

1991

Re-evaluating the Status of Flags of Convenience Under International Law

David F. Matlin

Follow this and additional works at: <https://scholarship.law.vanderbilt.edu/vjtl>



Part of the [International Trade Law Commons](#), and the [Law of the Sea Commons](#)

Recommended Citation

David F. Matlin, Re-evaluating the Status of Flags of Convenience Under International Law, 23 *Vanderbilt Law Review* 1017 (2021)

Available at: <https://scholarship.law.vanderbilt.edu/vjtl/vol23/iss5/5>

This Note is brought to you for free and open access by Scholarship@Vanderbilt Law. It has been accepted for inclusion in Vanderbilt Journal of Transnational Law by an authorized editor of Scholarship@Vanderbilt Law. For more information, please contact mark.j.williams@vanderbilt.edu.

NOTES

Re-evaluating the Status of Flags of Convenience Under International Law

ABSTRACT

This Note re-examines the role and status of flags of convenience in the international shipping arena. The author argues that universal condemnation of flags of convenience or open ship registration is unwarranted from legal and factual standpoints. The Note first examines the significance of ship nationality as a means of regulating conduct on ships when at sea or in foreign ports. This analysis leads into an examination of the methods states use to ascribe nationality to vessels. The author then analyzes attempts to impose "genuine link" requirements in several conventions and questions whether such requirements are legitimate under customary international law. The Note then characterizes the various registration requirements of selected nationalist and open registry states.

The Note next examines the economic benefits to shipowners with a flag of convenience. To attract business, flag of convenience states impose little or no taxes, allow for drastically reduced labor costs, and do not impose the strict safety standards as do closed registry states. The Note then analyzes policy reasons against flags of convenience. Commentators have criticized open registries for being slow in enforcing international agreements aimed to protect whales, prohibit pirate radio broadcasts, and restrict narcotics smuggling. Labor and environmental concerns have opposed flags of convenience because these nations have been lax in imposing the social benefits for the crews and the safety regulations for the ships that industrialized societies require. Several open registry states, however, recently have taken great strides to alleviate these criticisms. The author concludes that, in light of these strides, the poor reputation of flags of convenience has become outdated and unrealistic.

TABLE OF CONTENTS

I.	INTRODUCTION.....	1018
II.	SHIP NATIONALITY.....	1021
	A. <i>The Significance of Ship Nationality</i>	1021
	1. Competing State Interests.....	1024
	2. Consequences of Statelessness.....	1025
	B. <i>Ship Registration</i>	1027
III.	THE LEGITIMACY OF FLAGS OF CONVENIENCE IN THE CONTEXT OF SHIP NATIONALITY REQUIREMENTS....	1028
	A. <i>Judicial Recognition of Nationality Ascription</i> ...	1029
	B. <i>The Genuine Link Requirement</i>	1031
	1. International Law Commission Efforts.....	1032
	2. The High Seas Convention and UNCLOS..	1034
	3. The Convention on Conditions for Registra- tion of Ships.....	1035
	4. Enforcement of the Genuine Link Require- ment.....	1037
IV.	RECOGNIZING CHARACTERISTICS OF FLAGS OF CON- VENIENCE.....	1038
	A. <i>Typical Characteristics</i>	1038
	B. <i>Registration Requirements of Various States</i>	1039
	1. Closed Registration States.....	1039
	a. The United States.....	1039
	b. The United Kingdom.....	1041
	2. Open Registration States.....	1042
	a. Liberia.....	1042
	b. Panama.....	1043
V.	ADVANTAGES OF FLAGS OF CONVENIENCE.....	1044
	A. <i>Direct Economic Benefits</i>	1044
	B. <i>Taxation</i>	1045
	C. <i>Operating Costs</i>	1046
VI.	GROUND FOR OPPOSITION TO FLAGS OF CONVENIENCE	1048
	A. <i>Nefarious Activities</i>	1049
	B. <i>Labor Concerns</i>	1050
	C. <i>Safety Concerns and Marine Pollution</i>	1051
VII.	CONCLUSION.....	1054

I. INTRODUCTION

For centuries, some shipowners have sought to sail their vessels under the flags of foreign states. In the early 1700s, for example, Genovese ships operating along the Peloponnesian peninsula flew the French flag

to cloak their ships with the protection of a powerful state.¹ In the 1800s, United States and Latin American slave trading ships flew the flags of states that had not signed a slave suppression treaty granting Britain the power on the high seas to board and arrest ships registered with signatory states.² In recent years, many shipowners, for a variety of reasons, continue to fly the flags of foreign states. The primary motivation for shipowners to register a ship under a foreign flag is to seek direct economic benefits in the form of tax savings and decreased operating costs. Shipowners also are motivated by desires to avoid political or military conflicts that would interfere with the ship's activities if the ship flew the national flag of its owner.³

Today, some flags are easier to fly than others. The easiest and least restrictive flags are called flags of convenience. These are the flags of states with "open" registries, which place minimal or no restrictions on what ship may fly their flag.⁴ More specifically, flags of convenience "can be defined as the flag of any country allowing the registration of

1. See B. METAXAS, *FLAGS OF CONVENIENCE* 5, 8 (1985). For a discussion of shipowners' use of foreign flags in the Mediterranean during the eighteenth century, see *id.* at 8-9.

2. See R. CARLISLE, *SOVEREIGNTY FOR SALE* xiii (1981).

3. See *Politics Limits International Traffic*, *LLOYD'S SHIP MANAGER & SHIPPING NEWS INT'L, DIRECTORY OF INTERNATIONAL SHIP REGISTERS, SHIP MANAGERS AND MANNING AGENTS* (Supp. Nov. 1988) at 5 [hereinafter *LLOYD'S SHIP MANAGER*]. Some states specifically exclude the vessels of particular states from entering their ports. Israeli ships, for example, are forbidden from entering most Arab ports. Cypriot vessels are barred from Turkish ports. Albanian, Cuban, Iranian, Kampuchean, North Korean, Libyan, Nicaraguan, and Syrian vessels are barred from United States ports. South African vessels are barred from the ports of many states. See *id.* at 6.

4. Flags of convenience, however, should not be confused with "flags according to convenience." These are two distinct concepts. Flag of convenience refers to a method of ship registration, whereas flag according to convenience refers to the illegal procedure in which a shipowner registers a ship in more than one country and chooses to fly a particular flag for such reasons as evading jurisdiction. See *United States v. Ayarza-Garcia*, 819 F.2d 1043, 1046 (11th Cir.) (United States has jurisdiction if the ship "sails under the authority of two or more states, and uses them according to convenience"), *cert. denied*, 484 U.S. 969 (1987). Unlike flags of convenience, flying a flag according to convenience is strictly prohibited by article 2 of the Third United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, U.N. DOC. A/CONF. 62/122 [hereinafter *UNCLOS*], *reprinted in* 21 I.L.M. 1261 (1982), which provides that offending ships are rendered stateless. The prohibition against multiple flags, however, does not apply to displays of the flag to show some interest in the vessel. See B. BOCZEK, *FLAGS OF CONVENIENCE* 109 & n.66 (1962). For example, a Panamanian registered vessel owned by United States nationals may fly the United States flag at the masthead as long as the Panamanian flag flies aft. *Id.* This placement of flags indicates both United States ownership and Panamanian registry. See *id.*

foreign owned and foreign controlled vessels under conditions which, for whatever the reasons, are convenient and opportune for the persons who are registering the vessels."⁵ Flags of convenience have been described as "flags of necessity" insofar as shipowners must re-register in open registries to accrue the benefits that permit their ships to remain competitive.⁶ They also have been called "runaway flags" in the sense that the shipowners have "run away" from the flag under which they normally would register their ships.⁷

The principal flag of convenience states are Liberia and Panama.⁸ Other states, however, serve or have served as flag of convenience states. These states include Costa Rica, Cyprus, Haiti, Honduras, Lebanon, Malta, Morocco, San Marino, Sierra Leone, Singapore, Somalia, and Vanuatu.⁹ This Note will discuss and analyze the requirements for registration that some flag of convenience states impose.¹⁰

Flags of convenience are controversial for many reasons. They received negative media coverage in the 1970s after a series of oil tanker accidents involving flag of convenience vessels. Critics and courts blamed these accidents on substandard ships and poorly trained crews.¹¹ Adding to the controversy, national governments and shipowners expressed hostility on the grounds that low registration and operation costs available in these open registry states posed an economic threat to the shipping industry in traditional maritime states.¹² Labor unions still condemn open registries for the job losses suffered in traditional maritime states when shipowners hire foreign crews at considerably lower wage rates after registering under flags of convenience.¹³

This Note focuses on two dimensions of flags of convenience or open

5. B. BOCZEK, *supra* note 4, at 2.

6. *Id.* at 5-6.

7. *Id.* at 6.

8. See H. DEGENHARDT, *MARITIME AFFAIRS* 32 (1985).

9. See Comment, *Vessel Registration in Selected Open Registries*, 6 *MAR. LAW.* 221, 227 (1981).

10. See *infra* Part IV.B.2.

11. The United States District Court for the Southern District of New York, for example, held that the *Argo Merchant*, a Liberian tanker that broke apart and spilled oil off Nantucket in 1976, was unseaworthy, had poorly maintained navigational equipment, and had officers who made negligent navigational errors. *In re* Complaint of Thebes Shipping, Inc., 486 F. Supp. 436 (S.D.N.Y. 1980). The United States District Court for the Northern District of Illinois also found similar circumstances surrounding the *Amoco Cadiz* disaster in which a Liberian tanker ran aground off France and caused oil damage to the French coastline. The "Amoco Cadiz," 2 *Lloyd's Rep.* 304 (N.D. Ill. 1984).

12. See B. METAXAS, *supra* note 1, at 57.

13. See *infra* Part VI.B.

ship registration. First, this Note examines ship nationality and the "genuine link" concept that opponents of flags of convenience promote to limit or control flags of convenience. The promoters of this concept, including scholars and representatives of closed registry states, insist that there be a genuine link between a ship and the state of registry for the nationality to be valid. This Note questions the validity of the genuine link concept and analyzes its effectiveness in eliminating flags of convenience. Second, the analysis of nationality leads into a discussion of ship registration, the method by which states ascribe nationality. This discussion focuses on open registries and flags of convenience. The Note concludes by weighing the advantages and disadvantages of flags of convenience and determines whether they really deserve their tainted reputation.

II. SHIP NATIONALITY

A. *The Significance of Ship Nationality*

It is a fundamental premise of customary international law that all ships must have a nationality,¹⁴ though some commentators condemn the use of the term nationality to describe the legal relationship between ship and state.¹⁵ Critics of flag of convenience states view the nationality granted by these states as illegitimate. This criticism of nationality is a principal method opponents employ in their attempts to curtail open registries. Without requirements of ship nationality, however, the legal

14. See, e.g., UNCLOS, *supra* note 4, art. 91(1) ("Every state shall fix the conditions for the grant of its nationality to ships.").

15. Some scholars disfavor the use of the term "nationality" on the grounds that nationality's "special meaning with regard to the relationship between a State and a person precludes its application to vessels." R. RIENOW, *THE TEST OF THE NATIONALITY OF A MERCHANT VESSEL* 8 (1937). For individuals, nationality indicates that the individual is entitled to diplomatic protection from the state offering nationality. See B. BOCZEK, *supra* note 4, at 117-18. For vessels, national character is dispositive in determining which law applies on board the vessel. *Id.* at 118-19. Thus, the term "nationality" may be inaccurate because national character rather than nationality is involved.

Some committee members at the International Law Commission (ILC) also expressed disfavor with the term "nationality of ships." For example:

The representative of France (Mr. Pinto) criticized the expression "nationality of ships" used in Article 29 of the Commission's draft. He pointed out that the legislation of at least thirty-seven countries did not use the concept of nationality to define the legal status of ship. If the word "nationality" was retained, he said, there was danger of losing sight of the fact that "pseudo-nationality" was involved.

M. CHAUDHRI, *INTERNATIONAL LAW AND THE UNITED NATIONS* 154 (1988).

system by which nations regulate conduct on the high seas would not function.¹⁶

A designated flag state is necessary for several reasons. First, on the high seas, ships generally are subject only to the flag state's laws and to international law.¹⁷ Nationality is essential because it determines which state exercises jurisdiction over the vessel¹⁸ and which state's law governs the ship's on-board activities.¹⁹ The 1982 United Nations Convention on the Law of the Sea (UNCLOS) provides that "ships shall sail under the flag of one state only and . . . shall be subject to its exclusive jurisdiction on the high seas."²⁰ Under some circumstances, ships may fly the flag of an international organization and not be affiliated with a specific state.²¹ Such organizations include the United Nations, United Nations agencies, and the International Atomic Energy Agency.²²

Certain authorities view vessels metaphorically as a floating piece of the flag state's territory.²³ In legal terms, this indicates that on the high seas the flag state may assert territorial jurisdiction over the activities and persons on board.²⁴ United States and British courts embrace this notion of the vessel as floating territory.²⁵ The Permanent Court of In-

16. "The lack of nationality, which might better be termed 'statelessness,' robs a ship of privileges, and deprives it of a State to espouse its cause when it suffers injustice at the hands of another State. Even the privilege of clearing port may be denied the stateless vessel." R. RIENOW, *supra* note 15, at 14.

17. See M. AKEHURST, *A MODERN INTRODUCTION TO INTERNATIONAL LAW* 272 (5th ed. 1984).

18. See R. CHURCHILL & A. LOWE, *THE LAW OF THE SEA* 20 (2d ed. 1988).

19. "The law of the flag governs all occurrences on board." C. COLOMBOS, *THE INTERNATIONAL LAW OF THE SEA* 297 (6th ed. 1967).

20. UNCLOS, *supra* note 4, art. 92(1).

21. See G. VON GLAHN, *LAW AMONG NATIONS* 415 (5th ed. 1986). One unusual example occurred in 1983, when the United Nations, for "strictly humanitarian reasons," permitted ships evacuating Yasar Arafat and four thousand Palestine Liberation Organization guerrillas to fly the United Nations flag alongside the flag of registry. *Id.*

22. UNCLOS, *supra* note 4, art. 93. Article 93 provides that "[t]he preceding articles [which concern nationality and status of ships] do not prejudice the question of ships employed on the official service of the United Nations, its specialized agencies or the International Atomic Energy Agency, flying the flag of the organization." *Id.*

23. See 1 J. MOORE, *A DIGEST OF INTERNATIONAL LAW* 930 (1906).

24. *Id.*

25. United States courts clearly have adopted this principle. See, e.g., *Martha's Vineyard Scuba Headquarters, Inc. v. Unidentified, Wrecked & Abandoned Steam Vessel*, 833 F.2d 1059, 1066 (1st Cir. 1987) ("[A] vessel on the high seas is under the exclusive jurisdiction of the nation under whose flag she sails." (citation omitted)); *United States v. Rodgers*, 150 U.S. 249, 264 (1893) ("It is natural to consider the vessels of a nation as parts of its territory, though at sea, as the State retains jurisdiction over them; and,

ternational Justice (PCIJ) also has supported this position.²⁶ Some scholars, however, reject this idea and argue that jurisdiction is based on the nationality theory of jurisdiction rather than on territoriality.²⁷

The notion of the ship as a territorial entity was recognized judicially by the United States Supreme Court in *McCulloch v. Sociedad Nacional de Marineros de Honduras*.²⁸ In *McCulloch*, a Honduran corporation sought to enjoin the National Labor Relations Board (NLRB) from conducting an election for collective bargaining representation on board a Honduran ship. The Supreme Court affirmed the district court's decision enjoining the NLRB from interfering with the on-board activities of a foreign-registered vessel. The Court based its reasoning in part on "the well-established rule of international law that the law of the flag state ordinarily governs the internal affairs of a ship."²⁹

according to the commonly received custom, this jurisdiction is preserved over the vessels even in parts of the sea subject to a foreign dominion." (quoting letter from Secretary of State Webster to the British Foreign Minister, Lord Ashburton)); cf. *Scharrenberg v. Dollar Steamship Co.*, 245 U.S. 122, 127 (1917) ("It is, of course, true that for purposes of jurisdiction a ship, even on the high seas, is often said to be a part of the territory of the nation whose flag it flies. But in the physical sense this expression is obviously figurative, and to expand the doctrine to the extent of treating seamen employed on such a ship as working in the country of its registry is quite impossible." (citation omitted)).

For a discussion of British court decisions regarding the principle that vessels are floating territory, see C. FENWICK, *INTERNATIONAL LAW* 312 (3d ed. 1948).

26. In the *S.S. Lotus Case*, (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, France objected on jurisdictional grounds to the criminal negligence proceedings brought against a French naval officer whose vessel collided with a Turkish vessel on the high seas. Eight Turkish nationals drowned as a result of the collision. *Id.* at 10-11. The PCIJ ruled that Turkey lawfully could assert jurisdiction:

It follows that what occurs on board a vessel on high seas must be regarded as if it occurred on the territory of the State whose flag the ship flies. If, therefore, a guilty act committed on the high seas produces its effects on a vessel flying another flag or in foreign territory, the same principles must be applied as if the territories of two different States were concerned, and the conclusion must therefore be drawn that there is no rule of international law prohibiting the State to which the ship on which the effects of the offence have taken place belongs, from regarding the offence as having been committed in its territory and prosecuting, accordingly, the delinquent.

Id. at 25.

27. The nationality principle of jurisdiction provides that states have jurisdiction over their nationals even in the case of extraterritorial acts or renunciation of nationality because the national owes allegiance to his own country. See generally I. BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 303 (3d ed. 1979); J. BRIERLY, *THE LAW OF NATIONS* 238 (5th ed. 1955).

28. 372 U.S. 10 (1963).

29. *Id.* at 21. This rule was established by the United States Supreme Court in *Mali*

1. Competing State Interests

The *McCulloch* Court also suggested that the flag state's jurisdiction extends to official inquiries into accidents involving ships registered under its flag. In the *Torrey Canyon* oil tanker disaster,³⁰ for example, the flag state of the *Torrey Canyon*, Liberia, conducted an inquiry to determine the accident's cause, even though the grounding occurred in the British contiguous zone.³¹ The jurisdiction of the flag state is not exclusive, however. When a nongovernment merchant vessel enters a foreign port, for example, the foreign state may impose its laws and jurisdiction on the vessel.³² States eventually developed the practice whereby the vessel will not be subject to the foreign state's jurisdiction in matters concerning on-board discipline or economy. Acts concerning only the vessel or the persons on board that do not affect the "peace or dignity of the country, or the tranquility of the port"³³ are left to the jurisdiction of the

v. Keeper of the Common Jail (*Wildenhus's Case*), 120 U.S. 1, 11 (1887). In *Wildenhus's Case*, a Belgian sailor, aboard a Belgian-registered ship, stabbed to death a fellow Belgian crew member below deck while the vessel was moored in Jersey City, New Jersey. The Court held that Belgian law governed. *Id.* at 17.

30. For a detailed discussion of the *Torrey Canyon* disaster and its aftermath, see E. COWAN, *OIL AND WATER: THE Torrey Canyon DISASTER* (1968).

31. See Report of the Board of Investigation in the Matter of the Stranding of the S.S. *Torrey Canyon* on March 18, 1967, reprinted in 6 I.L.M. 480 (1967) [hereinafter *Torrey Canyon Stranding Report*].

32. See *Wildenhus's Case*, 120 U.S. at 19; see also *The Ester*, 190 F. 216, 220 (D.S.C. 1911) (holding that "[t]he merchant vessels of one country visiting the ports of another for the purposes of trade subject themselves to the laws which govern the port they visit, so long as they remain"); *Cunard Steamship Co. v. Mellon*, 262 U.S. 100, 123 (1923) (holding that "[i]t now is settled in the United States and recognized elsewhere that the territory subject to its jurisdiction includes . . . the ports, harbors, bays and other enclosed arms of the sea along its coast"); *Marine Cooks & Stewards v. Panama Steamship Co.*, 362 U.S. 365, 372 (holding that "a ship that voluntarily enters the territorial limits of this country subjects itself to our laws and jurisdiction as they exist"), *reh'g denied*, 363 U.S. 809 (1960).

33. In *Wildenhus's Case*, 120 U.S. at 12, Chief Justice Waite reached his decision, in part, on what he considered were substantial effects on commerce:

From experience . . . it was found long ago that it would be beneficial to commerce if the local government would abstain from interfering with general regulation of the rights and duties of the officers and crew towards the vessel or among themselves. And so by comity it came to be generally understood among civilized nations that all matters of discipline and all things done on board, which affected only the vessel or those belonging to her, and did not involve the peace or dignity of the country, or the tranquility of the port, should be left by the local government to be dealt with by the authorities of the nation to which the vessel belonged as the laws of that nation or the interests of its commerce should require.

Id.

flag state. Thus, jurisdiction over foreign vessels in United States ports is discretionary rather than mandatory.³⁴ This practice, however, is not a binding principle of international law. Rather, it is a practice states developed out of convenience and public policy concerns.³⁵

In the case of flag of convenience vessels, it may be necessary to consider other factors when determining jurisdiction because of the competing interests of the flag of convenience state and the shipowner's state. United States courts, however, hold otherwise and apply the same standards to flag of convenience vessels and vessels of closed registry states. It is well settled in United States courts that "the law of the flag, regardless of ownership, governs the internal economy of the foreign vessel . . ."³⁶ Thus, the on-board activities of a flag of convenience vessel, even when in a port of the state of which the vessel's owner is a national, will be subject to the flag of registry's laws as long as the peace and tranquility of the port remains undisturbed.³⁷

2. Consequences of Statelessness

Ship nationality helps to maintain an orderly system of identification and advocacy for ships on the high seas. The main consequence for a ship without a nationality is that it lacks the protection that flag states offer and, therefore, is not connected with a legal entity to advance or cover its interests within the international legal system.³⁸ It is well established in international law that only states may bring actions against other states. Further, stateless vessels are subject to seizure, largely be-

34. See *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 142 (1957) ("It is beyond question that a ship voluntarily entering the territorial limits of another country subjects itself to the laws and jurisdiction of that country. The exercise of that jurisdiction is not mandatory but discretionary." (citation omitted)).

35. See B. BOCZEK, *supra* note 4, at 160.

36. *Id.* at 172-73.

37. Under some circumstances, the United States extends its maritime regulatory jurisdiction to foreign-registered ships if the ships have significant contacts with the United States. In *Hellenic Lines, Ltd. v. Rhoditis*, 398 U.S. 306, *reh'g denied*, 400 U.S. 856 (1970), the United States Supreme Court held that the Jones Act (46 U.S.C. §§ 2103-04) applied to a ship that was Greek-owned and Greek-registered. The Court found it to be dispositive that the ship had significant contacts with the United States because (1) the vessel regularly carried cargo between the United States and other nations and (2) the ship's owner, who was not a United States citizen, managed the corporation from the State of New York. *Id.* at 310.

38. "In the interest of order on the open sea, a vessel not sailing under the maritime flag of any state enjoys no protection whatever, for the freedom of navigation on the open sea is freedom for such vessels only as sail under the flag of a state." L. OPPENHEIM, *INTERNATIONAL LAW* 369-70 (8th ed. 1955).

cause they have no protector state to protest such a seizure. Ships that encounter stateless vessels are able to assert substantial liberties with such ships because the ability to identify vessels is so essential to maintain order upon the high seas that seized ships engender little sympathy in the transnational arena.³⁹

Although no international convention grants states the power to seize a stateless vessel, UNCLOS article 110 provides that warships have a right to search any stateless vessels they encounter.⁴⁰ United States statutory⁴¹ and case law⁴² take a similar view of stateless ships, deeming, ipso facto, that they are subject to United States jurisdiction.

In *Naim-Molvan v. Attorney-General for Palestine*,⁴³ the British Privy Council held that a ship which lacks documentation to prove its nationality could not claim that its seizure was a violation of international law.⁴⁴ In one sense, however, the purported legal right of seizure is illegitimate. Without fear of reproach, Britain was able to establish a self-serving seizure rule in *Naim-Molvan*, not because unfettered seizure of stateless vessels is a fundamental premise of international law, but because no state has standing to object. A state cannot act in international legal circles on behalf of a party that is not of that state's nationality.⁴⁵ Thus, the right of seizure is by administrative fiat of the capturing state. Because a stateless vessel is not connected with a state to object on its behalf in an international forum, seizing states can act without fear of

39. See M. McDUGAL & W. BURKE, *THE PUBLIC ORDER OF THE OCEANS* 1084-85 (1962).

40. UNCLOS, *supra* note 4, art. 110(1)(d) ("Except where acts of interference derive from powers conferred by treaty, a warship which encounters on the high seas a foreign ship . . . is not justified in boarding it unless there is reasonable ground for suspecting that . . . the ship is without nationality . . .").

41. "[A] vessel subject to the jurisdiction of the United States includes—(A) a vessel without nationality; (B) a vessel assimilated to a vessel without nationality, in accordance with paragraph (2) of article 6 of the 1958 Convention on the High Seas." 46 U.S.C. app. § 1903(c)(1)(A)-(B) (1988).

42. See, e.g., *United States v. Marino-Garcia*, 679 F.2d 1373 (11th Cir.), *reh'g denied*, 685 F.2d 1389 (11th Cir. 1982), *cert. denied*, 459 U.S. 1114 (1983) (All states may assert jurisdiction over the ship when there are no legal links between the ship and a state.). *United States v. Cortes*, 588 F.2d 106 (5th Cir. 1979) (The United States has the power to board and search a stateless vessel.).

43. [1948] App. Cas. 351 (P.C.).

44. *Id.* at 371. The *Asya* sailed from France destined for what is now Israel with illegal immigrants as passengers. When a British destroyer approached the vessel on the high seas, the *Asya*, without authority, raised first the Turkish and then the Zionist flag. The court ruled against the owners of the *Asya* and held that stateless vessels were not protected by the doctrine of the freedom of the open seas. *Id.*

45. See R. CHURCHILL & A. LOWE, *supra* note 18, at 172.

interference or even criticism.

B. *Ship Registration*

A state ascribes nationality to a vessel through ship registration.⁴⁶ States use three principal systems to register their ships: nationalist, open, and balanced.⁴⁷ States using the nationalist system do not permit citizens of other states to sail under their flag. Many nationalist system states also require that the ship be manufactured in their country.⁴⁸ The principal nationalist, or closed, registries are Greece, Japan, Norway, the Soviet Union, Sweden, the United Kingdom, and the United States.⁴⁹

The second system is open registration, also known as flags of convenience,⁵⁰ which is the antithesis of the nationalist system. Open registry states allow the registration of ships owned by foreign citizens.⁵¹ In the past, these states would register almost any ship upon payment of registration fees.⁵²

The third system is the balanced system, which draws its characteristics from both nationalist and open registration systems. These also are called quasi-flags of convenience, because they offer the advantages of flag of convenience registries but have stringent national or genuine link requirements.⁵³ Some nationalist registry states in recent years have developed these alternatives to open registries for the purpose of retaining ships within the nationalist registry. Norway and Denmark, for example, each have established international registers that permit foreign crews, but both require that their nationals own the vessels.⁵⁴ Similarly, Spain has considered plans to turn the Canary Islands into an offshore registry in an effort to prevent Spanish ships from reflagging under flags

46. See M. AKEHURST, *supra* note 17, at 272. "It is the act of registering a ship which results in its being granted a particular flag." Sinan, *UNCTAD and Flags of Convenience*, 18 J. WORLD TRADE L. 95, 96 (1984).

47. See Sinan, *supra* note 46, at 97.

48. *Id.*

49. See Comment, *supra* note 9, at 221 n.3.

50. In 1981, the United Nations adopted the phrase "open registry" to replace the term "flag of convenience." *Id.*

51. See *infra* Part IV.A. One author argues that there is still no generally accepted definition of "flags of convenience." See Osieke, *Flags of Convenience Vessels: Recent Developments*, 73 AM. J. INT'L L. 604, 604 n.1 (1979).

52. See M. AKEHURST, *supra* note 17, at 272.

53. See Bergstrand & Doganis, *The Impact of Flags of Convenience (Open Registries)*, in *THE LAW OF THE SEA AND INTERNATIONAL SHIPPING: ANGLO-SOVIET POST UNCLOS PERSPECTIVES* 413 (W. Butler ed. 1985). For a discussion of genuine link requirements, see *infra* Part III.B.

54. See LLOYD'S SHIP MANAGER, *supra* note 3, at 12, 18.

of convenience.⁵⁵

The alternative to systems of ascribing nationality to vessels is a potentially chaotic situation in which ships sail the seas without a state to advance their interests or assert control over on-board activities. Ships would be without protection from actions by other states, and these ships could be the victims of piratical activities undertaken either independently or under the direction of a state without fear of legal reproach. Similarly, stateless ships, without a direct authority to control them, could degenerate into rogue vessels that serve as vehicles for nefarious activities, such as smuggling, piracy, and drug-running.

In theory, the concept of ship registration as a system for mandating order works: states control the ships and shipowners under their registries, and the shipping industry therein benefits. In practice, however, the effectiveness of ship registration in combating the ills that nations seek to avoid by ascribing nationality is limited by the central weakness of international law: international law is consensual and binding only on those states that choose to be bound. It takes just one state to circumvent stringent regulations by fostering a haven for loose regulation. In the absence of registration, states could assert control over ships indirectly by asserting nationality jurisdiction over owners who are nationals. Yet this, too, could be circumvented by transferring ownership and creating shell corporations. Despite these shortcomings, however, ship registration is more appealing than the chaos that would exist in its absence.

III. THE LEGITIMACY OF FLAGS OF CONVENIENCE IN THE CONTEXT OF SHIP NATIONALITY REQUIREMENTS

Some industrial states and many lesser developed countries (LDCs) have joined together in an attempt to abolish open registries and stop the flood of shipowners transferring their ships' registration to flag of convenience states.⁵⁶ Maritime industrial states have expressed resentment of open registries on the grounds that they lure ships away from the home registry, eliminate jobs for the home state's sailors, and otherwise

55. See Barnard, *Spain, Finland Joining Rush to Form Flags of Convenience*, J. Commerce & Commercial, Nov. 18, 1986, at 1, col. 2. "The proposed Canary Islands registry is part of a package designed to help Spanish shipowners, who have accumulated debts of about \$1.5 billion. Eighty companies are likely to move their operations to the Canaries, bringing about 360 of the country's 580 ships, according to the Spanish Maritime Institute." *Id.*

56. See, e.g., Convention on Conditions for Registration of Ships, Feb. 7, 1986, U.N. Doc. TD/RS/CONF/23 [hereinafter Ship Registration Convention], reprinted in 7 L. SEA BULL. 87 (Apr. 1986).

weaken the home state's shipping industry.⁵⁷ LDCs resent flags of convenience for similar reasons⁵⁸ and for the related reason that open registries, with cheap labor and reduced operating costs, undermine the development and competitiveness of LDC fleets.⁵⁹

The legitimacy of open registries is unsettled under international law. Part of the problem is that there is no effective international convention on registration and granting nationality to vessels.⁶⁰ Thus, states are left to themselves, without the opportunity to consult internationally agreed-upon standards, to delineate their own provisions concerning the granting of nationality to ships.⁶¹ One vein of authority adamantly supports the proposition that each state has the sovereign right to determine which vessels may fly that state's flag. There is contrary authority, however, suggesting that states do not have the right to grant nationality to a vessel absent a genuine link between the vessel and the state. This Note will address these arguments in turn.

A. *Judicial Recognition of Nationality Ascription*

Although ascribing nationality to ships did not develop fully until the end of the eighteenth century,⁶² the authority in favor of flags of convenience draws upon the well-established principle of customary international law that one state cannot infringe upon the sovereign rights of another state.⁶³ The traditional rule of international law is that each state is free to set the standards under which it will grant ships national-

57. See B. METAXAS, *supra* note 1, at 52, 57. See generally *infra* Part VI.B.

58. See C. MAHALU, PUBLIC INTERNATIONAL LAW AND SHIPPING PRACTICES: EAST AFRICAN ASPIRATIONS 20 (1984).

59. *Id.* at 19-21. "The development and competitiveness of LDCs['] national fleets is being adversely affected by flags of convenient [sic] fleets." *Id.* at 21.

60. See B. METAXAS, *supra* note 1, at 68.

61. *Id.* In fact, in some flag of convenience states, the legal provisions are completely inadequate in form, methods of enforcement, or both. Some states simply do not have the requisite administrative mechanisms to impose and enforce regulations. *Id.* Somalia, for example, has minimal regulations concerning officers and crew: "Any person may be engaged as Captain, Officer or member of crew provided he has the experience and aptitude to fulfill those tasks designated to him." *Id.* at 68-69.

62. See B. BOCZEK, *supra* note 4, at 94. Before the end of the eighteenth century, states viewed vessels as belonging to citizens of a state rather than to the state itself.

This state of things led to great arbitrariness on the part of the stronger powers, in particular in connection with neutrality in naval warfare. The question, decided by each state according to its needs, was, what criteria should be applied in recognizing or not recognizing the flag under which the given ship was sailing.

Id.

63. See *id.*

ity and register vessels.⁶⁴ Even a landlocked nation has the right to ascribe its nationality to vessels.⁶⁵

The rule that allows states to set their own requirements for nationality developed over the course of the nineteenth century.⁶⁶ This rule, however, first received major judicial recognition in the *Muscat Dhows* case in 1905.⁶⁷ In the *Muscat Dhows* case, subjects of the Sultan of Muscat flew the French flag to evade Muscat's regulations and inspections⁶⁸ and, it was suggested, to participate in the slave trade.⁶⁹ Britain, which controlled Muscat at the time, contended that the dhows,⁷⁰ because they were owned by citizens of Muscat, must fly Britain's flag rather than France's flag. The Hague, however, rejected Britain's contentions that ownership determined which flag a ship must fly. Rather, the Court held that each sovereign state has the right to determine who has the right to fly its flag "and to prescribe the rules giving such grants."⁷¹ Today, the *Muscat Dhows* case is still the leading international authority for the proposition that each state, as a matter of international law, determines when and under what conditions it will grant nationality to vessels.⁷²

*Lauritzen v. Larsen*⁷³ is the seminal United States case recognizing the principle that each sovereign state has the right to delineate the conditions for granting a ship nationality.⁷⁴ In *Lauritzen*, a Danish sailor brought an action under the Jones Act against the Danish owner of a Danish vessel.⁷⁵ The United States Supreme Court barred the seaman's claim on the ground that Danish law (the law of the flag state), rather than United States law, applied. Justice Jackson, writing for the majority, held that "[e]ach state under international law may determine for itself the conditions on which it will grant its nationality to a merchant

64. See D. BOWETT, *THE LAW OF THE SEA* 55 (1967).

65. UNCLOS, *supra* note 4, art. 90.

66. See B. BOCZEK, *supra* note 4, at 94-97.

67. *The Muscat Dhows* (Fr. v. Gr. Brit.), Hague Ct. Rep. (Scott) 93 (Perm. Ct. Arb. 1916).

68. *Id.*

69. See B. BOCZEK, *supra* note 4, at 100.

70. Dhows are 150 to 200 ton arab-style sailing vessels used primarily for trade routes in the Red Sea, Persian Gulf, and Indian Ocean. *THE OXFORD COMPANION TO SHIPS & THE SEA* 245 (P. Kemp ed. 1976).

71. *Muscat Dhows*, 1916 Hague Ct. Rep. at 96.

72. See generally *id.*

73. 345 U.S. 571 (1953).

74. See De Sieno, *Choice of Law in Maritime Torts: An Analysis of a Recent Trend*, 20 J. MAR. L. & COM. 375, 380 (1989).

75. *Id.* The Jones Act, codified at 46 U.S.C. §§ 2103-04 (1988), provides that a seaman injured as a result of his employer's negligence may recover from the employer.

ship, thereby accepting responsibility for it and acquiring authority over it."⁷⁶ Justice Jackson held further that the right to ascribe nationality to vessels is absolute and only the state ascribing nationality legitimately may question the nationality's validity.⁷⁷

Both *Lauritzen* and *Muscat Dhows* are compelling precedent for the notion that each state shall determine whether it will ascribe nationality to a ship. Furthermore, it follows from these cases that a state can neither regulate another state's standards for ascribing nationality nor forbid the existence of open registries.⁷⁸ It is a basic principle of international law that each state is sovereign and should be free to conduct its domestic affairs without interference from other states.⁷⁹

B. *The Genuine Link Requirement*

Even if nations have the right to confer nationality on ships, the ascription of nationality is meaningless unless other nations recognize the ascribed nationality. There have been several attempts to use the "genuine link" requirement to restrict open registration and even to abolish open registries. The genuine link concept traces back to the holding of the International Court of Justice (ICJ) in the *Nottebohm* case.⁸⁰ In

76. *Lauritzen*, 345 U.S. at 584.

77. *Id.* The proposition that only the flag state may question a registry's validity on the high seas dates back to the 1873 case of the *Virginus*. The *Virginus*, a United States registered ship flying the United States flag, was overtaken by a Spanish warship on the high seas. The United States Department of State and the United States Attorney General objected that even though the ship was flying the United States flag fraudulently, the Spanish government had no right to question the ship's registry on the high seas, but could question the ship's registry only after the vessel had entered Cuban territorial waters. See 2 J. MOORE, *supra* note 23, at 895-903.

78. See *supra* notes 72 and 77 and accompanying text.

79. States desirous of preventing their nationals from reflagging under open registries always can assert nationality jurisdiction over shipowners and forbid them from registering under a flag of convenience. The nationality principle of jurisdiction provides that a state may assert jurisdiction over its nationals, even when the national acts outside the boundaries of the nation. See D. GREIG, *INTERNATIONAL LAW* 386-87 (2d ed. 1976). Thus, one avenue of control over flag of convenience vessels would be to assert control over the shipowner rather than directly over the vessel. Yet, states are reluctant to advocate too strongly the elimination of flags of convenience, because they fear that ships owned by their nationals would be less likely to be competitive economically with other states' shipping. See *infra* Part V.A.

80. (*Liecht. v. Guat.*) 1955 I.C.J. 4. In the International Court of Justice (ICJ), individuals do not have standing to bring actions on their own behalf. Rather, only states have standing to bring claims in the court, the theory being that the injury is not suffered by the individual, but by the states. See generally W. GORMLEY, *THE PROCEDURAL STATUS OF THE INDIVIDUAL BEFORE INTERNATIONAL AND SUPRANATIONAL TRIBU-*

Nottebohm, the government of Liechtenstein sought to bring a claim in the ICJ against Guatemala on behalf of a naturalized citizen of Liechtenstein.⁸¹ The question arose whether Liechtenstein properly could act on *Nottebohm's* behalf.⁸² *Nottebohm* had renounced his German citizenship and acquired Liechtenstinian citizenship to avoid the difficulties German citizens encountered in Allied nations during World War II.⁸³ Because Guatemala viewed *Nottebohm* as a German citizen and an enemy alien, Guatemala seized his property and business.⁸⁴ The ICJ effectively dismissed the central issues in the case by denying Liechtenstein standing to litigate on *Nottebohm's* behalf because no "genuine link" existed between Liechtenstein and *Nottebohm*.⁸⁵ Specifically, the Court was swayed by the tenuousness of *Nottebohm's* ties to Liechtenstein. *Nottebohm* did not live in Liechtenstein; he did not maintain a residence there, and he had maintained his family ties and business connections with Germany.⁸⁶

1. International Law Commission Efforts

Since the 1950s, opponents of flags of convenience have applied the *Nottebohm* case by analogy and have attempted to employ the genuine link concept to combat open registries.⁸⁷ The eighth session of the International Law Commission (ILC) was the first formal discussion of the application of the genuine link requirement to ship registration.⁸⁸ The ILC advanced the notion that questioning the links between states and ships was analogous to questioning the links between states and people.⁸⁹ Though the *Nottebohm* case was not mentioned specifically at the ILC session, it was most likely the catalyst behind the ILC's suggestion that

NALS (1966).

81. *Nottebohm*, 1955 I.C.J. at 4.

82. "[T]he real issue before the court is the admissibility of the claim of Liechtenstein in respect of *Nottebohm*." *Id.* at 16.

83. *Id.* at 17.

84. *Id.* at 6-7, 18.

85. "Guatemala is under no obligation to recognize a nationality granted in such circumstances. Liechtenstein consequently is not entitled to extend its protection to *Nottebohm vis-à-vis* Guatemala and its claim must, for this reason, be held to be inadmissible." *Id.* at 26.

86. *Id.* at 25.

87. See, e.g., B. BOCZEK, *supra* note 4, at 116-17.

88. *Id.* at 119-20. See generally *Regime of the High Seas*, [1956] 1 Y.B. INT'L L. COMM'N. 71, U.N. Doc. A/CN.4/97/1956.

89. See B. BOCZEK, *supra* note 4, at 119.

there be a genuine link between ships and their flag state.⁹⁰ To this end, the ILC recommended to the conference that the convention provide that "for purposes of recognition of the national character of a ship by other states, there must exist a genuine link between the state and the ship."⁹¹ Interestingly, neither UNCLOS nor the 1958 Geneva Convention on the High Seas (High Seas Convention),⁹² which was part of the predecessor to UNCLOS,⁹³ denotes the consequences of a relationship that lacks a genuine link between a vessel and a state. One commentator suggests that, absent a genuine link, another state may judge the vessel stateless and deny access to its ports.⁹⁴ To date, however, no state has declined to recognize the nationality of a vessel on the grounds that there was no genuine link between the vessel and the state of registry.⁹⁵

Some opponents of the genuine link requirement for ships have argued vociferously that the *Nottebohm Case* was not intended to include vessels. At the eighth session of the ILC, both Guatemala and France argued that the holding of *Nottebohm* did not apply to vessels. Both countries contended that nationality applies only to individuals and that nationality, as applied to vessels, is only "pseudo nationality."⁹⁶ In addition, the *Nottebohm* court limited its discussion to individuals, without mentioning vessels and, in its analysis of the genuine link, focused on links that vessels lack. For instance, to determine that no genuine link existed between *Nottebohm* and Liechtenstein, the ICJ considered that the individual's "habitual residence," "the centre of his interests," the location of his family and ancestors, and the "attachment shown by him for a given

90. *See id.* at 119-20. The genuine link requirement was "proposed by the government of the Netherlands, which in its comment on the provisional articles referred to the *Nottebohm* judgment. This also is substantiated by the fact that the *Nottebohm* judgment was mentioned in the 'Reference Guide to the Law of the Sea' adopted by the ILC . . ." *Id.*

91. R. CARLISLE, *supra* note 2, at 155.

92. Geneva Convention on the High Seas, *opened for signature* Apr. 29, 1958, 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82 (entered into force Sept. 30, 1962) [hereinafter High Seas Convention].

93. The First Convention on the Law of the Sea (the First LOS Convention) was comprised of the Convention on the Territorial Sea and the Contiguous Zone, *opened for signature* Apr. 29, 1958, 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205 (entered into force Sept. 10, 1964), the Convention on the High Seas, *supra* note 94, and the Convention on the Continental Shelf, *opened for signature*, Apr. 29, 1958, 15 U.S.T. 471, T.I.A.S. No. 5578, 499 U.N.T.S. 311 (entered into force June 10, 1964).

94. G. VON GLAHN, *supra* note 21, at 414.

95. *See id.*

96. *See* B. BOCZEK, *supra* note 4, at 120-21.

country and inculcated in his children."⁹⁷ Ships, as inanimate objects, do not share any of these characteristics. Thus, applying *Nottebohm* to vessels arguably is illogical to the extent that courts would be required to ascribe human characteristics to inanimate objects.

2. The High Seas Convention and UNCLOS

The High Seas Convention was the "most significant" attempt to control flag of convenience vessels.⁹⁸ The mechanism for control was the insertion into the Convention of a genuine link requirement for nationality.⁹⁹ This provision's goal was to control flags of convenience by limiting a state's freedom to grant nationality to vessels.¹⁰⁰

The genuine link requirement, however, directly contravenes the principles espoused in *Muscat Dhows* and *Lauritzen*, both of which granted states significant leeway to determine the conditions under which states can register ships.¹⁰¹ Partly because of these contrary precedents, the genuine link provision has been criticized severely.¹⁰² Critics also have condemned the genuine link provision for its ambiguity.¹⁰³ The High Seas Convention makes no further effort to define concisely the term "genuine link." The ILC planned to formulate guidelines for inclusion in the High Seas Convention, but eventually determined that such a definition would be impracticable.¹⁰⁴

97. *Nottebohm Case* (Liecht. v. Guat.), 1955 I.C.J. 4, 22.

98. See Osieke, *supra* note 51, at 605-06.

99. High Seas Convention, *supra* note 92, art. 5.

Each State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. *There must exist a genuine link between the state and the ship*; in particular, the State must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.

Id. (emphasis added).

100. See D. BOWETT, *supra* note 64, at 56.

101. See *supra* notes 66-79 and accompanying text.

102. See D. BOWETT, *supra* note 64, at 56; see also Dempsey & Helling, *Oil Pollution by Ocean Vessels—An Environmental Tragedy: The Legal Regime of Flags of Convenience, Multilateral Conventions and Coastal States*, 10 DEN. J. INT'L L. 37, 59 (1980). See generally B. BOCZEK, *supra* note 4.

103. See D. BOWETT, *supra* note 64, at 56.

104. See McConnell, "Business as Usual": *An Evaluation of the 1986 United Nations Convention on Conditions for Registration of Ships*, 18 J. MAR. L. & COM. 435 (1987). Additionally, the High Seas Convention is silent concerning the consequences or status of a ship lacking a so-called genuine link. See R. CHURCHILL & A. LOWE, *supra* note 18, at 206.

The High Seas Convention's failure to define genuine link is a significant weakness in terms of enforcement and continuity, because flag states are left to make their own determination of what constitutes a genuine link. This lack of a definition has created a situation in which states will find a genuine link depending upon their own particular economic needs and interests.¹⁰⁵ The principal reason the High Seas Convention does not define genuine link is that there is no generally agreed upon definition,¹⁰⁶ and therefore, "genuine link" has different meanings for different parties.¹⁰⁷ Flag of convenience states revel in the ambiguity surrounding the genuine link requirement because it conveniently leads to economic benefits.¹⁰⁸

Similarly, UNCLOS did not resolve the genuine link controversy.¹⁰⁹ UNCLOS Article 91 is virtually identical to the language of article 5 of the High Seas Convention¹¹⁰ and both documents fail to clarify what constitutes a genuine link. This failure, however, arose from a lack of consensus, rather than from a lack of interest or effort by the parties.¹¹¹ This lack of consensus resulted from disparate state interests and goals that had become entrenched over the years during which no standard definition was available.¹¹²

3. The Convention on Conditions for Registration of Ships

In 1986, the United Nations Conference on Conditions for the Registration of Ships (Ship Registration Conference) attempted to define genuine link when it adopted the Convention on Conditions for Registration of Ships (Ship Registration Convention).¹¹³ The United Nations Conference on Trade and Development (UNCTAD) disseminated an optimistic press release proclaiming that "[f]or the first time an international in-

105. See McConnell, ". . . Darkening Confusion Mounted Upon Darkening Confusion: The Search for the Elusive Genuine Link," 16 J. MAR. L. & COM. 365 (1985).

106. See Dempsey & Helling, *supra* note 102, at 59.

107. See B. METAXAS, *supra* note 1, at 69.

108. See McConnell, *supra* note 104, at 436-37.

109. UNCLOS provides 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.*

UNCLOS, *supra* note 4, art. 99(a) (emphasis added).

110. See High Seas Convention, *supra* note 92.

111. See McConnell, *supra* note 104, at 439.

112. *Id.*

113. See Ship Registration Convention, *supra* note 56.

strument now exists which defines the elements of the 'genuine link' that should exist between a ship and the State whose flag it flies."¹¹⁴ The Ship Registration Conference, however, has proven no more successful at defining genuine link than previous attempts.¹¹⁵ The drafters included the term "economic" in conjunction with "genuine link" to require states to insist upon "key economic links" between the vessel and the flag state.¹¹⁶ The economic link, which is considered critical to establishing a genuine link, is related additionally to the idea that only nationals of the flag state be able to own, manage, and crew vessels under the flag.¹¹⁷

Until the end of the Ship Registration Conference, some states, most notably the LDCs, required that a new definition of genuine link encompass national ownership, management, and staffing requirements.¹¹⁸ Had the delegates incorporated this requirement in their final definition, it is likely that the definition of genuine link would have been sufficiently succinct so that future disagreement on the legitimacy of an ascribed nationality would have been minimal. Legitimacy of the ascribed nationality would have been less subject to question, because nationals of the flag state would have been required to exert control over the aspects of the ship that give the ship its identity: who owns it, who controls it, and who works on it. Instead, prior to the final signing, the LDCs abandoned their initial insistence on the national control requirements.¹¹⁹ As a result, the definition of genuine link in the Ship Registration Convention mandates that the flag state still must control management of the ship, though the ship owner now may choose between meeting the requirements for either manning of the ship or ownership.¹²⁰ The criteria for

114. UNCTAD Information Unit, U.N. Doc. No. TAD/INF/1770, Feb. 7, 1986, reprinted in McConnell, *supra* note 104, at 435.

115. See generally McConnell, *supra* note 104, at 449. McConnell concludes that "[t]he 1986 Convention on the Conditions for Registration of Ships fails to achieve its stated objective. It appears to have come closer to truly identifying an enforceable 'genuine link' and, rather than phasing out open registry practice, its provisions appear to have legitimized the practice." *Id.*

116. *Id.* at 444.

117. "The heart of the [Ship Registration] Convention, Articles 8, 9 and 10 provide for participation by nationals of the flag State in the ownership, manning and management of ships, thus establishing key economic links between a ship and the flag State that are often missing in practice." UNCTAD Information Unit, *supra* note 114, reprinted in McConnell, *supra* note 104, at 444.

118. See McConnell, *supra* note 104, at 444.

119. See *id.* at 445.

120. "[A] state of registration has to comply with either the provisions of paragraphs 1 and 2 of article 8 [ownership] or with the provisions of paragraphs 1 to 3 of article 9 [manning], but may comply with both." Ship Registration Convention, *supra* note 56,

what constitutes ownership, however, are ill-defined. First, the provision is not clear as to whether there must be equity participation in ownership. Second, the term "owner" is defined simply as the person on record who is registered as the owner of the vessel.¹²¹ Finally, this section leaves open the possibility that not all of the owners need be domiciled in the same state.

In essence, the attempt to define genuine link in the Ship Registration Convention fails in that shipowners and states still must work with an ill-defined, yet crucial term. Although the intentions of the Ship Registration Conference were ambitious, any substantive effect is negated by language that encourages self-interpretation rather than compliance with a concise, universal standard. Rather than using affirmative commands such as "shall" or "will," the framers invoked passive, nondeclaratory, noncommand language such as "observe in principle" and "may" and "satisfactory part."¹²² As a result, the definition of genuine link currently is no more workable or concise than it was before the Ship Registration Convention was adopted and when UNCLOS and the High Seas Convention were the sole documents with which the parties had to work.

4. Enforcement of the Genuine Link Requirement

Thus, the genuine link provisions in the High Seas Convention, UNCLOS, and the Ship Registration Convention are too vague. To be effective in limiting or controlling flags of convenience, the requirement for genuine link must be defined in unequivocal language. Further, a possible enforcement mechanism would be to ban ships from entering a port if they fly a flag in violation of the genuine link requirement. Several authorities support this enforcement mechanism,¹²³ and in theory, it would be possible to impose.

art. 7.

121. *Id.* art. 6.

122. *See, e.g., id.* art. 8, para. 2 ("... should be sufficient to permit the flag State to exercise effectively its jurisdiction and control over ships flying its flag"); art. 7 ("... a state of registration has to comply with either the provisions of paragraphs 1 and 2 of article 8 [ownership] or with the provision of paragraphs 1 to 3 of article 9 [manning], but may comply with both"); and art. 9 ("... observe in principle that a satisfactory part of the complement").

123. Barring open registry vessels from entering ports as an enforcement mechanism against open registries has been suggested by several authors. *See, e.g.,* D. BOWETT, *supra* note 64, at 59; B. BOCZEK, *supra* note 4, at 204, 208, 290; Watts, *The Protection of Merchant Ships*, 33 BRIT. Y.B. INT'L L. 52 (1957); McDougall, Burke, & Vlasic, *The Maintenance of Public Order at Sea and the Nationality of Ships*, 54 AM. J. INT'L L. 25, 29 (1960).

In the past, the mere threat of banning ships with certain registry from entering a port has proven effective. For example, before the December 1989 invasion of Panama by United States troops, President Bush announced that after February 1, 1990, Panamanian registered vessels would be banned from United States ports.¹²⁴ Although the ban was retracted before it entered into effect, the interim result was that shipowners rushed to reflag their vessels under other flags.¹²⁵

To be an effective deterrent against flags of convenience, a ban would have to apply to all flag of convenience states. Otherwise, shipowners simply would re-register their vessels under other flags of convenience. A ban would be desirable insofar as shipowners would be forced to abandon registries that do not comply with the banning state's criteria for control over the vessel. On the other hand, banning a nation's vessels from ports could inhibit trade. If some shipowners avoid trade with banning nations rather than sail complying ships, then ship terminals probably would experience diminished business and some LDC sailors on banned ships likely would lose their jobs.

Because no closed registry states have employed a comprehensive ban against flags of convenience, the existence of open registries has continued undeterred. Furthermore, in spite of their existence in various treaties, the genuine link requirements have had no effect on flags of convenience. Thus, contrary to assertions in the preamble to the High Seas Convention,¹²⁶ the genuine link requirement, as applied to nationality of vessels, has not been accepted as customary international law.

IV. RECOGNIZING CHARACTERISTICS OF FLAGS OF CONVENIENCE

A. *Typical Characteristics*

The requirements for flags of convenience are much less stringent than those of closed or nationalist registries and share characteristics and standards for granting nationality that contrast sharply with the requirements in nationalist systems.¹²⁷ There are six principal characteristics of open registries that distinguish them from closed or balanced registries.

124. See *Field Day for Lawyers*, Nat'l L.J., Jan. 15, 1990, at 2, col. 1.

125. See *id.* President Bush's plan to ban Panamanian vessels from United States ports resulted in the reflagging of approximately 400 vessels. "Lawyers advised shipowners to change their flags and helped lenders, who were drawn into the fracas because of mortgages, issue new ones under new flags." *Id.*

126. High Seas Convention, *supra* note 92, preamble ("The United Nations Conference on the Law of the Sea . . . adopted the following provisions as generally declaratory of international law.").

127. See R. CHURCHILL & A. LOWE, *supra* note 18, at 206.

First, the open registries allow noncitizens to own or control merchant vessels. Second, registration is easy to accomplish, with many open registries allowing registration at a consul's office abroad. Third, income from ships either is not taxed locally or the taxes are low. Also, the open registration state may guarantee, or the owner may have an understanding with the state, that the ship will remain free from taxation in the future. Usually, the only charges for a flag of convenience are registration fees and annual fees based on tonnage. Fourth, open registry states are small countries that have no national shipping registration requirements, but receipts from very small charges on large tonnage may have a substantial effect on national income and balance of payments. Fifth, owners and managers are freely permitted to man their ships with non-nationals. Lastly, the country of registry cannot practically impose government or international regulations, and it has neither the wish nor the power to control the companies themselves.¹²⁸

B. *Registration Requirements of Various States*

The typical nationalist or closed registry forbids the types of activity characteristic of flag of convenience states and imposes antithetical requirements. In contrast to nationalist registry requirements, open registry requirements are either minimal or easily circumvented. This Note will analyze and compare the requirements that different states mandate.

1. Closed Registration States

a. The United States

The requirements for United States registry are stringent. Since the nineteenth century, the United States has stressed strong bonds between the ship, the owners, and the United States.¹²⁹ To be eligible for United

128. See COMMITTEE OF INQUIRY INTO SHIPPING (ROCHDALE REPORTS) CMND. No. 4337, reprinted in Bergstrand & Doganis, *supra* note 53, at 414. Although these are traditional factors, the last two items (freely manning with non-nationals and the inability or lack of desire to control ships and their companies) arguably are no longer in line with current reality. See Dune, *Registration of Vessels and Mortgages in Developing Open Registries in the Caribbean*, in 2 CURRENT ISSUES IN SHIP FINANCING 1983 at 7, 9-10 (P.L.I. 1983).

129. "Ships or vessels of the United States are the creations of the legislation of Congress. None can be denominated such . . . except those registered or enrolled according to the act of September 1, 1789 and those which, after the last day of March, 1793 shall be registered or enrolled in pursuance of the act of [Dec. 31, 1792, 1 Stat. 287], and [such ships] must be wholly owned by [United States citizens]." *White's Bank v. Smith*, 74 U.S. 646, 655 (7 Wall) (1869).

States registry, a vessel must: (1) employ primarily a United States crew;¹³⁰ (2) employ only United States officers;¹³¹ (3) have its repairs performed in the United States or face additional taxation;¹³² (4) be wholly owned by United States citizens or a corporation under United States law;¹³³ and (5) be under the control of a United States citizen.¹³⁴

The ownership provisions, in particular, are strict.¹³⁵ Only United States citizens may own United States-registered vessels.¹³⁶ United States-organized partnerships may register a vessel under the United States flag only if all the general partners are United States citizens and only if the controlling interest is United States-owned.¹³⁷ Unlike open registry nations, the United States does not facilitate corporation formation under the United States flag. Rather, a corporation's ability to register a vessel in the United States hinges upon the nationality of the directors, officers, and the corporation itself. To register a vessel: (1) the corporation must be organized under United States law; (2) the president or chief executive officer and its chairman of the board must be United States citizens; and (3) the number of alien directors must be less than the number necessary to constitute a quorum.¹³⁸

130. 46 U.S.C. § 8103(b) (1988). This section provides in pertinent part that on board all United States registered ships unlicensed seamen must be citizens or permanent resident aliens of the United States and that not more than 25% of the total of unlicensed seaman may be permanent resident aliens. *Id.*

131. *Id.* § 8103(a). "Only a citizen of the United States may serve as master, chief engineer, radio officer, or officer in charge of a deck watch or engineering watch on a documented vessel." *Id.*

132. *See* 19 U.S.C. § 1466(a) (1988).

133. 46 U.S.C. § 12102(a) (1988).

Any vessel of at least 5 net tons not registered under the laws of a foreign country is eligible for documentation if the vessel is owned by—(1) an individual who is a citizen of the United States . . . (3) a partnership whose general partners are citizens of the United States . . . , (4) a corporation established under the laws of the United States

Id.

134. *Id.* § 12110(d). "A documented vessel may be placed under the command only of a citizen of the United States." *Id.*

135. *See generally* Goodman & Saunders, *Federal Regulation of Certain Foreign Investment in the United States*, 13 INT'L BUS. LAW. 7, 7 (1985).

136. *Id.*; *see also* 46 U.S.C. § 12102(b)(1).

137. 46 U.S.C. § 12102(a).

138. *Id.* § 12102(a)(4). Registration by a corporation of a vessel under the United States flag will be permitted only if it is "a corporation established under the laws of the United States or of a State, whose president or other chief executive officer and chairman of its board of directors are citizens of the United States and no more of its directors are noncitizens than a minority of the number necessary to constitute a quorum." *Id.*

The United States, however, will permit vessels of foreign flags to transfer to United States registry under special circumstances. To fly the United States flag, ownership must be transferred to a United States national or corporation and meet technical design and construction requirements.¹³⁹ Even if the ship does not meet these requirements, the President of the United States may waive the requirements if it would benefit foreign commerce.¹⁴⁰ The Secretary of Defense also may waive the ownership requirement in the interest of national defense.¹⁴¹ In 1987, then Secretary of Defense Caspar Weinberger invoked this provision to permit eleven Kuwaiti tankers to reflag under the United States flag.¹⁴² This reflagging was criticized sharply by some members of Congress who complained that the United States was giving protection to Kuwaiti ships that it would not give to United States-owned ships that fly flags of convenience.¹⁴³

b. The United Kingdom

Britain does not delineate as many restrictions for ascribing nationality to vessels as does the United States. The principal requirement is that the shipowners be British subjects or corporations.¹⁴⁴ This provision is significant because "British subjects" is a broad category, including citi-

139. *Id.* § 12102(b).

140. *Id.* § 3101. This section provides that "[w]hen the President decides that the needs of foreign commerce require, the President may suspend a provision of this part for a foreign built vessel registered as a vessel of the United States on conditions that the President may specify." *Id.*

141. *See* Act of Dec. 27, 1950, ch. 1155, Pub. L. No. 891, 64 Stat. 1120 (1950).

142. *See* 133 CONG. REC. at S9495 (daily ed. July 9, 1987) (statement of Sen. Sasser).

143. *See id.* at S9496. Senator Bumpers objected on the grounds that the United States would receive no benefit from allowing the Kuwaiti tankers to reflag. "I can tell you one thing: We get nothing out of it. We are going to be asking American servicemen to die for Kuwait, who will not even let us land so much as a helicopter on their soil." *Id.* at S11589 (daily ed. Aug. 7, 1987) (statement of Sen. Bumpers).

144.

A ship shall not be deemed to be a British ship unless owned wholly by persons of the following description (in this Act referred to as persons qualified to be owners of British Ships); namely

(a) . . . British subjects—

.

(d) . . . Bodies corporate established under and subject to the laws of some part of Her Majesty's dominions, and having their principal place of business in those dominions.

Merchant Shipping Act, 1894, pt. 1, § 1, *reprinted in* 39 HALSBURY'S LAWS OF ENGLAND 734 (4th ed. 1988).

zens of all British colonies and commonwealth countries¹⁴⁵ in addition to citizens of Great Britain.¹⁴⁶

To determine whether a corporation may register a ship under the British flag, British law ignores the nationality of the shareholders and, instead, considers the location of the principal place of business.¹⁴⁷ This view of ownership and nationality contrasts with the United States approach, which is concerned highly with the owner's nationality.¹⁴⁸ Thus, each attempt to register a ship under the British flag triggers a fact question as to the locality of the business. This question encompasses determining where the business operates and where the business is controlled.¹⁴⁹ The location of board meetings and directors, for example, is strong evidence of whether the business is controlled locally.¹⁵⁰

2. Open Registration States

a. Liberia

It is no accident that Liberia's Code of Laws is favorable to easy registration. A group of United States shipowners and corporations led by Edward Stettinius, former Secretary of State to Franklin D. Roosevelt, established Liberia's open registry in 1947 with the express intention of creating a registry with standards even lower than those of Panama.¹⁵¹ Today, Liberia's laws concerning ship registration are significantly less stringent than those of the United States or Britain, especially concerning ownership and manning provisions.¹⁵² Vessels larger than 1600 tons may be registered only by Liberian citizens or nationals, but Liberia considers corporations and partnerships to be nationals of Liberia.¹⁵³ In addition, this provision is circumvented easily by the flexibility of Libe-

145. Commonwealth countries may register under the British flag only if that country also considers its own citizens to be British subjects or Commonwealth citizens. See Hamilton, *England and Wales*, in 3A HANDBOOK ON MARITIME LAW—A REGISTRATION OF VESSELS, MORTGAGES ON VESSELS 137, 138 (L. Hagberg ed. 1983).

146. *Id.*

147. *See id.*

148. *See supra* note 133 and accompanying text.

149. *See* Hamilton, *supra* note 145, at 138.

150. *See id.* at 138-39.

151. *See* A. CAFRUNY, *RULING THE WAVES* 94-95 (1987). *See infra* notes 158-66 and accompanying text (discussing registration standards of Panama).

152. These standards are lower largely because Mr. Stettinius, Chase Manhattan Bank, Esso, and Standard Oil of New Jersey framed Liberia's Code of Laws and established the International Trust Company in New York as the clearing house for registering vessels under the Liberian flag. *See id.*

153. 22 LIBERIAN CODE OF LAWS § 51(g) (1981).

rian incorporation law.¹⁵⁴ The flexibility arises in that the ownership requirements will be waived if cause is shown and if (1) the vessel meets all registration requirements, (2) the need for the waiver is shown, and (3) the owner establishes a maritime trust and either maintains an office or appoints a local agent.¹⁵⁵ Non-Liberian nationals may establish corporations easily upon payment of minimal application and registration fees.¹⁵⁶ Liberia also provides shipowners with tax benefits by excluding from gross income earnings made from shipping activities outside of Liberia.¹⁵⁷

b. Panama

Panama was one of the original flags of convenience.¹⁵⁸ Since its emergence as a flag of convenience, Panama has developed into a major registry of vessels, along with Liberia.¹⁵⁹ Like the classic model of an open registry state,¹⁶⁰ Panama permits foreign-owned ships to fly the Panamanian flag. Foreign individuals or corporations¹⁶¹ residing in either Panama or abroad may register vessels in Panama.¹⁶² Although Panama does have a requirement that ten percent of the crew be Panamanian nationals, this requirement will be waived if a sufficient number of Pan-

154. For a cogent delineation of the requirements for incorporation and the contents of the articles of incorporation, see Brumskine, *Organizing Business Corporations in Liberia*, 8 LIBERIAN L.J. 2 (1986).

155. 22 LIBERIAN CODE OF LAWS § 51(f) (1981).

156. See Comment, *supra* note 9, at 230.

157. The Liberian Code provides that:

There shall be excluded from gross income all earnings derived from the operation, chartering or disposition of ships and aircraft. In the case of a ship or aircraft documented under the laws of Liberia, this section shall not apply to the extent the earnings are derived from traffic exclusively within Liberia.

36 LIBERIAN CODE OF LAWS § 11.23 (1979).

158. The genesis of Panama's open registry dates back to the period following World War I when a few United States shipowners quietly re-registered their vessels in Panama. The growth of the Panamanian registry increased rapidly in the 1930s and in the years immediately following World War II. See R. CARLISLE, *supra* note 2, at 1-2.

159. See *id.*

160. See *supra* note 128 and accompanying text.

161. "[T]he corporation law of Panama imposes no restrictions upon the ownership of shares of a Panamanian Corporation by foreign citizens or corporations, nor are there any nationality restrictions nor residence requirements imposed upon directors or officers of Panamanian corporations under the said law." Arosemena, *Formation, Operation and Taxation of Corporations under the Laws of the Republic of Panama*, in CURRENT ISSUES IN INTERNATIONAL SHIP FINANCE 1984 at 209 (P.L.I. 1984).

162. See Comment, *supra* note 9, at 232.

amanian citizens are not available at the port where the crew is hired.¹⁶³ Panama also does not require that officers be Panamanian citizens.¹⁶⁴ In addition, taxation is minimal with an assessed rate of ten cents per ton and an annual lump sum charge of not more than 1800 dollars per year.¹⁶⁵ Access to the Panamanian registry is easy and may be done directly in Panama's shipping office in New York.¹⁶⁶

V. ADVANTAGES OF FLAGS OF CONVENIENCE

A. *Direct Economic Benefits*

For shipowners, there arguably are several advantages for registering their vessels under a flag of convenience. Consumers also accrue economic benefits from lower prices for consumer goods because of lower shipping costs.¹⁶⁷ Critics, however, scorn these advantages and claim that, in the long run, the disadvantages to consumers outweigh the advantages.¹⁶⁸ For many shipowners, however, the advantages of flags of convenience exceed in value the disadvantages. Most of the advantages of flags of convenience are direct pecuniary rewards. Other advantages have political undertones; yet, they too result in at least indirect economic benefits.¹⁶⁹ Not surprisingly, the primary benefits to shipowners mirror sev-

163. *See id.* at 234.

164. *See id.*

165. *See id.* For shipowners, there is no further taxation. Owners of vessels registered in Panama's open registry are not taxed on their profits from shipping operations conducted outside of Panama. "The income tax of Panama is levied only upon 'Net Income' derived from operations within the territory of the Republic of Panama. Income derived from operations consummated abroad is not income obtained from 'sources within Panama' and therefore is not taxable under law." Arosemena, *supra* note 161, at 218. Similarly, Panama taxes the wages of crew members aboard Panamanian registered vessels only if such crew members are permanent residents of Panama. The salaries of nonresidents are not taxed. *Id.* at 219.

166. *See Comment, supra* note 9, at 236.

167. "The ultimate beneficiaries of the open registries are the consumers who are the ultimate users of the reasonable low cost and reliable shipping services which are provided." Dune, *supra* note 128, at 12.

168. B. METAXAS, *supra* note 1, at 100-02. Professor Metaxas argues that if we take a global long run view of the matter, we cannot help but see that, even on the basis of the criteria mentioned above, the expansion of [open registry shipping] has produced a net social disbenefit for the world community at large, rather than marginal benefits in the form of lower freight rates.

Id. at 100.

169. "Shipowners may turn to open registry because of political instability at home, the desire of lending institutions to achieve more protection for their mortgage liens, desire to achieve political neutrality or anonymity, which the corporate laws of certain

eral of the typical characteristics that distinguish open registries from closed or balanced registries.¹⁷⁰ According to a recent report of the International Labour Conference, shipowners register their ships under flags of convenience principally because (1) income taxes on ship income are non-existent or small; (2) there is little formality in registering a ship or deleting it from registry, and beneficial ownership can remain confidential; (3) managers can hire foreign crews at lower costs, and managers and owners seldom must meet nationality requirements; and (4) open registry states have limited powers to enforce national or international shipping regulations.¹⁷¹

B. *Taxation*

The tax benefits to a shipowner registering a vessel under a flag of convenience are significant. First, open registry nations generally provide that any income earned from operating vessels under their flag while engaged in international trade is not subject to taxation.¹⁷² Second, a United States shipowner can increase the economic benefits and avoid payment of United States taxes if it forms a corporation in the open registry nation to oversee the shipping operations.¹⁷³

Section 883(a)(1) of the United States Internal Revenue Code provides that gross income is exempt from taxation if it is "[g]ross income derived by a corporation organized in a foreign country from the international operation of a ship or ships if such foreign country grants an equivalent exemption to corporations organized in the United States."¹⁷⁴ The United States currently has reciprocal agreements with more than twenty-one nations that exempt foreign shipping income from gross in-

open registries provide." Dune, *supra* note 128, at 12.

170. See *supra* notes 46-55, 127-28 and accompanying text.

171. INTERNATIONAL LABOUR CONFERENCE, 1 ANN. REV. OF OCEAN AFFAIRS: LAW AND POLICY, MAIN DOCUMENTS, 1985-87, (74th Session) 196 (1989).

172. For example, "[t]he Republic of Vanuatu levies no income taxes of any kind on either business or personal income" Hubbard, *Registration of A Vessel Under Vanuatu Law*, 13 J. MAR. L. & COM. 235, 241-42 (1982). The Bahamas "do not impose any tax on income, capital gains or similar financial revenues. The operations and income of ships registered in the Bahamas are completely free of tax whether the ship is foreign owned or owned by a Bahamian company." LLOYD'S SHIP MANAGER, *supra* note 3, at 7.

173. "In the case of earnings derived from vessels which never enter U.S. waters, no direct U.S. tax is imposed on transportation services income (even if management or administrative activities are performed within the United States)." Dune, *supra* note 128, at 98.

174. I.R.C. § 883(a)(1) (1991).

come.¹⁷⁵ Thus, this tax exemption is an incentive for United States shipowners to incorporate in a flag of convenience state, even if the state does not require that one of its nationals, either a person or corporation, be an owner.¹⁷⁶

United States law requires that the corporation pay taxes on profits distributed to shareholders.¹⁷⁷ The foreign corporation, however, can defer its taxes by distributing dividends when the rates are more advantageous.¹⁷⁸ The corporation also has the opportunity to "use the tax-free accumulation of foreign earnings for new investment or for maintenance of [its] existing fleet."¹⁷⁹

C. *Operating Costs*

There also are other economic considerations that shipowners find favorable in flag of convenience registries. The primary benefit is derived from lower operating costs, which are achieved by decreased labor costs, lower repair costs, and the fact that foreign-registered vessels do not have to meet United States safety standards.¹⁸⁰ There is a substantial disparity between the operation of ships registered in open and nationalist registries in that operating a ship under the United States flag can cost as much as seventy percent more than operating the same ship under a flag of convenience.¹⁸¹

Decreased labor costs of operating a flag of convenience vessel is the

175. See Wittig, *Tanker Fleets and Flags of Convenience: Advantages, Problems, and Dangers*, 14 *TEX. INT'L L.J.* 115, 120-22 (1979).

176. Liberia, for example, does not require ownership by a national as a condition for registry; yet many United States shipowners will incorporate a subsidiary in Liberia to take advantage of the tax exemptions. See Dempsey & Helling, *supra* note 102, at 54. In Panama, this is facilitated by extremely liberal laws of incorporation. See Wittig, *supra* note 175, at 121. Panama's commercial code does not require incorporators, officers, or directors to be nationals or residents of Panama. See *id.*

It also authorizes the issuance of all kinds of shares, permits meetings to take place outside of Panama, and does not require a director to be a shareholder. Liberian laws are similarly unrestrictive, except that the Liberian Code of Laws of 1956 requires that a corporation have a place of business in Liberia and a qualified business agent. If the foreign corporation has no operating office in Liberia, the Liberian legislature may authorize a bank or trust company to act as resident business agent.

Id.

177. See Dempsey & Helling, *supra* note 102, at 54.

178. See Wittig, *supra* note 175, at 121-22.

179. *Id.* at 122.

180. See *infra* Part VI.B.

181. See Dempsey & Helling, *supra* note 102, at 51.

principal reason United States shipowners register their vessels in open registry nations.¹⁸² By transferring to a flag of convenience and decreasing labor expenditures, shipowners can be more competitive with foreign shippers.¹⁸³ Crew costs alone can be responsible for half of the total operating costs.¹⁸⁴ The International Shipping Federation reports that in Britain, for example, labor costs of operating a ship under the British flag are 908,000 dollars per year, while the labor costs to operate the same ship under Hong Kong's flag with a Hong Kong crew is only 396,000 dollars per year.¹⁸⁵ Greek shipowners also have shifted registry to other nations¹⁸⁶ in search of lower labor costs.¹⁸⁷ Greek shipowners can save an average of four hundred dollars per day by using Asian crew members working for wages well below those required by Greek crew members.¹⁸⁸ Norwegian shipowners also have cited high labor costs as a principal factor in decisions to reflag under a flag of convenience.¹⁸⁹

There are several reasons why labor costs for shipowners in industrialized nations are higher than in open registry states. United States and European shipowners must contend with unions that have been successful in obtaining high wages and benefits for their crew members. Shipowners also must pay overtime, whereas owners of ships flying flags of convenience generally pay sailors strictly on a salary basis.¹⁹⁰ In addition, on flag of convenience vessels, shipowners are not required to make social security payments or pay a specified minimum wage.¹⁹¹ Because

182. See Bergstrand & Doganis, *supra* note 53, at 416-17.

183. See Wittig, *supra* note 175, at 119-20.

184. See M. STOPFORD, *MARITIME ECONOMICS* 103 (1988).

185. *Non-National Manning Here to Stay*, Origin Universal News Services Ltd., Feb. 5, 1987. (LEXIS, Nexis library, Currnt file) (statement of John Whitworth, director of the International Shipping Federation). Similarly, a Liberian flag vessel with a Korean crew results in labor costs of \$490,000, and a Polish labor force would cost only \$338,000. *Id.*

186. *Shipping in the Doldrums*, *EUROMONEY*, Sept. 1987, at 44.

187. Greece used to be the second largest maritime nation in the world in terms of tonnage. It now ranks fourth behind Liberia, Panama, and Japan. *Id.*

188. *Id.*

189. See Bergstrand & Doganis, *supra* note 53, at 417. Norway's desire to avoid the denigrating effects of high labor costs also contributed to its decision to initiate a hybrid registration system. See *supra* note 54 and accompanying text.

190. "In addition to the difference in direct wages, regulations vary between individual countries and companies over the conditions of service, i.e. shift work, leave, overtime and other fringe benefits received by the crews. Indirect wage costs include pensions, social insurance, holidays, training, crew rotation and travel." M. STOPFORD, *supra* note 184, at 105.

191. See Payne, *Flags of Convenience and Oil Pollution: A Threat to National Security?*, 3 *Hous. J. INT'L L.* 67, 71 (1980).

the standards for crew members are lower on flag of convenience vessels, shipowners can hire less experienced crews for less money. Thus, to avoid these high costs of employment, shipowners flock to open registries in part to seek non-union crews to bring down the operating costs and make their operations competitive in international shipping markets.

Today, as a result of these labor cost disparities, vessels with United States and European crews are among the costliest in the world to operate.¹⁹² Annual labor costs in 1977 dollars are 1.7 million dollars to crew a thirty-two man, 50,000 ton United States tanker.¹⁹³ In comparison, on a similar ship, an all-Italian crew costs 600,000 dollars and an all-Spanish crew costs 450,000 dollars.¹⁹⁴

For United States ships to compete in the global shipping market, United States shipowners must receive substantial subsidies from the United States government. The Merchant Marine Act of 1935¹⁹⁵ provides that the United States government will subsidize shipowners who operate vessels engaged in foreign trade.¹⁹⁶ The government extends the subsidy, however, only to ships built in the United States.¹⁹⁷ The construction cost of the vessel in the United States is higher, which has the effect of reducing the net amount of the subsidy to the shipowner.¹⁹⁸

VI. GROUNDS FOR OPPOSITION TO FLAGS OF CONVENIENCE

Shipowners incur immediate economic benefits by registering their ships under flags of convenience. These benefits are not acclaimed universally, however. According to its critics, open registry shipping allegedly inflicts a variety of ills upon economies and the environment. Although some open registries may earn this condemnation, other registries are not so offensive and deserve a more respected role in international shipping.

192. For example, a 20,000 dead weight ton container ship with a European crew of 26 would cost \$1.05 million per year in 1983 dollars, while a Korean or Taiwanese crew of the same size would cost \$580,000 per year. See J. JANSSON & D. SHNEERSON, *LINER SHIPPING ECONOMICS* 16 (1987).

193. See *Recent Tanker Accidents: Legislation for Improved Tanker Safety: Hearings Before the Sen. Comm. on Commerce, Science, & Transportation*, 95th Cong., 1st Sess. 79 (1977).

194. *Id.* at 33.

195. 46 U.S.C. app. § 1151-61 (1988).

196. *Id.* § 1151.

197. *Id.*

198. See Wittig, *supra* note 175, at 120.

A. *Nefarious Activities*

Although the primary reason shipowners register their vessels under flags of convenience is to reduce operating costs, some shipowners seek less legitimate advantages. For example, flag of convenience vessels have been used to circumvent international attempts to protect whales.¹⁹⁹ The 1946 Convention for the Regulation of Whaling²⁰⁰ sets out to protect both the whale populations and the existing whale industry.²⁰¹ Some whaling vessel owners who seek to avoid controls imposed by this treaty on their whaling operations have registered their vessels under flag of convenience states, such as the Bahamas and Cyprus, which were not signatories to the treaty.²⁰² In recent years, however, as international campaigns against whaling have increased, the problem of "whaling under flags of convenience has also lessened."²⁰³ Thus, the problem of shipowners seeking to evade international conventions on whale protection by seeking flag of convenience registry is less severe today.

Another use of flag of convenience vessels for evading international regulations is pirate radio broadcasts, whereby individuals seek to avoid international radio regulations by transmitting unregulated radio programs from ships on the high seas.²⁰⁴ That the activity violates the laws of another state does not provide jurisdiction to ships desirous of halting the broadcasts. Therefore, pirate broadcasters register their vessels under flag of convenience states because the flag of convenience state likely will not make the effort to stop the broadcasts.²⁰⁵

Flag of convenience vessels also have been used to smuggle narcotics.²⁰⁶ One might assume that the shipowners would sail under a flag of

199. See Frizell, *The Pirate Whalers*, OCEANS, Mar.-Apr. 1981, at 25.

200. Convention for the Regulation of Whaling, Dec. 2, 1946, 62 Stat. 1716, T.I.A.S. No. 1849, 161 U.N.T.S. 72 (entered into force Nov. 10, 1948). The prologue of this treaty provides that the signers recognize "the interest of the nations of the world in safeguarding for future generations the great natural resources represented by whole stocks" and "that it is essential to protect all species of whales from further overfishing" *Id.* preamble.

201. *Id.*

202. See J. KINDT, 3 MARINE POLLUTION AND THE LAW OF THE SEA 1325 (1986).

203. *Id.*

204. See generally Note, *Interference with Non-National Ships on the High Seas: Peacetime Exceptions to the Exclusivity Rule of Flag-State Jurisdiction*, 22 VAND. J. TRANSNAT'L L. 1161, 1224-28 (1989). Pirate radio broadcasts peaked in the 1960s, but probably still exist. *Id.* at 1224 n.217.

205. *Id.* at 1225 & n.224.

206. See, e.g., *United States v. Beltran*, 761 F.2d 1, 5 (1st Cir. 1985) (Panamanian vessel used to smuggle marijuana).

convenience with the expectation that an open registry government would remain passive in regard to on-board illegal activities. Some flag of convenience states, however, have been accommodating to United States requests to board vessels that are suspected of carrying illicit drugs on the high seas.²⁰⁷ John C. Lawn, a Drug Enforcement Agency (DEA) administrator, noted that "since 1980, the government of Panama has granted every request by [United States] authorities to board Panamanian-registered vessels on the high seas."²⁰⁸ The Bahamas provides similar cooperation.²⁰⁹ Thus, registering a ship under a flag of convenience registry does not necessarily provide an easy avenue for drug smuggling.

B. Labor Concerns

For decades, labor forces have resoundingly criticized flag of convenience shipping.²¹⁰ Labor unions object to open registries because such systems allow shipowners to circumvent the imposition of minimum wages and social benefits that industrialized states require.²¹¹ Similarly, commentators condemn flag of convenience crews as substandard.²¹² One commentator noted that the officers and crew members of flag of convenience vessels have been, and continue to be, less competent than those who are working for similar compensation on similar vessels under nationalist maritime flags.²¹³ The commentator continues with the argument that the human element is primarily responsible for the navigational and other errors resulting in accidents and casualties.²¹⁴

Maritime employment opportunities for seamen from industrialized states have decreased in recent years,²¹⁵ and trade union leaders blame

207. See, e.g., *U.S. Foreign Policy and International Narcotics Control—Part II: Hearing Before the House Select Comm. on Narcotics Abuse and Control*, 100th Cong., 2d Sess., 113 (Mar. 29, 1988) (statement of John C. Lawn, Administrator, DEA).

208. *Id.*

209. Mr. Lawn noted that "[t]he Bahamian Minister of National Security, who is also the Attorney General, is providing forceful leadership of the Bahamian Police and Defense Forces and is continuing to cooperate fully in joint United States/Bahamian interdiction efforts." *Id.* at 121.

210. See M. STOPFORD, *supra* note 184, at 163.

211. For a detailed analysis of the relationship between labor forces and flag of convenience shipping, see H. NORTHRUP & R. ROWAN, *THE INTERNATIONAL TRANSPORT WORKERS' FEDERATION AND FLAG OF CONVENIENCE SHIPPING* (1983).

212. See B. METAXAS, *supra* note 1, at 45.

213. *Id.*

214. *Id.*

215. See INTERNATIONAL LABOUR CONFERENCE, *supra* note 171, at 297. The Report of the International Labour Organization Director-General provides that "[w]ith very few exceptions, seafarer employment in all developed maritime countries has fallen

open registries for this decrease.²¹⁶ In particular, the International Transport Workers' Federation has waged an extensive campaign against flag of convenience shipping that includes boycotts, litigation, and lobbying.²¹⁷ Furthermore, the declining job market for seamen of industrialized states is not likely to improve and probably will worsen.²¹⁸ This employment situation is caused in part by transferring vessels to registration in flag of convenience states.²¹⁹ Market forces mandate that shipowners pursue the flag of convenience benefits of lower operating costs.²²⁰ Because labor costs account for approximately one-half of a ship's operating costs, shipowners must employ foreign labor in an effort to remain competitive. Use of such a labor force is forbidden by most industrialized states.²²¹

This decrease in maritime employment, however, is not solely the result of shifts in vessel registration to flag of convenience registries. In general, the more modern ships require fewer crew members for efficient operations than in the past.²²² For example, although oil tankers required an average of fifty-five crew members per vessel in 1950, typical oil tanker operations in 1980 required only thirty crew members.²²³ In the future, oil tanker operation likely will require only around eighteen crew members.²²⁴ Therefore, although flag of convenience shipping may be responsible in part for the decrease in industrialized states' maritime employment, the decrease is attributable largely to technological advances.

C. *Safety Concerns and Marine Pollution*

Opponents of flag of convenience registries also have blamed flags of convenience for causing environmental pollution. Shipping in general has been cited as the main source of marine pollution.²²⁵ Flags of conve-

sharply in the intervening years and there is little evidence that the situation is changing." *Id.*

216. See B. METAXAS, *supra* note 1, at 46.

217. See H. NORTHRUP & R. ROWAN, *supra* note 211, at 43-53. International Transport Workers' Federation factions have waged campaigns against flag of convenience shipping in every industrialized maritime state and many LDCs. See *id.* at 13-16.

218. See *id.*

219. See *supra* notes 180-82 and accompanying text.

220. See *supra* notes 183 and accompanying text.

221. See *supra* notes 130, 184 and accompanying text.

222. See M. STOPFORD, *supra* note 184, at 103-04.

223. *Id.*

224. *Id.* at 104.

225. See R. CHURCHILL & A. LOWE, *supra* note 18, at 242. Ships present multiple

nience however, have been singled out as a particular culprit.²²⁶ To this extent, some critics see the elimination of flags of convenience as a panacea for the ills of marine pollution.²²⁷ This ascription of blame, however, arguably is misplaced. Though highly visible, oil spills are only a minute source of maritime pollution.²²⁸ Accidents at sea account for less than five percent of oil discharged into the oceans.²²⁹ By far, the majority of oil discharged into the oceans is discharged intentionally by ships during the course of routine operations rather than by casualties to vessels.²³⁰ Furthermore, there is no statistical evidence currently available which suggests that open registry vessels are responsible for a higher amount of the operational discharges of oil than are non-open registries. In addition, arguing that eliminating flags of convenience would solve oil pollution problems ignores the fact that some ships involved in catastrophic oil spills, like the *Exxon Valdez*, have been United States owned and registered.

Furthermore, inferior ships can be found under all registries, not just under open registries.²³¹ The United States still re-registers aging vessels

sources of pollution: ships may discharge oil that is mixed with bilge water; pollution from exhaust fumes dissipates into the atmosphere, but is returned seaward via precipitation; nontankers use their fuel tanks to hold ballast water, which often will be discharged into the sea; sewage and garbage often is deposited overboard; ocean water is pumped into oil tanks to clean them out and then is flushed back into the sea; and collisions, groundings, or explosions result in the discharge of oil or chemicals. *See id.* at 242-43.

226. *See* Shaw, Winslett, & Cross, *The Global Environment: A Proposal to Eliminate Marine Oil Pollution*, 27 NAT. RESOURCES J. 157, 162 (1987).

227. *See id.* Shaw, Winslett, and Cross conclude:

There is but one solution to the problem of oil spills, and that is the abolition of flags of convenience registry. The termination of flags of convenience would put an end to the causes of most oil spills—poorly trained crews and shoddy ship construction. Elimination of the less stringent safety standards under flags of convenience would greatly enhance a tanker's ability to make a voyage without running aground, colliding with objects or other ships, or losing oil because of structural failure.

Id. at 185.

228. The four principal sources of marine pollution are shipping, dumping, sea bed activities, and land activities. *See* R. CHURCHILL & A. LOWE, *supra* note 18, at 242.

229. *See* C. SANGER, ORDERING THE OCEANS 102 (1987).

230. As one source explains:

Casualties to ships are the most dramatic, but by far the least frequent part of the overall problem of oil pollution from ships. The tarball on your beach is far more likely to have been caused by an operational discharge of oil from a ship than by oil from a casualty.

D. ABECASSIS & R. JARASHOW, OIL POLLUTION FROM SHIPS 7 (2d ed. 1985).

231. "[S]ubstandard ships can be found under most, if not all, flags: they are by no means peculiar to flags of convenience." R. CHURCHILL & A. LOWE, *supra* note 18, at 207.

that are in many cases inferior to ships found in open registries.²³² United States tankers plying the waters of Alaska average 17.5 years of age, though the shipping industry considers most ships overaged at twenty and retires them.²³³ These conditions have caused significant loss of life in recent years in accidents involving World War II-vintage tankers and coal carriers registered under the United States flag.²³⁴

In the past, open registry vessels earned their poor reputations. The *Torrey Canyon*, *Amoco Cadiz*, and *Argo Merchant* all were flag of convenience vessels involved in horrific oilspills in the 1960s and 1970s. These accidents were blamed in part on poorly trained crews and in part on the condition of the ships.²³⁵ These factors arguably arose out of the nature of the vessels as flag of convenience vessels. Because the flag state did not have a genuine link, the flag state could not exert effective control over the vessel so as to avoid these substandard conditions.

Recently, however, the standards under which the principal flag of convenience vessels operate have improved. Today, maritime statistics indicate that the safety and casualty rates for some flag of convenience states approach or even are superior to those of industrialized states.²³⁶ Statistics indicate that in the five year period from 1984 to 1989, the casualty rates for the United States and the United Kingdom have remained relatively constant, while the rates for Liberia and Panama have decreased.²³⁷ Liberia in particular has improved its standards such that its casualty rates are less than the United States and comparable to that of the United Kingdom.²³⁸ Panama's casualty rate is still comparatively

232. See *Aging Fleet a Ticking Time Bomb?*, J. Commerce & Commercial, Mar. 30, 1989, at 1A, col. 2.

233. *Id.* "More than 130 vessels have an average age of 19.85 years—a hairbreadth away from being overaged." *Id.* at 10A, col. 1.

234. *Id.* "Two major maritime catastrophes in the U.S. merchant fleet during the 1980s appeared to be age-connected. The *Poet*, an old World War II-era vessel, sank in 1980, killing more than 30 officers and crew. The *Marine Electric*, a World War II-era coal carrier, sank in 1983, killing 31 of its 33 officers and crew." *Id.*

235. See *supra* note 11 and accompanying text.

236. See Appendix to this Note. Safety concerns, however, still linger. In April 1990, over 100 people died in a suspicious fire on board the *Scandinavian Star*, a Danish owned, Bahamian registered vessel. Passengers noted that fire alarms did not work and that the Portuguese crew seemed ill-trained and ill-prepared to handle the emergency. See *110 Die in Blaze on Danish Ferry; Arson Suspected*, N.Y. Times, Apr. 8, 1990, at 1, col. 3.

237. See Appendix to this Note.

238. *Id.*

high, but has improved significantly in only five years.²³⁹

The primary reasons for the improved safety records is increased administrative control over the vessels by the open registry states.²⁴⁰ Liberia's safety inspection has been particularly effective. As noted above, its loss rate is one of the lowest in the world, which is especially noteworthy considering the size of its fleet. Liberia has achieved this success through the expansion of an extensive safety program.²⁴¹ Panama, too, has augmented safety inspection programs and has seen its casualty rate cut in half in the period from 1984 to 1989. According to Professor Metaxas, "the Panamanians have made some rapid strides during the past few years and I am confident that we will see continued progress. The Panamanian annual safety inspection program is now in place, and the number of inspections is progressively increasing."²⁴²

It also is likely that the improvements in vessel standards are effected by the vessel owners, who seek to decrease their insurance premiums by improving the standards under which they operate. Marine insurance, and more particularly hull and machinery insurance, accounts for up to ten percent of vessel operating costs.²⁴³ The insurers set the premiums by taking into account several factors, including the shipowner's claims record, the flag of registry, and the nationality of the crew.²⁴⁴ It is likely, then, that shipowners in open registries are motivated to improve ship operation standards for the purpose of lowering their insurance premiums and thereby decreasing overall operating costs.

VII. CONCLUSION

Since the end of World War II, flag of convenience shipping has endured harsh criticism. States and international organizations have focused on the lack of a "genuine link" between ships and states in their attempts to condemn or control open registry shipping. Although nationality for vessels is essential to maintain order on the high seas, attempts

239. *Id.*

240. *See* B. METAXAS, *supra* note 1, at 46. "Despite some suggestions to the contrary, the roles of Liberia and Panama in exerting effective administrative control over their maritime programs in recent years have not been mere window dressing." *Id.*

241. *Id.* "For almost ten years Liberia has been expanding and refining the legal and professional machinery by which it exercises an effective degree of control over the construction, equipment, maintenance, and manning of Liberian vessels. The Liberian safety inspection program now is truly worldwide in the sense that it has 200 experienced and capable inspectors in 180 ports of 40 countries of the world." *Id.*

242. *Id.* at 46-47.

243. *See* M. STOPFORD, *supra* note 184, at 106.

244. *Id.*

to impose genuine link requirements between ships and states violates fundamental premises of international law that favor sovereignty for all states. Furthermore, because international law is consensual by nature, legal efforts to establish universal controls for flag of convenience vessels have proven unsuccessful. Rather, to maintain high shipping standards, either states must decide individually to exert control over ships that fly their flag, or shipowners must be motivated by factors such as a desire to decrease insurance premiums.

Flag of convenience shipping once was an evil of international shipping. Today, however, general condemnation of flag of convenience registries is outdated and unrealistic. The blame for many of the ills that flag of convenience vessels are alleged to promote is misplaced and unwarranted. Some registries, particularly Liberia and, to a lesser extent, Panama, have made great strides toward improving their fleets and now deserve a more respected place in the international shipping arena.

David F. Matlin

Appendix
CASUALTY RETURN
1989

Table 5 Total losses by Flag: 1984-1989

Flag	1984		1985		1986		1987		1988		1989	
	No.	Gross Tonnage	No.	Gross Tonnage	No.	Gross Tonnage	No.	Gross Tonnage	No.	Gross Tonnage	No.	Gross Tonnage
Cyprus	10	243,285	13	177,804	21	361,760	12	193,165	9	171,332	8	100,495
Greece	21	480,115	20	342,828	13	217,055	6	155,503	1	6,306	7	15,516
Liberia	10	424,300	6	107,251	7	849,663	3	108,053	4	75,810	3	28,686
Panama	49	231,123	46	295,895	38	178,309	23	141,634	27	173,074	28	100,115
United Kingdom	7	28,907	8	3,818	7	20,220	8	10,060	5	3,504	4	1,151
United States of America	18	64,510	14	10,979	8	16,578	13	77,034	13	30,016	16	35,050

Source: Lloyd's Register Casualty Return 1989