Flags of Convenience and the Need for International Co-operation

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In General

The history of flags of convenience dates back to the Roman Empire, but it was not until after World War II that the desire and the need to be competitive in the world shipping markets gave rise to the spectacular growth in the use of such flags. Obviously the reasons for registering a ship in a flag of convenience country vary from one owner to another. Today the primary reason for flags of convenience is to obtain cost economies and stay competitive in the industry.

In a maritime company all decisions are taken in order to achieve the common goal of minimising private costs and maximising private revenue. Therefore, it is not possible for a shipowner to choose a flag without considering the fiscal advantages. It is believed that taking part in competition in the market has great importance for a shipowner when considering open registry. On the basis of the history of flags of convenience and present practice, everybody involved in shipping practice knows that the flags of convenience system will continue to exist. It is time for the opponents of this system to find a different solution rather than trying to get rid of the system.

After the transfer of American ships to the Panamanian and Honduras flags organised labour opposition to flags of convenience began in the 1930s. In 1957 it also became clear to the business leaders of the advanced maritime states that if no steps were taken to control the situation, the flags of convenience institution would cause serious problems. In 1948 the ITF adopted a resolution in which it threatened to boycott ships transferred to the Panamanian flag. In 1958 the ITF Congress decided to start a worldwide boycott of open registry ships. The aim of the campaign was to drive the ships back to their national flags. Shipowners who operate their vessels under the flags of convenience are supposed to employ their crews under the ITF Collective Agreement. It is well known that this agreement covers minimum wages, holidays, hours and special conditions and also contributions by the owner to the ITF's Seafarers' International Assistance, Welfare and Protection Fund. But the question, which needs to be answered, is that when this agreement is signed does it drive back the ship back to its national flag? The answer is no, it merely allows, in other words licences, the owner to carry on without any union action. Within more than 50 years how successful has the ITF campaign become? It has co-ordinated an international campaign, has forced some owners to sign collective agreements but has not managed to drive the ships back to their national flags. Ships still have multinational crew, owned by a multinational company, registered in one country, mortgaged in another and managed from a third country. So it is possible to say that we have a globalised shipping sector which is based on private enterprise and that within this sector there are not many who are really dedicated to the safety of the ship, crew or the protection of the marine environment.

The International Maritime Organization (IMO)

In the 1950s, each shipping nation had its own maritime law. Compared with today, there were only a few international treaties and they were not accepted or implemented by all maritime states. On the basis of these different national laws, the standards and requirements varied and in some cases they were conflicting with each other. Therefore, IMO, as a specialised agency of the United Nations, started to develop international treaties and other legislation concerning safety and marine pollution prevention.[1] Despite its active role in the development of international maritime legislation in most cases IMO has been criticised for being too slow during the adoption process of a convention as it usually tries to act on a consensus basis. Is this criticism fair on IMO? Each convention includes appropriate provisions stipulating conditions which have to be met before it enters into force. These conditions vary, but generally speaking the more important and more complex the document, the more stringent are the conditions for its entry into force. With regard to amendments, more acceptances were required to amend a convention than were originally required to bring it into force in the first place. This practice led to long delays in bringing amendments into force. To remedy this situation a new amendment procedure was devised in IMO. Under this "tacit acceptance" procedure, it is provided that an amendment shall enter into force a particular time unless, before that date, objections to the amendment are received from a specified number of Parties. The tacit acceptance procedure has now been incorporated into majority of IMO's technical conventions and has been extended to some other instruments as well. The effectiveness of the tacit acceptance procedure can be seen most clearly in case of SOLAS 1974 Convention. Article VIII of the Convention states that the amendments to the chapters (other than chapter I) of the Annex, which contain the Convention's technical provisions shall be deemed to have been accepted within two years (or a different period fixed at the time of the adoption) unless they are rejected within a specified period by one-third of Contracting Governments or by Contracting Governments whose combined merchant fleets represent not less than 50 per cent of world gross tonnage. SOLAS 1974 has been amended on 16 occasions since then. During the amendment process some chapters have been updated more than ten times and four completely new chapters have been added. These amendments have usually entered into force around two years after being adopted. However, the 1988 (April) amendments to SOLAS which were adopted as a result of the *Herald Free Enterprise* ferry disaster, entered into force in October 1989, only 18 months later. This was the first time that the tacit acceptance procedure had been used to reduce the period before entry into force to less than two years.

Could the shipping industry not manage to become united in the area of safety of navigation? Or could the IMO not respond to emergencies? It is well known that IMO responded to major incidents. During the 1960s IMO started to deal with emergencies. Following the *Torrey Canyon* disaster in 1967 IMO started its work in the legal field on regulations concerning pollution. Following this incident IMO adopted the 1969

[1] According to Lloyd's Register of Shipping Casualty Returns for 1958 16% of the merchant shipping tonnage lost that year resulted from collisions and a further 32% from groundings or striking wrecks. The vast majority of these casualties were caused or contributed to by navigational error or deficiency. This was the year before the IMO Assembly met for the first time. Many of the worst disasters in shipping history have resulted from collisions and other accidents which can be attributed to navigational errors. http://www.imo.org/imo/focus/safnav/safenav1.htm. 25/03/1998

Intervention Convention enabling a government to take action if an accident in international waters threatened its coastline with pollution. It also developed a two-tier system, the 1969 Civil Liability Convention-the 1971 Fund Convention, for compensating victims of pollution. From this point onwards, the protection of the marine environment became a major objective for IMO. In 1973 the International Convention for the Prevention of Pollution from Ships (MARPOL) was adopted to cover pollution by oil, chemicals, harmful substances in packaged for, sewage and garbage. After the *Torrey Canyon* incident IMO was frequently called upon to respond emergencies. In 1976-1977, a series of tanker accidents off the coast of North America including the stranding of the *Argo Merchant* led to changes being made to the SOLAS and MARPOL Conventions. In 1987 the ro-ro ferry *Herald of Free Enterprise* capsized and sank with the loss of 188 lives. Over a year later a series of amendments to SOLAS 1974 were adopted and entered into force on 22 October 1989. A second group of amendments was adopted in October 1988 and entered into force in April 1990. Despite all the amendments in 1994 another passenger ro-ro ferry the *Estonia* sank with the loss of more than 900 lives. Following this incident, in 1994, three new chapters were added to the SOLAS Convention. One of them made the International Safety Management (ISM) Code mandatory. The Code was first developed as a result of the *Herald of Free Enterprise* disaster and designed to make safety first priority for shipping company management. In 1995 major changes were made to the 1978 STCW Convention. Under the amendments parties to the Convention were required to submit information to IMO concerning their training, certification and other procedures so that their ability to implement the Convention could be assessed. This requirement was the most radical feature of the amendments as it was the first time IMO has ever been given such authority over Governments.

The table provided by IMO shows that the vast majority of maritime countries have ratified the most important conventions.[2]

SUMMARY OF STATUS OF CONVENTIONS
as at 30 April 2000

{PRIVATE}Convention	Entry into force date	No. of Contracting States	% world tonnage*
{PRIVATE}IMO Convention	17-Mar-58	158	98.47
1991 amendments	-	46	68.62
1993 amendments	-	84	82.19
SOLAS 1974	25-May-80	140	98.34
SOLAS Protocol 1978	01-May-81	93	93.12
SOLAS Protocol 1988	03-Feb-00	40	58.82
Stockholm Agreement 1996	01-Apr-97	8	9.37

[2] Summary of Status of Conventions as at 30 April 2000.
http://www.imo.org/imo/convent/summary.htm 28/05/2000
The International Convention on Conditions for Registration of Ships 1986 does not need any discussion as it is nowhere near coming into force and even if it comes into force it will not be ratified by the flags of convenience countries and a shipowner in a contracting party's country will not be completely prevented from registering his ships in another country which is not a party to the convention.

LL 1966	21-Jul-68	143	98.33
LL Protocol 1988	03-Feb-00	39	58.77
TONNAGE 1969	18-Jul-82	124	98.05
COLREG 1972	15-Jul-77	134	96.77
CSC 1972	06-Sep-77	67	59.64
1993 amendments	-	5	3.07
SFV Protocol 1993	-	6	7.48
STCW 1978	28-Apr-84	133	97.92
STCW-F 1995	-	2	3.05
SAR 1979	22-Jun-85	65	46.82
STP 1971	02-Jan-74	17	22.12
SPACE STP 1973	02-Jun-77	16	23.71
INMARSAT C 1976	16-Jul-79	87	92.75
INMARSAT OA 1976	16-Jul-79	86	92.67
1994 amendments	-	38	31.93
1998 amendments	-	37	36.14
FAL 1965	05-Mar-67	84	53.60
MARPOL 73/78 (Annex I/II)	02-Oct-83	110	94.23
MARPOL 73/78 (Annex III)	01-Jul-92	93	79.39
MARPOL 73/78 (Annex IV)	-	77	43.44
MARPOL 73/78 (Annex V)	31-Dec-88	96	85.98
MARPOL Protocol 1997 (Annex VI)	-	2	4.86
LC 1972	30-Aug-75	78	68.38
1978 amendments	-	20	19.71
LC Protocol 1996	-	9	10.34
INTERVENTION 1969	06-May-75	74	68.25
INTERVENTION Protocol 1973	30-Mar-83	42	43.85
CLC 1969	19-Jun-75	66	36.89
CLC Protocol 1976	08-Apr-81	54	62.87
CLC Protocol 1992	30-May-96	60	85.79
FUND 1971	16-Oct-78	42	32.67
FUND Protocol 1976	22-Nov-94	34	55.07
FUND Protocol 1992	30-May-96	56	83.59
NUCLEAR 1971	15-Jul-75	14	21.35
PAL 1974	28-Apr-87	26	32.99
PAL Protocol 1976	30-Apr-89	20	30.40
PAL Protocol 1990	-	3	0.76
LLMC 1976	01-Dec-86	35	44.87
LLMC Protocol 1996	-	2	2.76
SUA 1988	01-Mar-92	44	47.39
SUA Protocol 1988	01-Mar-92	41	47.11
SALVAGE 1989	14-Jul-96	32	29.21
OPRC 1990	13-May-95	54	48.51
HNS Convention 1996	-	1	1.96
** Source: Lloyd's Register of*			

If the majority the countries are the members of these conventions, why is it still possible to find shipowners, managers or manning agents who force seafarers to risk their health and lives at sea, or find ships which are unsafe, do not comply with the required technical conditions under the international conventions or why are there still so many crew members who don't know what to do in case of emergency?

The shipping industry had the problem of each shipping nation having its own maritime law. IMO developed international treaties, vast majority of the countries are parties and even the major flags of convenience countries are parties to these conventions but the problem is still unsolved. Shipping is not failing in ratifying new conventions or the international community is not failing in adopting necessary litigation but shipping is failing in application and enforcement of international regulations especially the ones on safety, pollution and crew welfare.

Flag State and Port State Control

One of the beliefs in the shipping world is that IMO is there to implement a legislation. This idea is completely wrong, IMO is there to adopt a legislation, it does not have any powers to implement it. Governments are responsible for implementing legislation. When a government accepts an IMO Convention it agrees to make it part of its own national law and enforce it just like any other law and also set the penalties for infringements, where these are applicable. It is the flag state not the IMO which is supposed to enforce the standards that are set in the international maritime conventions. The obligation on Contracting States is not only to incorporate convention provisions into their legislative system. To meet their responsibilities flag States must have the means and the will to implement the requirements of international conventions. They must have an adequate legislative and regulatory apparatus and also a maritime authority with enough staff in order to control the enforcement of standards on board the ships.

This is what has to be done by the contracting states to implement a convention but in practice States do not always comply properly with these obligations. The enforcement of international conventions raises many problems. They may take a long time to be incorporated into the national legal system of each State. The way regulations are implemented varies from country to country. The coming into force of a convention does not necessarily mean its effective enforcement. Delays may occur in transcribing international safety standards into national law.

Under some conventions, certificates are required to be carried on board the ship to show that they have been inspected and have met the required standards. Under MARPOL all ships must carry an oil record book in which all operations involving oil are recorded. Any state party to MARPOL may inspect this book. The Convention also requires initial, periodical and intermediate surveys in order to ensure compliance with the Convention. It has been generally accepted that the entry into force of the MARPOL Convention had a substantial positive impact on decreasing the amount of oil that entered the sea as a result of marine transportation activities. However, the

Convention would have achieved more if it had been properly implemented.[3] Under Article 11(1) of the MARPOL Convention contracting parties are required to submit reports about the application of the convention to the IMO. Since the entry into force of the MARPOL Convention only six contracting parties have submitted reports. The failure about the implementation of the international conventions is not just limited with MARPOL. The Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW) establishes internationally recognised minimum standards for seafarers. Nearly all the flags of convenience countries listed on the ITF list are parties to this Convention. The Convention establishes standards for the deck department, engine department and radio department and deals with all members of the ship's complement. In each case the Convention prescribes minimum age levels, minimum periods of sea-going service and certification requirements. So why do we need to worry about the abilities of seafarers in a flag of convenience vessel to operate the ship in a safe manner? Because despite their participation in the STCW, open registers are less than rigorous in their application of standards and their monitoring of conditions on board the ship. Most of these countries do not have their own training establishments and many of them will accept certificates of competency, which meet very low standards. The less well regulated the administration gets the more work to be delegated to less reputable classification societies. Such a practice allows shipowners to exercise greater control in the standards which are applied. Do shipowners use this control in the application of standards? In general there are many ships owned by non-ship owners and managed by separate companies and they operate by providing the cheapest service rather than safest one. As a result the primary safety control by owners diminished, the training standards provided for the crews and officers in the third world are not proper and on-board management ability is not a success at all.

Despite the mass of legislation which IMO has produced over the years legislation has its limitations. The solution is not to adopt still more conventions but to make sure that the existing ones are properly implemented. In many cases lack of financial resources and expertise is the main problem. In some countries enforcement of an IMO Convention is not on the governments' list of priorities. IMO is helping to overcome these difficulties in many ways. It has developed a technical assistance to governments which lack experience and resources.

It is sometimes said that IMO should have some sort of authority to enforce its regulations. Should IMO take more sovereignty out of the hands of States? Or how would IMO have some sort of police function? The only way seems to be to create a team of inspectors and officials who would have the right to board a ship which they think is contravening with IMO regulations. Such practice would be financially impossible when one thinks about the international nature of shipping and politically most Governments would never agree to allow ships flying their flag to be boarded in international waters. It would also be unacceptable to introduce a system of penalties and punishments. Literally IMO does not have the authority to enforce its legislations but in practice IMO continually encourages observance of international standards by exercising a degree of institutional supervision. As explained above, authority was

[3] On 5 and 6 February 1990 a workshop organised by the National Academy of Sciences in Washington D.C. The report of the Academy states that "there is a lack or worldwide enforcement of the MARPOL Convention, there is a lack of worldwide efficient monitoring, there is a difficulty in identifying the source of oil spillage, and there is a lack of worldwide port states control systems."

given to IMO over governments, for the first time, under the changes made to the 1978 STCW Convention. This was one of the most important changes made in the 1995 amendments to the Convention which entered into force on 1 February 1997. The changes were not only the recognition of the importance of enforcing standards internationally but also IMO's own ability to ensure that this is done. According to these regulations governments will have to provide relevant information to IMO's Maritime Safety Committee which will judge whether or not the country concerned meet the requirements of the Convention.

IMO's Sub-Committee on Fag State Implementation (FSI) was established in 1992 to assist Governments in implementing conventions and other instruments which they have ratified. It also aims to consider the difficulties faced by developing countries. Since its first meeting in 1993 the FSI Sub-Committee has examined the port state control issues and it became possible both for flag and port states to meet and discuss issues relating the implementation of IMO instruments.

If the flag states do not take full responsibilities required from them under international law should the port states take that responsibility? Is it possible to replace flag state control with port state control?

Port state control is not a new concept. It was stated in many international conventions. However, the international conventions do not explicitly impose on contracting governments the obligation of port state control, but leave this to the discretion of contracting governments. By participating in the relevant port state control agreements the member states commit themselves to specified enforcement efforts regarding port state control. Under port state control the primary responsibility for compliance with the provisions of the relevant instruments lies with the shipowner/operator. The responsibility for ensuring that such compliance remains with the flag state. In other words, the primary responsibility for ensuring that a ship maintains a standard at least equivalent to that specified in international conventions rests with the flag State. The intention of the port state control is not to enforce on foreign merchant shipping any requirement which goes beyond convention requirements.

At present there are eight regional Port State Control agreements are in operation:

- the Paris Memorandum of Understanding on Port State Control (Paris MOU), adopted in Paris (France) on 1 July 1982;
- the Acuerdo de Vina del Mar (Vina del Mar or Latin America Agreement), signed in Vina del Mar (Chile) on 5 November 1992;
- the Memorandum of Understanding on Port State Control in the Asia-Pacific Region (Tokyo MOU), signed in Tokyo (Japan) on 2 December 1993;
- the Memorandum of Understanding on Port State Control in the Caribbean Region (Caribbean MOU), signed in Christchurch (Barbados) on 9 February 1996;
- the Memorandum of Understanding on Port State Control in the Mediterranean Region (Mediterranean MOU), signed in Valletta (Malta) on 11 July 1997;
- the Indian Ocean Memorandum of Understanding on Port State Control (Indian Ocean MOU), signed in Pretoria (South Africa) on 5 June 1998;
- the Memorandum of Understanding for the West and Central African Region (Abuja MOU), signed in Abuja (Nigeria) on 22 October 1999; and

- the Memorandum of Understanding on Port State Control in the Black Sea Region (the Black Sea MOU), signed in Istanbul (Turkey) on April 7 2000.

Another regional agreement is currently under development. In July 1999, a first draft of a regional PSC agreement for the ROMPE (Regional Organisation for the Protection of the Marine Environment) sea area and the complementary training programmes for its implementation was discussed in Manama, Bahrain. The meeting was attended by the delegates from Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and the United Arab Emirates, with UNEP/ROWA (Regional Office for West Africa) as observers.

The recitals of these agreements emphasise that the main responsibility for the effective enforcement of international conventions lies with the owner and the flag states but recognise the "need for effective action of Port States in order to prevent the operation of deficient ships." The port states can not prevent the accidents on the flag state vessels as the latter fails to enforce the standards. If a vessel is registered in a country which implements all the international and national regulations fully the owner of the vessel pays for flag state administration and the survey regime which it establishes. The owner is also required to pay the necessary taxes to maintain the flag state administration. And practically the port state can not have control over the standards of design, construction and equipment as by the time the ship arrives in a port state, it is already built and crewed and the standards of training and qualification of the crew have already been determined by the flag state. Obviously it is not possible to deny the benefits of the port control system either. With its monitoring function it imposes international standards on the vessels which do not follow them voluntarily. However, in order to use this function Port State Control needs to become a statutory function of the relevant government body. The authority exercising port state control is the national law based on relevant conventions. If a vessel is in a dangerously unseaworthy condition, the port state control should be in a legal position to demand repairs before departure. The port state should prevent the vessel from trading in a dangerously unseaworthy condition. The vessel should not be allowed to slip through the international safety net. Consequently, flag state control cannot be readily replaced by port state control it only adds to the efforts of flag states to improve maritime safety and to prevent maritime pollution. Today port state control gains more importance, the revised STCW Convention and the ISM Code which provides an international standard for the safe management and operation of ships and for pollution prevention give port states real powers to infringe the sovereignty of the flags as if they do not comply with the necessary legislation.

Conclusion

There will always be shipowners who are aided and abetted by the flag states and who are prepared to risk their ships, the cargo and the crew for more profit. Shipowners who are protected by the hull and P&I insurance cover and whose liability are limited under the international limitation of liability conventions would like to have a risk free business. It is very difficult to break the chain. Flag states which do not implement the legislation, officers who are financially desperate, classification societies that aim to attract more tonnage are on one side and the international organizations like IMO, ITF and port state control on the other side. Is there a chance for success? Governments have a vital role to play in implementation of international

conventions. Rather than assisting, IMO should have more power to vet the implementation of the Conventions in member states. One of the positive developments is that the ISM Code lays down a set of general principles, of widespread application to all types of ship and owner. The responsibility of management defined more closely than before in order to make sure that safety is a priority when decisions are made.[4] Hopefully this legislation will force the shipowners to think twice before they make their decisions. We also need to keep in mind that since the beginning of the flags of convenience institution there have also been major changes in the attitudes of the major flags of convenience countries. Some countries adopt a new approach to the open registry problem. They establish "international" or "second" registers in order to stem the loss of employment and the share of shipping market. They do not see the solution in trying to bring the ships back but rather attract the companies to come back and also attract foreign companies to set up business in their countries.

The port state control needs to become more effective in order to make it more difficult for sub-standard ships to find some where to hide, to prevent them from plying its waters. The flag state control and port state control are bound with each other. There is a need for increased flag state and tighter port state control.

The responsibility is not just on one party; flag states, port states, shipowners, classification societies, international organizations and whoever is taking part in shipping industry need to act together. They all need to comply with international rules and regulations. The enforcement standards of the conventions should be re-examined and penalties for infringements should be applied. ITF will always play an important role as a control mechanism over the flags of convenience system. However, none of flags of convenience ships will go back to their national flags and therefore there is a need to increase the standards under these open registry flags.

[4] The ISM Code became mandatory on July 1998.