessels by port states because of their non-compliance with MOUs represents a meaningful sanction that is making an impact on quality shipping in the public and private sector, where gradual and important changes are being observed. On one hand, these detentions will be “powerful economic disincentive”⁴⁹¹ to shipowners that will discourage them from continuing with the operation of substandard

⁴⁸⁸ The Paris MOU covers the Europe and the north Atlantic region and is composed by 20 member states which are 17 EU member states including Belgium, Croatia, Denmark, Finland, France, Germany, Greece, Ireland, Italy, the Netherlands, Norway, Poland, Portugal, Slovenia, Spain, Sweden, the UK; and also the Russia Federation; Iceland; and Canada. For more information about the Paris MOU, see generally the Paris MOU homepage at <http://www.parismou.org> (last visit September 20, 2003)

⁴⁸⁹ Other MOUs on PSC are the 1992 Acuerdo de Viña del Mar which established the Latin American MOU (Latin American region), see generally <http://www.acuerdolatino.int.ar>; the 1993 Asia-Pacific MOU (Asia-Pacific region) see generally <http://www.tokyo-mou.org>; the 1996 Caribbean MOU (Caribbean region), see generally <http://www.medmou.org/caribbean.html>; the 1997 Mediterranean MOU (Mediterranean region), see generally <http://www.medmou.org>, the 1998 Indian Ocean MOU (Indian Ocean region), see generally http://www.medmou.org/Indian_Ocean.htm, the 1999 Abuja MOU (West and Central African region), see generally http://www.medmou.org/west_africa.html; and the 2000 Black Sea MOU (Black Sea region), see generally http://www.medmou.org/black_sea.htm. Also the US has its own PSC programmer through the US Coast Guard, see generally <http://www.uscg.mil/hq/g-m/pscweb/index.htm>.

⁴⁹⁰ See Mendoza García, *supra* note 340, at p. 45

⁴⁹¹ See Coles, *supra* note 66, at p. 22

vessels. On the other hand, flag states will see these detentions as a negative influence on the development of their merchant marine fleets because shipowners will not be willing to register their ships under a country whose vessels are constantly detained by port states. Consequently, PSC will bring about the raising of international standards in shipping, especially with respect to safety measures. In this sense, “the availability of data on a flag by flag basis of vessels detained provides an equally powerful stimulus to flag states to improve their own control procedures”,⁴⁹² particularly to open registries.

PSC, as a mechanism for ensuring the compliance of ships with international standards regarding safety at sea, pollution prevention, and on-board conditions has enabled the identification of flags whose ships are more likely than others to be substandard.⁴⁹³ The clear effect that PSC will have through the targeting of substandard ships, therefore, will undoubtedly be the induction of shipowners to register their ships under flags whose ships have a low detention rate.⁴⁹⁴

Although PSC is clearly having an impact on all flag states, it will mainly be evident in open registries, because of their long tradition of substandard shipping. Substandard ships have been identified through the monthly publication of a list of ships detained by port states, where vessels registered under open registries are usually listed. Most MOUs publish annual reports containing important information on PSC and the performance of their member states; for the purposes of this research, it is important to review their Black-Gray-White lists, where flag states are classified according to yearly inspections and detentions.

For example, according to the 2002 Paris MOU Annual Report, 25 countries were listed on its Black list,⁴⁹⁵ the top five countries with the highest percentage of

⁴⁹² Ibid.

⁴⁹³ Ibid, at p. 51

⁴⁹⁴ Ibid, at p. 52

⁴⁹⁵ See generally the Paris MOU website, Annual Report 2002, available at the Paris MOU homepage at <http://www.parismou.org/anrep/anrep2002.pdf> (last visit September 21, 2003). Countries in the Black list of the Paris MOU are classified as states with very high risk, high risk, medium to high risk, and medium risk of detentions.

detentions⁴⁹⁶ being Albania with 14.35 %, Bolivia with 12.88 %, Sao Tome and Principe with 11.59 %, Tonga with 9.26 % and Lebanon with 7.84 %.⁴⁹⁷ On the Black list, there is a variety of countries, not only open registries, but also countries with the nationalist system, primarily developing states.⁴⁹⁸ Finally, while two of the leading open registries, such as Panama and Malta, are on the Black list ranked as twentieth and twenty-first respectively, being a medium risk for detention, other important open registries such as the Bahamas and Liberia are on the White list.⁴⁹⁹

In addition, in the 2002 Tokyo MOU Annual Report, 13 countries are listed on its Black list, the top five countries with the highest percentage of detentions being the Korean Democratic People's Republic with 13.51 %, Bolivia with 8.99 %, Indonesia with 7.48 %, Cambodia with 6.77 %, and Belize with 5.41 %. On the other hand, one of the leading open registries, Malta, appeared on the Gray list and some others, such as Panama, Liberia, and the Bahamas, appeared on the White list.⁵⁰⁰

Although these statistics could be relative, considering that vessels of specific flag states could be navigating more in specific areas of the world than in others and thus having a different position in the Black-Gray-White lists of different MOUs, PSC is still a helpful tool to know which marine merchant fleets are in compliance with international shipping standards.

In order to eliminate the stigma of being on the Black lists of the different MOUs, the publication of these detention lists are helpful, and encourage flag states to ensure that

⁴⁹⁶ Ibid. The positions in the Black list of detentions in the Paris MOU are measured in proportion to the number of inspections carried out to every flag state.

⁴⁹⁷ Ibid, at pp. 24 and 25

⁴⁹⁸ Ibid. The other countries in the Black list of the Paris MOU with a very high risk of detentions are Algeria, the Democratic Republic of Korea, Honduras, Cambodia, Georgia, Turkey, Syrian Arab Republic, Libyan Arab Jamahiriya, Romania, and Belize.

⁴⁹⁹ Ibid. In this report, the performance of open registries was like this: Panama had a 1.90 %, Malta with a 1.65 %, Bahamas with a - 0.28 %, Liberia with a -0.80 %. It must be noted the excellent performance of Liberia which consistently had a very low percentage of PSC detentions in the Paris and Tokyo MOUs.

⁵⁰⁰ See generally the Tokyo MOU website, Annual Report 2002, pp. 27 and 28, available at the Tokyo MOU homepage at <http://www.tokyo-mou.org/ANN02.pdf> (last visit September 21, 2003) It must be noted that in this report Malta had a 0.47 %, Panama had a -0.64, Liberia had a -1.11, and Bahamas had a -1.16%.

their merchant marine fleets comply with PSC requirements, thus avoiding detentions in port states, which could lessen their attractiveness to shipowners.

B. Flag State Implementation

The Subcommittee of Flag State Implementation⁵⁰¹ was created by IMO in 1992, for the purpose of identifying the measures necessary to ensure effective and consistent application of international conventions by flag states,⁵⁰² especially developing countries which have been having difficulties in effectively accomplishing their roles as flag states.

The objective of FSI will be achieved primarily by the establishment of the levels of adoption of IMO instruments by flag states and the range of obligations that they contain. It will try to identify the areas where flag states have difficulties in implementing IMO documents and the reasons for their noncompliance. In order to have a practical impact on the role of flag states, FSI will make proposals to them on the implementation and compliance of IMO documents. All of this work will ultimately be monitored by the Subcommittee in order to evaluate the performance of flag states regarding actions taken by them.⁵⁰³

The effect of FSI could be seen by the development of several guidelines and recommendations drafted with respect to specific topics regarding the performance of flag states, specifically with respect to the implementation of IMO instruments, cooperation in PSC, surveys and certifications, casualties, and statistics.⁵⁰⁴

The FSI Subcommittee was created to evaluate the role of flag states and assist them in general; indeed, it will serve as a helpful tool to improve the role of open registries as

⁵⁰¹ Flag State Implementation (hereinafter FSI) is a mechanism adopted by IMO in order to improve the performance of flag states. For more information about FSI, see generally IMO website at http://www.imo.org/Safety/mainframe.asp?topic_id=156 (last visit September 21, 2003)

⁵⁰² Hoppe, Heike. "The Work of the Sub-committee on Flag State Implementation - An Overview", (2000), online: IMO homepage at http://www.imo.org/InfoResource/mainframe.asp?topic_id=406&doc_id=1080 (last visit September 21, 2003)

⁵⁰³ Ibid.

⁵⁰⁴ Ibid.

flag states, especially considering that most of them are developing countries that have shown deficiencies in their performance as flag states due to lack of economical resources, expertise, proper administrations, and technology in order to manage their huge merchant marine fleet.

FSI, however, has not been totally successful, particularly because one of the principal mechanisms of FSI, the Flag State Performance Self-Assessment, has not been filled out by several countries.⁵⁰⁵ The gradual involvement of flag states in IMO's work and the increasing application of PSC will reveal, in the future, whether or not this initiative is a useful tool in enhancing quality shipping and whether there will be an improvement of open registries as flag states.

III. Current Development of Open Registries

Several open registries have been improving their performance as flag states by adopting measures to bring their merchant marine fleets in compliance with international shipping standards, due to the current demands for safety, environmental, and labour standards. Following is a summary of the most important developments in open registries, citing specific examples.

A. Improvements in the Adoption and Enforcement of International Maritime Conventions

Most open registries have now gone to considerable lengths to ensure their compliance with international regulations.⁵⁰⁶ The documents containing the most relevant international shipping standards regarding safety, environmental, and labour

⁵⁰⁵ For more information about the Flag State Performance Self-Assessment, see generally IMO homepage at http://www.imo.org/Safety/mainframe.asp?topic_id=156 (last visit September 21, 2003) According to the 11th Session of the Subcommittee in FSI, from 162 IMO member states, only 50 countries have been submitted for their self assessment test; see generally at http://www.imo.org/Newroom/mainframe.asp?topic_id=106&doc_id=2677#7 (last visit September 21, 2003)

⁵⁰⁶ Hayashi, Moritaka. Towards the Elimination of Substandard Shipping: The Report of the International Commission on Shipping. 16 *International Journal of Marine and Coastal Law* 501, 507 (2001). See also Coles *supra* note 66, at p. 16.

policies, such the SOLAS Convention 1974, including the ISM Code, the STCW 78/95 Convention, COLREGS, the 1966 International Convention on Load Lines,⁵⁰⁷ the MARPOL Convention, the 1969 International Convention on Tonnage Measurement of Ships,⁵⁰⁸ and the ILO's umbrella convention have been signed by most open registry countries, including the leading countries such as Panama,⁵⁰⁹ Liberia, the Bahamas, and Malta.⁵¹⁰

Because it is virtually impossible today to build and operate a ship which is not in compliance with international standards and requirements, stated in IMO's conventions,⁵¹¹ open registries have been obligated to improve their shipping policies in all aspects.

The issue of enforcement came into the discussion precisely when international organizations such as IMO became crucial to enhancing the quality of shipping. The strength of IMO resides in its role as an international forum for discussion about the important technical and legal aspects of the shipping industry; it counts on the participation of almost all countries with shipping interests and who are engaged in international commercial activities, where open registries have an increasing and fundamental participation in the leading bodies of IMO and are currently the most important economic contributors to IMO's budget.⁵¹²

Consequently, IMO serves as a means of international pressure against those states which do not adopt formal and non-formal treaty instruments concerning special safety, environmental, and labour measures regarding shipping activities, or having done so, do not enforce such instruments within their national jurisdictions, or they fail to adopt them,

⁵⁰⁷ International Convention on Load Lines, adopted on April 5, 1966 and entered into force on July 21, 1968, as amended by the 1988 Protocol adopted on November 11, 1988 and entered into force on February 3, 2000 (hereinafter LL 66/88)

⁵⁰⁸ International Convention on Tonnage Measurement of Ships, adopted on June 23, 1969 and entered into force on July 18, 1982 (hereinafter TONNAGE)

⁵⁰⁹ Panama has not adopted the ILO's umbrella convention

⁵¹⁰ Malta has not adopted the ILO's umbrella convention.

⁵¹¹ See generally Winbow, *supra* note 328.

⁵¹² According to IMO's budget for the period 2002-2003, the three main contributors are respectively Panama, Liberia, and the Bahamas, all of them open registries. For more detailed information about IMO's budget see generally IMO homepage at http://www.imo.org/About/mainframe.asp?topic_id=312#12 (last visit September 15, 2003).

or they exercise inadequate enforcement which affects shipping engaged in international trade.⁵¹³

B. Safety and Environmental Progress

A number of open registries have taken important measures to encourage quality shipping; however, one of the main steps in pursuing this objective has clearly been evidenced in the area of safety shipping standards.

1) Elimination of Substandard Shipping

In order to ensure the gradual elimination of substandard vessels that are still part of open registry merchant marine fleets, the principal measures adopted by countries within this system have been the imposition of age restrictions on vessels, a global implementation of safety programs, and the investigation of casualties in a more responsible way.

a) Age Restrictions over Vessels

A very important achievement by open registries in the marine safety field has been the imposition of fixed age restriction for registration on vessels entering their registry for the first time and for those which seek re-registration.⁵¹⁴ The common approach in most open registries has been the establishment of a 20-year limit; nevertheless, this criterion varies from country to country and some other open registries have established different maximum ages for the registration of vessels varying from 12 to 15 to 18 years. Few open registries do not impose a specific age for the registration of vessels; if vessels in their registers are more than 20 years old, special inspections must be done.

⁵¹³ See García-Correa, *supra* note 30, at p. 38

⁵¹⁴ See Coles, *supra* note 66, at p. 16

For example, a strict approach has been introduced by the Bahamas,⁵¹⁵ which has imposed a restriction of 12 years for vessels which seek initial registration; some other states such as Cyprus,⁵¹⁶ Luxembourg,⁵¹⁷ and Malta⁵¹⁸ have established a 15-year limitation for the registration of ships. The state of St. Vincent and the Grenadines has the policy that no tanker older than 15 years or any other type of vessel older than 18 years could fly its flag, “unless special permission is granted.”⁵¹⁹

However, most open registries follow the general approach of granting registration. This is the case with countries such as Liberia,⁵²⁰ Barbados,⁵²¹ Marshall Islands,⁵²² and Vanuatu.⁵²³ Other countries such as Jamaica⁵²⁴ and Panama⁵²⁵ do not establish a specific age limit for the registration of vessels, but they do accept registration for vessels after a specific age. In the case of Jamaica, vessels must be subject to a special inspection if they are more than 12 years old, and in the case of Panama, if they are older than 20. In the case of Cambodia,⁵²⁶ there is no age restriction; however, this country does not require the performance of special inspections of vessels after a certain age.

Although almost all open registries have a maximum age for the registration of vessels, in general terms, most of them have established waivers for registration over the authorized age under special circumstances, such as special permission and stringent inspections.⁵²⁷

⁵¹⁵ Ibid, at p. 54

⁵¹⁶ Ibid, from pp. 109 to 111

⁵¹⁷ Ibid, at p. 189

⁵¹⁸ Ibid, at p. 209

⁵¹⁹ Ibid, at p. 249

⁵²⁰ Ibid, at pp. 173 and 174

⁵²¹ Ibid, at p. 64

⁵²² Ibid, at pp. 223 and 224

⁵²³ Ibid, at p. 278

⁵²⁴ Ibid, at p. 160

⁵²⁵ Ibid, at p. 237

⁵²⁶ Ibid, at p. 87

⁵²⁷ Ibid. See generally for information about waivers for the registration of vessels over the authorized age in different countries.

b) Safety Programs

The worldwide presence of open registries is especially important considering that vessels registered under countries within this system rarely visit their national ports; consequently, it is virtually impossible for these flag states to constantly and properly supervise, if they do not rely on a good safety program with inspections abroad.

The expansion of extensive safety programs applied by open registries has been deemed successful because most open registries have inspectors present at the most important ports for international commercial activities around the world. As a result, factors such as construction, equipage, maintenance, and the manning of fleets of open registries have been surveyed in a more detailed way than before. Liberia has the lead position for open registries with a successful safety program;⁵²⁸ other countries, such as Panama, have also made improvements along those lines.

A worldwide safety program is critical in maintaining the quality of ship registries,⁵²⁹ where inspections should be focused mainly on operational, manning, training, and safety management issues.

Liberia has a worldwide network of inspectors to carry out annual safety inspections, which compliments the surveys conducted by the classification societies on its behalf. In addition, Liberia has been successfully tracking and reporting to IMO all PSC detentions of its vessels.⁵³⁰

On the other hand, since 1977, Panama counts on a representative office in New York which offers assistance in safety and technical matters to all users of the Panamanian

⁵²⁸ Ibid, p 51

⁵²⁹ See generally LISCR homepage at http://www.liscr.com/serchable/mari_services.cfm?RequestTimeout=500#five (last visit September 21, 2003)

⁵³⁰ Ibid.

registry, with efficiency and competency known as SEGUMAR.⁵³¹ The Panamanian registry also has strategic centers located in London and Manila.⁵³²

Along with their safety programs, open registries must also rely on a good spectrum of recognized classification societies when carrying out surveys regarding the application of the ISM Code. Most recently, it is important to note the application of the International Ship and Port Security Code⁵³³ by leading open registries such as Liberia⁵³⁴ and Panama⁵³⁵ which are making efforts for the implementation of this code.

c) Investigation of Marine Casualties

In compliance with the SOLAS and MARPOL Conventions, flag states have the responsibility of conducting investigations of marine casualties occurring to ships flying their flags and of notifying their findings to IMO.⁵³⁶ To comply with this responsibility, managers and operators of ships must issue an immediate report to the maritime administration.

Based on their high casualty rates, some open registries have been implementing more efficient measures to improve their role as flag states by conducting proper and more responsible investigations after a casualty at sea occurs. Countries like Liberia,

⁵³¹ See generally the Consulate General of Panama in New York homepage at http://www.nyconsul.com/maritime_dept_.htm (last visit September 21, 2003) For more information about SEGUMAR, the Panamanian safety office in New York, see generally SEGUMAR homepage at <http://www.segumar.com>.

⁵³² Ibid.

⁵³³ The International Ship and Port Security Code (hereinafter ISPS Code) contains detailed security-related requirements for Governments, port authorities and shipping companies in a mandatory section (Part A), together with a series of guidelines about how to meet these requirements in a second, non-mandatory section (Part B). The purpose of the Code is to provide a standardized, consistent framework for evaluating risk, enabling governments to offset changes in threat with changes in vulnerability for ships and port facilities. For more information about the ISPS Code, see generally IMO homepage at http://www.imo.org/Newsroom/mainframe.asp?topic_id=583&doc_id=2689#code (last visit September 21, 2003)

⁵³⁴ For information about the implementation of the ISPS Code by the Liberian maritime administration, see generally LISCR homepage, at http://www.liscr.com/searchable/mari_services.cfm?RequestTimeout=500#two (last visit September 21, 2003)

⁵³⁵ For information about the implementation of the ISPS Code by the Panamanian maritime administration, see generally SEGUMAR homepage at <http://www.segumar.com/ISPS%20Code.htm> (last visit September 21, 2003)

⁵³⁶ The responsibility of flag states regarding the investigation of casualties are prescribed by Regulation I/21 of the SOLAS Convention and articles 8 and 12 of the MARPOL Convention. See generally IMO website at http://www.imo.org/Safety/mainframe.asp?topic_id=799 (last visit September 21, 2003)

Vanuatu, and Panama make annual levies on ships in their registries, based on tonnage taxes, for casualty investigation.⁵³⁷ Along these lines, Liberia applies another measure which requires the appointment of a decision-maker that would be reachable on a 24-hour basis in the event of any incident affecting the vessel.⁵³⁸

It must be recognized that the system used by Liberia in the investigation of casualties and recommendations made in the interests of improving worldwide marine safety has been recognized as one of the best.⁵³⁹

C. Labour Progress

1) White List of the STCW 78/95 Convention

IMO has introduced the White list of the STCW 78/95 Convention in order to assert which flag states are in full compliance with the convention provisions and requirements. The purpose of this list is to enable one flag state to rely on certificates of the competency of seafarers issued by another flag state.⁵⁴⁰

Several open registry countries appeared on the STCW 78/95 Convention White list, where all the leading open registries such as Panama, Liberia, the Bahamas, and Malta are included.⁵⁴¹ Consequently, vessels registered under flag states which are not listed will be subject to detention by port states due to their noncompliance with the STCW 78/95.⁵⁴² In this respect, port states should not accept certificates issued by countries which are not on the list.

⁵³⁷ See Coles, *supra* note 66, at p. 21

⁵³⁸ *Ibid.*

⁵³⁹ See generally LISCRC homepage at http://www.liscr.com/serchable/mari_services.cfm?RequestTimeout=500#five (last visit September 21, 2003)

⁵⁴⁰ See Coles, *supra* note 66, at p. 33

⁵⁴¹ For the actual STCW 78/95 White List as June 5, 2003, annexed to IMO MSC/Circ. 1092, see generally IMO homepage at http://www.imo.org/includes/blastDataOnly.asp/data_id%3D7513/1092.pdf (last visit September 21, 2003)

⁵⁴² See Coles, *supra* note 66, at p. 50

D. Administrative Progress

All of the above developments have been achieved by open registries right after taking important measures to improve the administrative control system over their fleets.⁵⁴³ This is the case with Panama which created the PMA, the exclusive Panamanian public entity devoted to the administration of all national maritime issues in that country.⁵⁴⁴ In contrast, the maritime administration in certain open registries is managed by private companies through government concessions, and these companies use modern management principles and sound business practices, thus avoiding political problems or instability of the flag states in the administration of their ship registries. This is the case with Liberia, the Marshall Islands, and Vanuatu. Consequently, one must conclude that the maritime administrations of several open registries have been offering better service after relying on technical assistance, mainly from IMO, and after investing economical resources to improve their administrative performance through the introduction of computer and communication technologies, to meet the demands of today's shipping industry.⁵⁴⁵

IV. The Future of Open Registries

International law has legitimized the existence of open registries through the provisions of the Geneva Convention and UNCLOS, which recognize the sovereign right of every flag state to establish their national policies regarding the registration of vessels. Even though the genuine link requirement was also introduced by these two conventions, their failure to appropriately address the way this requirement would function and the consideration that its imposition was a violation of the rights of flag states, has made it

⁵⁴³ Ibid, at p. 51

⁵⁴⁴ The PMA was created by Decree-Law No. 7 of February 10, 1998 in order to unify all the different entities of the Panamanian government which were in charge of different maritime aspects in one public body. Currently the PMA is comprised by four general directorates which are in charge of the administration of the Merchant Marine, Seafarers, Marine and Coastal Resources, and Ports and other maritime industries. For more information about the PMA see generally its homepage at <http://www.autoridadmaritima.gob.pa/>

⁵⁴⁵ See generally LISCR homepage at http://www.liscr.com/serchable/mari_services.cfm?RequestTimeout=500#five (last visit September 21, 2003)

recognizes that registration is “the only test of the nationality of a merchant vessel”,⁵⁴⁶ and consequently, “the international legal position of flags of convenience countries is enhanced.”⁵⁴⁷

TMCs have recognized that any attempt to abolish flags of convenience would be doomed to failure,⁵⁴⁸ because a large number of shipowners that come precisely from these TMCs support the open registry system⁵⁴⁹ for obvious reasons of convenience.

Even though open registries emerged mainly because of shipowners’ desire to avoid strict national requirements for the registration of vessels, these schemes must also be recognized as devices that have been helping the shipping industry to obtain the development that it has reached today.

The primary reason that shipowners select an open registry to flag their vessels is because of the “highly competitive nature of the shipping industry.”⁵⁵⁰ Consequently, competitiveness has bestowed upon the open registry system the winning edge in today’s registration of ships;⁵⁵¹ their opponents, therefore, consider that the future of flags of convenience is only possible if they continue to give shipowners a competitive advantage over their competitors.⁵⁵²

The equation of open registry flags with substandard tonnage and, therefore, substandard crews, has created an undesirable reputation for the entire open system of registration of vessels, regardless of each particular flag situation.⁵⁵³ Behind all the criticism that has surrounded open registries for almost half of the last century, the actual performance of open registries as flag states should not be generalized and must be analyzed on an individual basis. Rather than generalizing their flaws, we should note the

⁵⁴⁶ See Li, *supra* note 204, at p. 154

⁵⁴⁷ See Hill, *supra* note 125, at p. 22

⁵⁴⁸ See Coles, *supra* note 66, at p. 26

⁵⁴⁹ See García-Correa, *supra* note 30, at p. 19

⁵⁵⁰ See Wittig, *supra* note 378, at p. 119

⁵⁵¹ See García-Correa, *supra* note 30, at p. 20

⁵⁵² See Wittig, *supra* note 378, at p. 138

⁵⁵³ See García-Correa, *supra* note 30, at p. 92

improvements that several open registries have individually made in the last few years, especially in regards to improving their safety and environmental policies according to international standards, as well as in their labour policies, by properly adopting and applying the most important international conventions in those shipping fields, but retaining more flexible policies for shipowners than those imposed by their national legislations.

Several open registry states have recently “taken great strides to alleviate” the criticism against the system,⁵⁵⁴ there is, of course, more work to be done. For example, savings in shipping expenditures also depend on how the ship is managed and operated; however, open registry shipowners can still provide international safety standards and reasonable conditions for wages, welfare, and employment of efficient crews, as several shipowners do.⁵⁵⁵

Even though the poor reputation of flags of convenience has been deserved in the past, it has nowadays become “outdated and unrealistic”⁵⁵⁶ because several countries have made great efforts towards improving their fleet and “now deserve a more respected place in the international shipping arena.”⁵⁵⁷

It is debatable whether the elimination of the open registry scheme for the registration of vessels will be the perfect solution for raising the quality of shipping, and whether by its elimination it will help to prevent substandard vessels from navigating through the seas and to eliminate marine pollution from ships. It has been proven that substandard ships are registered in all flag states, not only in open registry states. On the other hand, the gradual raising of shipping standards and their stricter enforcement mechanisms are deemed to affect more developing countries that followed the nationalist system than that of open registries,⁵⁵⁸ because the vessels registered in the latter are owned mainly by huge transnational shipping companies that can afford all the new devices and changes

⁵⁵⁴ See Matlin, *supra* note 94, at p. 1017

⁵⁵⁵ See Couper, *supra* note 289, at p. 3

⁵⁵⁶ See Matlin, *supra* note 94, at p. 1055

⁵⁵⁷ *Ibid.*

⁵⁵⁸ See Coles, *supra* note 66, at p. 23

that vessels currently require for safe operation and in order to maintain their vessels in business. In this respect, “any evangelical campaign against flags of convenience on the safety issue might only serve to harm third-world economies that simply could not afford to comply with a more sophisticated safety regime.”⁵⁵⁹

It is definitely the way a maritime country runs its registry which accounts for its image.⁵⁶⁰ The bad image of open registry countries could change if they were truly committed to the compliance of their flag state roles, providing a more responsible service to the shipping industry. This could be achieved in the area of safety, improving the adoption of international standards and their proper implementation that will only be possible with the application of more economical resources and a global representation,⁵⁶¹ in order to supervise the compliance in safety measures of their fleet abroad.

It seems to me that a possible solution to the safety problems faced by open registry countries could be the investment of an important part of the earnings received from the registration of vessels in their national maritime administration. These investments, in the end, will have a positive impact over the improvement of the conditions of their merchant marine fleet.

The open system for the registration of ships has been, and will continue to be, an important element of the shipping industry. Unfortunately, it is an element with a double-attribute for the shipping industry, and it is likely to maintain this double-attribute for a long time to come, until the performance of open registries as flag states demonstrates real and convincing changes. In a few words, the open system for the registration of vessels will remain a true advantage for shipowners and the best tool to continue in business, offering a competitive service while, for those who are opposed to

⁵⁵⁹ Ibid.

⁵⁶⁰ See García-Correa, *supra* note 30, at p. 29

⁵⁶¹ Ibid, at p. 31

open registries, it will remain an evil and disadvantageous phenomenon which should be eliminated.

It may well be that efforts must be made to improve safety standards on flags of convenience vessels, with the cooperation of the consumers of the shipping industry, such as shipowners or any other person in charge of the operation of vessels.⁵⁶²

There exists a double discourse from TMCs on the subject of open registries. On one hand, flags of convenience have been severely attacked, criticized, and blamed by the developed world for several maritime concerns dating back to their origins. On the other hand, flags of convenience have been used by shipowners due to their convenient characteristics in helping the growth and development of the shipping industry and the international trade of the wealthy and developed countries of the world for almost half of the last century.

The shipping industry has been considered a stressful industry⁵⁶³ as a result of being a very expensive and competitive activity to which the open system for the registration of vessels has definitely given the necessary relief to maintain its position as one of the most productive and important industries around the world.

⁵⁶² See Coles, *supra* note 66, at p. 23

⁵⁶³ See García-Correa, *supra* note 30, at p. 92

CONCLUSIONS

The practice of flagging out ships to foreign flags was not originated exclusively with the transfer of vessels to open registries. Traditionally, this practice was done by shipowners in traditional maritime countries when seeking for the advantages of certain flags because of convenience, particularly for political and military reasons. However, this practice was increased with the phenomenon of open registries in order to obtain economical advantages of the flexible system for ship registration offered by certain countries within the open system, particularly with the intention of avoid heavy taxation, inconvenient government regulations and high labour costs imposed by their national laws.

The principle of international law that every flag state has the sovereign right to establish the conditions to grant nationality to vessels, prescribed by the Geneva Convention on the High Seas and United Nations Convention of the Law of the Sea, has outlined the legal framework for the institutionalization and growth of open registry shipping. Since the failure of the genuine link requirement and the Convention for Registration of Ships which, with the International Workers Federations, had lead the international efforts to eradicate and phase out the open registry system for registration of vessels, every flag state has the unilateral competence to state the conditions under which it will register vessels under their flag.

In one hand, due to the competitive nature of the shipping business, shipowners of developed countries have recognized that the reliance on open registry shipping is necessary to stay in the shipping business. Furthermore, the same developed countries, specially those which depend on international shipping for international trade, have also recognized the importance of open registries by favouring the continued existence of the open system through their *laissez-faire*, policies permitting their nationals shipowners to transfer and register vessels under flags of open registries in order to find a lower costs environment to operate their vessels.

On the other hand, the high cost of international shipping has been the decisive factor which has helped the growth and development of open registry shipping as it is known today. Since the economical impact of open registry in international shipping, ship registration has become a competitive public service for flag states which has followed the trends dictated by a global economy and free market.

Even though the negative image and the poor performance of open registries as flag states were undeniable facts, not only due to several flaws regarding the economical and administrative deficiencies of these countries, mainly developing states, but also because the own nature of the open registry system, the current demands of the shipping industry and the new technology in safety and the protection of the marine environment has obliged *de facto* flag states in general, and specially open registry countries, to raise their shipping standards according to what is stated in international maritime conventions.

In my opinion it is nonetheless important to reconsider and reevaluate the performance of open registries as flag states, but on an individual basis, rather than generalizing the system as a whole. Even though some countries have made several efforts to raise the shipping standards of their merchant marine fleets according to international accepted standards and have achieved certain progress particularly regarding safety, environmental, and labour aspects, I must recognize that not all open registries are the same. Within the large spectrum of countries offering an open scheme, there are undoubtedly some registers whose only purpose is to profit from the registration of vessels; however, even though some others have the intention of giving important incomes to their national economies through this activity, they are also committed with their public service to international shipowners.

Indeed, it is a debatable consideration, even though international law recognizes that every state has the right to grant its nationality to vessels, even land-locked states, in my opinion the *de facto* application of a real connection of certain countries with international shipping interests should not be only measured by the parameter of national ownership or manning of vessels, such as the genuine link prescribed.

The development of a merchant marine fleet by the adoption of flexible shipping policies through the open registry scheme for registration of vessels, indeed, is an opportunity for nations which wish to participate in international shipping. However, it must be recognized that the development of certain open registries as truly shipping nations have been influenced by different reasons. The transformation of Liberia as a truly maritime country has been conceived in part to fulfill the economic shipping needs of certain developed countries which have been registering their vessels in this country to help the growth of their international shipping and trade activities. The same reason has been considered in the transformation of Panama as a truly maritime country. However, in my opinion, the case of Panama is totally different from Liberia, specially in regards to the origin of the Panamanian open system, although in principle conceived for reasons of convenience, it was not precisely for economic convenience. Furthermore, in this case it must be taken into account that the unique and natural geographical characteristics and comparative advantages of Panama have made it a real maritime country by its own right, mainly due to important shipping aspects of this country such as the Panama Canal and its several ports in both oceans, Atlantic and Pacific, which have been always key elements for the development of international trade.

It is extremely important that countries which are not performing their roles as flag states properly and effectively as the Geneva Convention on the High Seas and United Nations Convention of the Law of the Sea have prescribed, should double their efforts to strengthen their shipping registries. However, it is my view that the improvement of quality shipping and the promotion of a safety culture in shipping activities may only be asserted by a collective effort of the shipping community in general through the guidance of the International Maritime Organization and other international organizations, and through the cooperation of all the actors of the maritime scenario, from the public and private sector as well.

In my opinion, the future of ship registration will remain in the registration of vessels under flexible schemes; thus, the performance of specific open registries in raising their

shipping standards and, at the same time, offering advantages to shipowners will keep the international shipping industry in the position that it is today.

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