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Open Registers: A Necessity or Mere Convenience

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“The sea is a domain increasingly beyond government control, vast and wild, where laws of nations mean little and secretive shipowners do as they please – and where the resilient pathogens of piracy and terrorism flourish”.

William Langewiesche¹

The earliest use of foreign flags at sea can be traced back to the early 19th Century when English Merchants used the Spanish flag to avoid Spain's monopoly restrictions on trade with the West Indies. Nonetheless, as a general rule till the early 20th Century, ships needed national ownership, national flags, national construction and national crew. In 1919, the Panama registry opened up for foreign vessels, and *Belen Quezada* became the first foreign-owned vessel to register with them.² Many American and European ships followed suit over the next 15 years. By the late 1940s, demands came up for a competitor to the Panama registry, since many American shipowners had become unhappy with it. The Honduras Registry came up and, soon thereafter, the Liberian Registry was formed in 1948. By 1967, the Liberian register had bypassed United Kingdom to become the biggest register in the world.

The percentage of the world's merchant fleet operating under foreign registries has been continuously increasing. In the 1950s, approximately 4 per cent of the world's

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merchant fleet was registered with such registries; by the mid 1980s, this figure had risen to more than 30 per cent. Between 1989 and 2007, the share of 'foreign-flagged' cargo carrying vessels of 1,000 gross tonnage (GT) and above increased from 41.5 to 66.35 per cent of the world fleet as measured by dead weight tonnage (DWT). Today, the two largest ship registries in the world are "open registers", namely Panama and Liberia.³ Almost universally Panama is known as a "Flag of Convenience" (FOC) nation; virtually none of the 6,000 plus ships registered under its flag are owned by genuine Panamanian companies, or staffed by Panamanian crews and officers.

Table 1 gives a list of the top six vessel owners and flag states in the world.⁴ Except for Greece, none of the major flag states have beneficial ownership of a respectable shipping fleet and vice-versa.

Table 1. Top six vessel owners and flag states in the world

Top six beneficial owners (total DWT controlled by companies located in the countries)	Top six largest flags (GT carried by ships registered in the countries)
Japan	Panama
Greece	Liberia
Germany	Marshall Islands
China	Hong Kong (China)
Norway	Greece
Republic of Korea	Bahamas

This paper gives an insight into the significance of Open Registers in the light of globalisation and explains the concerns shared by experts regarding their performance.

Definition, Legality and Relationships

Foreign flags are formally referred to as "Open Registers". The term FOC is used to describe a foreign flag under which a merchant vessel is registered for purposes of reducing operating costs or avoiding government rules.⁵ The designation 'FOC' is assigned by a body of International Transport Workers Federation called the Fair Practices Committee, when the register fails to prove a genuine link with the ship's owners and crew. Another related term "Flagging out" indicates that a ship from a National register has subsequently adopted an FOC.

The motivation for choosing a foreign flag varies from country to country, vessel type and its characteristics. Empirical research suggest that newer vessels are more likely to be foreign flagged.⁶ Another determining factor seems to be the vessel owner's desire to trade internationally, as do most cargo and larger vessels, as compared to passenger and smaller units. Owners from high income countries are more likely to choose a foreign flag than owners from countries with a lower GDP, so that the operating costs can be reduced by employing seafarers from developing countries with lower wages.⁷

By choosing an Open Register, shipowners are also protected from burdensome taxes, wage scales and regulations while the registering state gains significant income. A specific example of the advantage of flying an FOC is bypassing of the 50 per cent duty the United States (US) Government charges on repairs performed on American-flagged ships in foreign ports.

FOCs derive their legality from the United Nations Convention on the Laws of the Sea, 1982 (UNCLOS) and the UN Convention on Conditions for Registration of Ships (UNCCRS). In accordance with Article 91 of the UNCLOS, "ships have the nationality of the state whose flag they are entitled to fly". This implies that states have the right to regulate the conduct of their nationals. One example of this principle at work is Section 4 of the Indian Penal Code, which states that

"The provisions of this Code apply also to any offence committed by (1) any citizen of India in any place without and beyond India; (2) any person on any ship or aircraft registered in India wherever it may be".

The International Shipping Associations have also issued the Shipping Industry Guidelines on Flag State Performance in 2006, which is a comprehensive document regarding the duties of owners and flag states with regard to their ships.

The relationships between various agencies involved in shipping operations are multifarious. The owner is responsible for the safe operation onboard and the welfare of the crew. The operator (or charterer) endows all the duties of the owner when operating the ship. The flag state is responsible for survival of life at sea, protection of marine environment and enforcement of international maritime regulations. In addition, the flag state assumes the overall responsibility for the conduct of the vessel in an international environment. The responsibility relationship is shown in Fig. 1.

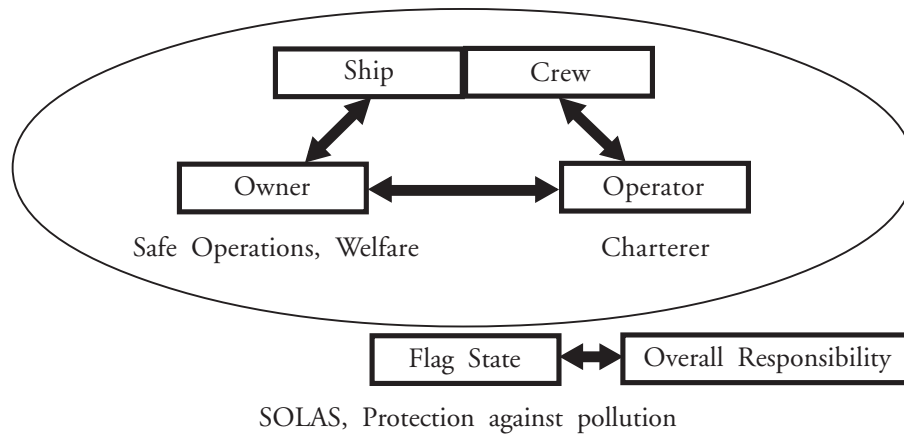


Fig. 1

The intricate relationships described in Fig. 1 are a manifestation of the globalisation of maritime trade. Aspinwall has lucidly illustrated these linkages:

*“it is a difficult and misleading proposition to discuss nationality when a ship may be built in Japan, owned by a Greek bank, crewed by Italians, Indonesians and Filipinos, managed by an American firm and underwritten by a British firm. This hypothetical example is further complicated by assuming it is carrying Saudi oil to Chile for an Australian merchant and flying the flag of Liberia. What state claims this ship? Under international law, it is a vessel of Liberia... Yet many states have an interest in it...”*⁸

The inexorable growth in FOC shipping deeply impacts upon the traditional task of navies, that of trade protection. It would be difficult for a nation's trade and energy flow to be protected in peacetime when it has no legal right to convoy shipping owned by another state.⁹ The issue of the rights of states to use warships to protect ships, persons or cargo on ships sailing under the flag of a different state will need to be addressed.

Support

Supporters of FOCs argue that where a vessel is engaged in international trade, it should be free to register in the jurisdiction which best suits its commercial model.

The choice of flags allows companies to take advantage of another country's infrastructure and the efficiencies of effective and non-bureaucratic maritime administrations typically offered by the prominent open registers.¹⁰ Tax-efficient FOCs enable both lower costs of registration and the maintenance of proper technical, safety and environmental standards. These efficiencies, in turn, reduce overall transportation costs and facilitate world trade and consumer savings.

Besides economic benefits, foreign registries offer political advantages. For example, during the Suez Canal crisis and the Arab oil embargo, the registration of tankers in open registries allowed American oil companies to operate relatively unhindered.

Many open registries effectively implement and enforce the international treaties of the International Maritime Organisation (IMO), such as International Convention for the Safety of Life at Sea (SOLAS) 1974; International Convention for the Prevention of Pollution from Ships (MARPOL) 1973/1978; Standards of Training, Certification and Watchkeeping for Seafarers (STCW) 1978; and the International Ship and Port Facility Security (ISPS) Code. Further, several open registers including Liberia have ratified the International Labour Organisation's (ILO's) Consolidated Maritime Convention of 2006, which specifically protects the interest(s) and rights of the seafarers. Many national registries are yet to ratify this ground breaking international treaty. In 2005, Panama and Liberia ship registries joined the Proliferation Security Initiative (PSI) of the US, thereby bringing almost half of the world shipping under this Treaty. This shows the resolve of the registries against indulgence in unlawful activities.

Opposition

Several seafarers' unions, in particular the International Transport Workers' Federation (ITWF), have been vocal in their opposition to FOCs. One of their main contentions against FOCs is, that the "genuine link" between the flag state and the ship is lacking. The ITWF website says that

"FOCs provide means of avoiding labour regulation in the country of ownership and they become vehicles for paying extremely low wages and forcing long hours of work and unsafe working conditions. Since the FOC ships have no real nationality, they are beyond the reach of any single national seafarers' trade union".¹¹

Some environmental groups have campaigned against FOCs involved in fishing. The use of FOCs for illegal, unregulated and unreported (IUU) fishing has also been formally acknowledged in a report published by the Department of Agriculture, Government of Australia, in 2005.¹² FOCs are also accused of having low safety standards and no construction requirements. Some other arguments include evasion of taxes and lack of patriotism. In fact, even the world's largest ship register, Panama, is categorised in the European Union Black List as a medium risk flag,¹³ while a number of other FOCs are in the banned list.

Many observers have cited the example of Bolivia and Mongolia – both land locked countries that own Open Registers. Mongolia's capital is almost 1,000 miles from an ocean, but its flag is now flying on 260 ships at sea.

"This unlikely venture is part business, part comedy, and part international intrigue".¹⁴

A well-known example involving the Indian Navy and an FOC ship is the case of *MV Alondra Rainbow*, a Panamanian flagged ship, owned by Japanese, crewed by Filipinos, and attacked off the shores of Indonesia by pirates of uncertain nationalities. At sea, the pirates changed the name of the ship to *MV Mega Rama* and displayed a Belize registration till the time they were caught by the Indian Navy and Coast Guard. The 25-year-old oil tanker *Erika*, which sank off the coast of France in 1999 causing a huge ecological disaster, was also an FOC ship of Maltese registration.¹⁵

In 1978, a number of European countries agreed in The Hague on a memorandum that agreed to audit whether the labour conditions on board vessels were according to the rules of the ILO. After the *Amoco Cadiz* sank that year, it was decided to audit safety and pollution also. To this end, the Paris Memorandum of Understanding (Paris MoU) was agreed upon in 1982, establishing Port State Control, currently consisting of 24 European countries and Canada as well. In practice, this was a reaction on the failure of the flag states, especially FOCs that have delegated their task to classification societies, to comply with their inspection duties.

Boon or Bane?

Globalisation has significantly influenced the mechanics of world trade, as also the owning and operating structures of merchant ships. The days of traditional family

Table 2. Reasons put forth in support of and against FOCs

Factors in support of FOCs	Factors against FOCs
Suitable commercial model	Avoidance of laws
Use of other nations infrastructure	Low wages
Efficiency	Extra work
Cost reduction	Low safety standards
Easy registration process	No patriotism
Savings for consumers	Tax evasion
	Illegal activities

owned and operated shipping companies have ended. Today's ships are commonly owned and operated by multinational corporations, which makes the traditional FOC argument of a national owner seeking an international jurisdiction seemingly irrelevant.

Although financially the system of FOCs has resulted in gross savings to ship owners, it has not found favour with the strategic community, particularly after the attacks of September 11, 2001, with the threat of maritime terror being viewed as a clear and present danger. To overcome some of the problems associated with FOCs a few countries have adopted specific models suited to their needs.

One such system is the Norwegian International Ship Register (NIS), which allows ship owners to operate in a low-cost environment whilst retaining the respectability of the national flag. The vessels may be Norwegian or foreign owned or manned, but the agent and a substantial part of the technical or commercial management of the vessel must be delegated to a ship management company established in Norway. This retention of the link with the national flag preserves the jurisdiction of the country over vessels owned by its nationals. The model of Norway is also being followed by various other countries including Germany and Denmark.

The ideal way to judge a ship register is not by whether it is a national register or an FOC. The parameters should be their responsiveness, pro-activity, quality of service, treatment of seafarers, ratification and implementation of modern regulatory conventions and safety records. If these parameters are considered, it will be evident that there are some very high quality FOCs operating today.¹⁶ These registers adhere to all maritime regulations and treaties and, compared to many national registers that have repeatedly failed to deliver, have been duly rewarded by a number of vessels "flagging out".

Nonetheless, not all FOCs maintain genuine links with their flagged vessels. At times, the registration is not even done in the country where the register is purportedly based. For example, in Liberia's case, registration is done by a private company based in Virginia. Cambodia's registration office is in Singapore. This ultimately results in poor state control over actions of ships at sea. The negligible visibility of major FOC nations in tackling maritime piracy off Somalia reveals a disconnect with their ships.

Conclusion

Ships belonging to a company registered in one nation may sail under the flag of another and they may also have multinational crews with conflicting loyalties. Shipping companies themselves may be components of international conglomerates, as could be the owners of the cargo being carried. As a consequence, the identification of beneficial ownership and appropriate state responsibility for protection of shipping, together with interest in its employment and safety, are often complex matters.

To shipping and fishing interests, the economic attraction of registering a vessel under a flag with lower costs, more relaxed crewing requirements and less vigorous regulation is undeniable. FOCs are also necessary for promoting trade, competitiveness and reducing costs to the consumer.

Although commercially logical, the wider consequences of FOCs should not be underestimated. Without transparency of ownership, and a genuine link between the owners of a vessel and the flag state, it would be nigh impossible to ensure the highest standards in maritime security and safety. For these reasons it is vital for states to address, at an appropriate level and without delay, these important issues of international governance. In the meantime, conscious efforts such as the Paris MoU and the NIS register provide means of bringing greater accountability in FOCs. David Cockcroft, General Secretary, ITF has neatly summed up:

*"We have never believed that all FOC ships are bad and all national flag ones are good. But the existence of the FOC system is dragging standards down to a point where we are seriously worried about what even some genuine national flag states are now doing to compete."*¹⁷

Notes

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7. *Ibid.*, Note 4.
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