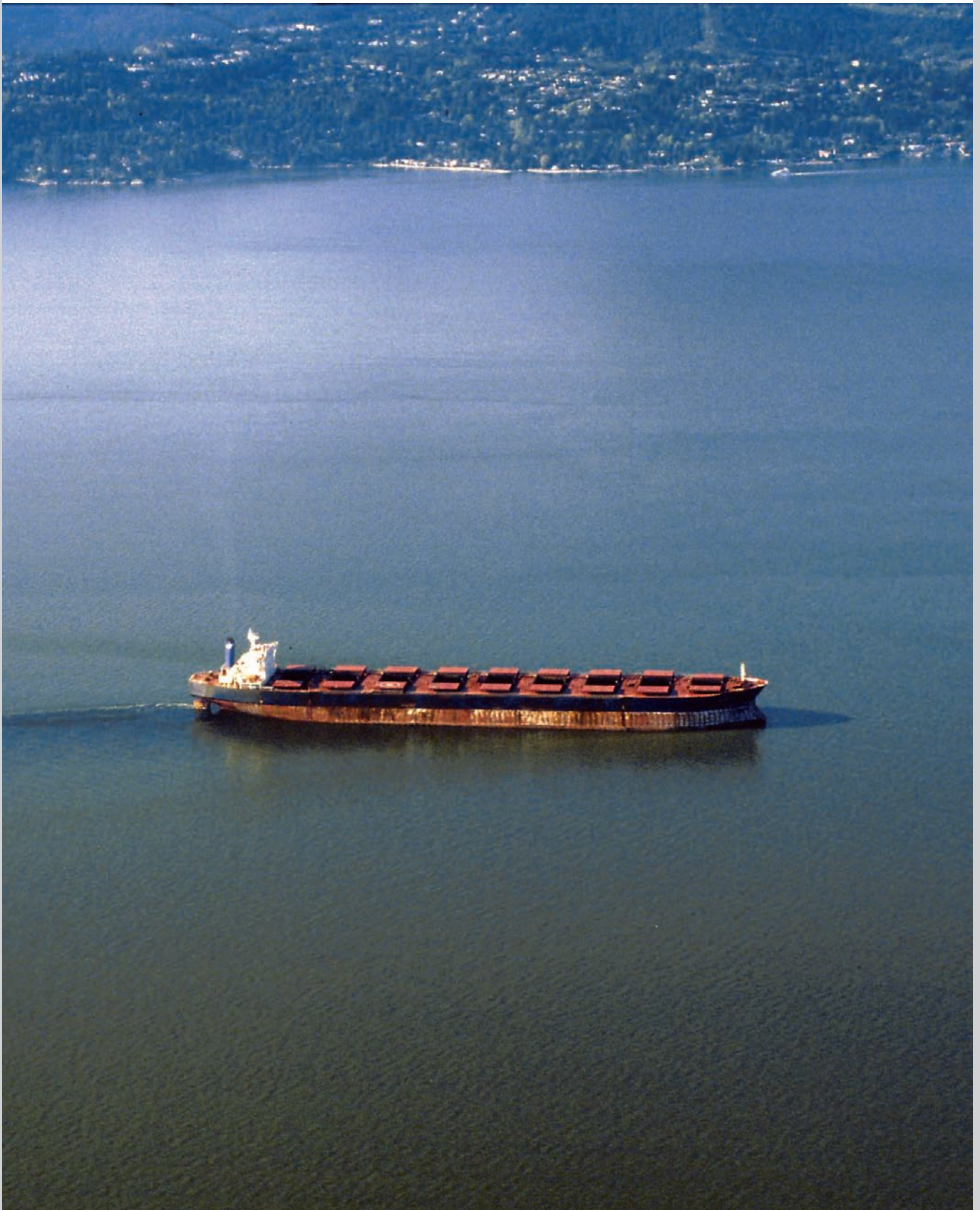


Real and Present Danger

Flag State Failure and Maritime Security and Safety

Matthew Gianni



EXECUTIVE SUMMARY



Background

Ships have the nationality of the State whose flag they fly. Flag States are responsible for ensuring that their vessels act in conformity with applicable rules of international law, wherever the vessels are located. Flag States play a particularly important role in ensuring maritime security and safety and the protection of the marine environment. Flag States are required to exercise effective jurisdiction and control in administrative, technical and social matters over ships flying their flag.

As has already been noted in the report of the UN Secretary-General to be submitted to the 63rd session of the UN General Assembly, there are clear indications that a number of flag States regularly fail to comply with the United Nations Convention on the Law of the Seas (UNCLOS), and other relevant international instruments and agreements. Some flag States fail to ratify and implement vital social and environmental instruments, some flag States fail to exercise effective jurisdiction over vessels flying their flag. In addition to the risks posed to seafarers and to the marine environment, this report highlights the failure of the current regime, with its preference for anonymity over accountability, to adequately address potentially catastrophic breaches of security or safety.

Open Registers or Flags of Convenience (FOCs)

The use of flags of convenience and the establishment of new registers by States with no pre-existing maritime infrastructure is growing. To shipping and fishing interests, the economic attraction of registering a vessel under a flag with lower costs, more relaxed crewing requirements and less vigorous regulation is undeniable. Moreover there can be a competitive disadvantage in registering with more reputable flags. However, the wider consequences should not be underestimated. Without transparency of ownership, without the connection between the beneficial owners of a vessel and the flag State responsible for jurisdiction on board it is not possible to ensure the highest standards in maritime security and safety. For these reasons it is vital for States to address, at the appropriate level and without delay, these important issues of international governance.

Security, Safety and Environmental issues

FOC-vessels dominate lists focusing on sub-standard shipping, poor performance on safety, maltreatment of crew, pollution of the marine environment and illegal, unregulated and unreported fishing on the high seas.

Due to the availability of lax registration procedures and poor controls, a number of States and international organizations have raised concerns over the potential use of vessels in criminal and terrorist acts. It is very easy and entirely legal to conceal the identities of vessel owners. Some flag States even use the promise of anonymity as an attraction when advertising their services for vessel registration. This report cites examples of the involvement of ships in terrorist and criminal activities, including arms smuggling and people trafficking, and notes that illegal activities are often intertwined with those that are legitimate. The multi-layered nature of the industry, the difficulties linked to flag State jurisdiction combined with a tradition of secrecy can make it impossible to trace ownership and to enforce compliance with international law.

The Worst Performers

Several international organizations and associations periodically conduct reviews of the performance of flag States in the merchant shipping sector. These reviews are based on a variety of criteria, including ratification of key IMO (International Maritime Organization) and ILO (International Labour Organization) conventions, and inclusion on port State control blacklists. The reviews reflect a picture of consistent poor performers dominated by FOCs.

Whilst the issues in fisheries are often different from those in maritime transport, the questions of accountability and performance are similar. This report raises concerns over the persistent flag State offenders associated with illegal, unreported and unregulated (IUU) fishing.

According to Lloyd's Register, three hundred and eighteen large-scale fishing vessels are registered to Cambodia, Georgia, Mongolia, North Korea, Sierra Leone and Togo. Yet based on a review of the information available from relevant regional fisheries management organizations (RFMOs), none of these countries have any vessels authorized to fish in any of the areas on the high seas regulated by these organisations. On the contrary, fishing vessels from five of these six countries are currently 'blacklisted' by RFMOs for having engaged in IUU fishing. The indicators would suggest these vessels may be involved in IUU fishing. It is unclear how the flag States concerned would be in any way able to exercise control over these vessels flying their flags.

Case Studies

The report highlights two case studies. The case of the Maltese flagged tanker, Erika, which sank off the coast of France in 1999, shows the multitude of parties involved in the case, the impossibility of tracing ownership (the owner eventually came forward of his own accord) and the ability of the flag State to walk away from any share of the responsibility. The case of the Spanish company Vidal Armadores shows the ease with which an enterprise can continue with its illegal fishing activities, even after being caught and fined.

Recommendations

Maritime Security and Safety is on the agenda of the 9th meeting of the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea (UNICPOLOS) in June 2008. The previously mentioned report from the Secretary-General identifies that, *'Many shipping accidents and resulting loss of life and marine pollution are not the result of inadequate regulation at the global level, but are due to ineffective flag State implementation and enforcement.'* (para 179) It also notes that *'the General Assembly has repeatedly called upon States to effectively implement international instruments relating to maritime security.'* (para 121)

Taking into account the statements made in the Secretary-General's report when read in conjunction with the findings of this report, WWF and ITF consider that there is a compelling need for action on flag State performance in general and compliance with the provisions of UNCLOS in particular. Considering the diplomatic processes involved, WWF and ITF call on governments to request that a UN Committee be established to address the deficiencies in flag State implementation of the current system and to negotiate a new implementing agreement to UNCLOS.

This new implementing agreement should set out enforceable measures to ensure flag States fulfill their duties and responsibilities under UNCLOS. Furthermore, it should include requirements as to how the 'genuine link' between the vessel and the flag it flies is to be established, and it should include measures to prevent States from operating vessel registers in breach of regulations and international agreements.

Oslo/London June 2008

World Wide Fund for Nature, WWF

International Transport Workers' Federation, ITF

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INTRODUCTION



Shipping is an essential facilitator of world trade however its unique history and characteristics have enabled the industry, to a certain extent, to avoid close scrutiny and regulation. Economic interests in shipping have at times been able to override attempts to strengthen the regulatory regime with the result that in some areas the industry is self-regulating and inclined to resist mandatory measures. Although commercially logical, there can be unforeseen consequences. Where international regulation does exist it can be difficult to ensure effective implementation. These factors, potentially, have a significant bearing on maritime security and safety.

1. WORLD MERCHANT FLEETS



1.1 Growth in World Shipping

There has been a threefold increase in the amount of seaborne trade, as measured by weight, between 1970 and 2006 from approximately 2.5 billion tons to 7.5 billion tons per year. Seaborne shipments of crude oil and related products have increased from 1.4 to 2.6 billion tons per year. The amount of 'ton-miles' of crude and related products however has doubled in the same period, from 6.5 billion ton-miles per year to 12.2 billion ton-miles per year reflecting the greater average distances traveled by tankers and other vessels transporting oil and related products.¹ Containerized trade has also increased dramatically, rising almost six-fold since 1985, from less than 200 million tons to almost 1.2 billions tons in 2006.² The numbers of container ships over 100 GT has risen fourfold in the past 20 years from 1,052 in 1987 to 3,904 in 2007. The average size of container ships, as measured in GT, has more than doubled during the same period.

Table 1.1 Development of international seaborne trade, selected years (Millions of tons)

| Year | Tanker cargo | Dry cargo | Main bulks ^a | Total (all cargoes) |
|-------------------|--------------|-----------|-------------------------|---------------------|
| 1970 | 1,442 | 1,124 | 448 | 2,566 |
| 1980 | 1,871 | 1,833 | 796 | 3,704 |
| 1990 | 1,755 | 2,253 | 968 | 4,008 |
| 2000 | 2,163 | 3,821 | 1,288 | 5,983 |
| 2006 ^b | 2,674 | 4,742 | 1,828 | 7,416 |

^a Iron ore, grain, coal, bauxite/alumina and phosphate.

^b Estimates

Source: UNCTAD 2007 (Estimated by UNCTAD Secretariat on the basis of annex II and data supplied by specialized sources.)

1.2 Flags of Convenience or Open Registries

As shipping has steadily increased worldwide, so has the use of open registries or flags of convenience (FOCs). These are generally defined as registries offered by countries which do not require the vessel to be owned by a national of the country of registry. They are open to anyone or any company, regardless of nationality, that wishes to register a ship and, in some cases, may not even require the establishment of a nominal 'legal entity' or shell company in the flag State. (See Box overleaf)

Flags of Convenience

A flag of convenience is generally defined as a registry operated by a flag State which allows non-national or foreign vessels to register to fly its flag. The International Transport Workers' Federation (ITF) defines flags of convenience (FOCs) as 'Where beneficial ownership and control of a vessel is found to lie elsewhere than in the country of the flag the vessel is flying, the vessel is considered as sailing under a flag of convenience.' The ITF currently lists the following 33 flags as FOCs:³

Antigua and Barbuda



Bahamas



Barbados



Belize



Bermuda (UK)



Bolivia



Burma



Cambodia



Cayman Islands



Comoros



Cyprus



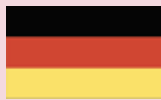
Equatorial Guinea



French International Ship Register (FIS)



German International Ship Register (GIS)



Georgia



Gibraltar (UK)



Honduras



Jamaica



Lebanon



Liberia



Malta



Marshall Islands (USA)



Mauritius



Mongolia



Netherlands Antilles



North Korea



Panama



Sao Tome and Principe



St Vincent



Sri Lanka



Tonga



Vanuatu



The percentage of the world's merchant fleet operating under FOC registries has continuously increased over the past several decades. In the 1950s, approximately 4% of the world's merchant fleet was registered to FOC registries; by the mid 1980s, this figure had risen to more than 30%.⁴ From 1989 to 2007, the share of 'foreign-flagged' cargo carrying vessels of 1,000 GT and above increased from 41.5% to 66.35% of the world fleet as measured by dwt.⁵

Table I.2 Top 60 Flags based on numbers of merchant vessels on registry ≥ 1,000 GT

| Rank | Flag | Number of merchant vessels ≥ 1000 GT | Rank | Flag | Number of merchant vessels ≥ 1000 GT |
|------|----------------------------|--------------------------------------|------|-----------------------|--------------------------------------|
| 1 | Panama | 5,764 | 32 | Belize | 261 |
| 2 | Liberia | 1,948 | 33 | Gibraltar | 216 |
| 3 | China | 1,775 | 34 | Georgia | 209 |
| 4 | Malta | 1,281 | 35 | Sweden | 194 |
| 5 | Bahamas | 1,213 | 36 | Ukraine | 193 |
| 6 | Singapore | 1,131 | 37 | Canada | 171 |
| 7 | Russia | 1,130 | 38 | Korea, North | 171 |
| 8 | Antigua & Barbuda | 1,059 | 39 | Spain | 167 |
| 9 | Hong Kong | 1,009 | 40 | Comoros | 144 |
| 10 | Indonesia | 965 | 41 | France | 141 |
| 11 | Marshall Islands | 902 | 42 | Netherlands Antilles | 138 |
| 13 | Greece | 824 | 43 | Brazil | 135 |
| 14 | Korea, South | 738 | 44 | Bermuda | 133 |
| 15 | Norway | 715 | 45 | Iran | 131 |
| 16 | Japan | 676 | 46 | Honduras | 126 |
| 17 | Italy | 604 | 47 | Cayman Islands | 124 |
| 19 | Saint Vincent & Grenadines | 582 | 48 | Portugal | 117 |
| 20 | Netherlands | 566 | 49 | Sierra Leone | 113 |
| 21 | Turkey | 565 | 50 | Saint Kitts and Nevis | 104 |
| 22 | India | 477 | 51 | Taiwan | 102 |
| 23 | United Kingdom | 474 | 52 | Syria | 96 |
| 24 | United States | 446 | 53 | Finland | 92 |
| 25 | Thailand | 405 | 54 | Azerbaijan | 86 |
| 26 | Philippines | 383 | 55 | Egypt | 77 |
| 27 | Germany | 382 | 56 | Croatia | 75 |
| 28 | Vietnam | 314 | 57 | Tuvalu | 74 |
| 29 | Malaysia | 304 | 58 | Mongolia | 73 |
| 30 | Denmark | 299 | 59 | Barbados | 71 |
| 31 | Isle of Man | 297 | 60 | Bulgaria | 71 |

Source: CIA World Factbook. November 2007

UNCTAD identified Antigua and Barbuda, Bahamas, Bermuda, Cyprus, Isle of Man, Liberia, Malta, Marshall Islands, Panama, and St. Vincent and the Grenadines as the 10 largest 'open and international registries' in 2007. Together these ten countries flagged 53.7 percent of the world fleet by deadweight tonnage (dwt). The report states that of these ten countries, a combined total of 13,927 vessels over 1,000 GT are flagged to six countries: Panama, Liberia, Bahamas, Malta, Antigua and Barbuda, and St Vincent and the Grenadines, are all foreign owned.

The World Fact Book published by the US Central Intelligence Agency provides a similar picture of the extent of foreign ownership of vessels flagged to countries operating 'open registries' although the numbers differ somewhat from those published by UNCTAD. Table 1.3 lists select countries operating 'open registries', the numbers of vessels on their registries and the number and percentage of vessels that are 'foreign owned'.

| Flag State (World Ranking by numbers of vessels \geq 1000 GRT on registry) | Total number of vessels \geq 1000 GRT flying flag | Number of vessels \geq 1000 'foreign owned' - owned by individuals or companies based in other countries | % of total |
|--|---|--|--------------|
| Panama (1) | 5,764 | 4,949 | 86 |
| Liberia (2) | 1,948 | 1,904 | 98 |
| Malta (4) | 1,281 | 1,197 | 93 |
| Bahamas (5) | 1,213 | 1,134 | 93 |
| Antigua and Barbuda (8) | 1,059 | 1,021 | 96 |
| Marshall Islands (11) | 902 | 857 | 95 |
| Cyprus (12) | 868 | 724 | 83 |
| Cambodia (18) | 586 | 463 | 79 |
| St Vincent & Grenadines (19) | 582 | 536 | 92 |
| Isle of Man (31) | 297 | 210 | 71 |
| Belize (32) | 261 | 217 | 83 |
| Gibraltar (33) | 216 | 201 | 93 |
| Georgia (34) | 209 | 180 | 86 |
| Netherlands Antilles (42) | 138 | 125 | 91 |
| Bermuda (44) | 133 | 126 | 95 |
| Cayman Islands (47) | 124 | 122 | 98 |
| St Kitts and Nevis (50) | 104 | 76 | 70 |
| Mongolia (58) | 73 | 62 | 85 |
| Slovakia (68) | 54 | 46 | 85 |
| Total | 15,812 | 14,150 | 89.5% |

The significance of the rise of flags of convenience in the context of maritime safety and security is various. Amongst other things, FOCs facilitate the use of corporate veils in terms of vessel registration and transparency of ownership. This may be particularly problematic given the large numbers of foreign-owned merchant vessels registered to FOC States. In addition, a recurrent list of FOCs is associated with substandard shipping. Both these issues, the first relating to accountability, the second to quality give rise to levels of security and safety risks that in other areas of the transport sector such as ground transport, rail and aviation would be highly unacceptable.

This report will focus on the question of whether flag States operating FOCs are effectively discharging their duties as flag States in implementing international regulations regarding shipping and other activities.

2. LAWS AND REGULATIONS



2.1 UNCLOS and the Primary Responsibility of Flag States

The United Nations Convention on the Law of the Sea (UNCLOS) provides the overarching framework governing the activities of vessels engaged in maritime transport, as well as other activities such as, seabed mining, high seas fisheries and marine scientific research. UNCLOS asserts that the flag State is the principal authority responsible for ensuring that vessels flying its flag have implemented and are in compliance with international laws and regulations, particularly in areas beyond national jurisdiction.

UNCLOS Article 91 states that:

'Every State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship' (91.1) and that *'Ships shall sail under the flag of one State only and... shall be subject to its exclusive jurisdiction on the high seas.'* (91.2)

UNCLOS further elaborates upon the rights and duties of flag States through Article 94, in particular Article 94.1 and 94.2:

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

94.2. In particular every State shall:

(a) maintain a register of ships containing the names and particulars of ships flying its flag, except those which are excluded from generally accepted international regulations on account of their small size; and

(b) assume jurisdiction under its internal law over each ship flying its flag and its master, officers and crew in respect of administrative, technical and social matters concerning the ship.'

Article 97 asserts that:

'No arrest or detention of the ship, even as a measure of investigation, shall be ordered by any authorities other than those of the flag State in relation to matters of collision or any other incident of navigation on the high seas.'

In relation to the prevention of marine pollution, Article 217 establishes a number of obligations, including the requirement that:

'Penalties provided for by the laws and regulations of States for vessels flying their flag shall be adequate in severity to discourage violations wherever they occur.' (Article 217.8)

2.2 Regulation of Maritime Transport

In the merchant shipping sector, altogether over 50 conventions and protocols have been negotiated under the auspices of the International Maritime Organization (IMO), most of which are in force.⁷ In addition, a number of International Labour Organization (ILO) conventions govern various aspects of the working conditions aboard vessels. However, effective implementation remains problematic.

Amongst the most important of the IMO conventions are the International Convention for the Safety of Life at Sea (SOLAS); Convention on the International Regulations for Preventing Collisions at Sea (COLREG); International Convention on Load Lines (LL), International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW); International Convention for the Prevention of Pollution from Ships (MARPOL); Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (LDC); International Convention on Civil Liability for Oil Pollution Damage (CLC); and the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA). A number of these have important Protocols and Annexes (e.g. MARPOL 1978 & 1997 Protocols; and Annexes I-VI, SUA 2005 Protocols).

Amongst the ILO agreements are Convention (No. 147) concerning Minimum Standards in Merchant Ships; the 1987 Repatriation of Seafarers Convention and Seafarers Welfare Convention; the 1996 Labour Inspection (Seafarers Convention); Recruitment and Placement of Seafarers Convention; and the Seafarers' Hours of Work and the Manning of Ships Convention. The first of these, ILO Convention 147, has been ratified by 55 countries as of March 2008; the remainder have been ratified by less than 20 countries each, including few or any States operating open registries.⁸

In 2006 the ILO Maritime Labour Convention was adopted, consolidating and updating more than 54 international labour standards adopted since 1920. It is hoped that with its system of certification and comprehensive compliance and enforcement mechanisms, this convention will be instrumental in improving seafarers' living and working conditions.

UNCLOS establishes a considerable number of additional obligations on flag States in relation to innocent passage, the transport of nuclear or other dangerous substances, the duties of flag States whose ships operate in the EEZ of another State, conservation of living marine resources and high seas fishing (see discussion in Chapter 6), illicit trafficking in narcotic substances, the prevention, control and reduction of marine pollution and responsibility and liability in relation to damage to the marine environment caused by pollution, and marine scientific research. Altogether, the Division for Oceans and the Law of the Sea of the United Nations cites 70 Articles of UNCLOS which contain, in whole or in part, duties applicable to the flag State.⁹

A detailed description and review of the various conventions applicable to the merchant shipping industry in relation to maritime safety, security and the protection of the marine environment has been prepared by the Division for Oceans Affairs and the Law of the Sea of the United Nations Office of Legal Affairs in advance of the 2008 meeting of the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea.¹⁰

3. MARITIME SECURITY, AND SAFETY: CONCERNS REGARDING FLAG STATE CONTROL AND COMPLIANCE



3.1 Potential Threats to Maritime Security and Safety

Numerous concerns have been raised by international organizations and certain States over the past several years regarding the lax registration procedures offered by States operating flags of convenience and the extent that they can be used as a cover by vessel owners to engage in illegal activities.

In regard to merchant ships, the delegation of Cyprus raised the issue of the potential use of ships by terrorist or other illegal operators in its submission to the April 2002 meeting of the Maritime Safety Committee of the IMO. Cyprus stated that a vessel could be used for the transportation of persons and equipment for the purpose of committing an unlawful act; as a weapon in an unlawful act; or in a lawful trade for the purpose of generating funds to finance unlawful acts. The submission highlighted the 'legitimate' concerns of any State relating to the ownership or control of a ship.¹¹

In a similar vein, the UK, in a submission to the Legal Committee of the IMO, stated '*A ship may be used as a weapon. It may be used to transport equipment or personnel for the purposes of committing an unlawful act ashore. A ship may be used to carry legal or illegal cargoes intended to finance unlawful acts. Port States therefore wish to seek greater information from ships concerning their ownership or control prior to the ship entering port. To be useful, the information that a port State requires about a ship's ownership and control, is information which enables the port State to identify which individuals or organizations truly own the ship or direct its operations.*'¹²

3.2 Challenges of Jurisdiction on the High Seas

One of the most publicized security related incidents involving a merchant ship occurred in December 2002. The 3,500 ton merchant vessel *So San*, departed a North Korean port in November 2002 and was tracked by American satellites and American naval ships. On 9 December, the ship was intercepted in the Indian Ocean and inspected by Spanish and U.S. naval forces. Spain and the United States justified the action by claiming that it was flying no flag and thus was considered stateless.¹³ The ship was found to be carrying North Korean built scud missiles. However, the White House stated at the time that '*While there is authority to stop and search, in this instance there is no clear authority to seize the shipment of Scud missiles from North Korea to Yemen. Therefore, the merchant vessel is being released.*'¹⁴

The ship was reported to be flying a Cambodian flag. However, at least three days after the incident, the Cambodian government was still unable to determine whether the ship was in fact registered to Cambodia. Up until July 2002, the Cambodian registry was run by a private company based in Singapore which had not provided the Cambodian government with a complete set of names or details of ships registered by the company and entitled to fly the Cambodian flag.¹⁵

According to an April 2007 article in the *Asia Times*, the ship claimed to be the *So San*, registered to Cambodia but was in fact North Korean. The ship was found to be carrying 15 Scud missiles with 15 conventional warheads, 23 tanks of nitric acid rocket propellant and 85 drums of unidentified chemicals hidden beneath bags of cement. The article states that to disguise the ship, named the *Song Sang*, by painting over the last two letters in the first name and the final letter in the second name (*So San*) to help prevent identification.¹⁶

The US Congressional Research Service in 2008 stated that the *So San* was flagged to North Korea and that the boarding of the ship was legal. However, the inspectors had no legal basis to seize the cargo of Scud-like missiles, warheads, and missile fuel oxidizer found hidden on board. The report stated that partially in response to legal gaps revealed in the 'incomplete interdiction' of the *So San* the US together with several other countries, initiated the Proliferation Security Initiative (PSI) in 2003.¹⁷

By 2006, the PSI had already resulted in the interdiction of thirty shipments of materials related to weapons of mass destruction 'including the interdiction of centrifuge parts that led to Tripoli's decision to abandon its chemical and nuclear weapons programs' since its inception in 2003 according to Robert Joseph, US State Department Under Secretary for Arms Control and International Security.¹⁸

In 2007 a Dutch national, Frans van Anraat, was convicted of complicity in war crimes and received a 17-year jail sentence. The court determined that van Anraat had knowingly and intentionally supplied chemicals from companies in the US and Japan for chemical weapons that were used by Iraq in Iraqi Kurdistan 1984-1988. An UNMOVIC study on the procurement methods used by Iraq for its chemical weapons programme, gives reasons as to why measures taken to prevent such trade failed. These include the existence of a network of a chain of brokers, intermediaries, bank accounts and transportation companies that enabled goods to be obtained and false end use certificates to be issued. Multiple transshipments by freight handlers were able to obscure the final destination of the goods.¹⁹

In at least one instance in a threat to international security deemed sufficiently serious to be brought before the UN Security Council, the Security Council dispensed with the fiction of the flag State control as distinct from that of the country of beneficial ownership. UN Security Council Resolution 787 (92), Article 10, stated that '*any vessel in which a majority or controlling interest is held by a person or undertaking in or operating from the Federal Republic of Yugoslavia (Serbia and Montenegro) shall be considered, for the purpose of the implementation of the relevant resolutions of the Security Council, a vessel of the Federal Republic of Yugoslavia (Serbia and Montenegro) regardless of the flag under which the vessel sails.*'²⁰

3.3 Ships as Weapons

In addition to the transport of weapons, concern over the use of ships as weapons or platforms from which to launch weapons was highlighted by the U.S. Government Accounting Office (GAO). In a report released in December 2007, the GAO identified vulnerabilities in the seaborne energy supply chain to terrorist attacks including the potential for suicide attacks using explosive laden vessels and attacks based on weapons launched from a ship. Attacks using ships carrying highly combustible commodities could result in fires or explosions posing a threat to public safety.²¹

Furthermore, the use of ships in such scenarios could cause substantial environmental damage and have the potential to cause serious economic consequences through disrupting the supply chain. The report noted that several attacks against tankers and off-shore oil terminals have been attempted since September 11 2001, including a suicide attack on the French supertanker Limburg off the coast of Yemen in 2002. The report emphasised that port facilities are particularly vulnerable given that they are often located in close proximity to major population centers.²²

Just how devastating such an attack could be was highlighted by William Langewiesche in an in-depth article on high seas piracy published in the Atlantic Monthly in 2003. Langewiesche describes an incident which occurred in Halifax harbor on December 6, 1917. A French munitions ship collided with a Norwegian freighter, caught fire, drifted to the city's waterfront, and blew up. More than 1,630 buildings were completely destroyed, another 12,000 were damaged, and more than 1,900 people died.²³ It is interesting to note the scale of the damage inflicted at a period of history that pre-dates the sophisticated weaponry available in today's world.

3.4 Smuggling and Trafficking

In addition to the concerns regarding the use of merchant ships as weapons or to illegally transport weapons, flags of convenience may facilitate the use of ships for other illegal activities. In the Asia Times article cited previously, the author, Robert Neff, reviewed information available on the Cambodian flag in the early part of the decade and reported that Cambodian flagged vessels had been involved in cigarette smuggling operations off Albania, the smuggling of Iraqi oil during the UN embargo on Iraq, human trafficking, drug smuggling and weapons smuggling over the previous ten years. The safety of Cambodian flagged ships was also reported to be a matter of serious concern. According to Neff, of the 450 ships registered to fly the flag of Cambodia in 2002, twenty-five had suffered shipwrecks or strandings, nine vessels had caught fire and forty-five were arrested for various offences.

In 2002, Alex Vines, a senior researcher at Human Rights Watch gave a statement to the US Armed Services Committee in which, amongst other things, he noted the activities of the Tamil Tigers' fleet. This fleet was built up during the 80's and 90's registered mostly under Panamanian, Honduran and Liberian flags of convenience using a number of front companies located in Asia. Alongside apparently legitimate trade, the fleet was able to transport arms and ammunition destined for the conflict in Sri Lanka. '*One such vessel, according to the Commonwealth Human Rights Initiative, the Honduran registered M.V. Swanee or Swene, sailed from the Ukraine to northeast Sri Lanka carrying fifty tons of TNT and ten tons of RDX explosives to the LTTE. These*

*explosives were used in a suicide bombing on January 31, 1996, of the Central Bank of Ceylon building in Colombo, which killed approximately 90 people and injured another 1,400.*²⁴

Other ships flying FOCs have also raised concerns. Two ships registered to Tonga were implicated in illegal arms shipments and people smuggling in 2002. In 2003, a North Korean freighter flying the flag of Tuvalu was caught attempting to smuggle US\$ 50 million dollars worth of heroin into Australia.²⁵

3.5 Sub-Standard Shipping

The Maritime Transport Committee of the OECD in 2002 adopted a Policy Statement on Sub-standard Shipping which summarizes concerns regarding flag State implementation and compliance with maritime conventions. The Policy Statement states, in part that: *'sub-standard ships carry with them a higher than normal risk of being involved in serious incidents, which impose large costs on communities, including loss of life and environmental damage. This is a situation which should not be tolerated by Governments, shipowners, shippers and the maritime industry generally. The Committee notes the large number of international maritime conventions that if effectively implemented would deal with the problem of sub-standard shipping. However, the Committee also notes with great concern that there is clear evidence that these conventions are often applied ineffectually, or inconsistently, and therefore urges all flag States to ensure that these conventions are effectively implemented in their jurisdictions.'*²⁶

This view has been echoed by Weng Mengyong, China's Vice-Minister in the Ministry of Communications. In an article in Fairplay in June of 2007, he stated that 'Countries that offer flags of convenience usually charge a small amount in registration fees, but do not have sound safety supervision systems'.²⁷

Paul Martin, former Prime Minister of Canada and owner of Canadian Steamship Lines, which has flagged a number of vessels to Liberia, Cyprus, Bahamas and Vanuatu over the years, stated in March 2006 that flags of convenience offer a number of advantages to ship owners, including those that wish to use ships for illegal activities. The registration and annual fees are cheaper than in countries such as Canada and the registration process is quicker – often as little as a few hours. FOC countries offer lax environmental regulations or, in some countries such as Equatorial Guinea and Cambodia according to Martin, virtually no environmental regulations at all. This provides a major advantage to shipping companies given that the ship is subject to the laws of the country whose flag the ship flies.

In the same interview, Martin added the FOC countries have lower labour standards and that 'Some FOC countries allow ship owners to effectively hide or muddy their true ownership in their registration documentation. Authorities have long complained that lax registration requirements make it more difficult to prosecute people smuggling, money laundering and drug trafficking'.²⁸

3.6 Concerns Regarding Onboard Working Conditions and the Treatment of Seafarers

As part of its long-running campaign against FOCs, the ITF has some one hundred and thirty inspectors visiting ships to check on seafarers' living and working conditions. The ITF notes a clear correlation between sub-standard shipping and irresponsible, even criminal owners who register their vessels with FOCs due to a combination of factors. Reinforcing and expanding on the statement of former Canadian Prime Minister Paul Martin, these can be summarized as low cost and ease of registration, low taxes, protection of anonymity for owners, ability to employ cheaper foreign crew and lower minimum manning levels, resulting in lower operational costs, higher work-load, more pressure, inadequate resources for on-going ship maintenance and questionable attention to security matters.²⁹

One aspect of the ill treatment of seafarers is the prevalence of cases of unpaid wages. In 2006, ITF inspectors carried out a total of 10,584 ship inspections as a result of which a total of US\$17.1 million in seafarers' unpaid wages were recovered. Eighty two per cent of inspections were carried out on FOC vessels, the remainder on national and second register flagged ships. Of the remuneration recovered for seafarers, US\$12.7 million came from FOC ships, US\$4.4 from national flag and second registries. The relatively high sums owed on non-FOC vessels is due to the fact that the majority of ITF inspections on FOC ships were routine, whereas inspectors, when boarding national flag vessels, are usually responding to a request from seafarers. While it is clear that the division is not black and white and concerns for seafarers' treatment cannot be limited to FOC vessels, many of these flags remain problematic.

In a recent case reported to the Joint ILO/IMO Abandonment Database by the ITF, five Burmese seafarers who joined a ship in October/November 2007 were stranded in Montelimar (Rhône River), France without pay, without adequate food supplies and subject to physical abuse from the captain. A similar fate befell the previous crew who left in November, only after ITF intervention secured their wages and repatriation.

The vessel, a 24 year-old general cargo ship, currently flagged to St Vincent & Grenadines, had been registered under the Netherlands flag for the first 18 years of its working life. In 2002 it reflagged to St Vincent & Grenadines. According to the ITF, one reason why non-FOC States and States traditionally associated with the maritime industry do not object to the lax regulation that allows FOCs to prosper, is because the system provides them with a market for their old tonnage.

3.7 Anarchy of the Open Ocean

On the issue of flags of convenience, Langewiesche opines that in many cases merchant ships *'are owned or managed by secretive one-ship companies so ghostly and unencumbered that they exist only on paper, or maybe as a brass plate on some faraway foreign door. But it is the ships themselves that truly embody the anarchy of the open ocean: they are possibly the most independent objects on earth, many of them without allegiances of any kind, frequently changing their identity, and assuming whatever nationality, or 'flag,' allows them to sail as they please.'*

While Langewiesche admits that the modern system of registering ships to flags of convenience does provide for cheaper costs to shipowners, and ultimately lower prices for consumers, he states that *'the efficiencies are accompanied by global problems, too, including the playing of the poor against the poor, the persistence of huge fleets of dangerous ships, the pollution they cause, the implicit disposability of the crews who work aboard, and the parallel growth of two particularly resilient pathogens that exist now on the ocean - the first being a modern and sophisticated strain of piracy, and the second its politicized cousin, the maritime form of the new stateless terrorism.'*

4. PORT STATE CONTROL



4.1 Port State Controls as a Measure of Performance of Flag States

Arguably, one of the best indications available of flag State performance regarding the safety of ships and their compliance with international regulations for preventing marine pollution are those produced by port States based on records of inspections and detentions of ships while in port. A number of regional regimes or 'Memoranda of Understanding' for port State inspections have been developed over the years, such as the Paris Memorandum of Understanding (MOU), the Tokyo MOU, and the Indian Ocean MOU. Flag States operating FOC registries figure prominently amongst the detentions and other actions taken by port States under these regional agreements.

The membership of the Paris MOU as of January 2008 consisted of 22 EU Member States plus the Russian Federation, Norway, Iceland, Canada, and Croatia. The Paris MOU Annual Report 2006 (the latest Annual Report available as of March 2008) stated that amongst the member countries of the Paris MOU, the number of ships detained by port authorities for deficiencies clearly hazardous to safety, health or the environment amounted to 1,174 vessels. The numbers detained in 2003, 2004, and 2005 and 2006 were 1,431, 1,187, and 994 vessels respectively. The percentage of the vessels detained by port authorities ranged from 4.7% to 7.1% annually of all vessels inspected between 2003 and 2006.

Altogether, 1,027 of the detentions in Paris MOU ports between 2004-2006, representing approximately 33% of all vessels detained, were registered to countries now on the Paris MOU 'black list': Albania, Belize, Bolivia, Brazil, Cambodia, Comoros, Egypt, Georgia, Honduras, Lebanon, Morocco, North Korea, Slovakia, St. Kitts and Nevis, or the Syrian Arab Republic. On average, one out of every seven vessels inspected flagged to these countries combined was detained.³⁰ Most of these countries operate FOC registries.

Table 4.1 shows the 2006 figures for flag States whose vessels in 2006 were detained over 10% of the times they were inspected. They are the latest indication of the performance of flag States in relation to the numbers of their vessels found with deficiencies deemed by port authorities as being sufficiently hazardous to safety, health or the environment as to require detention.

Table 4.1 Flags with greater than a 10% detention rate in 2006 - Paris MOU

| Flag | No. of inspections | No. of detentions | % of detentions per inspections |
|-------------------------|--------------------|-------------------|---------------------------------|
| North Korea | 114 | 42 | 36.84 |
| Albania | 97 | 29 | 29.90 |
| St Kitts and Nevis | 37 | 10 | 27.03 |
| Sierra Leone | 22 | 5 | 22.73 |
| Honduras | 30 | 6 | 20.00 |
| Comoros | 120 | 23 | 19.17 |
| Georgia | 280 | 52 | 18.57 |
| Slovakia | 101 | 18 | 17.82 |
| Syria | 48 | 8 | 16.67 |
| Cambodia | 166 | 27 | 16.27 |
| Lebanon | 39 | 6 | 15.38 |
| Azerbaijan | 36 | 5 | 13.89 |
| Egypt | 45 | 6 | 13.04 |
| Morocco | 55 | 7 | 12.73 |
| St Vincent & Grenadines | 813 | 100 | 12.30 |
| Belize | 195 | 23 | 11.79 |

Source: Paris MOU Annual Report 2006. Note: only includes flags whose vessels were inspected more than 10 times

The report also stated that a concerted inspection campaign to investigate the operability of oil filtering equipment systems, and to determine whether ships had properly disposed of sludge and oil residues (e.g. discharged into port reception facilities) was carried out by Paris MOU port States for three months in 2006. The inspections revealed that in 108 cases unauthorized by-passes were found in the engine room; these would allow oil residues to be pumped overboard directly, without being filtered.³¹

Another concerted inspection campaign was conducted by Paris MOU members for three months in 2007 on the implementation of the International Safety Management (ISM) Code adopted in 2002, whose purpose is to provide an international standard for the safe management and operation of ships.³² A total of 5,247 inspections were carried out with one out of five inspections showing ISM deficiencies. More importantly, 176 inspections resulted in a detention where one or more 'major' non-conformities (MNCs) were found. Most commonly found MNCs were issued against 'effective maintenance of the ship and equipment', 'emergency preparedness' and 'reports of non-conformities and accident occurrences'. All three are key areas with regard to the safety of the ship and its crew.

The average detention rate during the campaign was 5.4% of all vessels inspected. The worst performing ships, with a detention rate of 16.2% (three times the average) or higher, were flying the flag of Albania, Comoros, Cook Islands, North Korea, Sierra Leone, Slovakia, St Vincent and the Grenadines and the Syrian Arab Republic. By comparison, none of the vessels flying the flags of Azerbaijan, Belgium, Bermuda, China, Denmark, Faroe Islands, Finland, France, India, Ireland, Latvia, Luxembourg, Isle of Man, Philippines, Spain, Thailand, or the United States were detained.³³ Again, flags of convenience dominate the list of poor performers.

A similar picture emerges from the information on port inspections by countries that are members of the Tokyo and Indian Ocean MOUs. The member countries of the Tokyo MOU are Australia, Canada, Chile, China, Fiji, Hong Kong (China), Indonesia, Japan, Republic of Korea, Malaysia, New Zealand, Papua New Guinea, Philippines, Russian Federation, Singapore, Thailand, Vanuatu and Vietnam.

Table 4.2 Top 10 Flag States in terms of total number of detentions - Tokyo MOU 2004-2006

| Flag | Number of detentions | % of all vessel detentions |
|--------------------------------------|----------------------|----------------------------|
| Panama | 868 | 23.7 |
| Cambodia | 573 | 15.7 |
| Belize | 268 | 7.3 |
| Korea DPR | 241 | 6.6 |
| Indonesia | 153 | 4.2 |
| Viet Nam | 134 | 3.7 |
| Liberia | 111 | 3.0 |
| Mongolia | 102 | 2.8 |
| Cyprus | 93 | 2.5 |
| Thailand | 90 | 2.5 |
| Total Detentions Top 10 | 2633 | 72% |
| Total detentions all Flags 2004-2006 | 3,661 | 100% |

The Round Table of international shipping associations - BIMCO, INTERCARGO, the International Chamber of Shipping (ICS), the International Shipping Federation (ISF) and INTERTANKO – periodically reviews the performance of flag States. A total of 19 criteria are used by the Round Table to assess the performance of flag States, including the extent to which flag States have ratified key IMO and ILO conventions; the extent to which flag States are on the Tokyo or Paris MOU black and white lists and the US Coast Guard Qualship 21 or Target lists and the STCW white list; and the average age of the fleet and the extent to which flag States use non-IACS Classification Societies.

In its latest review, the 2007 Update of the Shipping Industry Flag State Performance Table, the Round Table identifies the following countries as the flag States with 12 or more negative scores against the 19 criteria used: Albania, Bolivia, Cambodia, Costa Rica, Democratic Republic of the Congo, Honduras, Kenya, Madagascar, Mongolia, North Korea, Sao Tome & Principe, Suriname, Syrian Arab Republic and Thailand.³⁴

All of these countries were also the Round Table list of worst performers in 2006 and, with the exception of North Korea, in 2005 as well.

Table 4.3 Black listed flags Paris and Tokyo MOUs; Marisec worst performers

| Flag | Paris MOU Black list | Tokyo MOU Black List | Marisec worst performers |
|-----------------|----------------------|----------------------|--------------------------|
| Albania | ● | | ● |
| Belize | | ● | |
| Bolivia | ● | | |
| Brazil | ● | | |
| Cambodia | ● | ● | ● |
| Costa Rica | | ● | |
| Comoros Islands | ● | ● | |
| Congo | | | ● |
| Dominica | | ● | |
| Egypt | ● | | |
| Georgia | ● | ● | |
| Honduras | ● | ● | ● |

| | | | |
|-------------------------|---|---|---|
| Kenya | | | ● |
| Madagascar | | | ● |
| Mongolia | | ● | ● |
| North Korea | ● | ● | |
| Sao Tome | | | ● |
| Slovakia | ● | | |
| St Vincent & Grenadines | ● | | |
| Suriname | | | ● |
| Syria | ● | | ● |
| Taiwan | ● | ● | |
| Tonga | ● | | |
| Thailand | | ● | ● |
| Turkey | ● | | |
| Ukraine | ● | | |

One of the clearest indications of the failure of flag States to discharge their obligations under UNCLOS can be seen in the Paris MOU list of ships banned from member country ports. The list currently includes 61 ships which have been banned as a result of either multiple detentions, jumping detention (e.g. leaving port without authorization from the port State authorities to do so), or failing to call in a designated shipyard to conduct necessary repairs identified as a result of inspection.

The current list of ships banned from entering ports under the Paris MOU, and the reasons why these ships are banned, can be found in the following table updated as of February 2008.³⁵

Table 4.4 Ships Banned from Paris MOU ports (February 2008)

| Name of ship* | IMO number | Banning date | Flag | Banning reason |
|-------------------|------------|--------------|--------------------|---|
| Agios Nikolaos II | 7378664 | 01-02-2008 | Comoros** | Multiple detentions |
| Blue Ice | 7340851 | 29-01-2008 | St Kitts & Nevis** | Multiple detentions |
| My Ship | 8121719 | 09-10-2007 | Slovakia | Jumped detention |
| Almarwa | 7420118 | 14-09-2007 | Libya | Failed to call at indicated repair yard |
| Esra C | 7509938 | 08-08-2007 | Panama | Failed to call at indicated repair yard |
| Malbork | 7725520 | 15-07-2007 | Georgia | Multiple detentions |
| Ibrahim M | 7026560 | 28-06-2007 | Bolivia | Jumped detention |
| Khaldoun | 7610270 | 01-06-2007 | Syria | Multiple detentions |
| Ghada 1 | 7121059 | 15-05-2007 | Cambodia | Failed to call at indicated repair yard |
| Tri Box | 7333896 | 13-03-2007 | Panama | No valid ISM certificate |
| Sohret | 7227009 | 10-01-2007 | Turkey | Failed to call at indicated repair yard |
| Nauta | 5034264 | 05-09-2006 | Lithuania | Jumped detention |
| Morena | 7229629 | 18-07-2006 | Cambodia | Failed to call at indicated repair yard |
| Aletta | 7725013 | 30-06-2006 | Panama | Failed to call at indicated repair yard |

| Name of ship* | IMO number | Banning date | Flag | Banning reason |
|-------------------------------|------------|--------------|---------------------------|---|
| Hyok Sin 2 | 8018900 | 22-05-2006 | North Korea | Multiple detentions |
| Gaspard | 7433218 | 04-05-2006 | Panama | Failed to call at indicated repair yard |
| Jazin I | 7030987 | 23-03-2006 | St Vincent & Grenadines | Failed to call at indicated repair yard |
| Hanny ex Mona Rosa | 5239199 | 22-03-2006 | Panama | Jumped detention |
| Timios Stravosex DD Seaman | 8400311 | 18-02-2006 | St Vincent & Grenadines | Multiple detentions |
| Abdulrahman | 7029421 | 27-12-2005 | North Korea | Multiple detentions |
| Hizir Karaer 1 | 8139302 | 05-12-2005 | Turkey | Jumped detention |
| Oil Ambassador | 8014203 | 30-11-2005 | Panama | Multiple detentions |
| El Loud II | 7350533 | 16-11-2005 | Madagascar | Jumped detention |
| Mai-S | 7501807 | 07-11-2005 | Syria | Multiple detentions |
| Heidi II | 7614147 | 28-10-2005 | Georgia | Multiple detentions |
| Stonny ex Pummy Star | 6903333 | 27-10-2005 | Cambodia (ex Honduras) | Failed to call at indicated repair yard |
| Nova | 5121079 | 14-10-2005 | Comoros | Failed to call at indicated repair yard |
| Anna | 6609858 | 27-06-2005 | Lebanon | Failed to call at indicated repair yard |
| Derya 2 | 7433323 | 30-05-2005 | Cambodia | Multiple detentions |
| Catalyst | 7122560 | 24-03-2005 | Panama | Failed to call at indicated repair yard |
| Salina II | 5364279 | 01-01-2005 | Panama | Jumped detention |
| Mers El Hadjadj | 6729696 | 28-12-2004 | Algeria | Failed to call at indicated repair yard |
| Long Guan | 7625720 | 24-12-2004 | St Vincent & Grenadines | Multiple detentions |
| Gnocchi | 5166134 | 14-12-2004 | Cambodia | Failed to call at indicated repair yard |
| Shahd Cleopatra ex Hoggar | 7046821 | 29-11-2004 | Algeria | Multiple detentions |
| Hermes | 7420326 | 17-12-2004 | St Vincent & Grenadines | Multiple detentions |
| Orion 1 | 7303229 | 26-10-2004 | Nigeria | Failed to call at indicated repair yard |
| Lady Fox ex Elpis | 7610098 | 21-04-2004 | St Vincent & Grenadines | Multiple detentions |
| Agios Nikolaos | 5330278 | 16-04-2004 | Comoros | Failed to call at indicated repair yard |
| Andra ex Sandra | 7336642 | 05-04-2004 | Bolivia | Multiple Detentions |
| Kinso | 7222279 | 05-01-2004 | North Korea | Failed to call at indicated repair yard |
| Barkat ex Armada | 8008840 | 31-10-2003 | Panama | Failed to call at indicated repair yard |

| Name of ship* | IMO number | Banning date | Flag | Banning reason |
|----------------------------------|------------|--------------|------------------------------|---|
| Al Tawfik | 7396616 | 30-10-2003 | Georgia | Failed to call at indicated repair yard |
| Manyas | 7533094 | 23-05-2003 | Turkey | Failed to call at indicated repair yard |
| Salih C | 7314589 | 27-03-2003 | Turkey | Failed to call at indicated repair yard |
| Newtec ex Pace | 7616482 | 24-01-2003 | Malta | Failed to call at indicated repair yard |
| Agios Dimitrios 7 | 7409097 | 22-11-2002 | Honduras | Failed to call at indicated repair yard |
| The Guardian | 7228041 | 13-11-2002 | Panama | No valid ISM certificate |
| Samy ex Gull, ex Ira, ex Vika | 7027241 | 9-9-2002 | Honduras | Failed to call at indicated repair yard |
| Arij ex Smooth Challenger | 7716000 | 5-8-2002 | Cambodia | Failed to call at indicated repair yard |
| Help | 5383861 | 30-03-2002 | Sierra Leone (ex Tonga)** | Jumped detention |
| Mercury ex Zanita | 5360572 | 21-01-2002 | Nigeria | Failed to call at indicated repair yard |
| Maria ex Nordvik | 7315624 | 17-05-2001 | Cambodia | Failed to call at indicated repair yard |
| Liao Chang Leng II | 8843939 | 12-03-2001 | Belize | Failed to call at indicated repair yard |
| Eldorado ex Cormoran | 8920701 | 28-10-2000 | Cambodia | Jumped detention |
| Suloy | 7041106 | 24-02-2000 | Russia | Jumped detention |
| Delmar Eagle | 6722038 | 11-11-1999 | Nigeria | No valid ISM certificate |
| Ogan Bey ex Funda C | 7106932 | 01-11-1999 | Turkey | Failed to call at indicated repair yard |
| Castor ex Dynacontainer I | 7035432 | 14-07-1998 | Panama | Failed to call at indicated repair yard |
| Ducado ex Hua Lung Reefer | 6803313 | 15-03-1998 | Belize | Jumped detention |
| Rina One ex Leader | 7329077 | 28-11-1996 | St Vincent & Grenadines | Failed to call at indicated repair yard |

* Please note that the particulars of the ships on this list are only updated on request of the banning authority. The main identifier of a banned ship is the IMO number.

** From the Equasis database (www.equasis.org)

In 2006, the Paris MOU Annual Report stated that most of the ships banned at that point in time under the Paris MOU were still in operation in other areas. To the extent that any of these ships banned by Paris MOU port States continue to operate in other ocean areas, the flag State concerned has clearly failed to discharge its obligations under UNCLOS to ensure compliance with relevant maritime conventions.

5. HIDING CORPORATE IDENTITY

5.1 Hiding Corporate Identity

One of the major challenges to effective implementation and enforcement of international maritime conventions is the ability of flag States to ensure that owners of ships comply with the regulations. Yet many flag States do not even require disclosure of beneficial ownership as a condition for registering ships and some actively advertise secrecy as a benefit of registering ships to their flag.

The Maritime Transport Committee of the OECD in 2003 undertook a review of ship registration provisions in various ship registers. The report was designed to assess the possibilities available to beneficial owners, who for one reason or another might wish to remain anonymous, to mask or hide their identity. The report analyzed both ship registration requirements and the role played by corporate registration requirements, as well as the use of instruments that permit or facilitate the cloaking of beneficial owners. The 2004 Report of the UN Secretary General's Consultative Group on Flag State Implementation summarized the key findings of the OECD Report as follows:

- *It is very easy, and comparatively inexpensive, to establish a complex web of corporate entities to provide very effective cover to the identities of beneficial owners who do not want to be known.*
- *While some ship registers actively facilitate and promote anonymity for reluctant owners, the principal mechanisms are not the registers themselves, but the corporate mechanisms that are available to owners to cloak their identity.*
- *These corporate mechanisms are freely available in many jurisdictions, they are quite legal, and will provide a properly incorporated international business corporation that can transact business almost anywhere in the world (but generally not in the country of incorporation).*
- *From the perspective of the ship-registering process, the most important single feature that facilitates anonymity of individuals is the ability (quite sensible from a commercial perspective) of corporations to be registered as owners of vessels.*
- *The most common and effective mechanisms that can provide anonymity for beneficial owners include bearer shares, nominee shareholders, nominee directors, the use of intermediaries to act on owners' behalf and the failure of jurisdictions to provide for effective reporting requirements.*
- *The most common institutional devices used to create corporations are private limited companies, and international business corporations (IBCs). Other devices such as trusts, foundations and partnerships may also be used. Open registers, which by definition do not have any nationality requirements, are the easiest jurisdictions in which to register vessels that are covered by complex legal and corporate arrangements. The arrangements will almost certainly cover a number of international jurisdictions which would be much more difficult to untangle.*
- *While open registers would be (by choice) the most obvious targets for beneficial owners wishing to avoid revealing their identities, traditional registers, including those of OECD, may not be immune to use by anonymous beneficial owners. The additional complexity and risk of registering vessels in traditional registers would be compensated by the status and perhaps lesser attention directed towards vessels registered in these traditional registers.*
- *Some institutional arrangements, such as the remaining dependencies of former colonial Administrations (United Kingdom, France and the Netherlands, for example), as well as internal free trade arrangements (such as the European Union) may also provide opportunities, albeit complex and perhaps risky ones, for beneficial owners seeking anonymity to achieve their objectives.³⁶*

5.2 Complex Corporate Structures

The OECD report identified a number of mechanisms for establishing corporate structures that could facilitate anonymity of ownership, including bearer shares, nominee shareholders, nominee directors, private limited companies, and international business corporations.

‘...in many instances, such as in the case of a known terrorist wishing to remain hidden, the normal procedure would be to use a multi-layered approach, employing a variety of methods, spread over a number of different jurisdictions. Such corporate arrangements are common in the off-shore sector, and any investigators, be they from taxation authorities, law enforcement agencies, security forces or others will find the cloaking processes almost impenetrable. Like peeling an onion, isolating and removing one layer simply reveals another, and another, and because these cloaking devices are relatively cheap and easy to create, those who have a need or a desire to do so can hide themselves very deeply indeed.

While a variety of mechanisms are available, in reality would-be terrorists need to resort to only a small number of them. The effectiveness of the legal structure is in the repeated use of the mechanisms, and spreading their use over a number of different jurisdictions. Because each jurisdiction will have its unique legal system and administrative process, this will multiply the difficulties of investigators in dissecting the corporate structures. Also, using jurisdictions which make a strong selling point of protecting identities will further add to the difficulty in establishing final ownership of a vessel.’³⁷

The report acknowledges that the main purpose of these mechanisms is not to provide a cover for terrorists, or for others involved in illegal or criminal activities. Beneficial owners may seek anonymity for a variety of reasons, legal or otherwise, that have nothing to do with security. Nonetheless, the report highlights the concern that *‘the reality is that regardless of the reasons why the cloak of anonymity is made available, if it is provided it will also assist those who may wish to remain hidden because they engage in illegal or criminal activities, including terrorists.’³⁸*

Once a shipowner has established a corporate ‘shield’, the OECD report states that *‘the next step would be to actually register a ship. Because of the protection offered him by his corporate arrangements, the terrorist has plenty of choice, and here arises a particular concern that may be of special interest to security agencies concerned with the possible use of ships for terrorist purposes. While there are Flag State administrations (both open and traditional) that are sometimes lax in the way in which they administer their registers, and therefore would be preferred by beneficial owners wishing to hide their identity, anonymity is not something that is restricted to a few rogue jurisdictions. Indeed, the problem is much more widespread than that, and therefore more difficult to pierce and to detect potential security risks.’³⁹*

The report concludes by stating that *‘even the most rigorous of registers may not be able to totally escape the attention of a terrorist determined to maximise the chances of his vessel remaining undetected by security agencies, while still maintaining anonymity for his own identity. However, it is also true that other registers, especially those that are open, are much easier targets in which to hide the identity of a beneficial owner. Indeed, as already noted, many open registers make a virtue of their confidentiality.’⁴⁰*

Appendix B of the OECD report identified a number of flag States as facilitating the anonymity of ownership in their ship registration process. These are Anguilla, Antigua and Barbuda, Bahamas, Barbados, Belize, Bermuda, Bolivia, Cambodia, Cayman Islands, Costa Rica, Cyprus, Republic of Djibouti, Dominica, Gibraltar, Honduras, Hong Kong, Isle of Man, Jamaica, Latvia, Liberia, Madeira, Malta, Marshall Islands, Mauritius, Panama, Seychelles, Singapore, Sri Lanka, St Kitts and Nevis, St Vincent and the Grenadines, Tonga, and Vanuatu.

A subset of these flag States which specifically do not require the disclosure of beneficial ownership as a condition of registering ships is as follows: Anguilla, Antigua and Barbuda, Bahamas, Barbados, Belize, Cayman Islands, Costa Rica, (Cyprus – requires disclosure but information kept confidential), Hong Kong, Isle of Man, Liberia, Madeira, Marshall Islands, Panama, Seychelles, St Kitts and Nevis, St Vincent and the Grenadines, and Vanuatu.

Finally, those flag States that allow the use of Bearer Shares, which the OECD report describes as *‘the ultimate cloaking device, as it allows near total anonymity, as well as the ability to instantly transfer ownership by simply passing the shares from one person to another’* includes Anguilla, Antigua and Barbuda, Belize, Cayman Islands, Republic of Djibouti, Isle of Man, Liberia, Madeira, Marshall Islands, Seychelles, St Kitts and Nevis, St Vincent and the Grenadines, and Vanuatu.

5.3 CASE STUDY: The Erika

The case of the Erika, a tanker which sank off the coast of France in 1999, illustrates many of the concerns raised in the previous sections. On December 8, 1999 the Erika, a 37,000 ton tanker flying the Maltese flag and chartered by the oil company Total SA, formerly Total Fina Elf (and Total Fina at the time of the spill), left Dunkirk and sailed through the English Channel en route to the port of Livorno in Italy.

The tanker was carrying over 30,000 tons of heavy fuel oil. As the tanker entered the Bay of Biscay, it ran into a heavy storm. Three days later, the vessel broke in two and sank due to a combination of bad weather and severe corrosion of the vessel's structures. Ten thousand tons of oil leaked into the ocean, while the remaining cargo sank along with the Erika. The combination of the oil, a no. 2 heavy fuel oil with a specific gravity close to that of seawater that made it hard to detect and track, and the weather conditions, caused an ecological disaster.⁴¹ During the following days, the oil spill reached and spread along the French Atlantic coast, affecting a 400-kilometer stretch. Over 34,000 oiled birds were collected of which two-thirds died. Besides the environmental consequences, the oil spill has also had repercussions on the local coastal economy, as bans on fishing and shell fishing were imposed and the tourism industry was affected.

Following the oil spill, a report was published on the causes of the accident. Inspections held in 1997 and 1999 revealed severe corrosion of the Erika.⁴² In spite of this, RINA, a member of the International Association of Classification Societies (IACS), which consists of the world's ten leading classification societies, renewed the certificate of seaworthiness. On February 12, 2007, more than 7 years after the spill, a trial started in the French Tribunal of First Instance in Paris to establish the liability of the parties involved, the amount to be indemnified as well as the existence of an ecological damage.

On January 16, 2008, the Tribunal issued a decision in which it found the liability of the shipowner (Giuseppe Savarese and Tevere Shipping,) the classification society (RINA), the management company (Antonio Pollara and Panship) as well as the charterer (Total SA) and ordered them to pay 192 million euro to the plaintiffs. Total SA was also fined 375,000 euros. It was the first time that a court in France has held an entity other than the ship owner liable for environmental damage. The French magistrate made attempts to summon the Malta Maritime Authority (MMA) but it did not succeed since the MMA is an extension of the Maltese State and the Administration of the Malta Flag is covered by 'immunity of jurisdiction'.⁴³

5.3.1 The French Ruling and its implications for the key defendants

The Shipowner and Manager

Tracing the ownership of the Erika proved quite a challenge for the French magistrates. The owner of the Erika at the time of the spill, through 12 off shore companies, of which 8 were Liberian and 4 Maltese, was Giuseppe Savarese an Italian 'financier' resident in London. Savarese owned the tanker through Tevere Shipping, a so-called 'single ship company'. Initial enquiries as to the ownership of the Erika began in Malta (the flag State), where records disclosed that the owning company was made up of two corporate shareholders, both of them companies registered in Liberia. The two Liberian company names were as close as it was possible to get to determining the ownership of the vessel, given the anonymity laws in Liberia. The ownership of the ship remained unknown until the owner came forward voluntarily at a later stage.⁴⁴ Antonio Pollara was the ship manager: he managed the Erika through an Italian company called 'Panship'. The company was in charge of managing the tanker as well as communicating with RINA about the status of the tanker on its requirements and condition.

Savarese and Pollara, shipowner and manager, respectively, deliberately reduced the scale of structural repairs carried out on the Erika in 1998 for reasons of cost. In so doing, the judge said, they could not have been ignorant of the fact that they were putting the ship in danger and exposing other people to a 'risk of particular gravity'. The Italian owner and manager received the maximum penalty of 75,000 euro (each) for 'blatant neglect' since they could not have been unaware of having spent only a minimal sum on the tanker's repair.⁴⁵

RINA

RINA, an Italian classification society, issued the Erika class certificates as well as the other certificates on behalf of the flag State as required under the 1974 International Convention for the Safety of Life at Sea ('SOLAS'), the Standards of Training, Certification and Watchkeeping ('STCW') and MARPOL regimes. Like other classification societies, RINA carried out all the inspections that are typically required. RINA argued that it should benefit from immunity from liability on the same grounds as the flag State, Malta, since its actions formed part of the statutory certification duties that it carried out on behalf of the flag State. In a technical report discussing the causes of the sinking of the Erika, RINA took the view that

it had substantially complied with the applicable rules, guidelines and procedures and that the proper operation and maintenance of the ship was solely the responsibility of the ship owners or the ship managers.⁴⁶

However, the Experts Report to the Dunkirk Court in 2005 indicates that RINA should not have delivered certificates authorizing the tanker to navigate, given the corrosion levels. RINA has been fined 175,000 euro in addition to having to pay 192 million euro with the other defendants.

Total SA

Different offices and branches of Total were implicated in the case, from the management, commercial services (Total SA) to Total Raffinage Distribution (TRD) as consignor, Total International Limited (TIL), Total Petroleum Services (TPS) and Total Transport Corporation (TTC) as voyage charterers.

When Total decided to charter the Erika (for the 4th time), it had recently undergone a five-yearly survey and repair work, during which its structures were inspected and renewed under RINA's supervision. In 1999 alone, it had passed no fewer than 11 inspections finding it acceptable and its target factor, which is calculated by port authorities, was that of a vessel that did not show any deficiency. But the Erika was 23 years old when Total SA chartered it, had had eight different names, had changed flag twice and been classed by four different classification societies.

The French court found Total SA guilty of causal negligence and '*as such brought the disaster about*' (French Ruling).⁴⁷ The judge did not indict Total SA in its capacity as charterer but rather as the cargo owner because as charterer it would likely have been immune to sanctions under MARPOL and the Liability and Fund Conventions (where omission must be shown). As a result the judge held it liable for the ship's 'vetting' policy. Total overlooked both the age of the Erika and the discontinuity in the ship's technical management and maintenance. Total SA nevertheless tried to argue that the MARPOL Convention took precedence over the 1983 French Law. Total SA also asked how it could be found guilty for shortcomings in a procedure that it had introduced voluntarily in order to improve its shipping safety standards. Total SA will have to pay a maximum fine of 375,000 euro.

5.3.2 The 'Missing Defendant': Malta, the flag State

Giuseppe Savarese, the owner of the Erika, argued that Malta should be held responsible for the Erika spill. In September 2002, the French magistrate Dominique de Talancé held the MMA and its Director responsible for '*endangering the lives of others*' and of having been '*an accomplice in pollution*'. However, efforts to hold the MMA accountable failed as a result of the fact that the MMA is a public entity and thus enjoys immunity from prosecution under national laws.

It is a leitmotiv in oil spills like the Erika, that there is always an entity that regularly escapes scrutiny, the flag State. Although the flag State should ensure that all international regulations and measures relating to the seaworthiness of a vessel flying its flag are complied with, because of immunity issues and the inability (in most cases) of a State to be sued under the laws of another State, Malta could not be tried in France over its role in the Erika spill. However, France could have possibly lodged a complaint against Malta in connection with the Erika spill in front of the International Tribunal for the Law of the Sea.

5.3.3 Erika Conclusions

The Erika episode has led to the implementation of EC Directive 2005/35 on ship source pollution, as well as a decision imposing civil liability on the ship-owner, the charterer and the classification society.⁴⁸ In addition, it may have moved a number of constituencies closer to a determination to modify the system so that flag States may be held accountable under national laws. Finally, still on the drawing board is the plan to set up an international maritime criminal court.⁴⁹

It has also been suggested that various jurisdictions establish a permanent Classification Society Oversight Committee to police the performance of classification societies (a proposal made by the Independent International Commission on Shipping to the European Commission).⁵⁰ Finally, the French ruling, included the important recognition of the future ecological prejudice that flows from damage to the environment, providing grounds for parties that suffer such future damage to sue for compensation. However, the case against the Erika also exposed in clear detail the ability of the flag State to evade its responsibility, with virtual impunity, under international law, to monitor and ensure that ships flying its flag are in compliance with the treaties and regulations to which the flag State is a party.

6. HIGH SEAS FISHERIES



6.1 Growth in High Seas Fisheries

There has been a tremendous growth in marine fishing over the past several decades. According to the UN Food and Agriculture Organization (FAO), the worldwide catch of fish from the oceans (marine capture fisheries) has increased from some 20 million tons in 1950 to over 80 million tons per year this decade.⁵¹ Today, many of the world's major fisheries and marine ecosystems are being exploited at rates far in excess of sustainable levels.

Precise figures are not available, but it is generally recognized that fishing on the high seas has increased, since the widespread adoption of the 200nm Exclusive Economic Zones by most coastal countries in the 1970s, for a variety of reasons, including the overfishing of coastal waters, growing market demand for seafood products, and increasing restrictions imposed by coastal States on allowing distant water fleets to obtain access to fisheries within their EEZs.⁵²

In reporting on the status of fish stocks on the high seas, the UN FAO State of World Fisheries and Aquaculture 2006 concludes that fish stocks on the high seas are in worse shape than those found within EEZs. The report states that *'evidence seems to suggest that the state of straddling stocks and of other high seas fishery resources is even more problematic... with nearly two-thirds of the stocks for which the state of exploitation can be determined being classified as overexploited or depleted. Although these high seas fishery resources represent only a small fraction of the world fishery resources upon which millions of people are critically dependent for their food and livelihood, these correspond to fish stocks that are key indicators of the state of an overwhelming part of the ocean ecosystem, which appears to be more overexploited than the EEZs.'*⁵³

6.2 International Law in the Regulation of High Seas Fisheries

As with the regulation of merchant shipping, UNCLOS establishes a range of general obligations on flag States in respect to the conservation and management of living marine resources on the high seas. In the case of fisheries for straddling stocks – fish stocks whose range occurs both in areas under national jurisdiction and on the high seas – Article 63.2 obligates coastal States and flag States whose vessels fish for the same stock on the high seas to *'seek, either directly or through appropriate subregional or regional organizations, to agree upon the measures necessary for the conservation of these stocks in the adjacent (high seas) area.'* Article 64 calls on States whose nationals engage in fishing for highly migratory fish stocks to cooperate in the conservation of such species and Articles 116-119 establish a range of general obligations for the conservation and management of fisheries on the high seas.

These obligations are further developed in a number of global instruments, including the 1993 UN FAO Compliance Agreement, the 1995 UN FAO Code of Conduct for Responsible Fisheries, and the 2001 UN FAO International Plan of Action to Prevent, Deter and Eliminate IUU Fishing, and the 1995 United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks – the UN Fish Stocks Agreement (UN FSA). The most important of these, the UN FSA establishes in Articles 5 and 6, and Annex 1 and 2 a range of obligations related to the conservation and management of high seas fisheries, the collection of data and the application of the precautionary approach. Articles 18-22 elaborate a series of flag State duties with respect to authorizing vessels to fish on the high seas and in relation to compliance and enforcement.

UN FSA Article 19.1 requires the flag State to exercise effective enforcement capabilities over fishing vessels flying its flag, ensuring compliance with applicable regional conservation and management measures irrespective of where violations occur through, investigating immediately and fully any alleged violation of subregional or regional conservation and management measures and report promptly to the State alleging the violation and the relevant subregional or regional organization or arrangement on the progress and outcome of the investigation; requiring any vessel flying its flag to give information to the investigating authority; and where sufficient evidence is available in respect of an alleged violation, refer the case to its authorities with a view to instituting proceedings without delay in accordance with its laws and, where appropriate, detain

the vessel concerned; and ensure that, where it has been established that a vessel has been involved in the commission of a serious violation of such measures, the vessel does not engage in fishing operations on the high seas until such time as all outstanding sanctions imposed by the flag State in respect of the violation have been complied with.

UN FSA Article 21 establishes a list of serious violations requiring enforcement action by the flag State. In language similar to UNCLOS Article 217.8 in regard to marine pollution, UN FSA Article 19.2 states that flag State sanctions in relation to vessels in violation of regulations established for the conservation and management of high seas fisheries '*shall be adequate in severity to be effective in securing compliance and to discourage violations wherever they occur and shall deprive offenders of the benefits accruing from their illegal activities.*'

In addition, there are a wide range of regional agreements and treaty organizations established for the conservation and management of fisheries of various species and types, as well as a number of relevant global agreements.

6.3 IUU Fishing

A large part of the problem related to the conservation and management of high seas fisheries is the problem of illegal, unreported and unregulated (IUU) fishing. Precise estimates of the extent of the problem of IUU fishing on the high seas are not available. However, a report by the Marine Resources Assessment Group of the UK in 2005 estimated that the annual value of IUU fishing on the high seas could be in the vicinity of \$1.2 billion USD.⁵⁴ The figure was based on estimates of the extent of IUU fishing on the high seas for tunas (primarily bluefin, yellowfin, albacore and big eye), sharks, toothfish, cod, redfish, alfonsino, orange roughy, and squid. The Environmental Justice Foundation, in a report published in 2005, cites an estimate of the cost of IUU fishing to developing countries alone at \$2 - \$15 billion dollars (US) per year.⁵⁵

The problem of IUU fishing on the high seas is two fold. First, IUU fishing directly leads to overexploitation of the stocks and greatly complicates the ability of RFMOs to accurately assess the impact of fishing on target and non-target species. In addition, IUU fishing imposes additional costs on responsible flag States and fleets in terms of lost revenue, lower market prices for the catch, and costs associated with enhanced monitoring, control, surveillance and enforcement efforts (including at-sea surveillance and port controls) in order to combat IUU fishing. The Australian Antarctic Division, for example, estimates that the wholesale value of the IUU catch of Patagonian toothfish since the late 1990s amounts to some \$1 billion Australian dollars.⁵⁶

Secondly, and equally importantly, IUU fishing acts as a deterrent to States that do exercise control over their vessels to agree to the stringent management measures needed to prevent overfishing, protect other species, including endangered species, and the marine environment from the adverse impacts of non-selective fishing and destructive fishing practices. Many fishers will argue that imposing conservation and management measures on responsible operators will not be effective because the beneficial effects of such measures will be undermined by IUU fishing.

Lack of effective flag State control is not limited to FOC States or States which are not parties to RFMOs. A 2004 survey of UN FAO Member Countries highlights the work that remains to be done. Of the 64 countries responding to the survey, over half indicated that their ability to control the activities of fishing vessels flying their flag on the high seas was either insufficient or ineffective. Only 23 countries declared that control measures had been put into place to ensure that vessels flying their flag complied with high seas conservation and management measures. Half had not developed the practice of avoiding registering fishing vessels with a history of IUU fishing.⁵⁷ All told, while many countries have adopted measures to ensure more effective flag State compliance, much more action by non-FOC countries is required. Nonetheless, improvements in the performance of flag States and RFMOs will be enormously difficult to put into place or simply will fail to have the intended effect if the problem of high seas fishing by vessels flying flags of convenience continues at anywhere near the scope and intensity of current practice.

6.4 The Use of FOCs by Large-Scale Fishing Vessels

In November 2005, the Australian Department of Agriculture, Fisheries and Forestry, ITF and WWF published the report *The Changing Nature of High Seas Fishing: how Flags of Convenience provide cover for illegal, unreported and unregulated fishing*. The report reviewed trends in the registration of large-scale fishing vessels registered to 14 FOC countries and described the impact of 'free-riding FOC fishing States on resource management, human rights and marine conservation. Information on the registration of fishing vessels was obtained from Lloyd's Register of Ships and the report reviewed all vessels listed as 'fishing vessels', 'trawlers' and 'fish factory ships' greater than or equal to 24 meters in length on the Lloyd's database.⁵⁸

In addition the report reviewed trends in the numbers of large-scale fishing vessels on the Lloyd's Register of Ships whose flag was listed as 'unknown'.

6.5 Updated Information: March 2008

The following table compares the numbers of vessels listed on Table 1.1 of the 2005 report, based on information from the Lloyd's Registry of Ships for July 2005, with updated information from Lloyd's Seaweb database from March 2008.

| Table 6.1 Fishing Vessels Registered to 14 Open Registry/FOC countries 2005/2008 | | | | | | |
|---|-----------|----------------------------------|------------------------|----------------------------|--|--------------------|
| Flag State | Data Year | Vessels Registered in Flag State | As % of 14 FOC Vessels | Average Tonnage Per Vessel | Total Tonnage as % of 14 FOC Gross Tonnage | Average Vessel Age |
| Belize | 2005 | 241 | 19.0% | 1075.2 | 26.9% | 22 |
| | 2008 | 52 | 4.9% | 2627.3 | 18.7% | 22 |
| Bolivia | 2005 | 16 | 1.3% | 1051.5 | 1.7% | 26 |
| | 2008 | 6 | 0.6% | 1241.7 | 1.0% | 33 |
| Cambodia | 2005 | 47 | 3.7% | 590.9 | 2.9% | 27 |
| | 2008 | 127 | 12.1% | 463.0 | 8.1% | 26 |
| Cyprus | 2005 | 27 | 2.1% | 2462.3 | 6.9% | 22 |
| | 2008 | 16 | 1.5% | 830.3 | 1.8% | 27 |
| Equatorial | 2005 | 39 | 3.1% | 554.8 | 2.2% | 22 |
| Guinea | 2008 | 30 | 2.8% | 442.8 | 1.8% | 26 |
| Georgia | 2005 | 60 | 4.7% | 762.6 | 4.7% | 22 |
| | 2008 | 65 | 6.2% | 704.9 | 6.3% | 26 |
| Honduras | 2005 | 416 | 32.8% | 381.8 | 16.5% | 24 |
| | 2008 | 283 | 26.9% | 371.3 | 14.4% | 28 |
| Marshall Islands | 2005 | 7 | 0.6% | 1633.4 | 1.2% | 17 |
| | 2008 | 4 | 0.4% | 1103.8 | 0.6% | 10 |
| Mauritius | 2005 | 24 | 1.9% | 401.3 | 1.0% | 30 |
| | 2008 | 24 | 2.3% | 342.9 | 1.1% | 32 |
| Netherlands Antilles | 2005 | 20 | 1.6% | 414.7 | 0.9% | 24 |
| | 2008 | 15 | 1.4% | 466.3 | 1.0% | 29 |
| Panama | 2005 | 222 | 17.5% | 604.9 | 13.9% | 30 |
| | 2008 | 265 | 25.2% | 553.3 | 20.1% | 32 |
| St Vincent & Grenadines | 2005 | 74 | 5.8% | 1322.9 | 10.2% | 26 |
| | 2008 | 49 | 4.7% | 1403.3 | 9.4% | 28 |
| Sierra Leone | 2005 | 27 | 2.1% | 321.4 | 0.9% | 29 |
| | 2008 | 55 | 5.2% | 508.7 | 3.8% | 30 |
| Vanuatu | 2005 | 47 | 3.7% | 2517.0 | 12.3% | 11 |
| | 2008 | 62 | 5.9% | 1399.8 | 11.9% | 13 |

In identifying trends in the registration of fishing vessels, the above table indicates a decrease from 1,267 vessels in 2005 to 1,053 in 2008, registered to the 14 countries combined – a decrease of approximately 20%. The largest decreases were in the vessels registered to Belize with a drop of 241 to 52 vessels between 2005 and 2008 and Honduras with 416 vessels in 2005 decreasing to 283 in March 2008. On the other hand, a number of countries show substantial increases in the numbers of fishing vessels on their registries over the period July 2005 to March 2008: Cambodia from 47 to 127; Georgia 60 to 65; Panama 222 to 265; Sierra Leone 27 to 55; and Vanuatu 47 to 62 vessels. This would seem to suggest that as one FOC State improves its standards and deregisters vessels suspected of engaging in IUU fishing or for other reasons, there are numerous other registries waiting in the wings to register these vessels.

Table 6.2 Large-Scale Fishing Vessels Flagged to Select 14 FOC Countries

| Year | Flag States | Total Number Vessels ≥ 24m | Number as % of Total | Gross Tonnage (G.T.) of Vessels | G.T as % of Total | Average G.T | Average Age |
|-------|------------------|----------------------------|----------------------|---------------------------------|-------------------|-------------|-------------|
| 1999 | All Countries | 19578 | | 10,537,690 | | 538.2 | 27 |
| (Jun) | 14 FOC Countries | 1368 | 7.0% | 1,043,169 | 9.9% | 762.6 | 26 |
| | Flag Unknown | 1104 | 5.6% | 392,312 | 3.7% | 355.4 | 34 |
| 2001 | All Countries | 19527 | | 10,363,926 | | 566.3 | 26 |
| (Oct) | 14 FOC Countries | 1309 | 6.7% | 1,118,584 | 10.8% | 854.5 | 26 |
| | Flag Unknown | 1227 | 6.3% | 535,614 | 5.2% | 436.5 | 32 |
| 2003 | All Countries | 19771 | | 10,902,500 | | 551.4 | 26 |
| (Dec) | 14 FOC Countries | 1277 | 6.5% | 1,030,631 | 9.5% | 807.1 | 25 |
| | Flag Unknown | 1483 | 7.5% | 618,212 | 5.7% | 416.9 | 29 |
| 2005 | All Countries | 19482 | | 10,275,073 | | 527.4 | 25 |
| (Jul) | 14 FOC Countries | 1267 | 6.5% | 963,313 | 9.4% | 760.3 | 25 |
| | Flag Unknown | 1656 | 8.5% | 836,048 | 8.1% | 504.9 | 28 |
| 2008 | All Countries | 18555 | | 9,765,896 | | 526.3 | 28 |
| (Mar) | 14 FOC Countries | 1053 | 5.7% | 730,112 | 7.5% | 693.4 | 26 |
| | Flag Unknown | 1707 | 9.2% | 980,595 | 10.0% | 574.5 | 31 |

The trends in the flagging of large-scale fishing vessels as reflected in the information from Lloyd's Register of Ships indicates that the number of large-scale fishing vessels registered to FOC countries still represents a substantial portion of the overall fleet of large-scale fishing vessels. Furthermore, the number of large-scale fishing vessels listed as flag 'unknown' on the Lloyd's database continues to increase; from 1,107 in 1999 to 1,707 in 2008. While some of the vessels in this latter category are likely to have been scrapped (especially considering the average age of this category of fishing vessels) but not yet been deleted from the Lloyd's database, those that remain active may be flagged to FOC countries, registered to two or more flags, or falsely flying the flag of one or more countries.

Other countries beside those on Table 6.1 operating FOCs include the following with a number of fishing vessels greater than or equal to 24m on the Lloyd's database in March 2008: Togo with 15 vessels; North Korea, 51; Mongolia, 5; Dominica, 6; and Cook Islands with 32 fishing vessels.

It is important to recognize the limitations of the information on the Lloyd's Register of Ships. Only fishing vessels with IMO numbers are included in the Lloyd's database. There may be many more large-scale fishing vessels in operation which do not have IMO numbers. Furthermore, the information on the Lloyd's database may be inaccurate or out of date in some cases, and sometimes contradicts the information available on lists published by regional fisheries management organizations (RFMOs).

It is also important to recognize that of the total number of 18,555 large-scale fishing vessels registered to all countries combined on the Lloyd's database, most are likely to be fishing either within the EEZs of the flag State or with an authorization to fish on the high seas or in another country's EEZ. With respect to the 14 FOC countries on Table 6.1, at least some of the large-scale fishing vessels registered to these countries are also likely to be operating within the EEZs of the flag State, and some, though not many, are included in RFMO lists of vessels authorized to fish on the high seas. Finally, the information on the Lloyd's database for each of the years indicated above is a 'snapshot' of a particular time. Fishing vessels can, and do, move from flag to flag easily and often.

6.6 CASE STUDY: VIDAL ARMADORES

Vidal Armadores SA, a well-known company based in Galicia, Spain with a history of involvement in IUU fishing for Patagonian toothfish in the Southern Ocean, has regularly used a variety of flags of convenience to facilitate IUU operations. According to Lloyd's Register of Ships, Seaweb database, Vidal Armadores is listed as either the owner or operator of five fishing vessels as of March 2008. These are the Galaecia, Belma, and Playa do Castro all registered to Spain, and Chilbo San 33 and the Ina Maka registered to North Korea. The latter two vessels have a history of IUU fishing in the Southern Ocean and both appear on CCAMLR's list of IUU fishing vessels. Over the past several years, the Chilbo San 33 has previously been named the Hammer and the Carran and flagged to Togo and Uruguay respectively. The Ina Maka has been previously named the Black Moon, Red Moon, Elo, Thule, Magnus and Dorita and has been flagged to Equatorial Guinea and St. Vincent & the Grenadines. Another well-known IUU fishing vessel reportedly owned or operated by Vidal Armadores, the Viarsa has been flagged at various points to Sierra Leone, Panama, Belize and Uruguay before finally being scrapped.

IUU fishing activities by at least one of these vessels has not been confined to fishing for Patagonian toothfish. According to the South African press, in 2007, the vessel Ina Maka was fined 400,000 South African Rand (approximately US\$55,400) and its 60 kilometres of gillnets were confiscated after being caught illegally fishing off South Africa with a load of nurse sharks on board.⁵⁹

According to press reports, Vidal Armadores received some 3 million euros in subsidies from the Spanish government several years ago, including 1.3 million in subsidies to conduct an 'experimental' fishery for toothfish in the Southern Ocean with the fishing vessel Galaecia.⁶⁰ In a press release the environment organization Oceana stated that in December 2005, Joe Borg, European Commissioner for Fisheries and Maritime Affairs, sent a letter to the Secretary General for Marine Fisheries of Spain requesting that Spain revoke the permit for the Galaecia because of its previous history of involvement in IUU fishing activities. According to a scientific observer on board the Galaecia at the time of the experimental fishery, the vessel made an illegal transfer of toothfish at sea to the fishing vessel, Hammer.⁶¹

As indicated earlier, the Hammer was formerly named the Carran, and was the vessel which caught a load of IUU toothfish that was illegally imported via Singapore into the US in 2004. Antonio Vidal Pego, of Vidal Armadores and an associated company, Fadir SA incorporated in Uruguay, were found guilty in US courts of attempting to import and sell 'illegally possessed toothfish' and obstructing justice. Vidal was fined US\$400,000 and Fadir SA was fined US\$100,000 and the company was ordered to be closed. These fines were in addition to the seizure of the 11 containers of toothfish Vidal attempted to import into the US, with a wholesale value, according to US NOAA Fisheries, of approximately 3.5 million dollars.⁶²

The Hammer (ex Carran) has since been renamed the Chilbo San 33 and reflagged to North Korea, continues to be owned or operated by Vidal Armadores and may still be active in IUU fishing.

6.7 Why These Trends Are Cause for Concern

The Lloyd's Register of Ships lists a combined total of 318 large-scale fishing vessels registered to Cambodia, Georgia, Mongolia, North Korea, Sierra Leone and Togo as of March 2008 (Table 2.1). Yet, a review of the information available from the lists of vessels authorized to fish provided by RFMOs indicates that there are no vessels flagged to any of these six countries on any RFMO list of authorized vessels. These include the lists of vessels authorized to fish for species regions regulated by the Atlantic, Pacific and Indian Ocean RFMOs established to regulate fisheries for highly migratory species: the Inter-American Tropical Tuna Commission (IATTC); the International Commission for the Conservation of Atlantic Tunas (ICCAT); the Indian Ocean Tuna Commission (IOTC); the Western and Central Pacific Fisheries Commission (WCPFC); and the Commission for the Conservation of Southern Bluefin Tuna (CCSBT).

There are also no vessels registered to these flags on the lists of vessels authorized to fish in the high seas areas regulated by the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR). Likewise, none of these countries are members of, or cooperating non-contracting Parties to, the Northwest Atlantic Fisheries Organization (NAFO); the North-East Atlantic Fisheries Commission (NEAFC); or the South-East Atlantic Fisheries Organisation (SEAFO). Finally, none have been involved in nor have reported any catches on the high seas of the South Pacific or Northwest Pacific to the Interim Secretariats of the RFMO negotiations currently underway in both regions.⁶³

Of the other countries operating FOC registries mentioned listed on Table 2.1, the Lloyd's Register of Ships lists 283 large-scale fishing vessels registered to Honduras as of March 2008. Honduras has only seven vessels on the IATTC list of authorized vessels and two on the ICCAT list. There are no vessels flagged to Honduras on any of the other RFMO lists of authorized vessels. Similarly, Lloyd's puts the total number of large-scale fishing vessels registered to St. Vincent & the Grenadines at 49, yet there are only nine vessels flagged to St. Vincent and the Grenadines on the ICCAT list and none on any other RFMO list.

This information raises a number of questions: Are all of the 650 vessels on the Lloyd's Register of Ships listed as registered to Cambodia, Georgia, Honduras, Mongolia, North Korea, Sierra Leone, St. Vincent and the Grenadines or Togo actually registered to these eight countries? If so, aside from the 18 vessels from Honduras and St. Vincent & the Grenadines mentioned above, where are they fishing? Which flags are these fishing vessels now flying, if any? How many have been scrapped and how many are still in operation? Are any of these vessels either stateless or illegally flying the flag of a country to which they are not registered?

In fact, vessels from a number of these countries, and others have been identified as having engaged in IUU fishing on the high seas by a number of RFMOs. Table 6.3 has been compiled from all RFMO IUU lists as of March 2008. Interestingly, vessels identified as 'flag unknown' have recently begun appearing on RFMO IUU lists. It is important to note that these lists are highly unlikely to contain all vessels engaged in IUU fishing activities on the high seas, only those that have been detected and agreed by all members of each RFMO as being classified as such.

Table 6.3 Vessels on RFMO IUU Lists as of March 2008 (numbers in parenthesis indicate RFMO IUU list)

| Flag | Vessel Names (IUU list) | Flag | Vessel Name |
|-------------------|--------------------------------------|--------------|-------------------------------------|
| Cambodia | Cliff (1,2), Taruman (3) | Togo | Murtosa (1,2), Aldabra (3), |
| Colombia | Marta Lucia R. (4) | | Amorin (3), Bigaro (3), Comet (3) |
| Equatorial Guinea | Gold Dragon (3), Perseverance (3) | | Rex (3), Ross (3), Typhoon-1 (3) |
| | Red Lion 22 (3), Tropic (3) | Russia | Cefey(1,2), Dolphin (1,2), |
| | Ocean Lion (6) | | Nicolay Chudotvoretz (1,2) |
| Georgia | Alfa (1,2), Ulla (1,2), Avior (1,2), | Flag Unknown | Bravo (5), Ocean Diamond (5), |
| | Yu Maan Won (6) | | Madura 2 (5), Madura 3 (5), |
| Guinea | Kabou (1,2), Maine (2) | | Southern Star 136 (5), |
| Indonesia | Bhaskara No. 10 (4), | | No. 101 Gloria (5), |
| | Bhaskara No. 9 (4), Bhineka (4), | | Melilla No. 103 (5), |
| | Hiroyoshi 17 (4), | | Melila No. 101 (5), Tonina V (5), |
| | Jimmy Wijaya XXXV (4), | | Lila No. 10 (5), No 2 Choyu (5), |
| | Permata (4), Permata 1 (4), | | Arcos No. 3 (5), Arcos No. 2 (5), |
| | Permata 102 (4), Permata 2 (4), | | No. 3 Choyu (5), |
| | Permata 6 (4), Permata 8 (4) | | Oriente No. 7 (5), Camelot (4), |
| North Korea | Chilbo San 33 (3), Ina Maka (3) | | Chi Hao No. 66 (4), Dragon III (4), |
| | Ulyses (3) | | Dragon 18 (4), Jyi Lih 88 (4), |
| Panama | Enxembre (1,2), Iannis I (1,2), | | Mary Lynn (4), |
| | Pavlovsk (1,2), Polestar (1,2), | | Ming Yu Sheng 8 (4), Orca (4), |
| | Gorilero (2), Duero (3), | | Permata 138 (4), Reyamar 6 (4), |
| | Seed Leaf (3) | | Ta Fu 1 (4), Wen Teng No. 688 (4), |
| Sierra Leone | Gorilero (1,2), Triton-1 (3), | | Sunny Jane (1), Toto (3) |
| | Bigeye (5), Maria (5) | | |
| | Total: | | 79 vessels |

(1) NAFO; (2) NEAFC; (3) CCAMLR; (4) IATTC; (5) ICCAT; (6) IOTC. (None of the vessels listed on the NEAFC and NAFO IUU vessel lists as having been scrapped have been included on the above list.)

6.8 Fish Carriers and Refrigerated Transport Vessels

In addition to fishing vessels, the numbers of fish carriers and refrigerated transport vessels operating under FOC registries is an issue of concern given the internationally recognized need to monitor the trade and, in particular, at-sea transshipment of fish products.

The UN FAO State of World Fisheries and Aquaculture 2006 states that: *'There have been suggestions that the recent rapid rise of fuel prices will change the economics of the fishing industry, especially with regard to distant-water fishing. The use of fish carriers is likely to increase in an attempt to cut overall fuel costs by reducing the time fishing vessels spend steaming to and from the fishing grounds.'*⁶⁴

Table 6.4 summarizes the information available on Lloyd's Registry of Ships in March 2008 regarding the total number of all vessels above or equal to 24 m listed as either 'fish carrier' or 'refrigerated cargo ship'; the number of this category of vessels flagged to one of the 14 countries on Table 3; those flagged to another 12 countries recognized as operating FOCs; and those vessels listed as flag 'unknown' on the Lloyd's database.

Table 6.4 Fish Carriers and Refrigerated Cargo Vessels (March 2008)

| Flag States | No. of Vessels ≥ 24 m | Number as % of Vessels flagged to all countries | Gross Tonnage (G.T.) of Vessels | G.T. as % of Total | Average G.T. | Average Age |
|---------------------------------|--------------------------|---|------------------------------------|--------------------------|-----------------|----------------|
| All Countries | 1880 | | 7,197,037 | | 3,828 | 24 |
| 14 FOC Countries | 541 | 28.8% | 2,652,095 | 36.8% | 4,902 | 23 |
| Flag Unknown | 97 | 5.2% | 280,714 | 3.9% | 2,894 | 31 |
| Additional 12 FOC countries* | 344 | 18.3% | 2,764,221 | 38.4% | 8,036 | 25 |
| All FOC | 885 | 47.1% | 5,416,316 | 75.3% | 6,120 | 24 |
| All FOC + Flag Unknown | 982 | 52.2% | 5,697,030 | 79.2% | 5,801 | 27 |

* The 12 additional FOC countries included are the following: Antigua and Barbuda, Bahamas, Barbados, Bermuda, Cayman Islands, Comoros, Kiribati, Lebanon, Liberia, Malta, North Korea, and Tonga.

Table 6.4 indicates that over half of the vessels ≥ 24 m on the Lloyd's Register of Ships listed as fish carriers or refrigerated cargo vessels are flagged to FOC registries involving almost 80% of such ships by tonnage. Of the total number of 1,880 vessels listed on Table 6.4, 619 are listed as 'fish carriers' and the other 1,241 are listed as 'refrigerated cargo vessels' on the Lloyd's database. Many, if not most, of the vessels identified as refrigerated cargo vessels may only transport fish products part-time, occasionally, or not at all. However, this category of vessel was included in the summary of the information to provide an indication of the number of vessels capable of transshipping and/or transporting fish products currently flagged to FOC registries.

The regulation, including in some cases prohibition, of at-sea transshipment of fish and fish products has been widely recognized as essential in combating IUU fishing on the high seas. A number of RFMOs have adopted measures to regulate or prohibit at-sea transshipment within their areas of legal competence. Flag State control over fish carriers, including refrigerated cargo vessels capable of engaging in at-sea transshipment of fish is essential to ensure compliance with RFMO regulations in this regard, especially in light of the UN FAO's assessment of the increasing economic incentives for distant water fishing fleets to transship their catch at-sea. Unfortunately, as the evidence regarding IUU activity confirms, FOC States are often unable or unwilling to ensure such compliance.

6.9 Measures to Prevent IUU Fishing

Many of the same flags that appear on the port State MOU black lists are also those that have been identified as problematic in relation to IUU fishing.⁶⁵ As in the case of merchant shipping, the anonymity of FOC fishing vessels operating on the high seas has been raised as an issue of concern in relation to enforcement, particularly in the Southern Ocean.⁶⁶

Even more so than in the case of merchant shipping, the flag State must maintain a continuous, real-time link with vessels fishing on the high seas in order to monitor the areas where the vessels are fishing and ensure effective compliance with the measures adopted by relevant RFMOs.

Nonetheless the burden of monitoring the activities of FOC fishing vessels, and in some cases, enforcing compliance with internationally agreed conservation and management measures, including those related to transshipping and resupply at sea, is increasingly being shouldered by non-flag States - a trend similar to that observed in the merchant shipping sector.

Over the past decade or so, a number of RFMOs have adopted market-related measures designed to prohibit the import of IUU caught fish by vessels and flag States operating in non-compliance with the measures adopted by RFMOs. Similarly a number of RFMOs have instituted port State measures to deny access to port to IUU fishing vessels. More recently, the UN FAO Committee on Fisheries has agreed to establish a process to negotiate a legally binding instrument on port State measures to prevent, deter and eliminate IUU fishing. The agreement, as currently drafted, would require port States to deny IUU fishing vessels and transshipment vessels carrying IUU caught fish access to port for the purpose of landing, transshipping, or processing fish, and in some cases, the use of ports for resupply and refuelling.⁶⁷

7. OTHER ISSUES



There are a range of other activities besides merchant shipping and transport and fisheries which have a potential to directly impact the health of the marine environment. The international community is increasingly recognizing the need to conserve and protect marine biodiversity, particularly in areas beyond national jurisdiction. Activities such as the exploitation of seabed marine genetic resources, CO₂ sequestration, and ocean fertilization have all recently gained increasing international attention.⁶⁸ Seabed mining may also soon become a viable commercial activity on a large-scale given the substantial increase in the prices of metals over the past few years. To the extent that ships engaged in such activities may or do operate in ocean areas beyond national jurisdiction, they will require effective flag State control to ensure that these activities are conducted in compliance with international regulations.

International efforts to address the challenge of global climate change will require enhanced flag State regulation and control of ships to reduce carbon emissions from ships. Similarly, ship based activities related to deep ocean carbon sequestration or ocean fertilization may also need to be regulated. In regard to the latter, the recent case of the US based company Planktos is illustrative. Planktos had planned to sell carbon credits through 'seeding' high seas areas in the eastern Pacific with iron pellets designed to stimulate primary production in open ocean areas to absorb carbon dioxide from the atmosphere. Planktos purchased and outfitted a ship, the *Weatherbird*, registered to fly the US flag, to conduct the ocean iron fertilization activities. Planktos' plans were widely criticized by scientists and environmental organizations. Similarly, the U.S. Environmental Protection Agency (EPA) warned that ocean iron fertilization, if conducted under the US flag, could violate the US Ocean Dumping Act.⁶⁹ In order to avoid the scrutiny of US laws, Planktos considered reflagging its vessel as well as loading the iron on the vessel in a non-US port. However, as a result of political developments, growing opposition from NGOs and others, and a lack of funding, Planktos announced in early 2008 that it would indefinitely postpone its plans.⁷⁰

8. CONCLUSIONS & RECOMMENDATIONS



As both seaborne trade and high seas fisheries have grown internationally over the past several decades, there has been an increasing trend toward the use of flags of convenience in both the merchant shipping and fishing sectors, including the transport and transshipment of fish. This is an area of concern in relation to maritime security and the potential for the use of ships by terrorist operations and criminal organisations. In addition it poses risks for the safety of life at sea, the prevention of marine pollution, the conservation of fish stocks and biodiversity on the high seas and the protection of the marine environment.

An increasingly complex set of conventions and international regulations governing shipping and high seas fisheries has been established over the past several decades. The UN Convention on the Law of the Sea provides the overall legal framework governing the use of ocean space and, together with other maritime and fisheries related agreements establishes detailed obligations for flag States to ensure that vessels registered to fly their flags are in compliance with international law and regulations.

Flags of convenience imply a tenuous link between the flag and ship. In some cases, such as in registries that do not require the disclosure of beneficial ownership, there is virtually no link or capacity to ensure flag State monitoring of the ship's activity nor compliance with, and enforcement of international regulations.

There are clear indications that a number of flag States regularly fail to comply with UNCLOS and other relevant international agreements in this regard, as evidenced by the numbers of merchant ships detained by port States and the numbers of flag States and large-scale fishing vessels acting in contravention of regulations established for the conservation and management of high seas fisheries.

In reality, the primary mechanism for State monitoring and enforcement of international laws in the merchant shipping sector is not the flag State, but the port State. However, the port State has limited powers of enforcement over ships, other than denial of access to port facilities.

The trend in the regulation of high seas fisheries is headed in a similar direction with port States, market States, coastal States and non-flag State members of regional fisheries management organizations increasingly absorbing the burden of enforcing internationally agreed conservation and management measures on vessels flying flags of non-compliance, the majority of which are FOCs.

Not all FOC registries are poor performers; and not all national registries have a perfect record. One aspect of the problem was well summarized by David Cockroft, General Secretary of the ITF:

*'We have never believed that all FOC ships are bad and all national flag ones are good. But the existence of the FOC system is dragging standards down to a point where we are seriously worried about what even some genuine national flag States are now doing to compete.'*⁷¹

The consistent failure of some flag States to discharge their duties under international law calls into question the integrity of the current system for registering ships. The continued operation of FOC registries with no real link to the ships flying their flag, including no capacity to ensure compliance and to take enforcement action, risks rendering the flag State, or flag State sovereignty, a notional entity or fiction of international law.

Maritime Security and Safety is on the agenda of the 9th meeting of the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea (UNICPOLOS) in June 2008.

The report of the UN Secretary-General to be submitted to the 63rd session of the Assembly identifies that:

'Many shipping accidents and resulting loss of life and marine pollution are not the result of inadequate regulation at the global level, but are due to ineffective flag State implementation and enforcement.' (para 179)

It also notes that:

'the General Assembly has repeatedly called upon States to effectively implement international instruments relating to maritime security.' (para 121)

Taking into account the statements made in the Secretary-General's report when read in conjunction with the findings of this report, WWF and ITF consider that there is a compelling need for action on flag State performance in general and compliance with the provisions of UNCLOS in particular. Considering the diplomatic processes involved, WWF and ITF call on governments to request that a UN Committee be established to address the deficiencies in flag State implementation of the current system and to negotiate a new implementing agreement to UNCLOS.

This new implementing agreement should set out enforceable measures to ensure flag States fulfill their duties and responsibilities under UNCLOS. Furthermore, it should include requirements as to how the 'genuine link' between the vessel and the flag it flies is to be established, and it should include measures to prevent States from operating vessel registers in breach of regulations and international agreements.

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