



SUB-COMMITTEE ON FLAG STATE
IMPLEMENTATION
7th session
Agenda item 9

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IMPLICATIONS ARISING WHEN A VESSEL LOSES THE RIGHT TO FLY THE FLAG OF A STATE

Note by ICFTU

SUMMARY

Executive summary:	Consideration of the implications arising when a vessel loses the right to fly the flag of a State from the point of view of both the flag State and the port State.
Action to be taken:	Paragraph 13
Related documents:	FSI 5/16, FSI 6/12, MSC 68/7/2, MSC 68/23, A.20/Res.847, COMSAR 3/7/4 and COMSAR 3/INF.19

Introduction

1 During the sixty-eighth session of the Maritime Safety Committee the ICFTU provided an explanation (document MSC 68/7/2) of the proposal it made at the fifth session of the Sub-Committee on Flag State Implementation, as requested in paragraphs 3.29 to 3.32 of the report (document FSI 5/16). The Maritime Safety Committee dealt with most of the issues and incorporated them into the revised Assembly resolution (A.20/Res.847). However, the MSC also agreed that:

“the FSI Sub-Committee should be requested to consider the implications arising when a vessel loses the right to fly the flag of a State from the point of view of both the flag State and the port State” (MSC 68/23 paragraph 7.7).

2 In the absence of papers to the sixth session of the FSI Sub-Committee, it was agreed that the matter should be held over for the seventh session of the Sub-Committee and the Sub-Committee invited comments and proposals for its next session (FSI 6/12 paragraphs 11. to 11.2).

3 The ICFTU considers that there are two related problems which need to be addressed. The first relates to the flag State removing a vessel from its register as a way of avoiding the obligation to exercise effective control and the second aspect relates to the general issue of re-flagging or flag hopping, which is in our view central to the general problem of flag state implementation.

Removal of vessels from a register

4 The ICFTU is concerned that a number of flag States are removing vessels flying their flag which do not comply with international minimum requirements from their register, often as a response to port state control detentions. This means that the flag State is not suspending the registration of a vessel or

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preventing the vessel from sailing in order to exercise flag State control, but seeking to wash its hands of the problem. Such actions can have a number of adverse implications for both seafarers and for the port State.

5 The ICFTU is firmly of the view that this action does not comply with international minimum requirements and does not provide an effective mechanism for a flag State to discharge its obligations, as provided for in customary international law, UNCLOS and applicable IMO Instruments, including resolution A.847(20). Moreover, as certain flag States offer easy registration, with a minimum of formalities and the provision of little documentary evidence, such actions will not enhance the safety of life at sea nor the protection of the marine environment. These flag States quickly issue “provisional certificates” and other statutory documents and may even only require the provision of an affidavit rather than a bill of sale and not take any measures to ascertain the reason the vessel is changing flag. Therefore, measures of this kind are hardly going to solve the problem of a vessel not being in compliance with international minimum requirements but only export the problem elsewhere.

6 The human element implications for seafarers include the invalidation of their contracts of employment and the possibility of abandonment in a foreign port without the resources to return home. It is worth noting that the issue of abandoned crew members is under discussion within the IMO Legal Committee and that it has been agreed that a Joint IMO/IMO Ad Hoc Expert Group will be established to examine this and related matters. This is a reflection of the severity of the problem and the ITF/ICFTU receives notification of an average of 1.3 new abandoned ships per week. This normally means that the vessel is at anchorage, without supplies of food, water and fuel and that the crew is being denied any medical attention it may need. It is therefore likely that many Governments will have direct experience of this problem.

7 In other instances where the vessel is quickly re-flagged, the resulting change in the registered ownership of the vessel puts the legal rights of the seafarers in doubt as they may not be transferred to the so-called new owner but may remain with the old owner, whose only asset was the vessel. This situation is particularly relevant when, as is often the case, the true beneficial owner remains the same. A further complication will arise when the revised STCW Convention fully enters into force as the seafarers will also need to secure an endorsement from the new flag State. If the shipowner walks away from the vessel and leaves the seafarers on board, they become stranded in a foreign port without the necessary resources to sustain themselves and without any possibility of securing repatriation to their home country. In such instances the seafarers are frequently left to depend on charity. The port State also has to deal with the problems which accrue when the vessel is abandoned in its port and which may be blocking a valuable berth.

8 Even if the vessel is not abandoned, it is likely that the port State will be inconvenienced. This is in view of the fact that Article 94 of UNCLOS requires that every State shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag and that every State shall take such measures for ships flying its flag as are necessary to ensure safety at sea. Article 94 4(a) defines “such measures as are necessary” as including that each ship, before registration and thereafter at appropriate intervals, be surveyed by a qualified surveyor. This is an absolute and express obligation which is not limited by any caveats, such as, “as appropriate” or “as necessary”.

Flag hopping

9 It is also worth noting that the problems relating to flag hopping were raised at the third session of the COMSAR Sub-Committee in the context of it providing a mechanism by which shipowners can evade paying their communication debts to INMARSAT (as per documents COMSAR 3/7/4 by the Russian Federation and COMSAR 3/INF.19 by INMARSAT.)

10 The issue of re-flagging to avoid control has, in a fisheries context, been raised during the negotiations which resulted in the adoption of Agenda 21 (the programme of Action for Sustainable Development, which was adopted by the United Nations Conference on Environment and Development, held in Rio de Janeiro in 1992) and paragraph 17.45 of the adopted text refers to vessels being re-flagged to escape controls. It was also one of the principal reasons the FAO adopted the Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Sea (the Compliance Agreement). It has more recently been raised in the United Nations General Assembly and operative paragraph 7 of resolution A/53/L.45 calls upon States which have not done so to take a number of measures, including measures to deter re-flagging to avoid compliance with applicable obligations.

11 Agenda 21, the programme of Action for Sustainable Development, also provides, in Chapter 39 (which addresses international legal instruments and mechanisms), that Parties to international agreements should consider procedures and mechanisms to promote and review their effective, full and prompt implementation. To this end, Parties are invited to consider establishing efficient and practical reporting systems and to consider appropriate ways in which relevant international bodies might contribute towards the further development of implementation mechanisms (paragraph 39.8).

12 The ICFTU also considers that such considerations were of relevance to the First Joint Ministerial Conference of Paris and Tokyo Memoranda of Understanding on Port State Control (held in March 1998) when they agreed, in their joint ministerial declaration, to, inter alia, take concerted action within the IMO for the adoption of comprehensive binding quality criteria for flag State Administrations and ship registers and to apply all reasonable measures to induce flag State Administrations with a record of being unable or unwilling to exercise adequate control over their ships to do so.

Action requested of the Sub-Committee

13 The Sub-Committee is invited to:

- discuss the matter in general;
- consider whether merely removing vessels flying their flag which do not comply with international minimum requirements from their register provides an effective mechanism for a flag State to discharge its obligations under IMO Instruments; and
- assess whether the general issue of flag hopping has implications for the overall strategic direction of the Sub-Committee.
