

**FLAGS OF INCONVENIENCE:
FREEDOM AND INSECURITY ON THE HIGH SEAS**

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I. Introduction

The sea is the last place on the globe that remains free from control by government. Over 40,000 large merchant ships, and innumerable smaller coastal craft,¹ ply the seven interconnected oceans comprising nearly three-fourths of the earth's surface.² Each year approximately 7.5 million containers of cargo, containing the bulk of raw materials and finished goods that constitute global trade, are transported between markets by commercial traveling the high seas.³ The ships are manned by seafarers of differing quality, mixed together without reference to language or nationality. The ships they man embody the anarchy of the open ocean, arguably the most independent objects on earth, many without allegiance of any kind and frequently changing their identity to assume whatever flag suits them.⁴

Although merchant ships spend most of their lifetime outside the territorial waters of any state, the current international maritime legal regime is paradoxically ordered around a system of vessel nationality.⁵ According to international law, and to the admiralty laws of most states, every vessel engaged in international trade must register in a country and is subject to the

¹ William Langewiesche, *Anarchy at Sea*, THE ATLANTIC MONTHLY, Sept. 2003, at 50.

² International Marine Science and Technology, *The United Nations Convention on the Law of the Sea (UNCLOS)*, at <http://www.marine.gov.uk/unclos.htm> (last visited 1/10/04).

³ ITF Annual FOC Report, available at http://www.itf.org.uk/seafarers/foc/report_2001/pages/s05-01.html (last visited 1/10/04).

⁴ Langewiesche, *supra* note 1.

⁵ Deirdre M. Warner-Kramer & Krista Canty, *Stateless Fishing Vessels: The Current International Regime and a New Approach*, 5 OCEAN & COASTAL L.J. 227, 228 (2000); see also H. Edwin Anderson, III, *The Nationality of Ships and Flags of Convenience: Economics, Politics, and Alternatives*, 21 TUL. MAR. L.J. 139, 141 (1996).

immigrant/refugee movement, and labor issues. Furthermore, the operations of the FOCs pose significant obstacles to the development of an effective international regime capable of compelling the various players in international maritime transport and trade to conform to international law.

This paper will illustrate how the FOC system, while operating under the color of international law, has worked to undermine the system of flag-state control and therefore exacerbate many troubles associated with international maritime trade. The paper will begin by presenting the background of the law of the high seas, UNCLOS, and flags of convenience. After establishing this framework, we will discuss several issues endemic to the maritime industry, focusing primarily on security concerns. We will then offer a multi-pronged solution encompassing the domestic, regional and international levels and conclude by discussing the future of the maritime industry. Recognizing the breadth and complexity of maritime law, this comment is merely an introduction to the current plight of the maritime industry and does not claim to be exhaustive in its discussion of the various topics and issues addressed within.

II. Freedom of the “High Seas”

The history of the law of the sea has been a constant struggle between states that asserted special rights with respect to areas of the sea and states insisting upon the freedom to use all ocean spaces.¹¹ Since at least as early as the Roman Empire, usage of the world’s oceans and maritime law has operated on the basic but unwritten principle of freedom of the seas, which provided unrestricted access for the common activities of fishing and navigation.¹² In 1608

¹¹ RESTATEMENT 3D ON FOREIGN RELATIONS LAW OF THE UNITED STATES (1987) PART 5 INTRODUCTORY NOTE.

¹² See *Marine Navigation: Freedom of the Seas*, available at <http://www.navis.gr/marinav/freeseas> (last visited 12/03/03) (quoting Grotius’ book, *infra* note 13, as saying that since the sea cannot be occupied like the land it is “free to all nations and subject [to control by] none.”); see also David J. Mitchell, Philip A. Collier, Frank J. Leahy

freedom of navigation, overflight, fishing, and scientific research. The high seas, as defined by UNCLOS, extends to the seabed, ocean floor and subsoil thereof, all of which is beyond the any state's territorial jurisdiction.¹⁶ All states, regardless of whether coastal or land-locked, have equal rights in the resources of this area, and equal lack of territorial jurisdiction.¹⁷

III. The International Legal Regime

The United Nations Convention on the Law of the Seas (“UNCLOS”)¹⁸ is an expansive piece of international legislation, intended to provide a “comprehensive regime dealing with all matters relating to the law of the sea . . . bearing in mind that the problems of ocean space are closely interrelated and need to be considered as a whole.”¹⁹ More than 150 countries contributed to the writing of the convention over a span of several years resulting in a universal document encompassing a wide range of political, geographical, and legal viewpoints.²⁰ UNCLOS was adopted on December 10, 1982²¹ and immediately signed by delegations from 119 countries. This unprecedented level of immediate international support is indicative of the universal agreement on the need for an international maritime regulatory regime.²² UNCLOS entered into force on November 16, 1994, and to date has been signed by 157 states and ratified by 145.²³ While the United States has not become a party to the treaty, however many provisions of UNCLOS are very similar to the maritime conventions which the US is a party to.²⁴

¹⁶ UNCLOS, *supra* note 7, art. 86.

¹⁷ Mitchell, *supra* note 12, at 4.

¹⁸ UNCLOS, *supra* note 7, 15.

¹⁹ INTERNATIONAL MARINE SCIENCE, *supra* note 2.

²⁰ *Id.*

²¹ UNCLOS, opened for signature Dec. 10, 1982, 21 I.L.M. 1261, 1267 (1982); *supra* note 7, 15.

²² J. S. Hobhouse, *Int'l Conventions and Commercial Law: The Pursuit of Uniformity*, 106 L.Q. REV. 530, 534 (1991).

²³ UNCLOS, *supra* note 7, 15.

²⁴ RESTATEMENT 3D, *supra* note 6. The Restatement goes on to note that “...by express or tacit agreement accompanied by consistent practice, the United States, and states generally, have accepted the substantive provisions

Other provisions of particular relevance to this paper include Article 217: Enforcement, requiring flag states to ensure their vessels only sail when in compliance with international rules and standards. The flag state is required to investigate any violation of international standards and to report the outcome to the international community. Article 218: Port state enforcement, allows investigations regarding “discharges” in violation of international rules and standards, outside of the port state’s territorial waters. Finally, Article 219: Measures relating to seaworthiness of vessels to avoid pollution, expands port state authority to include administrative proceedings initiated due to the violation of international standards regarding ship seaworthiness or pollution prevention. Ships may be detained until the causes of the violation have been removed, after which the vessel may continue on its way.³⁴

While UNCLOS has been successful in permeating “almost all aspects of contemporary international maritime law,”³⁵ the treaty also has serious flaws that must be noted at the outset. Firstly, the United States, one of the largest maritime countries and the largest monetary donor to the United Nations, is a non-signatory to the convention.³⁶ Fortunately, the United States has voluntarily integrated many of UNCLOS’ provisions into its domestic law, thus minimizing the impact of its non-party status.³⁷ Secondly, under the convention’s “optional clause” a signatory may choose among a variety of dispute resolution mechanisms and has the ability to exclude certain subjects from jurisdiction. The ability to use domestic legislation as a vehicle to exclude contentious maritime issues from mandatory dispute resolution greatly curtails the treaty’s

³⁴ *Id.*, Art. 219.

³⁵ International Marine Science, *supra* note 2.

³⁶ Patrick J.S. Griggs, *Obstacles to Uniformity of Maritime Law*, 34 J. MAR. L. & COM. 191, 207-08 (2003).

³⁷ See Peter D. Clark, *US Maritime Law Can Have Broad Interpretation in Arbitration Pact*, J. COM., AUG. 2, 1996, at 4B (explaining that most American contracts are subject to the General Maritime Law of the United States, which is a body of concepts, principles and rules, that is customary and international in origin, and provides the legal precedent in maritime court cases and arbitrations occurring the U.S., in the absence of pre-emptive legislation).

merchant ships that fly a foreign flag.⁴³ Coastal states are the states that have coast lines, near to which commercial ships often sail, and coastal states are also often port states. UNCLOS awards to coastal states full jurisdictional authority over the *territorial sea*, that is the band of ocean adjacent to the coastline, the outer limit of which does not exceed twelve miles from the TSB.⁴⁴ A State has full sovereign rights within its territorial sea, with the exception that under international law, it must allow foreign ships the right of innocent passage.⁴⁵ UNCLOS also gives a state the right to enforce its customs, fiscal, immigration, and sanitary laws and regulations over an additional twelve mile buffer zone beyond the territorial sea, named the *Contiguous Zone*.⁴⁶ Hence states have authority to assert their judicial jurisdiction over an area not exceeding twenty-four miles of ocean from the TSB.⁴⁷

Although each signatory is legally bound by all of the provisions in UNCLOS, the reality is that different states – port, flag, and coastal states - have different, and often contrary, interests in the ways in which maritime trade and law operate. While in principle each flag state is required to ensure that ships in its register adhere to international standards,⁴⁸ in practice states that operate as flags of convenience earn a great deal of money, usually from registration and maintenance fees and taxes, from the ships in its registries, but expend very little money to ensure that such ships meet international standards. Because many of the FOCs are not major port states, they therefore earn large profits by operating open registries but bear very little of the costs that result from the failures of ships to conform to international standards. On the other hand, coastal and port states bear a disproportionate burden of the costs of the FOC system, as

⁴³ *Id.* cited in Mellor, *supra* note 10, at 390.

⁴⁴ UNCLOS, *supra* note 7, art. 3.

⁴⁵ Mitchell, *supra* note 12, at 4.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ K. X. Li & Jim Mi Ng, *International Maritime Conventions: Seafarers' Safety and Human Rights*, 33 J. MAR. L. & COM. 381, 394 (2002), citing UNCLOS (1982), Art. 98(2).

shipping company or vessel owner other than that they were hired to work on the boat, controls the ship. While maritime crews technically fall under the protection of UNCLOS and other international agreements, their rights are often violated because the activities of their employers, the opaque shipping company and vessel owners, are largely unregulated.

Thus it is understood that vessel owners and cargo owners each have their distinct own interests, which may or may not differ from each other's, but often do differ from that of the primary interests of certain states. Because of the desire to hear as high profits as possible, both shipowners and cargo owners strongly favor the operation of FOCs, arguing that port states and the international community only need to know who is in day-to-day control of the ship, not the beneficial owner.⁵²

IV. Flags of Convenience

What is a flag state?

The nationality of ships is the basis upon which the international maritime regime is ordered. Article 91 of UNCLOS allows flag states to determine the conditions for ship registration and requires the existence of a genuine link between the ship and the state.⁵³ Article 92 requires ships to fly under the flag of only one nation⁵⁴; all ships must fly the flag of a single nation in order to notify the international community what state has jurisdiction over them. For

⁵² *Id.* (explaining the “chorus of protests” led by Greek shipowners in response to an American proposal to the International Maritime Organization to make ship ownership more transparent as part of antiterrorist precautions). “Beneficial owner” is the person/entity receiving the majority of the financial benefits from the ship’s activities.

⁵³ UNCLOS article 91, *supra* note 7. Article 91 reads as follows: “1. 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. 2. Every State shall issue to ships to which it has granted the right to fly its flag documents to that effect.

⁵⁴ UNCLOS article 92, *supra* note 7. Article 92 reads as follows: “1. Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas. A ship may not change its flag during a voyage or while in a port of call, save in the case of a real transfer of ownership or change of registry. 2. A ship which sails under the flags of two or more States, using them according to convenience, may not claim any of the nationalities in question with respect to any other State, and may be assimilated to a ship without nationality.”

Generally, a state has a “genuine link” entitling it to register a ship and to authorize the ship to use its flag, in accordance with article 91 of UNCLOS.⁵⁷ If the ship is owned by nationals of the state (whether natural or juridical persons), exercises effective control over the ship, is manned by nationals of that state, and stops in the ports of that state with some degree of frequency, then the genuine link will be found to exist.⁵⁸ The lack of a genuine link does not justify another state in refusing to recognize the flag or interfere with the ship in question, but a state may reject diplomatic protection by the flag state in such a scenario.⁵⁹ If another state doubts the existence of a genuine link, its only recourse is to request that the flag state conduct an investigation and take appropriate measures to remedy the situation, in accordance with Article 94(6) of UNCLOS.⁶⁰

U.S. courts have upheld the principle that another state is not entitled to decide unilaterally that there is no genuine link between a ship and the flag state or refuse to recognize the flag on that basis.⁶¹ The U.S. Supreme Court addressed the issue in Lauritzen v. Larsen:

Each state under international law may determine for itself the conditions on which it will grant its nationality to a merchant ship, thereby accepting responsibility for it and acquiring authority over it. Nationality is evidence to the world by the ship’s papers and its flag. The United States has firmly and successfully maintained that the regularity and validity of a registration can be questioned only by the registering state.⁶²

Nine years later, in Empresa Hondurena de Vapores, S.A. v. McLeod, the Second Circuit stated that “it would be unreasonable to conclude that... other states do not owe some obligations of respect” to the flag state so long as it effectively exercises its jurisdiction and control.⁶³

⁵⁷ RESTATEMENT 3D, *supra* note 6.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*, at Reporter’s Note 8.

⁶² Lauritzen v. Larsen, 345 U.S. 571, 584 (1953).

⁶³ RESTATEMENT 3D, *supra* note 6.

- 1) Increased market value of the ship.
- 2) Easy currency conversion.
- 3) Decreased cost of repairs.
- 4) Reduced operating costs.⁶⁹
- 5) Owners may avoid national income taxation.
- 6) Owners are able to acquire new tonnage more easily from their increased earnings.
- 7) Owners may avoid home country governing the condition of the vessel.

In summary, the major motivating factors are the “low taxation levels for profits and incomes with the resultant free cash flow and the reduced operating costs due to lower crew wages.”⁷⁰ By lowering operating costs, the shipowners also “limit the financial consequences of the occasional loss of a ship.”⁷¹ There are also non-economic advantages to FOCs, such as decreased transparency of ownership for shipowners, decreased likelihood of vessel seizure during times of war or other emergencies, and (generally) stable political climates of the registering country that are conducive to business.⁷² The disadvantages of FOCs are potential increased port state inspection rates, less efficient or comprehensive consular services, as well as deficient diplomatic support for shipowners.⁷³

An officer of the first shipping company to transfer a U.S.-flagged ship to Panamanian registry quite presciently explained the appeal of the system of flags of convenience: “The chief advantage of Panamanian registry is that [vessel] owner is relieved of the continual . . . boiler and hull inspections and the regulations as to the crew’s quarters and subsistence,” pointing out that

⁶⁹ See <http://people.hofstra.edu/geotrans/eng/ch3en/conc3en/registships.html> (last visited 01/17/2004) (explaining that operating costs may be reduced by twelve to twenty seven percent, as compared with traditional registries, due to lower labor and safety costs).

⁷⁰ Wells, *supra* note 68, at 223.

⁷¹ Langewiesche, *supra* note 1, at 50-51.

⁷² Wells, *supra* note 68, at 225.

⁷³ *Id.*

United State's desire to have a fleet of neutral ships to call upon during the Cold War, in the event of Soviet aggression. The return to all countries was a boost in their economy.⁷⁸

The states that run open registries enjoy many advantages at a low cost to their own welfare. For example, the fees Panama charges shipowners to enlist in the Panamanian registry constitutes five percent of the Panamanian national budget.⁷⁹ In Liberia, where revenue from the registry accounted for approximately ten percent of the national budget before the civil war, such revenue now contributes up to thirty percent.⁸⁰

V. The Inconveniences of Flags of Convenience

The Importance of Maritime Trade

The sea has continually provided a cheap, reliable method of shipping goods across the globe to this day. It is estimated that 95% of all goods shipped worldwide, by any means of transportation, move by water at some point during their journey from manufacturer to consumer.⁸¹ In 1998, the value of maritime transport services was estimated at \$4,020,000,000 in Canada, \$8,146,000,000 in France, \$13,983,000,000 in Denmark, \$14,408,000,000 in the UK, \$18,142,000,000 in the US, and \$33,954,000,000 in Japan.⁸² In the United States alone, 8,000 ships make approximately 51,000 port calls annually, delivering over 7.5 million containers of

⁷⁸ Jim Morris, *Lost at Sea: Flags of Convenience Give Owners a Paper Refuge*, HOUSTON CHRONICLE, Aug. 22, 1996, at 15, available at <http://www.chron.com/content/interactive/special/maritime/96/08/220part5.html> (last viewed 12/27/03).

⁷⁹ *Id.*

⁸⁰ De Sombre, *supra* note 74, at 4, citing Aviva Freudman, *Liberia Taps DC Lawyers to Handle Registry*, J. COM., DEC. 21, 1998, at 2B.

⁸¹ Taylor, *supra* note 65, at 131.

⁸² *Id.* at 150.

time of the incident the *Prestige* was chartered by a Swiss-based Russian oil trader and was sailing under a Bahamas flag. However, the ship was registered under a Liberian owner and operated by a Greek shipping company. The *Prestige* incident is emblematic of the problems of ships sailing under flags of convenience for which no traceable party is liable, as at the time of its sinking it was well over the authorized age of oil tankers and did not have the necessary double hull.⁸⁸ In June 2002, the *Jessica* sank near the Galapagos Islands, creating a 117 square mile oil spill, thereby polluting one of the most unique ecological systems on the planet.⁸⁹ The *Jessica* was carrying 160,000 gallons of diesel fuel and 80,000 gallons of petroleum product.⁹⁰ The *Jessica* was an Ecuadorian flagged vessel operated out of the Marshall Islands, with a Master who was not qualified to operate oceangoing vessels.⁹¹ These are just two examples of that demonstrate that oil tankers registered under FOCs have a significantly worse safety record than their non-FOC counterparts.⁹²

[FOC] vessels are widely thought to be in poor condition, manned by underqualified crews, and free from meaningful regulation by the states in which they are registered. Consequently, flag-of-convenience (FOC) tankers are considered more prone to accidents and more likely to emit excessive operational discharges than oil tankers registered in the traditional maritime nations. This assessment of the FOC fleet, coupled with the fact that FOC tankers carry most of the world's oil, has led to a continuing attack on convenience registry as a major cause of oil pollution in the oceans.⁹³

⁸⁸ David Lunggren, *Ban ships with flags of convenience – Canada*, REUTERS NEWS SERVICE (Nov. 21, 2002), <www.planetark.org/avantao/dailynewsstory.cfm?newsid=18695.p2>.

⁸⁹ *Oil Spill Off Galapagos Islands Threatens Rare Species*, available at <http://www.cnn.com/2001/NATURE/01/22/galapagos.spill/index.html> (last visited 12/11/03); see also *NOAA Scientists Provide Expertise In Galapagos Islands Oil Spill*, available at <http://www.noaaneews.noaa.gov/stories/s572.htm> (last visited 12/11/03).

⁹⁰ *Id.*

⁹¹ Centre de Documentation de recherché et d'experimentations sur les pollutions accidentelles des eaux, *Jessica*, available at <http://www.le-cedre.fr/uk/spill/jessica/jessica.htm> (last visited 3/30/04).

⁹² Andrew Schulkin, *Safe Harbors: Crafting an International Solution to Cruise Ship Pollution*, 15 GEO. INT'L ENVTL. L. REV. 105, 125 (2002).

⁹³ Mark L. Boos, *The Oil Pollution Act of 1990: Striking the Flags of Convenience?* 2 COLO. J. INT'L ENVTL. L. & POL'Y 407, 408 (1991).

lack a common language, are commonly ill-prepared to deal with the unexpected problems that plague substandard ships. Poorly paid and with little to no benefits, some crew members, including officers, find ways to supplement their income by taking on illicit cargo. As many scholars have observed, this combination of substandard ships and poorly-trained crew leads to less safe oceans for all parties involved in maritime trade.⁹⁵

Some of the problems faced by crews on substandard FOC ships are abandonment, refusal of wages, and unsafe working and living conditions. An estimated 220,000 seafarers work on FOC ships, with a fatality rate 1.2 times higher than the world average and three times higher than that of English seafarers.⁹⁶ During the summer of 2001, seventeen crew members walked off the cruise ship *Ocean Glory I* (registered in Panama) while it was detained in Dover, England and contacted the International Transport Workers Federation (“ITF”), citing unsafe working and living conditions.⁹⁷ The ITF typically receives complaints from crew members such as these, regarding issues as varied as company’s anti-union activity, refusal to pay wages, refusal to reimburse for work-related injuries, and unsafe working and living conditions.⁹⁸

The use of containers in which to hide stowaways on board commercial vessels, in order to gain entry to Western countries, is a well-established trick in human smuggling.⁹⁹ This technique relies on the huge volume of maritime trade to penetrate inside of a country’s borders.

Each year in the United States alone, 8,000 ships . . . deliver approximately 7.5 million overseas containers. Of these 7.5 million containers, only 2% are actually inspected and each inspection takes an average of three hours per container. This inability to verify the contents of containers and the general lack of inspection suggests that containers could be used as an effective means to transport weapons

⁹⁵ Schulkin, *supra* note 92, at 115.

⁹⁶ Li, *supra* note 48, at 381.

⁹⁷ American Maritime Officer, *Scandals Taint Panama’s Reputation as Maritime Nation*, available at <http://www.amo-union.org/Newspaper/Morgue/8-2001/Sections/News/scandals.htm> (last visited 12/08/03).

⁹⁸ For further information on the ITF, see <http://www.itf.org.uk/seafarers> (last visited 12/28/03).

⁹⁹ Langewiesche, *supra* note 1, at 64.

on land and at sea. Dangerous cargo and a lack of transparency regarding ship ownership and crew members, combined with the lack of regulations by FOC states constitute a grave transnational threat. The transportation of weapons or terrorists by FOC flagged ships, or the use of those ships to implement an attack against maritime targets, are disasters which would not and could not be confined by political boundaries.

At the root of maritime security issues is the containerization of the industry. The above noted story about Amid Farid Rizk, the man who hid in a container on board a ship from Egypt to Italy, highlights how the use of shipping containers, while extremely efficient for the shipping industry, had almost eliminated transparency in shipping and demonstrates how a bomb could be brought inside almost any state's waters.¹⁰⁴ The industry's focus on temporal and monetary efficiency means that ships are loaded with as many containers as possible, making it difficult to access them for inspection. In the United States, only two percent of the six million containers are opened for inspection.¹⁰⁵ This new vulnerability in the maritime sector is, in many respects, a product of the success of free trade and liberalized economic policies that allow for the free movement of goods across international boundaries.¹⁰⁶

Containers are increasingly carrying dangerous cargo.¹⁰⁷ In the past, dangerous goods were carried in package form, as deck cargo, for easy identification and jettison if need be. Nowadays, dangerous goods are carried in containers, making it harder to locate and access them, especially without proper labeling or them being listed as dangerous goods in the

¹⁰⁴ Mellor, *supra* note 10, at 346-47, note 21, citing Michael Grey, *Security-Abandon Secrecy in Global Fight Against Terror Says Register*, LLOYD'S LIST INT'L, Jan. 31, 2001, at 3 (suggesting that a "love of secrecy exists within the the industry that lead to national governments' attempts to increase transparency), available at 2002 WL 8245570.

¹⁰⁵ Langewiesche, *supra* note 1, at 76.

¹⁰⁶ Mellor, *supra* note 10, at 353.

¹⁰⁷ Li, *supra* note 48, at 398.

waterborne fireball; a ship could carry a radiological 'dirty bomb' into a harbor; a speedboat carrying explosives could blow up a tanker laden with oil or delivering liquefied natural gas."¹¹³ In addition to the cost in lives and property damage, any such seaborne terrorist attack would most likely close major American ports and cost the world economy many billions of dollars in suspended world trade.¹¹⁴ Thus we see that that the security issues presented by that the lack of transparency and "the emphasis on speed over security"¹¹⁵ inherent in the containerization of the shipping industry, combined with the opaque system of ship ownership facilitated by the FOC system, create a system in which ports are wide open to several types of terrorist attacks. These loopholes in the system must be sewn shut.

VI. Decreasing the Freedom of the FOCs, Increasing the Security of High Seas

As illustrated throughout this paper, the inadequacies with the current international maritime system are several and complex. The problems involve a wide range of parties, including, port, flag, and coastal states, as well as ship owners, shipping companies, and manufacturers.¹¹⁶ Despite the multiple and often competing interests of these parties, "[t]he sea with its winds, its storms and its dangers never changes and this demands a necessary uniformity of judicial regime."¹¹⁷ This section examines methods to improve the international maritime legal regime.

Any effort to improve the international maritime legal regime must aim to restore the "genuine link" between the shipping vessel and the flag it flies,¹¹⁸ as required by Article 91 of

¹¹³ Weiner, *U.S. Law Puts World on Notice*, *supra* note 101.

¹¹⁴ *Id.*

¹¹⁵ Mellor, *supra* note 10, at 349.

¹¹⁶ *Id.* at 387.

¹¹⁷ Griggs, *supra* note 36, at 192 (2003), quoting ALBERT LILAR & CARLO VAN DEN BOSCH, *LE COMITÉ MARITIME INTERNATIONAL 1897 - 1972*.

¹¹⁸ Heindel, *supra* note 51.

Control ("Paris MOU").¹²² Finally, domestic governments would enact the regulations into law their domestic legal systems and provide for effective administration through maritime authorities and staff. We suggest that domestic enactment of international regulations include the creation of a private cause of action for violation of these regulations, with the judicial system acting as a way of rectifying unsatisfactory ship conditions when the maritime authority does not.

The operations of effective port and flag state control regimes require all countries to pass domestic legislation giving effect to and enforcement strategies for the provisions contained in UNCLOS. This has occurred, in some various ways, in many maritime states since the attacks of September 11th. As a result of the seeming ease with which the airplanes were hijacked, maritime states have realized the risks that the current lax maritime regulatory system could bring. "Since September 11 there has been a flurry of activity in both the executive and legislative branches of the U.S. government to fill the port security void."¹²³ In July 2002 For example, on in November 2002 the President signed in the Maritime Transportation Security Act of 2002.¹²⁴ The law covers the entire maritime sector and required vessel owners to submit detailed security plans for their ships by December 31, 2003. The Coast Guard is currently reviewing such plans. The law requires that all ships and foreign ports create institute sufficient

¹²² See *infra* note 136 (discussing the Paris Memorandum of Understanding on Port State Control [hereinafter Paris MOU]).

¹²³ Firestone, *Combating Terrorism in the Environmental Trenches*, *supra* note 8, at 431.

¹²⁴ The Maritime Transp. Antiterrorism Act of 2002, H.R. 3983, 107th Cong. (2002). A parallel global code was adopted shortly after by the IMO, see International Ship & Port Facility Security Code, available at www.imo.org/home (last visited 3/30/04).

For example, in the ports belonging to the twenty Paris MOU states, officials conduct more than 18,000 inspections of foreign ships annually, to ensure that all ships docking in their ports meet international safety and environmental standards, and that crew members have adequate living and working conditions.¹³¹ Evidence suggests that recent efforts by port states to increase inspections of vessels flying FOCs are effective. Observers report that “the growing number of inspections now required by a variety of interests are becoming a significant cost item, both in terms of fees and lost revenue-earning days.”¹³²

While increased detentions of delinquent ships by port states are costly and may erode the desirability of using open registries, the lack of transparency of ship ownership remains a contentious issue in the continued existence of FOCs. The current anonymity of FOCs allows the *beneficial* shipowners, whose true identities are rarely known, to escape liability and prosecution of violating international standards.¹³³ In order to increase the transparency of ownership, flag states and port states must work together to increase the transparency of the corporate structure and ownership of vessels within their own fleets. Experts cite this lack of transparency, which is enabled by the operations of FOCs, as a facilitator of transaction criminal activities and terrorism.¹³⁴

The port state control regime could be created on a regional basis, based largely on the existing Memorandums of Understanding (“MOUs”), such as the Paris and Tokyo MOUs, which are regional agreements between maritime states.¹³⁵ The Paris MOU is an organization consisting of twenty maritime Administrations, which aims to “eliminate the operation of

¹³¹ The Paris MOU on Port State Control, Home, at <http://www.parismou.org> (last visited 3/30/04).

¹³² Anderson, *supra* note 5, at 167, citing *Open Registries Tighten Up On Safety*, MARINE LOG, Mar. 1992, at 20.

¹³³ Anderson, *supra* note 5, at 167.

¹³⁴ Heindel, *supra* note 51.

¹³⁵ Mellor, *supra* note 20, at 390; *see also* Özcayir, *supra* note 42, at 14-15 (explaining that the MOUs represent the best models around which to base port state control agreements).

regime. In order to accomplish this, the major maritime countries must lead the way in creating and enforcing pertinent domestic legislation, as well as providing resources, training, and infrastructure to developing maritime nations. As such, it is the hope of the authors that the United States Legislature will soon ratify UNCLOS. In return, developing countries can better enforce international standards, and bring delinquent ships, shipowners and shipping companies into line. The creation of a workable maritime system will take a tremendous amount of resources, both human and monetary, as well as a great deal of strategy and compromise among states. Nonetheless, the expenditure will be well worth the effort, for the safety of workers and travelers, the valuable cargo being shipped, the wellbeing of the oceans and most of all, the safety and security of the people of the world.