

Steering *the* Right Course

Towards an era of responsible flag States and effective
international governance of oceans and seas

A background document
addressed to the United Nations
and to Intergovernmental
organisations concerned with
sustainable oceans and seas

**by the
International Transport Workers' Federation**

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The International Transport Workers' Federation (ITF) is a federation of more than 600 transport workers' trade unions in 136 countries, representing over 4.5 million workers. The 184 seafarers' unions affiliated to the ITF represent about 660,362 members.

The ITF represents transport workers at world level and promotes their interests through global campaigning and solidarity. It is dedicated to the advancement of independent and democratic trade unionism, and to the defence of fundamental human and trade union rights.

The ITF is a member of Global Unions, an alliance of international trade union organisations which includes the ten sector-based Global Union Federations and the International Confederation of Free Trade Unions (ICFTU). Website: www.global_unions.org

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Summary

The shipping industry is the lynchpin of the global economy, transporting something in the region of 90% of world trade by volume. The global nature of the industry means that its operations have far-reaching social and environmental implications. The latest in a series of maritime disasters – the sinking of the ageing single-hulled tanker, the Prestige, off the coast of Spain last year – once again demonstrated the scale of the human and environmental catastrophe that is created when corners are cut and responsibilities flouted by ship owners and States. Grave as it was, the disaster highlighted only some of the problems associated with substandard shipping. Less visible, but as serious, are violations of seafarers' human rights and a variety of criminal activities including people smuggling and trafficking, drugs smuggling, arms smuggling and money laundering.

The oceans and seas are also exploited by a world fleet of fishing vessels. With fish stocks in a critical situation, the rise of illegal, unregulated and unreported fishing has become one of the most serious threats to the conservation of the marine environment. Like seafarers, fishers are frequently subjected to appalling working conditions. Indeed, there is evidence that the situation is much worse in the fisheries sector, particularly on board vessels carrying out illegal fishing.

These issues have arisen because there are fundamental structural problems within the current system of international maritime governance. They stem from the tension between the principle of flag State sovereignty that underpins the existing legal framework, and the flags of convenience system

where owners register vessels in countries other than their own in order to avoid binding regulations or controls. When subjected to the pressures of globalisation and the demands of global business, this system of governance collapses, leading to widespread non-compliance with international minimum standards, and paving the way for the problems highlighted.

Increasingly, the attention of governments, intergovernmental organisations and civil society has become focused on the damaging consequences of flags of convenience. There is also alarm over the fact that the evasion of international standards, facilitated by this system, is being financially rewarded while compliance is penalising ship owners, inevitably leading to the growth in substandard shipping. This concern appears to be borne out by the fact that the tonnage registered to flags of convenience States continues to rise. Furthermore it is those States with the most lax regimes that are growing the fastest. More and more States are also trying to join the flags of convenience ship registration business.

It is only by re-establishing the full role and responsibilities of the flag State, and by ensuring that there is a 'genuine link' between a ship and the flag it flies, that effective maritime governance which is crucial to the sustainable use of the oceans and seas can be achieved. We are at a defining moment, and a choice has to be made between proper flag States, with all that implies, or a gradual dismantling of the current regime as coastal States or regional bodies, dissatisfied with the failure of recalcitrant flag States, take unilateral measures that they deem necessary.



Introduction

The shipping industry was the world's first truly global industry. Today, at any time, there are around 45,000 merchant ships moving around the world's sea lanes, in and out of hundreds of coastal jurisdictions and through international waters. In 2000, according to the International Shipping Federation (ISF), the industry shipped around 5,000 million tonnes of goods over a distance of about 4.6 million miles giving roughly 23,000 billion ton-miles of total trade. The cargo that is transported includes millions of tons of highly dangerous goods, such as liquid gas, toxic chemicals and oil, which are potentially harmful to ecologically sensitive coastal environments and coastal livelihoods. The oceans and seas are also exploited by a world fleet of fishing vessels operating across increasingly fragile fishing grounds.

The world's merchant shipping fleets are crewed by around 1.2 million officers and ratings, of which about 930,000 are at sea at any one time. According to tentative estimates by the UN Food and Agriculture Organisation (FAO) Department of Fisheries, at present there are some 15 million fishers employed aboard decked and undecked fishing vessels in marine capture fisheries, of whom about 90% are occupied on vessels less than 24 m in length. Seafarers and fishers are uniquely vulnerable workers, for many of whom the workplace is for long periods of time completely out of

reach of all the normal protections of society – police, medical care, and health and safety inspectors. They work in what are considered by UN agencies such as the International Labour Organisation (ILO) and the FAO to be the most dangerous industries in the world. Recent research by Oxford University published in March 2003 in the British medical journal *The Lancet*, shows that deep sea fisheries and merchant shipping are the two most dangerous occupations in the United Kingdom, with fatal accident rates at 52.4 times and 26.2 times the national average.

The latest in a series of maritime disasters – the sinking of the ageing single-hulled tanker, the *Prestige*, off the coast of Spain on 19 November 2002 – highlighted yet again the scale of the human and environmental catastrophe that is created when corners are cut and responsibilities flouted by ship owners and States in such a global industry.

The current state of affairs, which not only tolerates, but facilitates substandard shipping as well as illegal, unregulated and unreported fishing is untenable. The shipping and fishing industries must be run on a rational and sustainable basis. That requires responsible flag States and effective international governance of oceans and seas.



Steering the Right Course

Shipping and the world economy

Shipping is vital to the world economy. The increasing liberalisation of world trade has lowered costs and increased the volume of international trade. Structural changes in global production and global marketing mean that more goods are produced than ever before and that these goods travel much further, both in the course of the production process and in order to reach their markets. Global production has grown faster than the global population, and global trade has grown faster than global production.

Over the last four decades total seaborne trade estimates have nearly quadrupled, from less than 6 thousand billion ton-miles in 1965 to 23 thousand billion ton miles in 2000. According to the Organisation for Economic Co-operation and Development (OECD) the amount of goods carried by ship doubled between 1970 and 1998 (from 2.5 billion tons to 5 billion tons). Ships carried 5.83 billion tones in 2002. While 2002 saw a flattening of this growth due to a worldwide economic slowdown, the ISF says that forecasts show a resumption of long term growth with a predicted near doubling of world seaborne trade over a fifteen year period.

The globalisation of the modern world economy places international shipping at the heart of a global supply chain upon which international business, and tens of thousands of jobs on assembly lines in Asia, Europe and the United States depend.

The vast bulk of goods shipped around the world are transported by sea. According to the Baltic and International Maritime Council (BIMCO), something in the region of 90% of world trade by volume is carried by sea. The ISF points out that, 'Shipping is the lynchpin of the global economy. Without shipping, intercontinental trade,

the bulk transport of raw materials, and the import /export of affordable food and manufactured goods, would simply not be possible on the scale that is necessary for the modern world to function'.

International governance of oceans and seas

It has long been understood that the special nature of maritime operations required some form of international governance. The primary legal instrument is the 1982 United Nations Convention on the Law of the Sea (UNCLOS). UNCLOS is a framework or umbrella convention. Its general principles are given effect, in practical terms, through the operative regulations in international agreements concluded under the auspices of UN Specialised Agencies such as the International Maritime Organisation (IMO), the ILO and the FAO.

Seafarers and fishers are meant to be protected by a range of Conventions of the ILO. The basic human rights of workers in such a vacuum of national social protection is also a matter covered by the UN Universal Declaration on Human Rights and a variety of widely ratified human rights instruments guaranteeing economic, social cultural, civil and political rights.

Environmental rules have been enunciated by the IMO in the International Convention on the Prevention of Pollution from Ships (MARPOL). The protection of the marine environment was also a central concern of the UN Conference on Environment and Development (UNCED) in 1992 which was meant to 'usher in a new era of responsibility for States' especially in relation to the responsibilities of flag States to enforce international standards. UNCED launched a major new era of coordination between international agencies to promote sustainable development set out in its document Agenda



21. Chapter 17 of Agenda 21 contained a number of recommendations crucial for the prevention, reduction and control of degradation of the marine environment from sea-based activities. The following Earth Summit, the UN World Summit on Sustainable Development (WSSD) held ten years later, also called for the urgent development and implementation of national and, where appropriate, regional plans of action, to put into effect the international plans of action developed by relevant UN Specialised Agencies and to establish effective monitoring, reporting and enforcement, and control of fishing vessels, including by flag States. The FAO has been tasked with managing endangered fish stocks which are currently in a critical situation.

The failure of international governance

The recent sinking of the Prestige off the coast of Galicia put a major public spotlight on the regulation of shipping. In particular, concern focussed on the tangle of international jurisdictional issues involved. As Greenpeace scientist David Santillon noted, "It's a Liberian tanker registered in the Bahamas, managed in Greece and chartered by a company in Switzerland. The immediate response by everybody is to throw up their hands and deny responsibility".

Increasingly, the attention of governments and intergovernmental organisations has become focussed on the existence of a relatively small but significantly damaging substandard portion of the shipping industry. Their ability to exploit gaps in the international governance of shipping to obtain an unfair competitive advantage has had a considerable impact in driving down standards in the industry generally. There is a growing awareness that the authority and effectiveness of international maritime standards has been severely eroded by a major loophole in

international law covering oceans and seas. The Prestige was registered in the Bahamas, a State which allows ship owners from any country to fly its flag. This is called a 'flag of convenience'. In today's shipping industry this is not an unusual situation. Nearly 50% – the figure is growing – of the shipping industry is registered under flags of convenience (by gross tonnage). One of the primary 'conveniences' offered by such flag States is the capacity to evade international maritime rules and standards at will.

What are FOCs?

As mentioned earlier, the current legal framework for international shipping is set out in UNCLOS. This is based on the concept of flag State sovereignty. This means that ships have the nationality of the State whose flag they fly. A ship's nationality affords it the protection of a government and subjects the ship to its jurisdiction.

Flag States have a wide range of responsibilities placed upon them by international law. Every flag State is required to 'effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag' (Article 94, UNCLOS). Article 217 of UNCLOS on 'Enforcement by Flag States' requires that the flag State:

- effectively enforce applicable international rules and standards irrespective of where the violation occurs;
- prohibit vessels flying its flag from sailing until they can proceed to sea in compliance with the requirements of international rules and standards;
- investigate violation of international rules and standards and where appropriate institute proceedings irrespective of where the violation occurred; and
- provide by laws and regulations penalties of adequate severity to discourage violations of applicable

international minimum rules and standards, wherever they occur.

In addition, flag States are responsible for implementing on board vessels flying their flags, the international safety, training and maritime pollution standards and basic social conditions set out in the relevant instruments of the IMO and the ILO.

Traditionally, flag States would only register the ships of ship owners from their own country, and applied strict nationality rules. But increasingly, shipping companies began to look for ways to escape the obligations placed on them by their flag States. They soon found that a number of foreign States were ready to effectively rent out their flags to ship owners seeking to evade their own country's rules. These States are now commonly called 'flags of convenience' (FOCs). A flag of convenience ship is one that flies the flag of a country other than the country where its beneficial ownership is based.

FOCs have become havens for ship owners wanting to shelter from the tax or regulatory regimes of their own governments. The 2002 UNCTAD Review of Maritime Transport records that in terms of tonnage owned by nationals in the flag State the percentage is zero for Panama, Liberia, Bermuda, and Vanuatu, with Bahamas being 0.8%, Malta 0.1% and Cyprus 2.3%.

As long ago as 1958, the OECD defined FOCs as, 'the flags of such countries as Panama, Liberia, Honduras and Costa Rica whose laws allow – and indeed, make it easy for – ships owned by foreign nationals or companies to fly these flags. This is in contrast to the practice in the maritime countries (and in many others) where the right to fly the



national flag is subject to stringent conditions and involves far reaching obligations'.

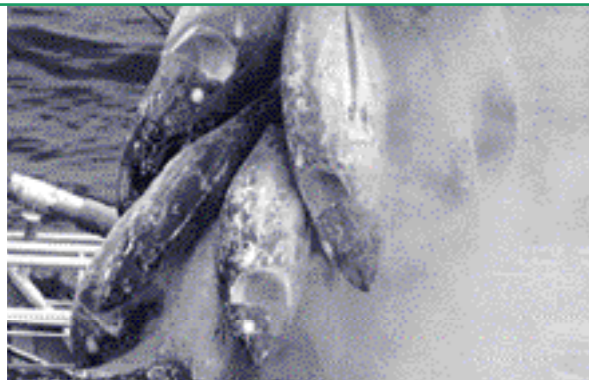
The growth of substandard shipping

The relentless demands placed on sea transport by global industry are not only to provide an ever higher volume of transport, but to do it at ever lower costs. Globalisation has relied upon low unit costs in transport. Since the 1970s total freight payments for imports, as a percentage of import value, have continuously fallen. According to the ISF, in 1970 the percentage of the value of an import accounted for by transport costs was 10.6%. In 1998 this had come down to only 5%.

The ruthless drive to cut costs comes at a price. This price has been a steady erosion of international standards. The International Commission on Shipping (ICONS) believes that not enough has been done to draw public attention to this very serious matter: 'The drive by cargo owners for lower and lower freight rates where the benchmark is shipping that does not meet international safety requirements must be exposed publicly'.

The OECD has become similarly concerned that in some market sectors of shipping, the number of ship owners ready to make cost savings by ignoring international safety standards has made it almost impossible for any ship operator who complies with these standards to stay in business.

The emergence of FOCs has created an institutional mechanism that allows the development of shipping operations which can ignore international minimum standards. The OECD reported that, 'the development of "open" registries – where non-national shipowners could register their ships in national registries with a sometimes-



tenuous link to the flag – saw the direct ship-Flag State-national crew link weakened.’ (Cost Savings Stemming from Non-Compliance with International Environmental Regulations in the Maritime Sector, OECD, 2003)

The OECD has sounded the alarm because it appears that evasion of international standards is being financially rewarded while compliance is penalising ship owners. As a result there will be an inevitable growth in substandard shipping. It notes in the same report that, ‘Herein lies the insidious impact that substandard shipping can have on this global industry – as long as substandard operators get away with breaking the rules and make money and gain market share by doing so, other operators will be tempted to follow in their footsteps with repercussions on the safety of vessels, the well being of crews and, in the present case, on the environment’.

This concern appears to be borne out by the fact that the tonnage registered to FOCs continues to rise. Furthermore it is the most lax FOCs that are growing the fastest. As Winchester and Alderton note, ‘Amongst the new entrants to the FOC market there is both a total lack of formal regulation, and a capacity and willingness of the State to

take responsibility for its actions’ (Winchester, N and Alderton, T, ‘Globalisation and De-Regulation in the Maritime Industry’, 2002). In addition, substandard shipping operations have not been limited to FOCs. Some traditional flag States have been just as lax as FOCs in the non-enforcement of standards.

FOCs – Shipping’s growth industry

Today there are 28 States which are classified by the ITF as FOCs. In 1980, the number of flags designated by the ITF as FOCs was 11. Of the world’s six largest fleets in 2001, five were FOCs.

According to UNCTAD the main open registers (i.e. Bahamas, Bermuda, Cyprus, Liberia, Malta, Panama and Vanuatu) accounted for 34.1% of tonnage in 1990. This rose to 48.7% in 2002. This means that FOCs now account for nearly half of the world’s merchant shipping fleet (in terms of gross tonnage), including the majority of large tankers, bulk carriers and cruise ships. FOCs have more than doubled their share of container shipping since 1990 rising from 21.1% to 43.1%.

ITF designated Flags of Convenience

The following 28 countries have been declared as FOCs by the ITF’s Fair Practices Committee (a joint committee of ITF seafarers’ and dockers’ unions). The criteria applied by the ITF is set out in its website www.itf.org.uk

- | | | | |
|--|---|---|---|
| <input type="checkbox"/> Antigua and Barbuda | <input type="checkbox"/> Cayman Islands | <input type="checkbox"/> Jamaica | <input type="checkbox"/> São Tomé and Príncipe |
| <input type="checkbox"/> Bahamas | <input type="checkbox"/> Comoros | <input type="checkbox"/> Lebanon | <input type="checkbox"/> St. Vincent & the Grenadines |
| <input type="checkbox"/> Barbados | <input type="checkbox"/> Cyprus | <input type="checkbox"/> Liberia | <input type="checkbox"/> Sri Lanka |
| <input type="checkbox"/> Belize | <input type="checkbox"/> Equatorial Guinea | <input type="checkbox"/> Malta | <input type="checkbox"/> Tonga |
| <input type="checkbox"/> Bermuda | <input type="checkbox"/> German International Ship Register (GIS) | <input type="checkbox"/> Marshall Islands | <input type="checkbox"/> Vanuatu |
| <input type="checkbox"/> Bolivia | <input type="checkbox"/> Gibraltar | <input type="checkbox"/> Mauritius | |
| <input type="checkbox"/> Burma/Myanmar | <input type="checkbox"/> Honduras | <input type="checkbox"/> Netherlands Antilles | |
| <input type="checkbox"/> Cambodia | | <input type="checkbox"/> Panama | |



Percentage of world total dwt registered in major open-registry fleets

Year	Oil Tanker	Bulk Carriers	General Cargo	Container Ships	Other Ships
1980	36.2	31.7	20.8	13.5	17.0
1990	41.6	33.2	26.2	21.1	24.2
2001	50.1	50.1	35.7	43.1	39.0

Source: UNCTAD Review of Maritime Transport, 2002

Increases in particular FOC registers

Growth of Selected FOCs (number of ships registered)

Country	1989	2001	Percentage Increase
Antigua & Barbuda	212	840	296.2
Bahamas	724	1312	81.2
Barbados	37	68	83.8
Belize	3	1516	50433.3
Bermuda	107	121	13.1
Bolivia	1	78	7700.0
Cambodia	0	564	
Cyprus	1278	1407	10.1
Equatorial Guinea	2	60	2900.0
Honduras	677	1183	74.7
Liberia	1455	1566	7.6
Malta	410	1421	246.6
Panama	5121	6425	25.5
St Vincent & the Grenadines	414	1318	218.4
Vanuatu	177	316	78.5
World	76100	87939	15.6



Growth of Selected FOCs (gross tonnage registered)

Country	1989	2001	Percentage Increase
Antigua & Barbuda	391519	4688330	1097.5
Bahamas	11578891	33385713	188.3
Barbados	8322	687331	8159.2
Belize	620	1828190	294769.4
Bermuda	4076093	5312780	30.3
Bolivia	9610	174042	1711.1
Cambodia	0	1996738	
Cyprus	18134011	22761778	25.5
Equatorial Guinea	6412	37225	480.6
Honduras	691465	966511	39.8
Liberia	47892529	51784010	8.1
Malta	3329120	27052579	712.6
Panama	47365362	122352071	158.3
St Vincent & the Grenadines	1486102	7072895	375.9
Vanuatu	920333	1496422	62.6
World	410480693	574551264	40.0

Source of figures: Lloyd's Register, World Fleets Statistics 1989 and Lloyd's Register-Fairplay, World Fleets Statistics 2001

More and more States are trying to join the FOC ship registration business. In the absence of an external shock to the system, this trend is likely to continue. Not only has the tonnage registered to FOCs continued to rise, but recent history has shown a significant increase in the number of FOCs. The market has the following characteristics:

- Flag States are free to determine the conditions for the registration of ships.
- Flag States' ship registration may be privately operated and hence it can be run on a profit-making

model from a third country.

- Ship registration is a highly competitive market.
- Separation of ownership, control and crewing of the vessel from the flag State.
- Ease of which vessels may change flags.
- Extreme opacity of ownership.
- Low barriers to entry into the ship registration business.

The specific conjunction of these characteristics in the contemporary ship registration business has led to a stratification of regulatory regimes, from the highly

regulated by some of the traditional maritime nations, to the almost unregulated environment put in place by flag States that have little, or no, expertise in regulating the maritime industry (or any international regulation per se).

Many FOCs make the process of ship registration ever easier without even a cursory attempt to inspect the ships they take under their flag, as expressly required under UNCLOS.

The Cambodian flag provides a good example of the new generation of more exotic FOCs. Cambodia has been named in connection with the smuggling of people, arms and drugs. Its lack of concern about the activities of the ships flying its flag is demonstrated by the comments of Ahmad Yahya of the Cambodian Ministry of Public Works and Transport, quoted in the shipping journal, Fairplay, "We don't know or care who owns the ships or whether they are doing 'white' or 'black' business...it is not our concern" (Fairplay, 12 Oct 2000).

The Cambodian register was operated by the Cambodian Shipping Corp (CSC), owned by Korasia Shipping and Trading Pte Ltd, a Singaporean company, which was said to be partly owned by a North Korean diplomat, and with strong business links to North Korea. The Cambodian Government ended CSC's contract last year after the French navy detained the Winner, a ship flying the Cambodian flag and used for cocaine smuggling. Cambodia's shipping register is now operated by a company in Korea.

The Paris Memorandum of Understanding (Paris MOU) Annual Report for 2001 comments on the existence of flag States which have more interest in revenues than in maintaining standards, singling out Cambodia, São Tome & Príncipe and Tonga for special mention. All three of these FOCs are run as franchises-type

operations from other countries and are pure money making ventures with negligible State control.

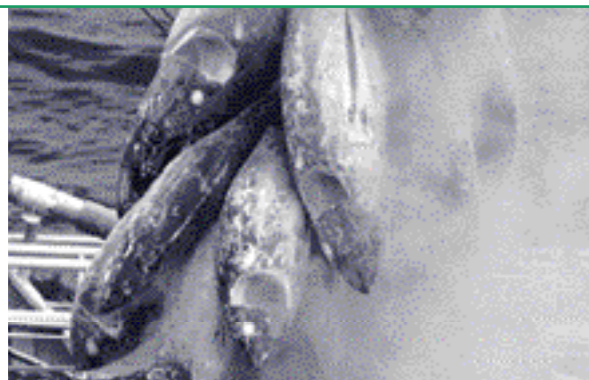
Paris MOU

The Paris Memorandum of Understanding on Port State Control consists of 19 administrations and aims to eliminate the operation of substandard ships through a harmonized system of port State control. Its members are Belgium, Canada, Croatia, Denmark, Finland, France, Germany, Greece, Iceland, Ireland, Italy, Netherlands, Norway, Poland, Portugal, Russian Federation, Spain, Sweden, and the UK.

Some of the more exotic FOCs have also recorded some of the fastest rates of growth. Over the period 1989 – 2001, the Bolivian flag exhibited a net increase in tonnage of 1,711%, from 9,610 gt to 174,042 gt. Between 1995 and 2001, the Cambodian flag recorded a net increase in tonnage of 3,230%, from 59,958 gt to 1,996,738 gt – it was inactive between 1989 and 1994. (Flag State Audit 2003, University of Cardiff).

The importance of a 'genuine link' between ship and State

It is clear that by affording ships from any country their nationality, and by refusing to discharge their international obligations, FOCs make it easy for ship owners to evade international standards. There is a requirement in Article 91 of UNCLOS that a 'genuine link' exist between the State and the ship entitled to fly its flag. This ought to ensure that governments can in practice exercise effective control over the ships which fly their flag and that they are able to impose effective sanctions against ship owners who



violate international rules and standards. However, the lack of a clear definition of what constitutes a 'genuine link' has enabled FOCs to interpret this term in the loosest possible way, and to carry on untroubled by it.

FOCs do not require their 'clients' to have any assets or any real presence in the flag State. Frequently the registered owner of the ship is a 'shell' company set up in that State for the sole purpose of owning that ship. In some cases, there isn't even a requirement that the registered owner be incorporated in the flag State. The registered owner is often, in turn, owned by another 'shell' company, which may itself be registered in a country with very lax company laws.

The OECD notes that, 'While many have argued that the "genuine link" should restrict the ownership of vessels to nationals of the State in which the ship has been registered, or to some other clearly established linkage, the de-facto interpretation of this provision has been considerably less than this, and the linkage requirement has been widely accepted as being met by nothing more than a commercial, fee-for-service relationship between the owner and the Flag State.' (The Ownership and Control of Ships, OECD, March 2003)

The issue of the 'genuine link' is critical because it ought to mean that a ship owner has some form of substantive presence in the flag State in terms of assets and resources which can be subject to fines and penalties in the event of serious breaches of regulatory standards. Peter Morris, a former Australian Minister of Transport and the Chairman of ICONS, has pointed out, "The absence of a substantial connection between the ship and the flag State neutralised the capacity of the flag State to penalize non compliant operators. The secrecy and concealment of true ownership of ships

further limited the ability of flag States to supervise the compliance of ships registered under its flag even if they were so disposed." (Peter Morris, Statement Before the House Armed Services Committee Special Oversight Panel on the Merchant Marine Vessel Operations Under "Flags of Convenience" and National Security Implications, June 2002).

In recent years, the social, economic and environmental problems generated by substandard shipping and illegal, unregulated and unreported fishing (IUU fishing) has led a number of governments and intergovernmental organizations to turn their attention to FOCs and the need to define the 'genuine link'.

In 2002, the European Commission (EC) published a Communication on the 'Community action plan for the eradication of illegal, unreported and unregulated fishing'. The Communication draws attention to the fact that FOCs are particularly harmful to the sustainability of fishing activities and goes on to argue that, 'The adoption of criteria for defining what is meant by a substantive link will mean that the scope for dishonesty afforded by the lack of an international rule can be excluded, and will make it possible for States which refuse, out of hand, to engage in international cooperation to secure the sustainable conservation and management of fish stocks to be identified objectively. This approach should make it possible to emphasise the capacity of the flag State to exercise its responsibilities effectively over fishing vessels flying its flag.' Underlining the seriousness with which the EC views this issue, the Communication also proposed a Community diplomatic initiative to convene an international conference to negotiate an international agreement determining conditions for implementing Article 91 of UNCLOS for fishing vessels.



Although there is currently no clear definition of what a 'genuine link' means, it is nevertheless possible to identify some of the key elements this concept should include by applying the rules of treaty interpretation laid down in the Vienna Convention on the Law of Treaties 1969 and by reviewing the decisions of influential courts, and opinions of legal academics. In 2000, the ITF commissioned an independent legal study by Robin Churchill, Professor of Law at the Cardiff Law School, University of Wales to try to discover what was meant by a 'genuine link' and what consequences followed from its absence. The study, came to the following conclusions:

- Registration of a ship, thereby granting it the nationality of the registering State, obviously creates a link between the ship and that State. Registration does not in itself, however, make that link genuine. There must exist circumstances which mean that the link is a real one, not artificial, casual or tenuous.
- There is no single or obligatory criterion by which the genuineness of a link is to be established. A State has a discretion as to how it ensures that the link between itself and a ship having its nationality is genuine, be it through requirements relating to the nationality of the beneficial owner or crew, its ability to exercise its jurisdiction over such a ship, or in some other way.
- Although it is not an obligatory criterion for establishing the genuineness of a link, the effective exercise of jurisdiction and control over its ships is one of the principal ways in which a flag State may demonstrate that the link between itself and its ships is genuine. A State must be able to show that the necessary mechanisms for such exercise are in place at the time when the ship is granted its nationality. Such mechanisms could include sufficient and suitably qualified personnel for carrying out the necessary surveys of the ship, checking the certification of the

crew, etc.

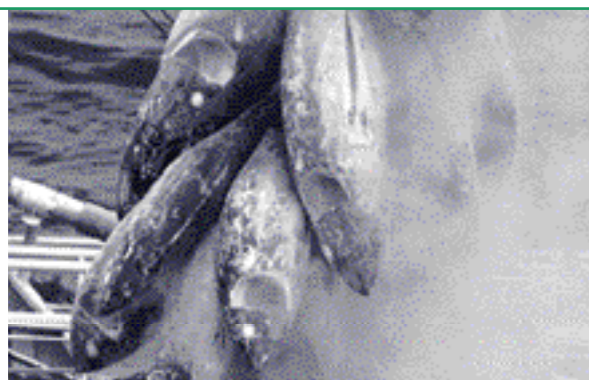
- Where there is no 'genuine link' between a ship and the State purporting to confer its nationality upon it, that State may not exercise diplomatic protection in respect of the ship.

A veil of corporate secrecy

What FOCs offer above all is corporate secrecy and hence the ability to avoid liability. The OECD has observed that, 'One problem facing legislative bodies in their bid to impose greater accountability for substandard ships is the potential difficulty of establishing the identity of the ultimate owner of a given vessel. In practice, many owners separate their fleets into single-ship companies based in flag-of-convenience countries. This makes it far harder for legislative authorities to pursue liability claims, as it serves to disguise the identity of the actual owner and the interests responsible for running a given vessel. By such means, an irresponsible owner may be able to evade at least some of the penalties that might result from casualty incidents involving any tonnage that he owns' (The Cost to Users of Substandard Shipping, OECD, January 2001).

When the Maltese-flagged Erika spilled oil all over the coast of Brittany in 2000, the entire resources of the French media and of EC investigators were put to the task of trying to discover the identity of the real or beneficial owners of the ship. The Maltese registry merely showed the ship to be 'owned' by an International Business Corporation (IBC) registered in Liberia. The identity of the owners of the Erika only became known when they voluntarily revealed themselves.

The OECD's report on 'The Ownership and Control of



Ships' (cited above) concluded that FOCs are the easiest jurisdictions in which to register vessels that are covered in complex legal and corporate arrangements, and would be the most obvious targets for beneficial owners wishing to avoid revealing their identities.

Multiple layers of corporate secrecy are constructed using a variety of devices including IBCs and bearer shares. IBCs can be established virtually instantly (many on-line) and at a relatively low cost. Bearer shares are negotiable instruments that accord ownership of corporations to the person(s) who physically possesses the bearer share certificates. They are not traded through the stock exchange and can be sold on without any record of the transaction or of the name of the purchaser, making them virtually impossible to trace. Often, more than one off shore jurisdiction is involved in a complex corporate structure which lies between the registration of a ship and its true beneficial owner. The result is that the ship owner is able to remain anonymous, and to use that cloak of anonymity to provide cover for any number of activities, as well as to escape liability.

The OECD notes, '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 process 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 desire to can hide themselves very deeply indeed.'

Liberia provides an example of how FOCs offer secrecy to reclusive owners. An IBC in Liberia can be set up in just 24 hours. The articles of incorporation can be

bought off the shelf and do not even have to mention shipping. No company directors need be named, no accounts need be produced. Ownership through bearer shares is permitted. It is worth noting that the registered owners of the *Prestige*, was a Liberian 'shell' company, even though the vessel was registered in and flew the Bahamas flag.

There are other examples. A company seeking to fly the Honduran flag need not provide any details of the beneficial owner. Ship owners are not required to submit any form of accounts or annual returns. The Internet site of the Marshall Islands Register advises that, 'Documents filed in connection with registration of a ship in the MI do not require consular authentication'.

Open for criminality and terrorism

While there may be non-criminal motives for ship owners to seek such levels of corporate secrecy, clearly FOCs are ideal for concealing the ownership of vessels engaged in many forms of criminal activity, including people smuggling and trafficking, drugs smuggling, arms smuggling and money laundering. In terms of drug trafficking, MacKinnon notes that, 'illicit drug traffickers use vessels registered with States that offer a convenient register' (Doug Mackinnon, *Transnational Dimensions of Maritime Crime*, 2001). There is also ample evidence of the link between FOCs and other forms of criminality, including terrorism.

In March 2002 a Lebanese-owned ship the *Monica* was intercepted trying to land 928 Kurds in Italy. The ship was flying the flag of Tonga. In the past 15 years the *Monica* had shifted its registration from one FOC to another, including Belize, Honduras and Cambodia. The same year, the French navy stopped the *Winner*, a ship flying the flag of Cambodia, carrying a large

consignment of cocaine.

A UN Panel of Experts set up by the Sanctions Committee of the UN Security Council in 2002 described the Liberian Bureau of Maritime Affairs as little more than a cash extraction operation and a cover for sanctions busting. The Liberian flag is the second largest in the world. The Liberian Government appointed the Liberian International Ship and Corporate Register (LISCR), a US company, as its exclusive agent to manage the corporate and maritime registers with effect from January 1, 2000 under a ten years contract. The U.N. Panel uncovered details of two bank transfers from LISCR to SAN Air General Trading (SAN Air was found to be the main company behind sanctions-busting to Liberia and was an agent for Centrafrican Airways, the main company of international sanctions-buster Victor Bout), at Standard Chartered Bank, Sharjah, United Arab Emirates, which were for arms and transportation in violation of U.N. sanctions. The UN Panel also found that the corporate registry, part of the responsibility of the shipping agent, had been used for diamond transactions. The human rights organisation Global Witness has been tracking illegal arms shipments by the Liberian government and notes, 'Due to the obscure nature of the shipping industry under maritime "flags of convenience" shipping by boat is the superlative route for arms traders' (*The Usual Suspects: Liberia's Weapons and Mercenaries in Cote d'Ivoire and Sierra Leone*, Global Witness, 2003).

In June 2002, the US Congress House Armed Services Committee Special Oversight Panel on the Merchant Marine heard testimony concerning 'Vessel operations under flags of convenience and national security implications'. The panel heard testimony from a Human Rights Watch representative that the Tamil Tigers had had a fleet of 11 commercial ships under the Panama,



Liberian and Honduran flags. One of these ships illicitly brought explosives from the Ukraine to northeastern Sri Lanka. These explosives were used in a suicide bombing on the Central Bank of Ceylon Building on 31 January 1996. Approximately 90 people were killed and another 1,400 injured. Other testimony reported that the *Karine A* was seized by the Israeli navy transporting tons of arms and explosives. The ship was owned by an Iraqi national but flying the flag of Tonga. The Tongan register has now been closed to new entries but the existing fleet can carry on sailing for five years. The Statement from the Human Rights Watch representative to the House Armed Services Committee gave an overview of illegal arms shipments made through flags of convenience ships and concluded that, 'Flags of Convenience offer a high level of corporate secrecy and are easy to obtain. Some flags appear to be particularly inviting for illicit arms trading networks'.

The OECD produced its report 'The Ownership and Control of Ships' (cited above) following increased concerns that FOCs provided ideal hiding places for the assets of terrorist organizations. In relation to security issues, it concluded that, 'These (open registries) of course would be the preferred destination of a potential terrorist, as it would be highly unlikely that those jurisdictions, even if they could, would actively undertake any due diligence checks on the owner; after all their main selling point is anonymity'.

In a paper discussing the relationship between the open register system and crime, Winchester states that, 'the open register system has led to a situation in which ship operators may choose the regulatory regime they wish. Essentially shipowners are provided with the opportunity to: opt for a low taxation regime; reduce legal liability through the creation of a single-ship company; employ seafarers of any nationality and



combination they wish; follow their own system of vessel maintenance; and, choose which organisation classifies their vessels. However, the shipowner is also provided with the opportunity to: hide their identity under multiple dummy corporations; register their vessel with little or no checks from the flag State; not maintain their vessel; break fishing laws with minimal consequence from the flag State; and, engage in a range of illegal activities in the absence of directed State control. This system creates the conditions of existence for a range of criminal activity as it does for running a lean effective business within the boundaries of the law. It is this fact that the contemporary flag market enable the widest degree of freedom of the shipowner that confronts attempts to prevent the occurrence of illegal activities conducted by and through the maritime industry.' (Winchester, N, Open registers, zelfreguleren criminaliteit, 2003).

No need for a functioning maritime administration

UNCLOS places upon flag States the responsibility for implementing, inter alia, international safety standards on ships flying their flag. The horror of a ship sinking at sea, taking with it human lives, ought to make it highly unlikely that any State would not take these responsibilities seriously. Nevertheless, many flag States do not seem to feel it necessary to have a functioning maritime administration capable of fulfilling these responsibilities.

There are two models for ship registration in FOCs, neither of which require a functioning maritime administration. The first model is the State-owned money making business where the flag State collects the tonnage taxes and delegates most, if not all, the survey and certification functions of the State to a

recognised organisation (a private body and usually a classification society).

The other model is where the operation of the register, including the statutory functions, is franchised out to a commercial entity which is located outside the territory and jurisdiction of the flag State, and which itself may be bought and sold. Examples of this include Liberia, whose shipping register is run by an American company operating in Virginia; the Bahamas, whose shipping register operations are undertaken by a private company in London; Cambodia, whose register was in Singapore, and is now in Korea; and Honduras, whose shipping register operations are based in New York.

Unsurprisingly, the OECD identifies a strong correlation between casualties and certain flag States (see 'Marine casualties and the threat of environmental disaster' below). FOCs account for a high proportion of these ship losses. In 2001, FOCs accounted for 58% of the losses by numbers, and 63% by gross tonnage. Not all FOCs have low standards, but FOCs are regularly the worst offenders.

Flag States are also required to investigate ship accidents. Yet many patently fail to do so. In the 2001 Annual Report of the UK Marine Accident Investigation Branch, Chief Rear Admiral John Lang openly attacked the high proportion of flag States which have been unable or unwilling to conduct independent in-depth accident investigations.

Some flag States have become well known for their failure to carry out casualty investigations. Panama is the largest flag State in the world, accounting for around 21% of the world's merchant fleet in gross tonnage. Yet according to the maritime journal Fairplay, 'Panama has long ignored its international obligation to

carry out casualty investigations and the Panama Maritime Authority's excuse is that it does not have the resources' (Fairplay, 13 June 2002).

Stephen Roberts concludes on the basis of extensive research that, 'It would seem clear from the available evidence that when British seafarers lost their lives whilst employed in foreign merchant vessels, the flag State authorities seldom took responsibility for investigating the death. (Stephen Roberts, Occupational Mortality Among Merchant Seafarers in the British, Singapore, and Hong Kong Fleets 1981-1995, 1998)

Ignoring crew conditions

Flag States have an ongoing responsibility for the welfare and social rights of the seafarers on board ships flying their flag. Article 94 (2) (b) of UNCLOS requires that the flag State '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'.

In an analysis of the relationship between flag States and working conditions based on data from an ITF-MORI survey of seafarers in 1996, Winchester and Alderton conclude that, 'There is a strong correlation between inefficient regulation and inferior working conditions for seafarers. Where the aim of owners flagging to weak regulatory regimes is, invariably, to cut costs, then this has measurable, and significant, effects upon the working conditions and safety of those who toil at the sharp end of the maritime industry.' (Winchester, N and Alderton, T, 'Globalisation and De-Regulation in the Maritime Industry', 2002)

The area most neglected in terms of these



responsibilities is certainly the welfare and social rights of the crews. In 2000, ICONS conducted a major investigation into compliance with international minimum safety, environmental and social requirements. The Commission's report 'Ships, Slaves and Competition' concluded, amongst other things that, 'Little effective attention... has been given to the working conditions of seafarers on foreign ships. Although many ship owners act responsibly, the failure of many flag states and the international regulatory system to adequately implement international labour standards has exposed thousands of seafarers to exploitation and abuse.'

The vulnerability of seafarers and the responsibility to ensure minimum labour standards has been recognised by governments through ILO Maritime Conventions and Recommendations as well as the ILO Decent Work at Sea programme. Between 1920 and 1996, a total of 39 Conventions, 29 Recommendations and one Protocol concerning seafarers were adopted. ILO standards provide a vital regulatory benchmark for minimum standards. However, on the whole, apart from ILO Convention (No. 147) concerning Minimum Standards in Merchant Ships which has port State control provisions in some areas, there is no enforcement mechanism other than through the flag States.

The ILO Meeting of Experts on Working and Living Conditions of Seafarers On Board Ships in International Registers held in Geneva between 6-8 May 2002 issued a Consensual Statement which, amongst other things, agreed that, 'The flag State has the overall responsibility for ensuring that the rights of seafarers are respected in relation to service on board ships flying its flag.' It also agreed that 'In order to effectively exercise its jurisdiction in social matters, every State shall have a sound maritime administration with a firm



legislative framework complying with, as a minimum, international labour standards and a strong enforcement mechanism'. The Experts expressed the view that 'consideration should be given to a possible mechanism by which performance of flag states in respect of ILO instruments might be introduced'. They considered that in the context of enforcement, due consideration should be given to the relevant provisions of UNCLOS and the relevant provisions of the ISM Code (The IMO's International Safety Management Code).

Seafarers around the world desperately need the effective enforcement of international standards, especially of safety and labour standards. In the absence of such enforcement, it is worth quoting at length from the ICONS report (cited above) regarding the levels of exploitation and abuse it found during the course of its hearings, 'Life at sea for many seafarers involves much abuse. Physical abuses including beatings and sexual assault, inadequate medical treatment, sub-standard accommodation, and inadequate food. Mental abuse arises from isolation, cultural insensitivity and lack of amenities for social interaction.' In addition, 'Non payment of wages, delays in paying entitlements to families, and even abandonment are additional abuses that contribute to the suffering of a large proportion of seafarers. There are few major ports in the world that have not played host to one or more abandoned ships, and their crews in recent years. The crews can go for many months, sometimes years, with no pay and little hope of repatriation.'

While, as the ICONS report notes, any flag State can fail in its responsibility to seafarers, there have to be serious questions over the capacity or the will of FOCs to provide social protections for seafarers. Peter Morris pointed his finger directly at FOCs during hearings of the

US House Armed Services Committee in June 2002 when he testified, 'The switch from ship registrations from the traditional shipping nations to offshore registers led to a proliferation of ship registries. Many of these registries were incapable of effective supervision of ship's conditions or crew competence and compliance with labour and social security provisions.....The use of offshore registries inevitably places restrictions and obstacles in the way of crew members gaining access to their entitlements or seeking redress for a wrong committed against them. But then that is why some ship operators seek out offshore flags'.

According to the Flag State Audit of 2003 conducted by the University of Cardiff, measuring the performance of 38 flag States, 'There is a direct link between flag of convenience/open register States and poor scores on the welfare rights category'. Many of these States keep no labour records for the workforce on board ships flying their flag.

The ILO has argued that, 'The vicious circle involving extremely low freight rates, very poor conditions, low standards enforced by inadequate regulation and reluctance to enforce must be broken' (The Impact on Seafarers Living and Working Conditions of Changes in the Structure of the Shipping Industry, ILO, 2001). The stark conclusion reached by the ICONS report shows the end result of having regulation without effective enforcement, 'For thousands of today's international seafarers life at sea is modern slavery and their workplace is a slave ship'.

While the situation for many merchant seafarers may be grim, there is evidence that the situation is much worse in the fisheries sector, especially on the FOC vessels involved in IUU fishing. During the Camouco case (Panama vs. France), at The International Tribunal of the



Law of the Sea, Mr. Jean-Francois Dobbelle, the Agent of France, mentioned the deplorable conditions of crew members on board the ships that had been arrested, with crew members often ill, badly nourished and living in unhygienic conditions close to slavery (ITLOS/Press 34 – 03.02.2000).

Ships beyond the law

Seafarers and fishers do not only need protection from violations of international labour standards, all basic human rights and protection from crimes against the person must also be guaranteed on board ships, even when they are in international waters. In such cases there can be conflicting claims from different States. UNCLOS clearly places the responsibility with the flag State. However, those concerned with the application of international law view FOCs as being likely to undermine the system. The International Law Commission has recently expressed its concern, stating that, 'If the ship flew a flag of convenience, the State of registration would have no interest in exercising diplomatic protection should the crew's national Governments fail to do so' (Report of the 54 Session of the United Nations General Assembly 29 April – 7 June; 22 July –16 August 2002).

While this is a much under-documented area, there are examples which illustrate this reality. In 1995, in Australian waters, an Indonesian radio officer and some of his crew mates jumped overboard after allegedly being beaten with iron bars by the officers. The radio officer died from his injuries. The crew members were rescued after 5 hours in shark infested waters. No criminal charges were laid in Australia and no investigation was undertaken by the ship's flag State, Panama (Ship Safe: an inquiry into the Australian Maritime Safety Authority, Annual Report 1996-7).

More recently, on 7 April 2002, an incident occurred on the high seas on board the Panamanian-flagged vessel MV Tajima, in which a Japanese second officer was murdered. Two Filipino crew members were accused of the crime. According to a statement submitted by the Japanese Government to the IMO Legal Committee, Panama as the flag State was the only State that could exercise criminal jurisdiction. Neither Japan nor the Philippines had appropriate provisions in their domestic laws (see IMO I:\LEG\85\10.DOC). As a result, the two accused seafarers were kept in detention on board the ship while in port in Japan for one month until the ship departed for another port. According to the Tokyo High Public Prosecutors Office, the two Filipino seafarers had admitted killing the Japanese second mate and to throwing his body into the sea.

Marine casualties and the threat of environmental disaster

The failure of some flag States to exercise their regulatory responsibilities appears to be reflected in maritime casualties. The OECD has noted 'mounting criticism, based on growing evidence which shows a strong correlation between marine casualties and certain flags of registration' (Competitive Advantages Obtained by Some Shipowners as a Result of Non-observance of Applicable International Rules and Standards, OECD, 1996). This issue has an important additional dimension when a casualty involves a hazardous cargo such as chemicals or oil, and becomes a major threat to the marine environment and coastal livelihoods.

In an analysis of vessel casualties in the period 1997-1999, Winchester and Alderton notes that, 'There are observable differences between casualty rates for FOC, second/international register and national flagged



vessels, but there are also such differences within the FOC group itself. The newer entrants to the FOC market are much more likely to have poorer safety records than their more established competitors, and it is suggested that this is mainly due to market forces.' (Winchester, N and Alderton, T, *Flag States and Safety: 1997-1999, 2002*).

A history of recent casualties off the coast of Europe tells its own story. The casualty of the Bahamas-flagged the *Prestige* in November 2002 was not an isolated incident. In 2000 another aged single-hulled tanker, the Maltese flagged *Erika*, similarly broke in two and spilled 12,000 tonnes of heavy fuel oil off the coast of Brittany. In the past ten years three other major oil spills have occurred off the coasts of Europe – the *Sea Empress* (flying the Liberian flag) off Milford Haven in 1996, the *MV Braer* (flying the Liberian flag) off the Shetland Islands in 1993, and the *Aegean Sea* off Galicia in 1992 (flying the Greek flag, though having previously spent time moving between the Liberian and Bahamian flags).

In 2001 seven out of the ten flag States which had the most ships detained by port State control under the Paris MOU were FOCs. The worst five flags for numbers of ships over 500 GT (excluding fishing vessels) were all FOCs.

A problem with placing too great an emphasis on port State control is that it tacitly accepts the falling out of the flag State from the regulatory regimes. In this way port State control becomes not an addition to flag State control but a replacement. The problem with this kind of approach is that it fails to address the central structural conditions that enable problems of enforcement. It simply misses the root cause of the problem; the element that gives this problem its freedom to exist, that is, the FOC system itself.

The Paris MOU Annual Report for 2001 recognises the close correlation between safety and working and living conditions. Deficiency rates for working conditions under the standards of ILO Convention (No. 147) concerning Minimum Standards in Merchant Ships have increased over the years. This, of course has an effect on accident and pollution as well, and the report notes that, 'Combined with contracts of long service on board and extensive working hours there is no room for a proper safety culture on board these ships'.

Following the sinking of the Maltese flagged *Erika*, port State control authorities covered by the Paris MOU carried out a concentrated inspection campaign on older oil tankers. 47% of the ships detained were Maltese flagged. Two of them had serious structural defects. One of these ships, the 26 year old *Maria S* had 31 defects covering all convention certificates, crew levels, ship stability and strength, hull corrosion and cracking and cracks in the bulkheads.

It should be noted that it is not only when a ship sinks that it causes a pollution problem. The OECD Maritime Transport Committee observes that there is deliberate illegal discharge of oil into the seas, 'unscrupulous ship operators release more oil illegally into the marine environment than all of these spills combined' (Cost Savings Stemming from Non Compliance with International Environmental Regulations in the Maritime Sector, cited above). Nor is oil the only form of marine pollution. Garbage and sewage discharges, chemicals, air pollution and ballast water discharges are all damaging to the marine environment. The gravity of this problem is reflected by the fact that the European Union is currently considering a Proposal for a Directive on ship-source pollution and on the introduction of sanctions, including criminal sanctions, for pollution offences (COM(2003) 92 final).



The cruise ship industry often operates in environmentally sensitive coastal zones. The cruise ship industry also has a strong preference for flying FOC flags. The major cruise ship operators, including Carnival Cruise Lines, Royal Caribbean Cruise Lines have all had to pay large fines after investigations by the US coastguard. David Uhlmann, chief of the environmental crimes section of the US Justice Department, said, "Nearly all these ships have oil-water separators and pollution control devices and, for whatever reason the owners or the people on the ship decide they are not going to pay to use them, they are not going to pay to dispose of the waste properly, but instead they are going to dispose of it overboard'.

In 1999 Royal Caribbean pleaded guilty to 21 felony charges for dumping bilge water and chemicals, falsifying records and lying about it. In April 2002 Carnival Cruise Lines, the world's largest cruise ship operation was found guilty at a court in Miami of dumping waste and falsifying its records.

While any industry is liable to have its rogue operators the OECD has recently raised serious concerns that there is an institutional breakdown in the regulation of the shipping industry which effectively rewards the practices of substandard operators and penalises quality shipping. The OECD estimates that 10-15% of the world's fleet operates in full contravention to the IMO's body of environmental regulations. It notes that the primary responsibility for ensuring that IMO standards are complied with by ships lies with the flag State.

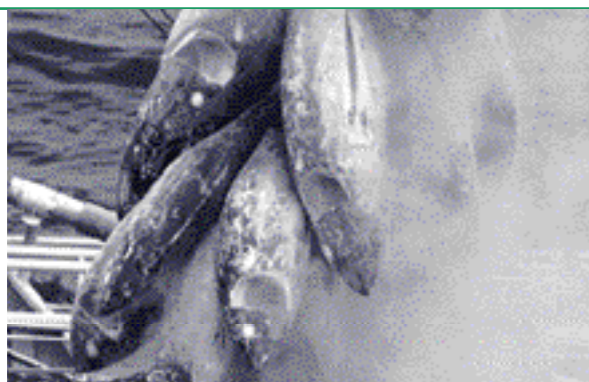
Flag States and fisheries

There is a serious environmental crisis facing world fish stocks. A number of species are at grave risk of being

fished out of existence, which would have a profound impact on the marine ecosystem. As a result, in recent years many countries have put in place much more strict conservation safeguards to allow their fish stocks to recover. It has been during this period that there has been a boom in the growth of fisheries vessels flying FOCs. In 1998, FOCs constituted about 10% of the world's fishing fleet. By 2001 this had grown to 12.5%.

The major reason why any fishing vessel would fly an FOC flag is to evade fish stock conservation measures. At a time when there is real concern over the fragility of international fish stocks, FOC fishing operations are seen not only as an exacerbating factor but as one of the most serious threats to the conservation system. The UN Secretary General has called the prevalence of IUU fishing 'one of the most severe problems facing world fisheries'.

The United Nations Conference on Environment and Development (UNCED) in 1992 launched a major programme agreed by governments aimed at addressing some of the world's most serious environmental issues. This specifically agreed in paragraph 17.52. of Agenda 21 that 'States should take effective action, consistent with international law, to deter reflagging of vessels by their nationals as a means of avoiding compliance with applicable conservation and management rules for fishing activities on the high seas.' UNCED concentrated international focus on the problem of conservation and unregulated fishing operations, and the FAO took up the UNCED agenda, immediately prioritising the issue of FOCs in fisheries. According to the FAO 'The post-UNCED decade, since 1992, has ushered in a new era of responsibility for states in respect of their fishing fleets... The term flag State responsibility has taken on some compelling new dimensions.' (FAO Circular 980, 2002).



In 1993 the FAO adopted the FAO Compliance Agreement, which had as its primary objective 'to deal with the problem of fishing vessels re-flagging into flags of convenience to avoid compliance with agreed conservation and management measures'. From early on, the FAO began to develop an instrument to address IUU fishing, approving an International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing. The Action Plan contained a whole section on flag State responsibilities, including such basic principles as, 'A flag state should ensure, before it registers a vessel, that it can exercise its responsibility to ensure that the vessel does not engage in IUU fishing', and that, 'Flag States should deter vessels from re-flagging for the purpose of non compliance with conservation and management measures or provisions adopted at a national, regional or global level'.

In recent years the annual reports of the UN Secretary General and the General Assembly Resolutions which have been adopted have placed particular emphasis on the need to eradicate illegal fishing.

The FAO is clear that FOCs lie at the heart of the difficulties of fish stock conservation, and that getting flag States to exercise their responsibilities is the key to the solution. In the circular cited above, the FAO states, 'Increasingly, the reflagging of fisheries vessels in particular fisheries has been directly associated with the avoidance of fisheries management measures...'. It goes on to argue that, '...for many States open registers are just another way of making money... Most of these states do not belong to, or cooperate with any RFMO (Regional Fisheries Management Organisation) that has adopted international conservation and management measures. This makes it very attractive for fishing vessels that would otherwise have to comply with such measures to buy a "flag of convenience" (FOC) from an

open registry State that does not exercise effective flag State compliance responsibilities over fishing fleets..'. It points out that, 'The post-UNCED international instruments reflect the increasing international consensus that the effective exercise of flag State responsibilities is the key to the future of the global fisheries resource'.

In April and May 2000, Greenpeace International conducted a seven-week expedition to Atlantic fishing grounds off Angola. The information collected clearly shows how the operation of FOC longliners is supported by a whole sea-going infrastructure designed to tranship the FOC catches to market and to re-supply the FOC fishing vessels at sea. The flags of these vessels were Belize, Cambodia, Panama or Equatorial Guinea (Pirate Fishing, Plundering the Oceans, Greenpeace, 2001). These governments did little or nothing to act against these activities.

In November 2000 members of the International Commission for the Conservation of Atlantic Tunas (ICCAT) agreed to close their markets to all big-eye tuna caught by fishing vessels flying the flags of Belize, Honduras, Equatorial Guinea, St Vincent and the Grenadines and Cambodia. However, flag-hopping between FOCs makes the ships harder to track down and to prosecute.

Some FOCs have become concerned at the spotlight placed on fisheries. Panama, Malta and Mauritius have reduced the number of fishing vessels flying their flag. Cambodia, Belize and Honduras have claimed that they were in the process of deregistering fishing vessels. Unfortunately the nature of the FOC system means that when one country tightens up on registration conditions for fishing vessels in response to international pressure, there are still several other countries where registration



can be performed, and new FOCs are emerging in fisheries, such as Bolivia. Notably, there were also 1,349 fishing vessels flying 'unknown flags' in 2001, a significant increase on 2000 (1,043) and a huge increase over the figure nine years ago in 1994, when only 14 fishing vessels were flying 'unknown flags'. In other words when some FOCs get rid of fisheries vessels they do not resolve the problem, they just export it elsewhere.

Movements between FOCs can be observed as sanctions are being applied or lifted by certain regional fisheries organisations. For example, after trade restrictive measures imposed on Panama by ICCAT were lifted after Panama joined it, a number of vessels reflagged to Panama and there were claims that they were engaged in IUU fishing again. This led ICCAT in November 2001 to re-identify Panama as having vessels engaged in IUU fishing.

The continuing crisis in fish stocks has brought in other

voices. In July 2002, Franz Fischler, European Commissioner for Agriculture, Rural Development and Fisheries said in his statement 'Illegal Fishing – a threat to our common heritage', "...the practice of flags of convenience, where owners register vessels in countries other than their own in order to avoid binding regulations or controls, is a serious menace in today's maritime world".

An international conference on IUU fishing hosted by the Spanish Government in Santiago de Compostela in November 2002 concluded that 'Expanding market demand for fisheries products, at a time of decreased available resources and increasingly stringent regulation of marine species, has been accompanied by widespread IUU fishing, in particular by vessels flying flags of convenience' and it condemned 'Lack of effective flag state control of fishing vessels, in particular those flying flags of convenience'. The Spanish Government has since banned FOC fishing vessels from Spanish ports.



Conclusion

There are fundamental structural problems within the current system of international maritime governance. These stem from the tension between the principle of flag State sovereignty and the flags of convenience system. When set within the context of globalisation and the demands of global business, the system of governance collapses, leading to widespread non-compliance with international minimum standards. The consequence is real suffering and hardship amongst seafarers and their families, as well as damage to fragile marine ecosystems, which in turn has an impact on those who rely on them for a living. The system is also open to abuse by those with criminal intentions, raising concerns over matters of peace and security.

It is only by re-establishing the full role and responsibilities of the flag State, and by ensuring that there is a 'genuine link' between a ship and the flag it flies that effective maritime governance can be achieved. We are at a defining moment, and a choice must be made between proper flag States, with all that implies, or a gradual dismantling of the current regime as coastal States or regional bodies take the unilateral measures that are deemed necessary to meet the demands of their own societies.



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