

Flags of Convenience: Emerging Force of Globalization and Problem Creator for the Seas

The concept of “Free Sea” does not provide absolute freedom. Every state has privilege to navigate and explore sea resources in such responsible way under the regime of “the Area” or High Sea. International regulatory under the Law of Sea Convention (LOSC) in part VII- the High Sea, articles 87 and 88 regulate that sovereignty on high seas consists of the freedom of activities, such as navigation, over flight, laying of submarine cables and pipelines, construction of artificial structures, scientific research, and fishing in such peaceful reason. Conversely, it also sets states’ obligation for resources management and conservation and the ships’ responsible that are operated in the high sea. The principles of LOSC in article 91, 92, and 93, which also in line to article 6(2) and 5(2)a of the High Seas Convention 1958, elaborate that ship must present its nationality under one specific state, fly its national flag, and has registration and related documentation as evidence of the right to fly the State flag.¹

In accordance to LOSC, the IPOA-IUU² has established that flag State has responsibility under international law for controlling the fishing activities of a vessel at anywhere of their operation area and ship’s liability to fly its state flag and not to change its flag, as known as “flag hopping”.³ The IPOA-IUU sets forth a series of tools under three sub-headings, i.e. fishing vessel registration, record of fishing vessels, and authorization to fish. The fishing vessel must be registered in one state and the flag state must ensure that the vessel does not engage in IUU fishing before state registers it.⁴

While the regulation purpose of ship registry is to stipulate genuine flag state responsibility, the practices of flying false flags began from the Roman era through to the Middle Ages, to evade political or military enemies or prevention against attack by pirates.⁵ During period between the two World wars, certain nations were developed as ‘open registers’, i.e. states will accept the registration of ships from any other nation with virtually no restrictions, for instance Panama, Liberia, and Marshall Island⁶. Its development was encouraged by the rivalry in business of states and wars among the major maritime nations.

¹ *United Nations Convention On The Law of The Sea*, opened for signature 10 December 1982, I-31363 (Entered into force 16 November 1994)

² FAO – International Plan of Action – Illegal Unreported and Unregulated (IPOA-IUU)

³ FAO – Technical Guideline For Responsible Fisheries 2001, Part 4 Flag State Responsibilities

⁴ FAO – Technical Guideline For Responsible Fisheries 2001, Part 4.1. Fishing Vessel Registration

⁵ Gross, Leo, and Brunson MacChesney, Reviewed Work: *Flags of Convenience. An International Legal Study.* by Boleslaw Adam Boczek, Myres S. McDougal, *The American Journal of International Law* 57, no. 4 (1963): 949-52.

⁶ Alderton, T & Winchester, N 2002, ‘Globalisation and de-regulation in the maritime industry’, *Marine policy*, vol. 26, no. 1, pp. 35-43.

In the late twentieth century, FOC countries have comparably easy and quick processes of registration. Ship owners may avoid the regulation set by national registers, such as tax liability, minimum wages for crews, ship maintenance protocols and liability on environmental laws. As the shipping industry is central to world trade, FOC represented a response to crises of low profitability through flagging and domiciling vessels in tax and emerged enormous growth of the transnational corporation (TNC), global trade, foreign direct investment and mergers and acquisitions. Hence, as FOC allows transnational corporations to pursue globally integrated strategies that exploit variations in costs and tax across the globe and also pressure companies to become global, FOC became alongside to the emerging forces of globalization.

However, as FOC system offers relaxation to comply such regulations in labor, tax, fishing licenses, conservation, and pollution, many reports in recent decades convey serious repercussions for aspects in such representative regulation neglected. FOC allows ship owner to have low waged crews or as it was reported as human trafficking or force labor practices and working under low safety facilities and procedures. The existence of these FOC fleets are indicated as IUU actors with the practices of flag hopping in such certain Regional Fisheries Management Organization (RFMO) area, over fishing and using prohibited, harmful or destructive fishing gear. FOC is also indicated as shield for marine polluter, such as dumping fishing gear and hazardous chemical wastes or even using the harmful material for the ships, for instance the marine-paint additive tributyltin (TBT).⁷ The concern critic of FOC is the flag state has limited access to identify ship owner, in order to proceed law enforcement for the crime committed by the ship.

Unfortunately, proposal to ban FOC practices come into ineffective recommendation. Developed market economies remain the control and benefit of the FOC ships as it balances between lacks of political action against open registries which signify economic cost in return. The urgent improvement is to enforce flag state of FOC to establish sufficient regulations, and control action towards the registered ships. The LOSC provisions has eliminated economic benefits of open registries and permissible for external enforcement against FOC fleets, i.e. port state control. The concept of genuine link is interpreted as effective jurisdiction and control.⁸

In recommendation, significant modification of FOC should include security, safety standards, crewing, taxes, registration on overall process and information technology, in accordance to regulation issued by International Organization, such as FAO, IMO and ILO. The FOC flag state must monitor and control the compliance of registered ships. Moreover, the

⁷ Wilson, SP 2008, 'Flags of convenience shield polluters in battle to protect seas', *Nature* (London), vol. 455, no. 7216, pp. 1029–1029.

⁸ See Gross, 1963

commitment of all states to deterrence the practices of irresponsible FOC by encouraging FOC states to enforce appropriate regulations at any bilateral, regional and international forums.

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