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Flags of Convenience — New Dimensions to an Old Problem

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The "Argo Merchant" syndrome

Of late, much commentary has been made regarding the problems posed to the international community and to individual states by the widespread existence of large oil-carrying vessels registered in so-called flag of convenience jurisdictions.[1] Most of the recent public concern has been focussed on tanker disasters occurring largely in the United States and involving vessels registered in Liberia and Panama, by far the largest flag of convenience jurisdictions.[2] The

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[1] A "flag of convenience" can be generally defined "as the flag of any country allowing the registration of 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". See Boczek, *Flags of Convenience* (1962), 2.

[2] A recent study by the UNCTAD Secretariat states that as a result ot the rapid expansion of fleets registered in Liberia and to a lesser extent Panama during the period 1965-1976 as well as in newer flag of convenience or "open registry" conntries, the open registry fleets in 1976 accounted for 34% of the world tanker tonnage and 30% of world bulk carrier tonnage. Out of a total world merchant fleet tonnage of 367.1 million gross registered tonnage (grt) in 1976, Liberia accounted for 73.5 grt or roughly 20% of the world total. Flag of convenience registrations accounted for 27.6% of the total world grt in 1976. These figures are based on *Lloyd's Register of Shipping: Statistical Tables. Economic Consequences of the Existence or Lack of a Genuine Link Between Vessel and Flag of Registry*, Report by the UNCTAD Secretariat, 22-26, U.N. Doc. TD/B/C. 4/168, (1977). A 1975 study entitled "World Shipping Under

singular disaster which, in large part, provided the stimulus for much of this concern involved the 640-foot Liberian-flag tanker *Argo Merchant,* which broke up southwest of Nantucket Island on December 21, 1976, spilling about 7.5 million gallons of heavy oil into the sea and causing a serious threat to the rich George's Bank fishing ground.[3] In addition, other disasters involving Liberian-registered vessels have recently occurred,[4] the most recent being the super tanker, *Amoco-Cadiz,* which ran aground off northwestern France on March 16, 1978, spilling 58 million gallons of oil over fishing and oyster grounds. These incidents have contributed to a general recognition of the inadequacy of present international rules that allow ancient, poorly-repaired, ill-equipped or inadequately manned and navigated vessels into ocean-borne trade service.[5] Speaking recently on the need for international co-operation in controlling vessel-source pollution, the Canadian Minister for Fisheries and the Environment declared that "the present method whereby many countries register their vessels under another nation, otherwise known as 'flags of convenience' is ... inadequate ...".[6]

The problem of flag of convenience jurisdictions exemplifies some of the shortcomings of present-day international law and demonstrates the absence of coherent rules or standards, applicable on a global basis, which would help to regulate maritime safety and to ensure the environmental protection of the oceans. The problem has two aspects. First, there is the set of issues regarding the very existence of flag of convenience registries and the consequent desirability (or necessity) of establishing international rules prescribing

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Flags of Convenience" prepared by a firm of U.K. shipping consultants says that of the total of U.S.-owned tanker tonnage under foreign registry, 46.5% is registered in Liberia; *The Globe and Mail,* Jan. 10, 1977, 1. As reported in the *Vancouver Sun,* Jan. 5, 1977, Lloyd's record of tanker incidents, compiled from reports provided by the firm's worldwide network of some 1,400 agents and published in *Lloyd's List,* shows that Liberian and other flag of convenience tankers were responsible for 2/3 of the estimated 15 million gallons of oil dumped into oceans and coastal waters as a result of tanker mishaps as of Sept. 30, 1976.

[3] See *The New York Times,* Dec. 21, 1976, 20; Dec. 22, 1976, 1; Dec. 23, 1976, 1.

[4] In 1976, a total of 19 tankers were lost, according to the Tanker Advisory Center in New York out of which 11 were Liberian flag vessels. See *The New York Times,* Feb. 13, 1977, 1.

[5] See Kifner, "Flag of Convenience Oil Tankers Magnifying Concern About Spills", *The New York Times,* Feb. 13, 1977, 1; "Liberia: A Phantom Maritime Power Whose Fleet Is Steered By Big Business", *The New York Times,* Feb. 14, 1977, 14; "Tanker That Blew Up Provides Insight Into Oil Shipping", *The New York Times,* Feb. 15, 1977, 10.

[6] *Halifax Chronicle Herald,* Dec. 31, 1976.

minimum requirements for vessel registration together with international sanctions for failure to comply with these standards. The second aspect of the problem concerns the need to ensure a reasonable balance, on the one hand, between the rights and interests of flag states in ensuring the maintenance of freedom of commerce on the seas, and the rights and interests of coastal states, on the other, to protect the integrity of their coastal environment. These two aspects are inseparably related.

This article will attempt to demonstrate that the old flag of convenience/genuine link controversy (*i.e.*, the need to ensure an adequate legal relationship between the owner of a particular vessel and the state of registry) is much less an international issue than the need to ensure adequate protection for the marine environment by requiring all vessels to comply with minimum standards of construction and safety, regardless of the existence of a so-called "genuine link". One avenue under consideration at the current Law of the Sea Conference is to place greater obligations on flag states in matters of vessel safety and management. Enhanced coastal state jurisdiction in carefully defined areas[6a] may, in addition, offer a complementary and perhaps ultimately a more realistic solution to the problem. However, in considering the multiplicity of issues involved in the flag of convenience problem, it must also be born in mind that the availability of flag of convenience or open registry jurisdictions is not of itself necessarily a negative factor, since such jurisdictions contribute to the efficiency of international commerce by providing the basis for increased availability of shipping services. Viewed from this perspective, the problem which the international community faces is not simply the limitation of open registries but rather the development of sound rules of law which ensure against the deployment of substandard vessels, regardless of registry.

The use of flag of convenience jurisdictions — the registration and operation of vessels beneficially owned and controlled by foreign interests under the laws of certain states with only a tenuous connection between the state of registry and the vessel[7] — is not a new

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[6a] An issue of considerable importance to states such as Canada at the Law of the Sea negotiations.

[7] The term has a variety of connotations, some pejorative, others commendatory or neutral: Goldie, *Recognition and Dual Nationality — A Problem of Flags of Convenience* (1963) 39 Brit.Yb.Int'l L. 220. The Report of the UNCTAD Secretariat, *supra*, note 2, 22, refers to flag of convenience states more diplomatically as countries of "open registry". Until recently, the term referred to vessels registered in Panama, Liberia and Honduras — the so-called Panlib-

phenomenon. As early as the sixteenth and seventeenth centuries English merchants resorted to their use in attempts to circumvent Spanish trading monopolies in the West Indies; similarly, American entrepreneurs have, almost since the birth of the Republic, used foreign flags to their advantage.[8] In particular, use of Panamanian registry as a registry of convenience began in earnest shortly after World War One, but the heyday of flag of convenience registration came out of the highly competitive world shipping conditions prevailing at the end of the Second World War.[9] Reasons for choosing flag of convenience registrations vary, but many shipowners, principally those in the United States, have found foreign registration an extremely advantageous method of reducing operating costs. Lower wages are paid to non-U.S. seamen and American laws regarding labour relations, wages and crew composition can be avoided.[10] Other advantages include the avoidance of heavier national taxation policies and the facility of currency conversion. In addition, it appears that one motivation for foreign registration by European shipowners may have been the fear of nationalization following the Second World War.[11]

In addition to these cost-saving factors, flag of convenience registration permits shipowners to evade national laws and regulations which control the design, construction, manning and equipment of vessels. The evasion of such safety measures has become a major issue in light of the growing demand for adequate national and international standards to protect the world's oceans from recurring maritime pollution disasters, a demand amply justified by the *Argo Merchant* and *Amoco-Cadiz* disasters.

Flags of convenience also allow shipowners to avoid international rules and standards applied under treaties or conventions respecting

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hon vessels. In recent years, however, Honduras has declined in importance as a flag of convenience jurisdiction, and today the major states of importance in this regard are Liberia and Panama: *OECD Study on Flags of Convenience* (1972-73) 4 J.Mar.L.& Com. 231, 235.

[8] Goldie, *supra,* note 7, 224.

[9] See Boczek, *supra,* note 1, 9-16; *OECD Study on Flags of Convenience, supra,* note 7, 233-37; Report of UNCTAD Secretariat, *supra,* note 2, 24 for a capsulated history of the recent growth of the flag of convenience phenomenon.

[10] The U.S. labour movement is concerned that American labour has been displaced by cheaper foreign labour aboard flag of convenience ships. For a thorough study of the legal action taken by U.S. maritime unions and the decisions of U.S. courts regarding union activities against flag of convenience vessels, see Goldie, *supra,* note 7.

[11] See generally Boczek, *supra,* note 1, ch.II; *OECD Study on Flags of Convenience, supra,* note 7, 243-47.

maritime safety, fisheries and nuclear liability.[12] However, in all fairness to the flag of convenience states, it is important to note that Liberia, Panama, Lebanon, Cyprus, Somalia and Nigeria[13] are all parties to the 1960 International Convention for the Safety of Life at Sea[14] and the 1966 Load Lines Convention,[15] and both Panama and Liberia are parties to the 1954 International Convention for the Prevention of Pollution of the Sea by Oil.[16] Nevertheless, as has been pointed out:

> These are, however, formal requirements which can only have sense if the administration retains direct or indirect control of their fulfilment. This is sometimes lacking in the case of flag of convenience countries (as well as for certain other flags) and under such circumstances the ships involved may threaten the safety both of other ships and of the countries whose shores they pass.[17]

Many other states, including Canada, have not ratified or acceded to pollution prevention and maritime safety treaties.[18] But the existence of jurisdictions available for vessel registry and *not* committed to applying minimum international environmental and safety standards as a matter of national policy is of concern to the international community at large. The existence of such jurisdictions, coupled with the absence of international rules applicable to all vessels, regardless of registry, impelled the representatives of many coastal states to attempt to alter the present state of customary and conventional international law at the Third Law of

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[12] Goldie, *supra*, note 7, 221-22.

[13] Traditionally, these countries are among the largest flag of convenience jurisdictions.

[14] 536 U.N.T.S. 27.

[15] 640 U.N.T.S. 133.

[16] 327 U.N.T.S. 3.

[17] *OECD Study on Flags of Convenience, supra*, note 7, 250.

[18] Canada is a party to the 1960 Convention for the Safety of Life at Sea, 536 U.N.T.S. 27; the 1954 International Convention for the Prevention of Pollution of the Sea by Oil, 327 U.N.T.S. 3; the 1960 and 1972 International Regulations for Preventing Collisions at Sea; the 1965 Convention on Facilitation of International Maritime Traffic; the 1966 International Convention on Load Lines, 640 U.N.T.S. 133; the 1969 International Convention on Tonnage Measurement of Ships; the 1972 Convention on the Prevention of Marine Pollution by Dumping. Canada is not a party to a number of important maritime conventions, however, including the 1969 International Convention relating to Intervention on the High Seas in cases of Pollution Casualties; the 1971 Convention relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material; the 1971 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage; the 1973 International Convention for the Prevention of Pollution from Ships; and the 1974 International Convention on the Safety of Life at Sea.

the Sea Conference. They argued that the current situation, whereby flag states have complete or predominant enforcement powers,[19] should be replaced by a more balanced approach which recognizes essential coastal state interests in preventing vessel-source pollution. This "functional sharing" of jurisdiction was explained by the Canadian representative to the Second Committee of the United Nations Conference on the Law of the Sea (July 16, 1974) in the following terms:

> The solution to the problem [of whether the coastal state could pass laws affecting design, construction, manning and equipment] lay not so much in restricting the exercise of coastal-state rights to particular areas of jurisdiction as in restricting their exercise to cases where they were strictly necessary, and ensuring that they were applied under appropriate safeguards on a non-discriminatory basis, in response to particular geographic, navigational or ecological situations not adequately covered by international rules and standards. This was the functional approach ... .[20]

The legal significance of flags of convenience

It is an unassailable principle of international law that the high seas (traditionally meaning that part of the oceans not included in the territorial sea or in the internal waters of a state) are not susceptible to possession, appropriation or subjection to national sovereignty or other forms of national jurisdiction.[21] In what was a rationalization of the right of the Dutch to navigation and commerce in the Indies, Grotius provided, in a now famous passage, the legal underpinning to the freedom of the high seas concept:

> [T]hose things which are incapable of being occupied, or which never have been occupied, cannot be the private property of any owner, since all property has its origin as such in occupancy. The second inference

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[19] While, admittedly, the sovereign powers of the coastal state in its territorial sea under Art.1 of the Geneva Convention on the Territorial Sea and the Contiguous Zone (U.N. Doc. A/CONF.13/L.52, Apr. 28, 1958, 516 U.N.T.S. 205) would appear to allow the coastal state the right to apply national legislation respecting maritime safety (such as the design, manning, construction and equipment of vessels) against foreign vessels, the corresponding right of innocent passage under Art.14 of the Convention allows for arguments against any interference with innocent passage by enforcement of national laws unless such passage is "prejudicial to the peace, good order or security of the coastal state". Support for the contention that "peace, good order or security" of the coastal state does not include threats to the environment and support for arguments limiting the coastal state in passing laws hampering innocent passage is found in Art.15 of the Convention and to some extent in the *Corfu Channel Case* [1949] I.C.J. 4.

[20] *Third United Nations Conference on the Law of the Sea* (1975), Official Records, vol.II, 317.

[21] Colombos, *The International Law of the Sea* 6th ed. (1967), 47.

> may be stated thus: All those things which have been so constituted by nature that, even when used by a specific individual, they nevertheless suffice for general use by other persons without discrimination, retain today and should retain for all time that status which characterized them when first they sprang from nature... . In the precepts of the law of nations, too, such things are described as 'public', that is to say, as the common possession of all men and the private possession of none. Air falls into this class for two reasons: first, because it is not possible for air to be made subject to occupancy; secondly, because all men have a common right to the use of air. For the same reasons, the sea is an element common to all, since it is so vast that no-one could possibly take possession of it and since it is fitted for use by all with reference to purposes of navigation and to purposes of fishing as well.[22]

For centuries, the concept of the freedom of the high seas expounded by Grotius and supported by other jurists[23] was the premise upon which international law respecting the use, transit and nationality of vessels was developed. Exempt from the claims of all nations, the high seas became *res communis,* the property of all states, available to all for purposes of navigation, fishing, laying of submarine cables and overflight.[24]

The corollary of the freedom of navigation on the high seas is the right of all states to sail their vessels without hindrance or restriction. As stated by Sir William Scott in the *Le Louis* case:

> [A]ll nations being equal, all have equal right to the uninterrupted use of the unappropriated parts of the ocean for their navigation: in places where no local authority exists, where the subjects of all states meet upon a footing of entire equality and independence, no one state, or any of its subjects, has a right to assume or exercise authority over the subjects of another.[25]

Freedom of navigation has thus been the cornerstone of international law on the rights and obligations of states regarding both the use of the seas by their maritime vessels and the manner in which such vessels are to be legally identified with particular states. Freedom of navigation is, in turn, the basis for the development of the modern phenomenon of flag of convenience jurisdictions.

While legal theories have posited that vessels on the high seas were, in a juridical sense, floating portions of the state to which

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[22] Grotius, *De Jure Praedae* (1950), Williams (trans.), ch.XII, 230-31. This chapter entitled "Commentary on the Law of Prize and Booty" is sometimes referred to as the *Mare Librum* treatise.

[23] *Le Louis* [1817] 2 Dods. 210.

[24] These rules of customary international law have been codified in Art.2 of the 1958 Geneva Convention on the High Seas, U.N. Doc. A/CONF.131/53 and Corr. 1, 450 U.N.T.S. 82.

[25] *Supra,* note 23, 243.

they belonged,[26] this fiction has now been abandoned[27] in favour of a more functional approach:

> [T]hat there is an intimate connection between the ship and the State whose nationality she acquires which carries with it the application to the ship of the laws of the flag-State. It is under these laws that the captain exercises his authority and enforces it. The ship may be a chattel, a piece of moveable property, but she is governed by special laws and her independence, while on the high seas, from any control other than that of the authorities of the flag-State, is universally recognized. It is not necessary to speak of her as territory.[28]

Evidence of the "intimate connection" between the state and the vessel is the flag which the vessel is required to fly. All vessels must carry a flag as *prima facie* evidence of their nationality. As Reinow states:

> The entire legal system which states have evolved for the regulation of the use of the high seas is predicated on the possession by each vessel of a connection with a state having a recognized flag. This connection has been commonly called nationality.[29]

The logical, legal implication of the right of all states to allow their vessels to sail on the high seas is the corresponding discretion of states to determine the conditions under municipal law which apply to the grant of the right to fly its flag, a matter determined to be within the exclusive competence of the state by the Permanent Court of Arbitration in the *Muscat Dhows* case.[30] In that case, Britain challenged the right of France to issue to subjects of Muscat registration documents authorizing them to fly the French flag. The Court held that "generally speaking it belongs to every sovereign to decide to whom he will accord the right to fly his flag and to prescribe the rules governing such grants".[31] This view was restated by the United States Supreme Court in *Lauritzen* v. *Larsen*.[32]

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[26] *The S.S. Lotus* (1927) P.C.I.J., ser. A, no 10. In that case, involving a collision between a French and a Turkish ship on the high seas and the subsequent arrest and trial of the French captain by Turkish authorities, the Court said, at p.25: "A corollary of the principle of the freedom of the seas is that a ship on the high seas is assimilated to the territory of the state the flag of which it flies, for, just as in its own territory, that state exercises its authority upon it and no other state may do so."

[27] *Chung Chi Cheung* v. *The King* [1939] A.C. 160 (P.C.).

[28] Colombos, *supra*, note 21, 288. See also O'Connell, *International Law* 2d ed. (1970), vol.2, 604-606.

[29] Reinow, *Nationality of a Merchant Vessel* (1937), 13-14.

[30] *The Hague Court Reports* (1916), Scott (ed.), 93.

[31] *Ibid.*, 96.

[32] 345 U.S. 571 (1952).

Controversy remains among jurists as to whether the freedom to fix conditions for the grant of nationality to a vessel was, or indeed should be, as unrestricted and exclusive as the Permanent Court of Arbitration seemed to indicate. It has been suggested that the necessary degree of certainty and precision in identification of the national character of vessels, and hence the peaceful use of seas, can only be assured by giving states virtually exclusive unilateral competence to confer nationality upon vessels.[33] However others have argued that such unrestricted freedoms are incompatible with the interests of the international community as a whole, contributing to the use of flag of convenience registrations[34] and to the subjection of the community to conflicting or inadequate national laws and policies with respect to vessel standards.

Liberals versus conservatives

Attack on the traditional view of unrestricted state competence regarding vessel registration began with the efforts of the Institute of International Law. At the 1896 meeting, an attempt was made to achieve a greater degree of similarity among the laws of various states. The Institute accepted the current doctrine of the states' freedom as a general rule, but recognized the possibility that if nationality were granted without taking into account some basic rules of international law, there could be cases where the legislation of a state would be ineffective vis-à-vis other states and possibly not acknowledged by them. The solution proposed by the Institute was to formulate precise conditions in which a state could grant nationality to a vessel.[35]

The next and most significant development in the attempt to alter the state of international law and practice began with the work of the International Law Commission in its consideration of

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[33] See McDougal, Burke and Vlasic, *The Maintenance of Public Order at Sea and the Nationality of Ships* (1960) 54 Am.J.Int'l L. 25. This principle was followed in *Lauritzen* v. *Larsen, supra,* note 32.

[34] See Watts, *The Protection of Merchant Ships* (1957) 33 Brit.Yb.Int'l L. 52, 53: "[T]he unilateral action taken by a State in regard to the nationality of its ships has important international consequences. Even more than with the conferment of nationality on individuals, the conditions on the fulfilment of which the registration of a ship depends are often unrelated to any considerations of a genuine link with the particular State, but are dictated by the demands of national commercial policy. The 'paper nationality' which a ship may obtain by registration should not *per se* be sufficient to form the basis of protection: a more direct and effective link must be sought."

[35] Boczek, *supra,* note 1, 209-15.

the regime of the high seas in 1950,[36] work which eventually formed the basis for the 1958 diplomatic conference which adopted the four Geneva Conventions on the Law of the Sea. In his first report to the International Law Commission on the Regime of the High Seas, J.P.A. François, the Special Rapporteur, referred to the 1896 report of the International Law Institute:

> L'attribution aux navires de mer d'une identité et d'une nationalité est le corollaire du principe du libre usage de la haute mer. D'une façon générale, il appartient à tout Etat souverain de décider à qui il accordera le droit d'arborer son pavillon et de fixer les règles auxquelles l'octroi de ce droit sera soumis. Toutefois, pour être en toutes circonstances efficace, il faut que la législation d'un Etat sur cette matière ne s'écarte pas trop des principes qui ont été adoptés par le plus grand nombre des Etats et qui peuvent de ce fait même être considérés comme formant à cet égard un élément du droit international.[37]

Although there was lack of unanimity among members of the International Law Commission concerning the desirability of limiting traditional doctrine with respect to flag-state freedoms, the majority followed the approach of the Special Rapporteur.[38] In its presentation of provisional articles to the General Assembly of the United Nations in 1955, the Commission proposed a series of conditions respecting vessel registration which not only restrained traditional freedoms but provided that these conditions would be a requisite for recognition of the vessel's national character by other states.[39] In its commentary on the draft provisions, the Commission concluded:

> [W]ith regard to the national element required for permission to fly the flag, a great many systems are possible; but there must be a minimum

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[36] See Boczek, *ibid.*, 215-32.

[37] [1950] Yb.Int'l L.Comm'n., 38.

[38] Boczek, *supra*, note 1, 220.

[39] Art.5 of the provisional articles concerning the regime of the high seas, (1955) 2 Yb.Int'l L.Comm'n. 22, states:

> "Each State may fix the conditions for the registration of ships in its territory and the right to fly its flag. Nevertheless, for purposes of recognition of its national character by other States, a ship must either:
> 1. Be the property of the State concerned; or
> 2. Be more than half owned by:
> (a) Nationals of or persons legally domiciled in the territory of the State concerned and actually resident there; or
> (b) A partnership in which the majority of the partners with personal liability are nationals of or persons legally domiciled in the territory of the State concerned and actually resident there; or
> (c) A joint stock company formed under the laws of the State concerned and having its registered office in the territory of that State."

> national element, since control and jurisdiction by a state over ships flying its flag can only be effectively exercised where there is in fact a relationship between the state and the ship other than that based on a mere registration.[40]

In its report of the following year, however, the Commission reformulated the provisional articles previously tabled. Instead of a series of conditions relating to the grant of nationality to a vessel, the Commission presented a general principle (reflected in Article 29) based upon the new and soon-to-be-controversial "genuine link" approach.[41] Article 29 began with the recognition of freedom of the seas:

> 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.

However, the new Article went on to state:

> Nevertheless, 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.

The genuine link concept provoked great controversy at the 1958 Geneva Conference on the Law of the Sea, with the flag of convenience states vehemently opposing the International Law Commission formulation.[42] In final adoption in plenary session at the Conference the first two sentences of the above formulation were accepted but the non-recognition clause in Article 29 was removed. As adopted by the Conference, Article 5 of the 1958 Convention on the High Seas[42a] provides:

> 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.

The inclusion of the genuine link principle in the 1958 Convention has resulted in considerable debate among jurists. It has

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[40] *Ibid.*

[41] [1956] 2 Yb.Int'l L.Comm'n, 278. Referring to the 1955 provisional articles, the Commission states, *ibid.*, 279, that "after examining the comments of Governments [it] felt obliged to abandon this viewpoint" because state practice was too divergent to postulate universal conditions. "The Commission accordingly thought it best to confine itself to enunciating the guiding principle that, before the grant of nationality is generally recognized, there must be a genuine link between the ship and the State granting permission to fly its flag. The Commission does not consider it possible to state in any greater detail what form this link should take."

[42] For a complete account of the discussions at the 1958 Conference, see Boczek, *supra*, note 1, ch.IX.

[42a] 450 U.N.T.S. 82.

been argued not only that the "link" principle is counter to international law, but also that the principle "if adopted and interpreted as some suggest might introduce vast and costly uncertainties into the simple, rational inherited system".[43] Such uncertainties were due in part to the failure of the Conference to specify what ingredients were to make up the "genuine link", but, more importantly, to the fact that the 1958 Convention leaves unspecified such vital matters as who is to apply the requirements and what sanctions would apply in the event of failure to conform.[44] Central to the criticisms of Article 5 have been arguments that (i) the Commission greatly exaggerated the degree of accord among nations on the application of the genuine link principle and erred in its assumption that the requirement of a nationality link between ship and flag constituted customary international law[45] and that (ii) the Commission over-extrapolated the *Nottebohm* decision[46] in its attempt to apply the ratio of that case (which dealt with the competence of states to confer nationality on individuals) to the question of the duties and obligations of states with respect to the nationality of vessels.[47]

Opponents of the genuine link principle, not the least of whom were representatives of the major flag of convenience states,[48] found some support for their criticisms of the Commission's draft articles and Article 5 of the Convention in the opinion of the International Court of Justice in the *IMCO* dispute of 1960.[49] The dispute centered on the interpretation to be given to Article 28 of the IMCO Convention[50] which determined the make-up of the important IMCO

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[43] McDougal, Burke and Vlasic, *supra*, note 33, 28.

[44] *Ibid.* See also, McDougal and Burke, *The Public Order of the Oceans* (1965), 1013; Boczek, *supra*, note 1, 284.

[45] Together with McDougal, Burke and Vlasic, *supra*, note 33, and McDougal and Burke, *supra*, note 44, see Vinar, *Effect of the "Genuine Link" Principle of the 1958 Geneva Convention on the National Character of a Ship* (1960) 35 N.Y.U.L.Rev. 1049, 1059.

[46] [1955] I.C.J. 4.

[47] To quote McDougal, Burke and Vlasic, *supra*, note 33, 39: "To derive from applications of criteria of this type to the competence of states to confer nationality upon individuals, principles assumed to be relevant to limiting the competence of states to attribute nationality to ships is, if not an exercise in irrelevancy, certainly a disguised mode of stating that because certain limits have been imposed on states with respect to individuals for some problems, other limits ought to be imposed with respect to ships for other problems."

[48] See Boczek, *supra*, note 1, 256.

[49] *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization* [1960], I.C.J. 150.

[50] 289 U.N.T.S. 3.

Maritime Safety Committee on the basis of, *inter alia,* "those nations having an important interest in maritime safety, *of which not less than eight shall be the largest shipowning nations*" (emphasis added).[51] States opposed to flag of convenience jurisdictions took the position that the term "largest shipowning nations" was not synonymous with the eight states with the greatest registered tonnage.[52] According to the Court, however, the foregoing phrase should be interpreted in accordance with its ordinary meaning and, as a consequence, those states with the largest registered tonnage were eligible for election to the Committee in accordance with the Convention.[53] The implication of this decision could be, therefore, that the test of registered tonnage is the only one by which the size of a shipowning nation should be determined. Nevertheless, although it has been claimed that the opinion could have general application,[54] it is doubtful that it supports more than the literal interpretation of Article 28(a) of the IMCO Convention.

Proponents of the genuine link theory have been of the view that it provides a means of bringing order to an international situation which, based as it now is on the unrestricted freedom to register vessels, could ultimately lead to international conflict.

According to many of its defenders, the acceptability of the genuine link should depend on its utility in protecting broader community interests by bringing a measure of order, and protection, to the uses of the seas. Speaking in his capacity as Expert to the 1958 Geneva Conference and as Rapporteur of the International Law Commission, Professor François succinctly outlined the real concern of the international community:

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[51] Art.28(a) of the IMCO Convention reads as follows: "The Maritime Safety Committee shall consist of fourteen Members elected by the Assembly from the Members, governments of those nations having an important interest in maritime safety, of which not less than eight shall be the largest ship-owning nations, and the remainder shall be elected so as to ensure adequate representation of Members, governments of other nations with an important interest in maritime safety, such as nations interested in the supply of large numbers of crews or in the carriage of large numbers of berthed and unberthed passengers, and of major geographical areas."

[52] *Supra,* note 49, 166 *et seq.*

[53] *Ibid.,* 171:."The Court having reached the conclusion that the determination of the largest ship-owning nations depends solely upon the tonnage registered in the countries in question, any further examination of the contention based on a genuine link is irrelevant for the purpose of answering the question which has been submitted to the Court for an advisory opinion."

[54] Boczek, *supra,* note 1, 155.

> [A] system under which any state can grant its flag to all ships applying for it is in fact the acme of freedom. That conception of freedom is, however, incompatible with the interests of the international community .... If [the genuine] link no longer exists, the entire system collapses, and a situation will arise on the high seas which some may regard as the ideal state of freedom, but which others ... regard as contrary to a sound conception of the freedom of the seas and hence to the interests of the international community.[55]

This point of view has been echoed by others who have also argued in favour of a strong element of national ownership.[56] Some have argued that the transposition of the genuine link principle of the *Nottebohm* case to the determination of the nationality of ships is fully justified and that, while arguments can be offered on both sides as to whether Article 5 of the Convention is *lex lata*, it is likely that the International Court of Justice would sustain the application of the link theory to the nationality of ships.[57]

The elements inherent in the genuine link requirement of Article 5 of the Convention are made more specific by the additional phrase in paragraph 1 that "in particular, the state must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag". The addition of this phrase has been criticized, however, as importing no meaningful elaboration of the link, and as offering additional undefined (and not necessarily supplementary) criteria for ensuring national control of vessels.[58] Whether or not this is the case, the inclusion of these requirements in Article 5 (as with the proposals for Article 34 of the 1956 draft articles)[59] is aimed at providing some measure of international uniformity and control over the widespread dangers to maritime safety which were perceived as resulting in part from the existence of flag of convenience jurisdictions.[60] Both provisions should be

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[55] Quoted in Bowett, *The Law of the Sea* (1967), 150.

[56] Watts, *supra*, note 34, although Watts' position has been criticized, principally because of his reliance on the *Nottebohm* case, *supra*, note 46. See McDougal, Burke and Vlasic, *supra*, note 33, 37.

[57] Jessup, *The United Nations Conference on the Law of the Sea* (1959) 59 Colum.L.Rev. 234, 256.

[58] McDougal, Burke and Vlasic, *supra*, note 33, 28.

[59] Now Art.10 of the 1958 Convention on the High Seas, 450 U.N.T.S. 82.

[60] In its commentary, *supra*, note 41, 280, the Commission stated: "Regulations concerning the construction, equipment and seaworthiness of ships, and the labor conditions of crews, can contribute much to the safety of navigation. Objections to the transfer of ships to another flag have often been accentuated by the fact that such regulations, and an effective control over their application, were lacking in the State of the new flag."

read together in analysing the present state of the law in this regard. Article 10 of the Convention, based upon the International Law Commission draft Article 34, provides:

1. Every State shall take such measures for ships under its flag as are necessary to ensure safety at sea with regard *inter alia* to:
   (a) The use of signals, the maintenance of communications and the prevention of collisions;
   (b) The manning of ships and labour conditions for crews taking into account the applicable international labour instruments;
   (c) The construction, equipment and seaworthiness of ships.
2. In taking such measures each State is required to conform to generally accepted international standards and to take any steps which may be necessary to ensure their observance.

The degree to which the genuine link principle in Article 5 and the safety of navigation provisions in Article 10 have had the effect of reducing the abuses which flag of convenience jurisdictions were seen to represent is impossible to say. Neither Panama nor Liberia are parties to the 1958 Convention. It is interesting, nevertheless, that these two most important flag of convenience jurisdictions supported the principle underlying Article 10 as not inconsistent with their national objectives although, because of the effect that the genuine link requirement in Article 5 would have had on their economies by reducing vessel registrations, these same states remained vehemently opposed to this concept. In addition, there is some evidence that, having become party to other international treaties, certain flag of convenience jurisdictions have passed legislation intended to fulfil certain of the requirements of Article 10 of the Convention, although it is impossible to say whether those states have satisfied the requirement that national laws conform to "generally accepted international standards", in accordance with Article 10(2). Beyond the foregoing generalizations, it would appear difficult to determine the effect of either the genuine link principle or the maritime safety provisions of the Convention on the problem of flags of convenience. Since neither Liberia nor Panama, *inter alia*, have become parties to the Convention, there are no data on attempts by third states to require application of the Convention by these or other flag of convenience states.

Developments at the Third Law of the Sea Conference

The issues raised by recent maritime disasters involving flag of convenience vessels are multi-dimensional. At stake is the broad community interest in ensuring against uncontrolled registration and the deployment of unseaworthy vessels with the attendant risk

of marine pollution incidents. To a degree, the genuine link concept was envisaged, by both its proponents and subsequent supporters, as one means of dealing with the problem, although the impetus behind the adoption of the *Nottebohm* approach was as much directed to ensuring a measure of state responsibility for acts done by its vessels and to unifying divergent national laws regarding vessel registration as it was to protect the marine environment.

As has been illustrated, opponents have claimed that the genuine link principle, as applied to maritime law in Article 5 of the 1958 Convention, has no foundation in either international law or in state practice. Additional arguments have been raised regarding its inherent vagueness and ambiguity. Commercial interests, as well, would militate against restricted use of foreign flag registrations because of the manifold economic advantages normally offered by flag of convenience jurisdictions. If it were universally binding, Article 5 would inevitably restrict the utilization of these registries by requiring, at the very least, some measure of corporate activity in the state of registry, including possibly a degree of local participation in the ownership of the registering company. Whether of itself corporate activity of sufficient degree to ensure a "link" with the state of registry would improve vessel safety and help safeguard the marine environment remains speculative. For this and for many of the other reasons cited above, there are strong doubts as to the efficiency of the genuine-link approach as the prime instrument in helping to ensure the ultimate objective of protecting the world community against the risks posed by unseaworthy vessels. Thus other approaches, taking into account both flag state obligations and coastal state interests, must be considered in attempts to deal with this issue.

Strengthened flag state obligations are outlined in Article 10 of the 1958 Convention as well as, perhaps, the "in particular" phrase in Article 5(1); both are directed toward ensuring the application of local laws over vessels registered in a particular state with respect to safety at sea.[61] The support given at the 1958 Law of the Sea Conference to the provisions of Article 10 by certain flag of convenience states and the acceptance by these same states of certain existing maritime conventions is some evidence, at least, that there is no necessary inconsistency between opposition to a strengthened link between vessel and state of registry and accept-

[61] However, the requirement in Art.5(1) that "in particular, the State must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag" is not necessarily to require such "jurisdiction and control" directed to ensuring safety at sea.

ance by the flag state of greater responsibilities in regulating matters pertaining to vessel design, construction, manning and equipment. Apart from its lack of universal acceptance, the inherent ambiguities in the genuine link requirement as a rule of law lead to the conclusion that increased flag state obligations in the realm of safety at sea may be a more efficacious way of dealing with modern challenges regarding the use of the oceans and in particular maritime safety and environmental protection. The trend toward increased flag state obligations beyond those imposed under the 1958 Convention have been strongly evident at the recent sessions of the Third United Nations Law of the Sea Conference.

The genuine link requirement has been included in Article 91 of the Informal Composite Negotiating Text (ICNT)[62] of July 15, 1977, which emerged from the recently concluded sixth session of the Conference, held in New York from May 23 to July 15, 1977. It is interesting to note that Article 91 is identical to Article 5 of the 1958 Convention, except for the deletion of the last phrase of paragraph (1) — the "in particular..." phrase. The latter has been inserted in Article 94, the ICNT equivalent of Article 10 of the 1958 Convention.[63] Article 94,[64] entitled *Duties of the flag States*, provides for: (i) the duty of every flag state to exercise "jurisdiction and control" over administrative, technical and social matters; (ii) flag state obligations with respect to safety at sea — an elaboration of the three categories of safety requirements contained in Article 10 of the 1958 Convention; (iii) an element of sanction by requiring the flag state to investigate and take appropriate action regarding any matter where it is claimed that such "jurisdiction and control" has been lacking; and, significantly, (iv) the requirement that the flag state investigate every marine casualty or incident of navigation on the high seas causing loss of life or serious injury or serious damage to the marine environment.

The objective of Article 94 is to elaborate the duties of the flag state in comprehensive fashion with respect to overseeing the

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[62] A/CONF.62/W.P. 10, July 15, 1977.

[63] The relevant articles are set out in Appendix "A", *infra*.

[64] The origin of Art.94 is found in a series of draft provisions introduced at the third session of the Conference by certain European states: A/CONF.62/C.2/L.54, Aug. 17, 1974, contained in *Third United Nations Conference on the Law of the Sea, supra*, note 20, vol.III, 229. As stated by France when introducing the draft on behalf of itself, Belgium, Denmark, FGR, Ireland, Italy, Luxembourg, Netherlands and the U.K., the object was to "state precisely the obligations of the flag state since the relevant articles of the Geneva Convention (*i.e.*, Articles 5 and 10) were incomplete".

management of its vessels. To the extent that the obligations elaborated in Article 94 are opposable to flag states in the event of a binding treaty, they may offer a more practical means of protecting the marine environment and ensuring safety at sea than an attempt to spell out more precisely the ingredients of the genuine link. Yet in the views of some, over-emphasis of flag state jurisdiction in the ICNT is not the only or the most effective method of dealing with flags of convenience jurisdictions and the dangers that certain of their vessels pose to the international community.

Apart from the duties of the flag state in Article 94 with respect to maritime safety and administrative, technical and social matters over ships flying its flag, Article 218[65] of the ICNT places additional enforcement obligations on the flag state to ensure "compliance with applicable international rules and standards established through the competent international organization or general diplomatic conference" in controlling pollution of the marine environment. Vessels which do not comply with such rules and standards may be prevented by the flag state from sailing or may be subject to criminal or civil proceedings initiated by the flag state. Article 212[66] requires flag states to pass national laws to prevent marine pollution which "shall at least have the same effect as that of generally accepted international rules and standards". However uncertain the phrase "generally accepted international rules and standards" may appear to be, it would at least seem to import obligations pursuant to the general duties of flag states regarding administrative, technical and social matters as well as safety at sea under Article 94 of the ICNT. The phrase would also import more specific flag state obligations than the general ones set out in Article 94, contingent on the ability of international organizations such as IMCO to agree on applicable rules and standards aimed at ensuring seaworthy vessels.

The efforts to establish meaningful flag state obligations in this regard and to improve upon the more generally-drafted provisions in the 1958 Convention are commendable. The limitations of this approach as the only solution to the flag of convenience problem, however, are all too evident. For example, the requirement under Article 212 that the laws of flag states "shall at least have the same effect" as that of "generally accepted international rules and standards established through the competent international organization or general diplomatic conference" and the corresponding

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[65] See Appendix "A", *infra*.
[66] *Ibid.*

obligation to enforce such laws under Article 218 raise serious problems of interpretation. What does the phrase "generally accepted international rules and standards" mean? If "generally accepted" means, as some contend, rules set down under a treaty which is in force, the present effect would be to require, for example, flag states to pass laws giving effect to the provisions in the International Convention for the Prevention of Pollution of the Sea by Oil, 1954,[67] which is in force; however, similar action would not be required with respect to the International Convention for the Prevention of Pollution from Ships, 1973, because the latter, which sets higher environmental protection standards and is to supersede the 1954 Convention, is not yet in force. Thus, the absence of internationally accepted standards enshrined in an international treaty currently in force limit the obligations of the flag state and thus reduce the efficacy of the concept of the flag state jurisdiction as embodied in the ICNT. Furthermore, there is a problem with respect to international rules or standards regarding vessel-source pollution embodied in treaties which may be in force but to which a particular flag state is not a party. In such a case, do the obligations contained in Articles 212 and 218 apply? The answer is not clear. Moreover, to preserve their freedom of action, flag states may not wish to become parties to a comprehensive law of the sea treaty that could potentially impose on them precise international obligations to enact domestic legislation which might not be in their interests.

The series of recent oil spills involving flag of convenience oil tankers and the risks which such disasters pose to the environment of coastal states have helped to illustrate the extent to which such incidents affect community interests. Given the extent of coastal state and flag state interests, it would seem to follow that the development of international law should provide recognition of the interrelationship between these competing, but not necessarily irreconcilable, concerns. Thus, ideally, any new law of the sea treaty should ensure a balance between the rights and obligations of the flag state with respect to the registration, internal management and regulation of its vessels consistent with the principle of freedom of the high seas, and those of the coastal state with respect to the preservation of its coastal environment, including, under appropriate circumstances, the right to take specific action regarding vessels in its territorial sea or perhaps beyond.[68] However, while the posi-

[67] 327 U.N.T.S. 3.

[68] Legault, *The Freedom of the Seas: A Licence to Pollute?* (1971) 21 U.of T.L.J. 210, 218.

tion of flag states as prime instruments in enforcing pollution prevention and maritime safety standards has been reflected in the ICNT, even to the extent, as in Article 94, of requiring national laws in the absence of generally accepted rules or standards, the rights of coastal states in protecting the coastal environment seem to have been given less prominence. This limitation arises in part because although coastal states can establish national laws for the prevention, reduction and control of marine pollution from vessels under appropriate provisions in the draft treaty, such laws must not hamper innocent passage of foreign vessels in the territorial sea, in accordance with Article 212(3). Article 212(3) is cross-referenced to Part II of the ICNT and under Article 21 of Part II, which sets out the permissible scope of laws and regulations of the coastal state relating to innocent passage, coastal states are not empowered to pass laws regulating design, construction, manning and equipment standards of foreign vessels unless they give effect to "generally accepted rules or standards", a limitation which restricts coastal states even beyond their implicit powers under the 1958 Convention on the Territorial Sea and Contiguous Zone.[69] The latter provides in Article 1 that "the sovereignty of a state extends beyond its land territory and its internal waters to a belt of sea adjacent to its coast, described as the territorial sea".[70] Thus, under the ICNT, coastal states may establish national laws regulating vessel traffic in their territorial sea, including the right to inspect and, if necessary, arrest vessels.[71] They are, however, limited to adopting laws that incorporate only "generally accepted" rules or standards in the territorial sea regarding design, construction, manning and equipment of foreign vessels, elements which are key components

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[69] U.N.Doc.A/CONF.13/L.52, Apr. 28, 1958.

[70] Art.14 of the 1958 Convention defines innocent passage through the territorial sea as passage "not prejudicial to the peace, good order or security of the coastal state" and requires such passage to be in accordance with the Convention "and with other rules of international law". While it has not been settled as to whether "peace, good order or security" include serious threats to the environment, the powers of the coastal state in requiring national standards respecting design, construction, manning and equipment to be complied with by vessels sailing through its territorial sea as a basis for maintaining its "peace, good order or security" has not been specifically foreclosed by the 1958 Convention, as it has in Art.21 of the ICNT. See *supra*, note 19. Article 17 of the 1958 Convention also requires foreign ships to "comply with the laws and regulations enacted by the coastal state in conformity with these articles and other rules of international law, and in particular, *with such laws and regulations relating to transport and navigation*" (emphasis added).

[71] ICNT, art.221(2).

in laws designed to deal with vessel-source pollution. Within the 200-mile exclusive economic zone,[72] coastal states are clothed with even less power; under the ICNT a coastal state can only pass laws "giving effect" to "generally accepted international rules and standards".[73] It follows that coastal states are not empowered to set national standards in the territorial sea (respecting vessel design, construction, manning or equipment) or in the 200-mile exclusive economic zone (regarding the prevention, reduction and control of pollution from vessels) in the absence of generally accepted international rules and standards which, in turn, must be first established through the competent international organization or general diplomatic conference.

Enforcement powers of coastal states, as distinct from law-making powers, appear equally circumscribed under Article 221 of the ICNT.[74] Proceedings against vessels voluntarily within a port or at an offshore terminal of a state may be instituted with respect to pollution incidents occurring either in the territorial sea or exclusive economic zone of that state, but only to the extent that such vessel has violated national laws or applicable international standards. Such "national laws" as has been pointed out above, cannot hamper innocent passage in the territorial sea and, with respect to the exclusive economic zone, coastal states can only pass pollution control legislation "conforming to and giving effect to generally accepted international rules and standards established through the competent international organization or general diplomatic conference". With respect to a vessel not within a port or at an offshore terminal, the coastal state may undertake physical inspections and, may in certain cases arrest and take proceedings against polluting vessels — subject to relevant provisions respecting expediting proceedings and the prompt release of vessels and provided that innocent passage through the territorial sea has not been hampered and also that, with respect to violations in the exclusive economic zone, the violation has been in respect of applicable international

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[72] ICNT, Art.55, defines the exclusive economic zone as "an area beyond and adjacent to the territorial sea subject to the specific legal regime established in this Part, under which the rights and jurisdictions of the coastal state and the rights and freedoms of other states are governed by the relevant provisions of the present Convention".

[73] ICNT, Art.212(4).

[74] See Appendix "A", *infra.*

rules or standards. Again, the limitations on coastal states in the absence of "generally accepted" international rules are obvious.[75]

On the assumption that coastal state regulation provides an effective means of ensuring against pollution incidents resulting from the use of unseaworthy or improperly manned vessels, the limitations in the new law of the sea treaty could prove to be unfortunate restraints where "generally accepted international rules or standards" are either inadequate or non-existent. Moreover, even strengthened control of flag states under the ICNT provisions (or under an eventual treaty) is prejudiced by the existence and continuing growth of flag of convenience jurisdictions which have neither the power nor the administrative machinery to impose national or international regulations nor indeed the desire to control the registering companies themselves.[76] Thus, while extending flag state powers and obligations under an international treaty is one method of providing a measure of safeguard against the risks entailed in present day flag of convenience registration practice, given the limitations in the foregoing approach, a second, and perhaps more effective though complementary approach, would be to extend coastal state jurisdiction and to remove the present limitations in the ICNT respecting coastal state legislative competence to establish standards in the territorial sea and coastal state enforcement powers in the economic zone.[77] If this latter approach were combined with

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[75] An additional problem area in the ICNT is the provision contained in Art.229 with respect to suspension of proceedings by the coastal state if within 6 months of commencement of those proceedings, the flag state has itself instituted similar proceedings to impose penalties. This provision for flag state pre-emption has been of concern to coastal states like Canada since it could have the effect of rendering coastal state powers illusory. Art.229 does provide, however, that flag state pre-emption cannot occur where the proceedings "relate to a case of major damage to the coastal state or the flag state in question has repeatedly disregarded its obligations to enforce effectively the applicable international rules and standards in respect of violations committed by its vessels".

[76] Lowe, *The Enforcement of Marine Pollution Regulations* (1975) 12 San Diego Rev. 624, 633.

[77] Additionally, it is important to note that apart from the port enforcement powers accorded coastal states under Art.221 of the ICNT in respect of its own territorial sea and economic zone as discussed in the text, *supra*, p.21, Art. 229 accords the coastal state powers of port enforcement with respect to certain types of violations occurring within the territorial sea or exclusive economic zone of another state or on the high seas, when, for example, the violation is likely to cause pollution to that coastal state. This attempt to "universalize" port state enforcement is another avenue to solving marine pollution dangers brought about by sub-standard vessels including those flying flags of convenience.

effective dispute settlement provisions in the law of the sea treaty, the result would not automatically lead to a diminution of the freedom of the high seas principle or be prejudicial to the unrestricted movement of ocean-borne commerce due to a plethora of divergent national regulations. On the contrary, such an approach could ensure that some measure of control and an element of sanction is brought to bear on expanding flag of convenience fleets, which, in themselves, are inimical to the maintenance of the high seas as *res communis* in the truest sense.

APPENDIX "A"

ARTICLE 91

Nationality of ships

1. 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.
2. Each State shall issue to ships to which it has granted the right to fly its flag documents to that effect.

ARTICLE 94

Duties of the flag States

1. Every State shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.
2. In particular every State shall:
   (a) Maintain a register of shipping containing the names and particulars of ships flying its flag, except those which are excluded from generally accepted international regulations on account of their small size; and
   (b) Assume jurisdiction under its internal law over each ship flying its flag and its master, officers and crew in respect of administrative, technical and social matters concerning the ship.
3. Every State shall take such measures for ships flying its flag as are necessary to ensure safety at sea with regard, *inter alia*, to:
   (a) The construction, equipment and seaworthiness of ships;
   (b) The manning of ships, labour conditions and the training of crews, taking into account the applicable international instruments;
   (c) The use of signals, the maintenance of communications and the prevention of collisions.
4. Such measures shall include those necessary to ensure:
   (a) That each ship, before registration and thereafter at appropriate intervals, is surveyed by a qualified surveyor of ships, and has on board such charts, nautical publications and navigational equipment and instruments as are appropriate for the safe navigation of the ship;
   (b) That each ship is in the charge of a master and officers who possess appropriate qualifications, in particular in seamanship, navigation,

communications, and marine engineering, and that the crew is appropriate in qualification and numbers for the type, size, machinery and equipment of the ship;

(c) That the master, officers and, to the extent appropriate, the crew are fully conversant with and required to observe the applicable international regulations concerning the safety of life at sea, the prevention of collisions, the prevention, reduction and control of marine pollution, and the maintenance of communications by radio.

5. In taking the measures called for in paragraphs 3 and 4 each State is required to conform to generally accepted international regulations, procedures and practices and to take any steps which may be necessary to secure their observance.
6. A State which has clear grounds to believe that proper jurisdiction and control with respect to a ship have not been exercised may report the facts to the flag State. Upon receiving such a report, the flag State shall investigate the matter and, if appropriate, take any action necessary to remedy the situation.
7. Each State shall cause an inquiry to be held by or before suitably qualified person or persons into every marine casualty or incident of navigation on the high seas involving a ship flying its flag and causing loss of life or serious injury to nationals of another State or serious damage to shipping or installations of another State or to the marine environment. The flag State and the other State shall co-operate in the conduct of any inquiry held by that other State into any such marine casualty or incident of navigation.

ARTICLE 212

Pollution from vessels

1. States, acting through the competent international organization or general diplomatic conference, shall establish international rules and standards for the prevention, reduction and control of pollution of the marine environment from vessels. Such rules and standards shall, in the same manner, be re-examined from time to time as necessary.
2. States shall establish laws and regulations for the prevention, reduction and control of pollution of the marine environment from vessels flying their flag or vessels of their registry. Such laws and regulations shall at least have the same effect as that of generally accepted international rules and standards established through the competent international organization or general diplomatic conference.
3. Coastal States may, in the exercise of their sovereignty within their territorial sea, establish national laws and regulations for the prevention, reduction and control of marine pollution from vessels. Such laws and regulations shall, in accordance with section 3 of Part II not hamper innocent passage of foreign vessels.
4. Coastal States, for the purpose of enforcement as provided for in section 6 of this Part of the present Convention, may in respect of their economic zones establish laws and regulations for the prevention, reduction and control of pollution from vessels conforming to and giving effect to generally accepted international rules and standards established through the competent international organization or general diplomatic conference.

5. Where international rules and standards referred to in paragraph 1 are inadequate to meet special circumstances and where coastal States have reasonable grounds for believing that a particular, clearly defined area of their respective exclusive economic zones is an area where, for recognized technical reasons in relation to its oceanographical and ecological conditions, as well as its utilization or [*sic*] the protection of its resources, and the particular character of its traffic, the adoption of special mandatory methods for the prevention of pollution from vessels is required, coastal States, after appropriate consultations through the competent international organization with any other countries concerned, may for that area, direct a communication to the competent international organization, submitting scientific and technical evidence in support, and information on necessary reception facilities. The organization shall, within twelve months after receiving such a communication, determine whether the conditions in that area correspond to the requirements set out above. If the organization so determines, the coastal State may, for that area, establish laws and regulations for the prevention, reduction and control of pollution from vessels, implementing such international rules and standards or navigational practices as are made applicable through the competent international organization for special areas. Coastal States shall publish the limits of any such particular, clearly defined area, and laws and regulations applicable therein shall not become applicable in relation to foreign vessels until fifteen months after the submission of the communication to the competent international organization. Coastal States, when submitting the communication for the establishment of a special area within their respective exclusive economic zones, shall at the same time, notify the competent international organization if it is their intention to establish additional laws and regulations for that special area for the prevention, reduction and control of pollution from vessels. Such additional laws and regulations may relate to discharges or navigational practices but shall not require foreign vessels to observe design, construction, manning or equipment standards other than generally accepted international rules and standards and shall become applicable in relation to foreign vessels 15 months after the submission of the communication to the competent international organization, and provided the organization agrees within twelve months after submission of the communication.

ARTICLE 218

Enforcement by flag States

1. States shall ensure compliance with applicable international rules and standards established through the competent international organization or general diplomatic conference and with their laws and regulations established in accordance with the present Convention for the prevention, reduction and control of pollution of the marine environment, by vessels flying their flag or vessels of their registry and shall adopt the necessary legislative, administrative and other measures for their implementation. Flag States shall provide for the effective enforcement of such rules, standards, laws and regulations, irrespective of where the violation occurred.
2. Flag States shall, in particular, establish appropriate measures in order to ensure that vessels flying their flags or vessels of their registry are

prohibited from sailing, until they can proceed to sea in compliance with the requirements of international rules and standards referred to in paragraph 1 for the prevention, reduction and control of pollution from vessels, including the requirements in respect of design, construction, equipment and manning of vessels.

3. States shall ensure that vessels flying their flags or of their registry carry on board certificates required by and issued pursuant to international rules and standards referred to in paragraph 1. Flag States shall ensure that their vessels are periodically inspected in order to verify that such certificates are in conformity with the actual condition of the vessels. These certificates shall be accepted by other States as evidence of the condition of the vessel and regarded as having the same force as certificates issued by them, unless there are clear grounds for believing that the condition of the vessel does not correspond substantially with the particulars of the certificates.
4. If a vessel commits a violation of rules and standards established through the competent international organization or general diplomatic conference, the flag State, without prejudice to articles 28, 30 and 38 shall provide for immediate investigation and where appropriate cause proceedings to be taken in respect of the alleged violation irrespective of where the violation occurred or where the pollution caused by such violation has occurred of [*sic*] has been spotted.
5. Flag States may seek in conducting investigation of the violation the assistance of any other State whose co-operation could be useful in clarifying the circumstances of the case. States shall endeavour to meet the appropriate request of flag States.
6. Flag States shall, at the written request of any State, investigate any violation alleged to have been committed by their vessels. If satisfied that sufficient evidence is available to enable proceedings to be brought in respect of the alleged violation, flag States shall without delay cause such proceedings to be taken in accordance with their laws.
7. Flag States shall promptly inform the requesting State and the competent international organization of the action taken and its outcome. Such information shall be available to all States.
8. Penalties specified under the legislation of flag States for their own vessels shall be adequate in severity to discourage violations wherever the violations occur.

ARTICLE 221

Enforcement by coastal States

1. When a vessel is voluntarily within a port or at an off-shore terminal of a State, that State may, subject to the provisions of section 7 of this Part of the Convention cause proceedings to be taken in respect of any violation of national laws and regulations established in accordance with the present Convention or applicable international rules and standards for the prevention, reduction and control of pollution from vessels when the violation has occurred within the territorial sea or the exclusive economic zone of that State.
2. Where there are clear grounds for believing that a vessel navigating in the territorial sea of a State has, during its passage therein, violated

national laws and regulations established in accordance with the present Convention or applicable international rules and standards for the prevention, reduction and control of pollution from vessels, that State, without prejudice to the application of the relevant provisions of section 3 of Part II may undertake physical inspection of the vessel relating to the violation and may, when warranted by the evidence of the case, cause proceedings, including arrest of the vessel, to be taken in accordance with its laws, subject to the provisions of section 7 of this Part of the present Convention.

3. Where there are clear grounds for believing that a vessel navigating in the exclusive economic zone or the territorial sea of a State has, in the exclusive economic zone, violated applicable international rules and standards or national laws and regulations conforming and giving effect to such international rules and standards for the prevention, reduction and control of pollution from vessels, that State may require the vessel to give information regarding the identification of the vessel and its port of registry, its last and next port of call and other relevant information required to establish whether a violation has occurred.
4. Flag States shall take legislative, administrative and other measures so that their vessels comply with requests for information as set forth in paragraph 3.
5. Where there are clear grounds for believing that a vessel navigating in the exclusive economic zone or the territorial sea of a State has, in the exclusive economic zone, violated applicable international rules and standards or national laws and regulations conforming and giving effect to such international rules and standards for the prevention, reduction and control of pollution from vessels and the violation has resulted in a substantial discharge into and, insignificant pollution of, the marine environment, that State may undertake physical inspection of the vessel for matters relating to the violation if the vessel has refused to give information or if the information supplied by the vessel is manifestly at variance with the evident factual situation and if the circumstances of the case justify such inspection.
6. Where there are clear grounds for believing that a vessel navigating in the exclusive economic zone or the territorial sea of a State has, in the exclusive economic zone, committed a flagrant or gross violation of applicable international rules and standards or national laws and regulations conforming and giving effect to such international rules and standards for the prevention, reduction and control of pollution from vessels, resulting in discharge causing major damage or threat of major damage to the coastline or related interests of the coastal State, or to any resources of its territorial sea or exclusive economic zone, that State may, subject to the provisions of Section 7 of this Part of the Convention provided that the evidence so warrants, cause proceedings to be taken in accordance with its laws.
7. Notwithstanding the provisions of paragraph 6, whenever appropriate procedures have been established either through the competent international organization or as otherwise agreed, whereby compliance with requirements for bonding or other appropriate financial security has been assured, the coastal State if bound by such procedures shall allow the vessel to proceed.

8. The provisions of paragraphs 3, 4, 5, 6 and 7 shall apply correspondingly in respect of national laws and regulations established pursuant to paragraph 5 of article 212.

ARTICLE 229

Suspension and restrictions on institution of proceedings

1. Proceedings to impose penalties in respect of any violation of applicable laws and regulations or international rules and standards relating to the prevention, reduction and control of pollution from vessels committed by a foreigu vessel beyond the territorial sea of the State instituting proceedings shall be suspended upon the taking of proceedings to impose penalties under corresponding charges by the flag State within six months of the first institution of proceedings,, unless those proceedings relate to a case of major damage to the coastal State or the flag State in question has repeatedly disregarded its obligations to enforce effectively the applicable international rules and standards in respect of violations committed by its vessels. The flag State shall in due course make available to the first State instituting proceedings a full dossier of the case and the records of the proceedings, whenever the flag State has requested the suspension of proceedings in accordance with the provisions of this Article. When proceedings by the flag State have been brought to a conclusion, the suspended proceedings shall be finally terminated. Upon payment of costs incurred in respect of sucli proceedings, any bond posted or other financial security provided in connexion with the suspended proceedings shall be released by the coastal State.
2. Proceedings to impose penalties on foreign vessels shall not be instituted after the expiry of a period of three years from the date on which the violation was committed, and shall not be taken by any State in the event of proceedings having been instituted by another State subject to the provisions set out in paragraph 1.
3. The provisions of this article shall be without prejudice to the right of the flag State to adopt any measures, including the taking of proceedings to impose penalties, according to its laws irrespective of prior proceedings by another State.

Interprétation et application des règles de conflit de lois en droit québécois

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I. INTRODUCTION

1 — Le droit international privé québécois, tout comme le droit civil, tire son origine de l'ancien droit français. Les règles de conflit de lois ont été succinctement codifiées dans les articles 6 à 8 C.c. qui s'inspirent de l'article 3 du Code Napoléon. Celui-ci prévoit que:

> Les lois de police et de sûreté obligent tous ceux qui habitent le territoire. Les immeubles, même ceux possédés par des étrangers, sont régis par la loi française. Les lois concernant l'état et la capacité des personnes régissent les Français, même résidant en pays étranger.

Les Codificateurs[1] en ont retiré les lois de police et de sûreté qui appartiennent à la compétence fédérale et ont comblé les lacunes quant aux meubles et à l'état et à la capacité de l'étranger. De plus, ils ont ajouté une règle concernant la forme des actes, reproduisant la maxime *locus regit actum*, à l'exemple du Code civil de Louisiane[2] ainsi qu'une autre concernant la loi régissant les contrats. Ces dispositions et d'autres peu nombreuses, éparpillées dans le Code civil,[3] correspondent plus ou moins à celles du droit international privé français de l'époque.[4] Il faut noter, toutefois, une différence fondamentale dans le facteur de rattachement du statut personnel, le domicile, qui convient mieux que celui de la nationalité au système juridique d'une unité territoriale comprise dans un Etat fédéral.

2 — La jurisprudence a fait évoluer ces quelques principes, tout comme en France mais pas toujours dans le même sens. Certaines divergences marquantes sont à signaler. Elles sont dues à un ensemble de facteurs tels que les différences dans les textes de base, l'existence d'une division des compétences législatives entre les pouvoirs fédéral et provincial au Canada[5] et, surtout, l'influence du système de la *common law* en vigueur dans les autres provinces du Canada. On peut citer, à titre d'exemples de cette dernière, l'application automatique de la loi du for au divorce international[6] et

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[1] *Deuxième Rapport des Commissaires chargés de codifier les lois du Bas-Canada en matières civiles* (1865), aux pp.144, 242 et ss., arts.7 à 7b.

[2] Art.10, al. 1: "The form and effect of public and private written instruments are governed by the laws and usages of the places where they are passed or executed."

[3] Notamment, arts.135 et 348*a* C.c.

[4] Les Codificateurs citent à plusieurs reprises l'ouvrage de Foelix, *Traité du droit international privé ou du conflit des lois de différentes nations* 3e éd., par Demangeat (1856).

[5] Voir *Acte de l'Amérique du Nord Britannique*, 30-31 Vict., c.3, arts.91 et 92 (U.K.) (S.R.C. 1970, Appendice II, no 5, à la p.191).

[6] Voir Mendes da Costa, "Divorce and the Conflict of Laws", dans *Studies in Canadian Family Law* (1972), t.2, 899, à la p.966; Castel, *Canadian Conflict*