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THE 1986 UNITED NATIONS CONVENTION ON
CONDITIONS FOR REGISTRATION OF SHIPS

Thesis Presented to the School of Graduate Studies and Research
at the University of Ottawa in partial fulfilment of the
Requirements for the Master of Laws.

January 1988

Under the Supervision of
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by

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THE 1986 UNITED NATIONS CONVENTION ON CONDITONS FOR REGISTRATION OF SHIPS

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To my mother and father

whose love and support made law school possible.
ABSTRACT

The purpose of this work is to present the evolution, legal implications and current developments of the old problem of the registration of ships in international law. This is done through a legal and political analysis of the 1986 U.N. Convention of Conditions for the Registration of Ships in a systematic manner.

The thesis consists of two parts. Part I, entitled "Historical Background and the Origin of the Convention" includes two chapters: Chapter 1 addresses the genuine link controversy and the principle of exclusive jurisdiction. It attempts to explain the different attacks on the traditional principle of exclusive jurisdiction that each state has over its own vessels in areas of the high seas. This is presented in chronological order in five sections. It shows the reader the different stages of the struggle for limiting the importance of the principle which claims that each state under international law may decide for itself the conditions on which it will concede its nationality to a merchant ship, thereby accepting responsibility for it and acquiring authority over it. The chapter concludes with the interests of developing countries to guide the reader into the present dispute which the 1986 U.N. Convention on Conditions for Registration of Ships is trying to resolve.
Chapter 2 shows the strong influence which UNCTAD has in international shipping. It comprises three sections: the first demonstrates a profound relationship between UNCTAD and the principles of the new international economic order with the Convention of Registration of Ships. The second explains that the Convention is not an isolated instrument in the trend of a new maritime order promoted by UNCTAD. Finally, the chapter ends with a third section which comments on the implications of UNCTAD as the international forum for the negotiations on the Convention.

Part II, the core of the thesis, attempts to construe the "legal implications of the new conditions for the registration of ships." This is done by way of a detailed analysis of each separate article of the Convention vis-a-vis existing customary law and the contemporary political realities.

Hence, Chapter 3 assesses "the registration and genuine link as the main objective of the Convention." It is divided into two sections. The first shows the main consequences of registration and genuine link in the existing customary international law. The second displays not only the main objective of the Convention on registration and the genuine link, but also separates what are believed to be the most important provisions of the Convention, namely the provisions on ownership, manning and the management of shipowning companies.
Chapter 4 presents the other objectives of the Convention. Here the reader finds the Convention's goals which are a result of the groundwork previously mentioned. This chapter is called "Avoiding fraud, complying with international standards and promoting joint ventures", as it studies the provisions in the Convention which make reference to these three subjects.

Part II finishes with Chapter 5. It approaches a global overview of the "achievements and pitfalls" of the Convention. Here, the author on the one hand discusses the general implications of the whole new document for the international community, emphasizing in particular the benefits to the open registry countries and to land-locked states. On the other hand, the author specifically points out some technically slippery grounds in the Convention which could have been avoided.

Finally, this thesis concludes that the 1986 Convention represents a great political achievement, in terms of the capacity of multilateral negotiations of conflicting matters at the international level. Legally, however, there are still so many ambiguities and loopholes that it is possible to argue in international law that the status quo remains. For this reason, the author has also offered a certain number of recommendations at the end of the thesis.
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INTRODUCTION

The evolution and development of the 1986 United Nations Convention on Conditions for Registration of Ships is a very colorful story, replete with debate, subterfuge and disappointment. It provides a vivid illustration of the interface between law, commerce, politics and economic philosophy in international shipping. This work not only attempts to show the reader the dramatic evolution of the Convention but also to highlight some achievements and pitfalls from the legal and political point of view.

The 1986 Convention had two parents. One was the opinion, which still exists, that the existence of ships under open registry flags represents a phenomenon which must be destroyed. This is so because according to the attackers there is no real genuine link between an open registry country and a ship flying its flag. Consequently, it is believed that without an international convention calling for the strengthening of the genuine link it would be difficult for a country of registry, in particular an open registry country, to exercise effectively its jurisdiction and control over its ships with regard to identification and accountability of shipowners and operators as well as with regard to administrative, technical, economic and social matters.

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The Convention's other parent was the perceived need to help developing countries in their efforts to develop their commercial fleets. This laudable objective is very hard to attain through the tightening up of the genuine link between a flag state and its ships. There are far more serious problems that developing countries are presently facing, such as transfer of technology, outdated laws, political instability, lack of capital and shortage of qualified manpower which are currently affecting their fleets' development.

Moreover, with a close fitting link between a ship and its flag state the existence of open registry fleets, especially in developing countries, is under strong challenge. Yet no real demonstration was ever given that the use of open registry had really prevented the growth of developing country fleets. During the negotiations of the 1986 Convention, the conflicting parties, namely, those which are for the open registry practice -- mostly developed countries and a few developing countries -- and those which are against the open registry practice -- mostly developing countries and the Socialist countries -- realized that the elimination of open registry fleets would not necessarily produce the expansion of developing fleets. They decided to adopt a flexible system which perfectly allows the practice of offshore registration. Hence the heart of the Convention has an option between two mandatory articles. The parties are provided with the alternative of accepting as binding a) either the provision on manning and participation of nationals
of the state of registration as officers, and/or b) the provision
on ownership or participation of nationals from the state of
registration, or the participation of the state itself in the
capital or ownership of ships flying the flag of the state.

It is interesting to note that the Convention came from
UNCTAD. From its inception, UNCTAD has been at the very centre
of the international debate on development. It has been the
forum where the developing countries have brought attention to
their needs.

Recently UNCTAD has been very involved in shipping,
because developing countries are demanding a change. *Inter alia*
a change in regard to a) the practices of liner conferences, b)
national participation in the carriage of trade and c) the
operation of open registry fleets. In general they are creating
a New International Maritime Order which includes the concepts
inherent in the Declaration on the Establishment of a New
International Economic Order and the principles reflected in the
Charter of Economic Rights and Duties of States. The 1986
Convention is part of this movement.

On the one hand, politically, we agree with the document.
There is no doubt that the Convention is a political success, not
only because it takes into account all the different interests
involved, but also because it manages to get an agreement on a
highly controversial topic. Thus, the Convention represents the
first time that an international instrument defines the elements
of the genuine link that should exist between a ship and the
state whose flag it flies, i.e. the national maritime register; the national maritime administration; the national maritime law and regulations; national maritime ownership and/or manning; national participation in the management of shipowning or ship-operating companies and the transparency and responsibility of owners and operators of ships.

On the other hand, legally speaking, it will be shown that the Convention is obscure, ambiguous and even confusing. It does not resolve the international legal questions related to nationality and genuine link in international shipping. There are two possibilities for this imperfection. One is that the Convention portrays the first attempt to regulate one of the most venerable and universal rules of maritime law. It says that any state has the conclusive unilateral competence as a sovereign privilege to grant its nationality to merchant vessels. Therefore, no country would have become a party to a tough and direct regulating Convention in such a sensitive field. The other reason could have been that the main goal of the Convention was just to be a "political instrument" and for the sake of universality and expediency in the process, legal errors were made.
PART I

HISTORICAL BACKGROUND AND THE ORIGIN OF THE CONVENTION
CHAPTER 1

The Genuine Link Controversy and
The Principle of Exclusive Jurisdiction

1. The First Opposition to the Traditional Principle

In 1609, Grotius (Hugo de Groot) wrote *Mare Liberum*. For the first time, he expounded the doctrine of freedom of navigation which became the cardinal principle of the international law of the sea. (1)

Originally, freedom of navigation was not a policy favoured by the powerful states and consequently unilaterally imposed by them on the weaker states. On the contrary, it was a principle for which the latter had to fight bitterly against the major maritime powers in order to achieve its recognition and implementation. The "oceanic equality" principle was considered an important policy at that time. However, seen in its historical framework, a different aspect appears which shows the powerful states supporting universal oceanic freedom because the opening of the world had made real colonial and commercial power possible and ocean transportation was the only means to achieve it. Maritime power was what the world required during the next 150 years and maritime power demanded freedom of navigation. (2)

Since then, the international law of the sea has comprised two very different sets of principles: one set establishes basic
overriding community goals that call for the widest possible access to, and the fullest enjoyment of, the world's oceans. The second set of principles, commonly described as jurisdictional, aims to encourage shared community use outside the exclusive control over any particular state. (3)

The most important jurisdictional principle provides that each state may exercise sole authority over its own vessels in areas of the high seas and, conversely, that no state may exercise authority over the vessels of another except as authorized by international law. (4) Therefore, all sovereign states were deemed to have the right to prescribe the laws and regulations governing the registry of ships and which, in turn, entitled the ships to fly their flags. Professor O'Connell cited in International Law of the Sea part of the Lauritzen v. Larsen case:

Perhaps the most venerable and universal rule of maritime law is that which gives cardinal importance to the law of the flag. 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. (5)

As a result, flying the so-called "flags of convenience" has emerged as a norm of customary international law. In fact, flags of convenience have been used many times throughout history for economical and political reasons. (6) Shipowners and others interested in access to the high seas who deemed flags of convenience advantageous did not hesitate to attach their vessels to foreign merchant fleets, taking the general concept of Freedom of the Seas for granted.
Flags of convenience (7) have been identified by several specific common features: (a) the country of registry allows ownership and/or control of its merchant vessels by non-citizens; (b) access to the registry is easy; (c) taxes on the income from the ships are not levied locally or are too low; a registry fee and an annual fee, based on tonnage, are normally the only charges made; (d) manning of ships by non-nationals is freely permitted. Certain parties trying to undermine the granting of flags of convenience would add a few more points to the traditional definition. Their definition would include the country of registry is a small power with no national requirement under any foreseeable circumstances for all the shipping registered. However, receipts may produce a substantial effect on its national income and balance of payments. The country of registry may have neither the power nor the administrative machinery to effectively impose any government or international regulations. Nor may the country have the wish or the power to control the companies themselves. (8)

Attacks on the traditional view of unrestricted state competence regarding vessel registration began with the attempts of the Institute of International Law in 1896 to achieve a greater degree of similarity among the laws of various states. (9) But the principle of a state’s freedom, to determine its prerequisites for granting its nationality to ships was well entrenched in the concept of state sovereignty to be modified by the Institute’s proposals. These modifications remained only as guidance and advice, and states did not adhere to them when they enacted new laws on the nationality of ships.
It was not until the end of the 1940s and early 1950s that the question of a vessel's flag as opposed to ownership became an important international issue. This phenomenon was due to rapid expansion of fleets in countries adhering to the doctrine of flags of convenience.

Consequently, some traditional maritime nations of Europe joined hands with the International Maritime Labour Unions in order to create stronger conditions for the recognition of a vessel's national character by other states. Boczeck reports that:

... the seamen's unions are concerned about the allegedly lower labour standards aboard the Panlibhon ships and -- particularly the American unions -- about the loss of job opportunities for American seamen that results from the flight of the American flag. (10)

He concludes that:

... The shipowners of the traditional maritime countries in Europe, supported by their governments, find that the vessels operating under the virtually tax-free flags of convenience present very serious competition. (11)

It was claimed by the representatives of the anti-flags of convenience groups that mere registration was not sufficient to establish a tie between the ship and its flag state; there must be a "genuine link" between a country and the ships registered there. This doctrine tried to develop certain minimum requirements that all maritime states should enact in dealing with the nationality of ships.

If nationality were granted without taking into account international legal directives, there might be cases where the
legislation of a state in the matter of the nationality of ships in general, and the nationality of a particular vessel, would be ineffective and presumably not recognized by other states. One possibility of non-recognition could be in naval warfare, in the situation of a dispute of the nationality of a merchant vessel in a prize court, if the nationality were based on a much more liberal law than that of the majority states. Another example could be a conflict of law problems whose solution depended on which municipal law should be applied to determine the nationality of a vessel. This would raise important legal questions such as labour jurisdictional problems (12), taxation questions, and criminal law issues.

In 1950 the Report on the High Seas by the International Law Commission represented a skirmish between the old school of thought and the new doctrine of limiting states' rights. The Report led to several legal defeats on the flag of convenience practice. (13) Boczeck explains the conclusions of the ILC stating that:

... with regard to the national element required for permission to fly the flag, a great many systems are possible; but there must be a minimum 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 mere registration. (14)

The level of effectiveness which might be satisfied by the flag state in the exercise of its control and jurisdiction (genuine link) (15) was first expressed at the early stage of the ILC's debates, but it was not further developed. The ILC became entangled in several intricate legal questions like the
definition of national ownership requirement, the nationality of
crew, and whether the nationality of the ship's captain should be
criteria.

The complexity of each topic provoked heated discussions in
the ILC. From the very beginning, the wide divergence of
interests underlying the issue were certainly influenced by the
position taken in the dispute by each respective member country.

While the historical principle of a state's inherent right
to establish legislation governing the conditions of a ship
flying its flag was not serious, the limits of this right, the
effects of third party recognition proved quite contentious.
This compressed the very concept of the genuine link and left
essential questions of its elements obscure.


As a result of the Nottebohm case, decided by the
International Court of Justice in 1955, concerning the
nationality of individuals for the purpose of diplomatic
protection in international law (16), the International Law
Commission took a stand against the flag of convenience fleets.
It introduced into the corresponding article of its Report on the
High Seas of 1956, the genuine link doctrine of nationality of
ships in exactly the same fashion as the Nottebohm judgement
created it.

Contrary to the Nottebohm judgement (17), the genuine link
doctrine with regard to the nationality of ships found entrance
into the practice of states through article 5 of the Geneva Convention on the High Seas of 1958. This article states that:

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; in particular the state must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.**

2. Each state shall issue to ships to which it has granted the right to fly its flag documents to that effect. (18)

Although there is no reference to "flag of convenience" vessels in this provision, the proceedings of the conference reveal that this section was aimed at controlling such vessels. Instead of expressly prohibiting states from registering foreign-owned vessels, the conference preferred to deal with the problem by requiring a "genuine link" between the state and the ship. This genuine link between the state and the ship meant that the country of registry had effective jurisdiction and control over ships flying its flag. (19)

Article 5 has given rise to differences of opinion among noted legal authorities. For example, Professors McDougall and Burke contend that this article provides the most ambiguous criterion ever devised for identifying the national character of a ship, to wit, "there must exist a genuine link between the state and the ship." According to Professors McDougall and Burke, these words introduced a new concept hitherto unknown either to customary and treaty law of the sea or to the national shipping laws of any country; they submit the Convention does not attempt to define what "genuine link" means nor does it state what
criteria it might insist upon to attain a "genuine link." (20)
Furthermore, Professor McDougal states: "in particular, the state
must effectively exercise its jurisdiction and control in
administrative, technical and social matters over ships flying
its flag" could be construed to mean that, even though a ship has
passed "genuine link" test, it may still fail to satisfy the
additional criteria imposed by the quoted words. (21)

Professor Philip Jessup, in his article "The United Nations
Conference on the Law of the Sea" on the Nottebohm decision,
considers that the criterion of a "genuine link" was useful in
deciding the nationality not only of ships but of corporations
as well. (22) This analogy had been used in an argument by the
Netherlands delegation to the Geneva Conference. It referred to
the Nottebohm decision, saying that the nationality of ships
is very similar to the nationality of individuals (23)

The majority of the delegates at the Geneva Conference
agreed that it was extremely hard to define a criterion for
deciding if there is a genuine link between the state and a
ship. In fact no elements of the genuine link could be
adequately defined. So the delegates preferred enunciating a
vague criterion to not achieving a criterion at all for
restricting the flag of convenience practice. Most agreed that a
genuine link refers to a country’s ability to have effective
jurisdiction and control in administrative, technical and social
matters (24). However, many countries at the Conference were
not satisfied with these results due to the difficulties arising
from the practical implementaion of these rules, inter alia
1) the absence of sanctions resulting from the non-fulfilment of the requirements; and 2) the non-definition of the extension of "jurisdiction and control" (25).

Nevertheless, international law continued to allow flags of convenience, since article 5 of the Convention affirms the prerogative of each state to determine the conditions under which it will grant nationality to merchant vessels. And it did not mention ownership, operation or crew of the vessels registered (26).

3. The IMCO Dispute of 1959.

Another incident further demonstrates the growing sentiment against "flags of convenience". At the inaugural meeting of the United Nations Intergovernmental Maritime Consultative Organization (27) held in London, in January 1959, Liberia and Panama, leaders of flag of convenience states, were not granted seats on the Maritime Safety Committee. The International Court of Justice was asked to give an advisory opinion on the meaning of article 28(a) of the Convention designed to establish a world organization to deal with maritime questions and regulations (28).

The point at issue was that the seats on the Maritime Safety Committee had been reserved for the eight largest shipowning nations and, although on the basis of registered tonnage Panama and Liberia were eligible for memberships they were not given positions. The traditional maritime states (The Netherlands, the
United Kingdom, Norway and France) asked the Court to apply the genuine link test as set out in Nottebohm. They argued that ownership meant that the actual beneficial owner of the vessel must be a citizen of that state, and that registration was not sufficient. This position was countered by Panama, Liberia and the United States. They claimed that registry was the recognized way to decide a vessel's nationality (29).

The International Court of Justice in its advisory opinion not only found that the genuine link was irrelevant to the issue before the Court but held that the assembly failed to comply with article 28(a) of the Convention. Thus it accepted the interpretation of Panama, Liberia and the U.S.A. It also formulated two main principles of paramount importance. First, registration and flag determine the quantum of shipping tonnage of a state. In the words of the Court, "...the largest shipowning nations are the nations having the largest registered tonnage..." Second, the registration and flag allow for the enforcement of treaties. (30)

Thus, in the eyes of the International Court of Justice, registration did not merely establish ownership by an individual or a corporate body in the eyes of the national law. It also established ownership of the state as an overall concept of national tonnage. Furthermore, ships flying the flag of a state have to observe the international laws to which the flag state becomes party. The advisory opinion even lists international conventions illustrating how international law is to be enforced. It mentions examples such as: the Load Line Convention of 1930; the Brussels Convention of 1910 respecting Collisions,
Assistance, and Salvage at Sea; and the Convention for the
Prevention of Pollution of the Sea by Oil, 1954. (31)

Clearly, the Court's advisory opinion of 8 June 1960
underlines three important points: First, granting nationality to
ships was never intended to convert vessels into natural
persons, rather it was meant as a way to recognize state
sovereignty over vessels in its registry. (32) Second, the
Court, in a nutshell, implied in its decision that registration
ties a ship to a nation, and the genuine link theory, a totally
irrelevant doctrine to the issue, is an enforcement procedure
which cannot be a precondition for recognizing a ship's
nationality. (33) Third, although there was explicitly no
question of dealing with the problem of flags of convenience,
which lay outside the scope of issues involved, there was clearly
present an element of political bias. In the statements
submitted to the Court, it was said by the Court itself that:

The Statements submitted to the Court ... have shown that,
linked with the question put to it, there are others of a
political nature. The Court as a judicial body is however
bound, in the exercise of its advisory function, to remain
faithful to the requirements of its judicial character. (34)

Nevertheless, in reality, the battle fought was largely one of
prestige, in which recognition of the flag of convenience was at
stake.

Following this decision, the strategy of the established
maritime powers underwent a gradual shift. They no longer
concentrated their attacks on the flags of convenience per se.
Rather, the focus was turned to the evils existent under the
practice. This trend toward using international regulation as a


Although the 1982 Convention evidences some changes from the Convention on the High Seas 1958, many of the provisions were imported with very little alteration. For example, article 91 of the 1982 Convention on the Law of the Sea concerning a ship's nationality almost duplicates article 5 of the Geneva Conference 1958. However, there is an important difference. The latter states not only that there must be a genuine link between the state and the ship, but also that in particular, "the state must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag." (36) This sentence is included in article 91 of the 1982 Convention. Nevertheless, this important part of article 5 of the Convention on the High Seas became paragraph 1 of article 94 of the 1982 Convention "Duties of the Flag States." Thus, the Convention not only has replaced and expanded article 5, but has amplified article 10 of the 1958 Convention in a very detailed manner. (37)

Significantly, article 94 of the 1982 Convention also creates a general international right to supervise the exercise of jurisdiction and control. Thus, paragraph 6 establishes that:

- a state which has clear grounds to believe that proper jurisdiction and control with respect to a ship has 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. (38)
Interestingly enough, despite this supervisory provision, there is no sanction provided for lack of flag state enforcement other than action against the offending vessel itself.

The protection and preservation of marine environment features prominently on the agenda of the 1982 Convention. Article 217 sets out state obligations to prevent a vessel-source pollution. It requires compliance with "international rules" set for pollution prevention. Thus, on one hand, a new mechanism was accepted at UNCLOS III in an effort to improve the enforcement of vessel-source pollution rules and regulations, namely, Port State enforcement provisions, and on the other hand, it is severely restricted by other provisions. These allow a coastal state to take proceedings when the alleged violation has occurred; furthermore, it can also take proceedings if the pollution causes or threatens major damage to the coastal state; and when it has "clear grounds" for believing that the suspected vessel is the responsible one.

In addition, it has been argued that the flags of convenience system leads to the formation of a regime of immunity because of the internationalization of the contemporary maritime firm. As a result, the enforcement of any convention is practically impossible. The classic example was provided by the disaster of the "Torrey Canyon," which was owned by an American company that had leased the vessel to a British company. The ship, built in the United States and rebuilt in Japan, was registered in Liberia, insured in London and manned by Italians. The United Kingdom and France, which suffered most of the damage caused by its grounding in 1967, did get their money, but not
through the conventional channels. Indeed, when one of the Torrey Canyon's sister ships entered Singapore (part of the British Commonwealth) they arrested and held her until the insurers paid a $7,500,000 damage settlement. (43)

The 1982 Convention on the Law of the Sea states that coastal states may pass whatever laws they wish in their internal waters and within the commonly accepted 12-mile limit in order to prevent pollution from foreign vessels. But these laws shall not apply to the design, construction, equipment or manning of foreign ships and international law will not tolerate the tampering of innocent passage. (44)

Nonetheless, shortcomings in the enforcement and safeguard regimes given to flag state sovereignty and freedom of navigation in UNCLOS III were addressed in the 1982 Convention. (45) The Convention provisions on vessel standards regulate the evils/advantages perceived to exist in flag of convenience shipping. Thus, the Convention seeks to eliminate substandard operators by requiring flag state enforcement "backed up" by a better port and coast state enforcement. (46) This, evidently, impacts upon the economics of the flag of convenience system to the advantage of the traditional maritime states (47) so much so that one author commented:

it could be argued that the system of the provisions of the RSNT Part II, in particular article 79(1) in conjunction with those of article 82, (91 and 94) when compared with corresponding provisions in the 1958 Convention on the High Seas, allows the inference that the traditional maritime powers may be permitted to succeed this time.(48)

Finally, it is important to mention that the question of
attribution of nationality and genuine link is not clarified to any extent by the 1982 Convention. Yet provisions such as article 92 on status of ships, which duplicates article 6 of the 1958 Convention, contemplates changes of registry occurring during the life of a vessel. (49) Hence, the strength of the genuine link must be limited, since for each registration a new "link" would have to be formed. Another example of an article that leaves the intention of the authors in doubt is article 104. It infers that the granting or withdrawing of nationality is a matter of municipal law. (50)

Consequently, the 1982 Convention on the Law of the Sea emphasizes that the problem with the genuine link controversy is not definition. Rather it is enforceability. The strategy of the traditional maritime states and organized labour shifted from direct regulation in the 1950s, which proved to be politically and legally unacceptable, to indirect regulation through the attainment of international standards. Yet since the problem was enforceability, they still could not eliminate the flag of convenience system. (51)

5. The Interest of Developing Countries

The first occasion within UNCTAD on which the open registry (52) countries were specifically classed as such, insofar as policy measures are concerned, seems to have arisen in 1974 (53). The ad hoc Intergovernmental Working Group on the economic consequences of the existence or lack of a genuine link between vessel and flag of registry of UNCTAD, held a meeting in Geneva in February 1978. There adopted a resolution concluding that the
expansion of open registry fleets had adversely affected the development and competitiveness of the fleets of countries that did not offer open registry facilities, including those of developing countries. (54)

The main element of the attack on open registries was that their existence impedes Third World economic development; so if they were eliminated, shipowners would somehow be restricted to their own national flags. (55) However, some authors believe that this argument is very weak; for example, UNCTAD data shows that over 70 per cent of the open registry tonnage is owned in four countries, namely: the United States, Hong Kong, Greece and Japan. The remainder is spread among a large number of other countries. None have more than three per cent of total tonnage. Furthermore, at its peak in 1979, the tonnage under registries amounted to 29.7 per cent of the world DWT. This is a far cry from the 4.3 per cent of GRT under flags of convenience in 1948. Hypothesizing, Mr. Sturmey asked, "had open registries not existed, where would this tonnage have been registered?" He then stated that:

the serious owners would, probably, have found ways of keeping the shipping under their own flags, or they would have sought registries less open than the open ones, but more convenient than their own. (56)

The choice made between the available registries would have depended partly on where the owners in each country felt the national shoe to be pinching and partly on more general factors, including political or other ties. (57) Nevertheless, the open registry system at UNCTAD has been perceived by many of the developing countries as a mechanism for continued economic
colonialism by the developed states. The practice is seen as a convenient method for the developed market economies to make use of the developing states' resources while retaining control and benefit of the wealth generated. Professor Lawrence Juda stated that:

... the use of flag of convenience allows shipowners from developed countries to use the cheaper labour of lower-cost states, much of it from developing countries, while retaining the management of the industry in Western hands. In this view the developed states, through the use of subterfuge, are preventing the developing states, which supply the labour and the cargoes, from receiving an equitable share of the proceeds of world shipping. (58)

This argument is still valid. (59)

Some authors have pointed out in a very precise form that many developing states have sought to develop merchant shipping fleets, for a variety of reasons: to earn foreign currency; to broaden the industrial base and provide employment; and to more closely control their own cargo's transportation. Interestingly, exports of developing countries accounted for 61 per cent of world seaborne trade. But the developing states owned only eight per cent of the world tonnage. Eighty per cent of world cargo is bulk cargo. And the developing states generated one-third of dry bulk cargo and about nine per cent of liquid cargo; but they owned only six per cent of the tonnage carrying it. (60) The least convincing argument for developing states to invest in shipping is that it offers a certain level of prestige.

Although the philosophy of and language used by the developing countries differs from that of the states, which in
1958 were vociferous in their demands for a clearly defined link between flag state and vessel (the traditional maritime states), the essential concern remains the same — shipping competition. So in recent years, developing countries have revived the controversy. They have done so by an indirect attack on registry requirements; their aim is to eliminate open registry practice and competition. Accordingly the main theme of recent UNCTAD proposals focused on identifying and amplifying the elements constituting a genuine link.

6. Conclusion

The phenomenon of flags of convenience is a direct consequence of the principle of freedom of the seas. As world oceans became accepted as belonging to all states ships began to fly the flag of countries with the least stringent regulatory regimes rather than those of only the powerful states. The widespread proliferation of "flags of convenience" has been the subject of scathing attacks.

There are two main reasons for this criticism. It is argued that flags of convenience have created a regime of immunity. Ships are not subject to sufficient regulation. The second argument is that they have adversely affected the development and competitiveness of the fleets of countries with many more restrictions. The world community has endeavoured on five major occasions to modify the international legal regime governing "flags of convenience".
In 1896, the Institute of International Law tried to achieve a greater degree of similarity among state laws. The Institute attempted to restrict the trend towards liberalizing "nationality" provisions. It did not achieve this objective because of the proliferation of flags of convenience.

The second international attempt to modify the international shipping regime resulted in the 1958 Geneva Convention on the High Seas. It sought to limit the growing presence of flag of convenience ships on the high seas. It also brought to the Law of the Sea the very controversial concept of the Genuine Link enunciated in the Nottebohm Case of 1955. Article 5 of the Geneva Convention of the High Seas of 1958 has simplified or complicated -- according to one's point of view -- the question of the jurisdiction and nationality of merchant vessels.

The IMCO dispute of 1959 represents the third major movement challenging the world shipping order. But merely modifying the existing regime was deemed insufficient; the complete elimination of flags of convenience was the goal. If the traditional maritime states demand had been accepted by the ICJ, ownership would have prevailed over registration as the recognized way to decide a vessel's nationality. This would have resulted in the eradication of the flags of convenience concept and its practice.

Tightening up international regulations in the 1982 Convention on the Law of the Sea sought to make flags of convenience so disadvantageous that states would not be interested in the practice. But setting international standards
is easier than enforcing them. The Montego Bay Convention of 1982 established minimum standards but lacked enforcement procedures, and so the phenomenon of the flag of convenience survived.

The 1986 United Nations Convention on Conditions for Registration of Ships represents a final assault on the flag of convenience. The movement of the developing countries against flags of convenience started in 1978 when UNCTAD blamed the practice of flags of convenience for preventing the development and expansion of Third World merchant fleets. The conference on the conditions for registration of ships began with the direct purpose of phasing out flags of convenience. Unsuccessful in this endeavour, the developing countries have been increasing national registry requirements in order to protect their interests.

While the practice of flying flags of convenience emerged with the principle of freedom of the seas in the seventeenth century, it is only recently that the international community has endeavoured to constrain this practice.
1. F. De Pauw, Grotius and The Law of the Sea (1965) 9-22. See also, H. Grotius, The Freedom of the Seas (J.B. Scott, ed., 1969) 10-61. An essential part of this freedom is the fact that all sovereign nations were deemed to have the right to prescribe the laws and regulations governing the granting of registry of ships which, in turn, entitled the ships to fly their flags.


4. Id. 1010. See also H. Smith The Law and Custom of the Sea (1959) 61.


7. The term has been used differently throughout history and perspective on the problem: (1) Panlibhon Flags; (2) Flags of Necessity; (3) Runaway Flags; (4) Flags of Refugee or Tax-free Flags; and (5) Flags of Attraction.


9. There were a great variety of criteria. While the legislation of some maritime states had required as conditions, e.g., that the ship must have been built in the state, that all or prescribed part of the crew must be nationals, that the ship must be wholly or as to a prescribed part, owned by nationals and so on, there are states which make it extremely easy and inexpensive to get ships registered. See also, L. Herman, "Flags of Convenience, New Dimensions to an Old Problem," 24 McGill Law Journal (1976) at 9.
10 A. Boczeck Flags of Convenience. An International Legal Study. (1962) 64.

11 Ibid.


14 A. Boczeck Flags of Convenience. An International Legal Study (1962) 221.

15 Id. 238-239.

16 Nottebohm case (second phase) judgement of April 6, 1955, I.C.J. Rep. 4, p. 23 in which the Court established that "According to the practice of States, to arbitral and judicial decisions and to the opinions of writers, nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties."


20 Id. 1122.


24 The genuine link should be interpreted as implying a general rule enjoining the states to improve and make more effective their control over shipping registered under their flag, in the
interests of order and safety at sea. See A. Boczeck *Flags of Convenience -- An International Legal Study* (1962) 291.

Article 4 specifically recognizes the right of land-locked states to register ships under their flags. The degree of effective jurisdiction and control that a state which has no seaport can exercise is quite limited because no ocean-going vessel can ever come within its actual territorial jurisdiction.


Inter-governmental Maritime Consultative Organization (IMCO) now International Maritime Organization (IMO).

This was done under article 56 (which with article 55 of IMCO’s Convention represents Part XV entitled “Interpretation” providing that “any legal question which cannot be settled as provided in article 55 shall be referred by the organization to the International Court of Justice for an advisory opinion in accordance with article 96 of the *Charter of the United Nations*). The San Francisco Conference of the United Nations held from April 25 to June 26, 1945, entered into force on October 24, 1945. *Reprinted in Yearbook of the United Nations* (1945-1947) 831.


CHAPTER 2

UNCTAD and International Shipping

1. UNCTAD and the New International Economic Order

Shipping is a dominant "invisible" activity and one in which the participation of developing countries has been negligible. Services such as shipping, insurance and banking are referred to, in the jargon of international trade as "invisibles," as opposed to "visibles" which include tangible goods, products, or commodities. As a Brazilian diplomat notes: "the developing states tended to concentrate immediately after the independence, on diversifying their export products. But little attention was paid to either the costs or the consequences of invisible transactions." (1)

The aim of UNCTAD in the field of invisibles is to devise policies to enable developing countries to increase their earnings and to decrease the outflow of foreign exchange on this account. The desire for a New International Economic Order (NIEO) provides a general context in which to understand the demands being made by developing states. The call by the developing countries for a NIEO encompasses at least two general and interrelated themes. The first is to restructure the world economic system so that more benefits devolve to the developing countries. The goal is to achieve an equitable international economic system. The second is that third world states should be
fully involved in the making of economic and political decisions that affect their well-being.

Accordingly, the Charter of Economic Rights and Duties of States(2) supports the principle of sovereignty (sovereignty equality), mutual interdependence and solidarity between states. This principle reflects the opinion of most developing countries on the New International Economic Order (NIEO)(3). The principle of sovereign equality appears early on in the fourth paragraph of the legal preamble. The fourth sentence of the preamble states that:

Declaring that it is a fundamental purpose of the present charter to promote the establishment of the New International Economic Order, based on equity, sovereign equity, interdependence, common interest and cooperation among states, irrespective of their economic and social system.(4)

The external aspects of sovereignty are dealt with in article 4. It lays down the basic right of all states to engage in international trade and other forms of economic cooperation.(5)

Article 10 deals with the aspect of equality of the principle of sovereignty. It is defined as the right to participate fully and effectively, as equal members of the international community, in the international decision-making process in the solution of global economic, financial and monetary problems.(6)

Another principle relevant to the question of shipping is "the principle of solidarity". Clear duties are included for all states to take into account the interests of other countries in their internal and external policies. Chapter I of the Charter contains principles of cooperation for development including the
rights of the land-locked countries. Articles 5, 20, 21, 23 and 28 deal with these rights too. Article 27 is the most important:

1. Every state has the right to enjoy fully the benefits of world invisible trade and to engage in the expansion of such trade.

2. World invisible trade, based on efficiency, and mutual and equitable benefit, furthering the expansion of the world economy, is the most common goal of all states. The role of developing countries in world invisible trade should be enhanced and strengthened consistent with the above objectives, particular attention being paid to the special needs of developing countries.

3. All states should co-operate with developing countries in their endeavours to increase their capacity to earn foreign exchange from invisible transactions, in accordance with the potential and needs of each developing country and consistent with the objectives mentioned above. (7)

Similarly, the Charter also contains general principles of equality. The most important deals with the regulation of trade and the development question. For instance, article 8 of the Charter says that all the states should coordinate and cooperate to bring about equitable international economic relations. And that they should help change the structure of the system for a much more balanced world economy. The article also stresses the needs and interests of developing countries. (8)

Maritime transport is very important. It is an extension of industry. So it can help a country’s economy to grow. It is equally of vital importance to military security. Thus it is not surprising that UNCTAD has extended these principles to shipping. (9) The new shipping principles are called The New International Maritime Order (NIMO)(10). Its aim is to change the maritime rules, norms and customs that the old colonial powers set long before the developing countries became independent.
2. The New International Maritime Order in Action

The approach of developing countries to the question of trade and shipping has had three basic objectives. The first is to influence the structure and level of freight rates in order to lessen the impact of high freight rates on their traditional and non-traditional exports. An example of the effort towards the first objective is the Code of Conduct for Liner Conferences. The second is to establish and expand their own national merchant fleets. UNCTAD's genuine link principle attempts to achieve this through the 1986 Convention on the Conditions for the Registration of Ships. The third is to rewrite international shipping legislation and the basic framework of regulation. In general, the New International Maritime Order legislation is trying to achieve it.

(1) The Code of Conduct for Liner Conferences

The first objective is to lower freight rates. This is to be achieved by changing rate structures in order to lessen the impact of high freight rates on their traditional and non-traditional exports as well as to secure promotional low freight rates for non-traditional export items, which would enable these countries to compete more effectively. Developing countries expect to work for this objective through several channels. The first is by securing admission of their national shipping lines to liner conferences serving their trade routes(11) through which they hope to acquire an insight into the mechanism of fixing liner freight rates and to ensure that their needs are taken into
account. The second is by setting up effective and efficient ways to promote and facilitate consultations on mutual problems between shippers, governments and the liner conferences. It is interesting to note that liner conferences have existed for many years. However, during the 1970s, the conferences came under considerable criticism from the developing countries for their inability to police themselves and for the lack of any response to the developing states' national interests. Because of the criticism by developing countries, an international legal approach to conferences was sought and the matter was raised at UNCTAD III in 1972 where the possibility of a code was discussed. (12) This was followed by the United Nations Diplomatic Conference on a Code of Conduct for Liner Conferences in Geneva, 1972. (13)

The code establishes legal guidelines and sets norms of behaviour for liner conferences. It is a compromise between two groups: the most developed countries, which supported continued self-regulation on conferences, and those, mostly developing countries, seeking government control. First it deals with intra-conference relations, including membership and cargo-sharing. Many developing countries believed they had not been able to participate enough in these conferences. They also believed that developed states economically dominated them. These were probably decisive factors in the genesis of the cargo-sharing scheme in the UNCTAD Code of Conduct. National lines of the trading partners received special status (article 2). These lines are vessel-operating carriers that have their
head office of management and effective control in the country that officially recognized them for special rights outlined in the code. When the Conference sets up a pooling arrangement, national lines of the trading partners have the right to acquire a significant part, such as twenty per cent. (14)

The developing countries put forward the idea of cargo-generation. This was to be the first determinant of the amounts of cargo each fleet should carry. The philosophy of cargo-generation gave rise to the concept of cargo-sharing, as the most effective means of building up the merchant fleets of developing countries to a level at which they could compete on a world-wide scale (15).

Second, the code deals with two issues important to shippers; dispute settlement and access to information. On the dispute settlement it is worth noting that the code established a machinery for this system on the basis of consultation and conciliation.

Developed countries have long resisted such a system. Probably they were afraid it would lead to governmental control of negotiations which would have created a precedent for direct governmental involvement in other areas. This, according to these countries, would have destroyed the "free enterprise" shipping system. (16)

Regarding the information provision, it would not be easy to dismiss outright allegations regarding the instability of governments and lines from developing countries to obtain information on the mode of setting freight rates of their
exclusion from freight rates negotiations. Conferences are prone to take unilateral action in respect of freight rates.(17)

(2) The U.N. Convention on Conditions for the Registration of Ships

The second main objective of developing countries is to establish and expand their national merchant fleets or, where necessary, to develop multinational or regional fleets. Foreign seaborne trade is crucial to the economies of developing countries, so it seems natural for these countries to try to reduce their dependence on foreign shipping. This objective was pursued at the Geneva Conference of the Conditions for Registration of Ships. Indeed, according to UNCTAD, on the eve of the Geneva Conference ownership of the world fleet was concentrated in the hands of the traditional maritime countries. All are developed countries. They, in effect, controlled about eighty per cent of world shipping capacity, including tonnage registered in open registry states but beneficially owned by nationals of developed countries. (18)

Although developing countries generated some sixty per cent of world exports and about forty per cent of world trade, they owned only fifteen per cent of world shipping tonnage. Moreover, because of the great fleet growth that has occurred among those countries utilizing flags of convenience, the developing countries have argued that this growth has been at the expense of their own fleet development. Developing countries have taken the position that their limited participation in the bulk trades is in conflict with the programme of action of the establishment of
a new economic order. This programme insists that all efforts should be made to promote the increasing and equitable participation of developing countries in world shipping tonnage. The UNCTAD secretariat has responded by calling for a comprehensive set of measures: 

1) to ensure cargoes for developing countries;
2) to reduce competition by phasing out convenience shipping; and
3) to provide assistance to developing countries for the purchase of new and used vessels.(19)

The preparatory negotiations within the UNCTAD framework lasted for more than seven years. The developed countries for the most part resisted moves to draw up international regulations relating to ship registration, as had the open registry states themselves. For example, Liberia and Panama had refused to participate in early preparatory meetings on the subject, as had the United States (the main location of beneficial ownership of open-registry tonnage). However, from November 1983 all three countries became actively involved in the negotiations, deciding that they wanted to ensure that any international agreement would not be damaging to their interests. Hence, in December of 1984, it was generally agreed to "prepare and consider the adoption by this conference of an international agreement on conditions for registration of ships."(20)

The importance of the conference is that seven components internationally recognized as fundamental factors in the genuine link concept were identified: 

1) the national maritime register in which ships were entered; 
2) the national maritime rules; 
3) the national maritime administration; 
4) the identification
and accountability of the real owners and operators of ships; v) the participation of nationals in manning; vi) the participation of nationals in management; and vii) the participation of nationals in ownership of vessels. (21)

Faced with a possible irreconcilable "North-South" conflict, the Group of 77 proposed the following compromise which was accepted: They said that there ought to be nationality requirements in respect of both manning and ownership of ships. But a state might be permitted to select only one of these as mandatory for it.

More important, though, was the draft agreement endorsed by consensus at the third session of the Conference on Conditions for Registration of Ships. It was a compromise between the developing countries and the major shipowning nations. Three central and most controversial issues were at stake: i) the extent of the registering state's participation in ownership; ii) the role of flag countries in the management of shipowning companies and vessels; and iii) the manning of vessels. (22) This session of the Conference produced the Final Act of the United Nations Conference on Conditions for Registration of Ships in February of 1986.

The 1986 Convention on the Conditions for the Registration of Ships has been seen by developing countries as the main solution to the lack of the genuine link between a state and ships flying its flag. Therefore, through the Convention developing countries expect to establish a better harmony and a more ordered and better balanced development in world shipping
fleets. This would strengthen international maritime cooperation in all its essential aspects and lastly, ensure more effective participation by developing countries in world shipping activities. (23)

(3) International Maritime Legislation

The third objective of developing countries comes from their uneasiness about the framework of international shipping regulations. Shipping legislation evolved over several centuries under circumstances very different from the present situation. Developing countries maintain that, since today's maritime law evolved at a time when they did not have the opportunity to express their views and needs, it favours shipowners at the expense of cargo owners. They argue that international legislation on shipping should provide the necessary safeguards to protect their interests in view of their vulnerable position as mainly users rather than suppliers of maritime transport services. (24) Therefore, through UNCTAD, the developing countries have tried to re-structure the system. Among the major achievements, it is worth mentioning the United Nations Convention on the Carriage of Goods by Sea(25) and the United Nations Conference on International Multimodal Transport of Goods. (26) In addition, there are other interesting work programmes for the near future in the area of international maritime shipping legislation. These will soon change the entire picture of international shipping. There will be, for instance, a work programme on international ports, another on technical
assistance and training, and a third on insurance and on countering maritime fraud.(27)

3. UNCTAD as a Negotiating Institution

The path taken over twenty years of UNCTAD work, particularly relating to international shipping, has not been easy. Successes, disappointments and sometimes failures were unavoidable. Deliberations have often taken place in a general atmosphere of "rich-poor" confrontations and negotiations. Mr. Malinowski described such confrontations as a:

situation in which the interests of various groups formulated either as demands or as defence of the status quo. Each participating group looks for ways and means to obtain total or at least partial satisfaction. Such a situation may lead to deadlock, to unilateral action, or to accommodation and reconciliation of interest through negotiations. Thus, confrontation is the opening of the road to progress.(28)

UNCTAD has seen these confrontations in all its major accomplishments: the Code of Conduct,(29) the multi-modal transport of goods,(30) and, of course, the open registry issue.

It should also be noted that the International Maritime Organization(31) and the International Labour Organization,(32) technically speaking, could have accomplished agreements on the conditions for the registration of ships each in their own jurisdiction.(33) And, in fact, both international organizations, as part of the United Nations system, have been working on shipping matters related to the conditions of registration of ships. For instance, the IMO's main responsibilities are inter alia: maritime safety and navigation; prevention and control of marine pollution. Professor Singh explains that:
...The organization discharges its responsibilities mainly by providing machinery for the consideration, adoption, review and revision of international regulations and procedures dealing with the various aspects of maritime safety and prevention and control of marine pollution and by promoting and assisting effective implementation and enforcement of the standards and regulations by all concerned.(34)

Similarly, the ILO - Joint Maritime Commission which has dealt with a multitude of questions, such as minimum age of entry to employment; repatriation; social security; certificates of competency; identity documents; hours of work and manning; crew accommodation, etc. The ILO itself is responsible for framing valuable legislation on the welfare of seamen.(35)

Nevertheless, both organizations preferred to delegate part of their own jurisdiction to UNCTAD to reach for an international agreement on the conditions for the registration of ships. This was done for obvious reasons: (a) In the long run, there cannot possibly exist a permanent division of function between two or more international organizations dealing with different aspects of the same problem. The phenomenon of flags of convenience or open registry and the Convention on the Conditions of Registration of Ships involves legal, economical and social elements. (b) Both international organizations, IMO and ILO, must have realized that UNCTAD has proved to be a useful international forum for discussion and policy formation on the question of shipping needs of the developing countries insofar as their maritime evolution is concerned. (c) UNCTAD is the most important agency through which the developing countries have campaigned for shifts in the existing balance of international economic relations. Evidently,
their major concern at the Conference for the Conditions for the Registration of Ships was the economic development side of the issue.

4. Conclusion

In this chapter we have seen that the aim of UNCTAD in the field of "invisibles" is to devise policies to enable developing countries to increase their total earnings and to decrease the level of foreign exchange leaving their borders.

The desire for a new international economic order (NIEO) provides a general context in which to understand the demands being made by developing states in the field of international shipping. We have mentioned the following general principles: the equality principle whereby developing countries demand that benefits accruing to the international economic system are more equitable shared among world states; the principle of sovereignty where third world states are demanding full participation in the making of economic and political decisions that affect their well-being; the principle of solidarity where clear duties which are enumerated in the Charter of Economic Rights and Duties impose or states the duty of to take into account the interests of other countries on their policies.

Because maritime transport is an extremely important industry for most countries it is not surprising that UNCTAD has extended these principles of justice and equity to shipping. The new shipping principles are called the new maritime order (NIMO).
Its aim is to change the maritime rules, norms and customs that the old colonial powers set long before the developing countries became independent.

We have also seen that the approach of developing countries to the particular question of trade and shipping has had three basic objectives. Developing countries wish to influence the structure and level of freight rates in order to lessen the impact of high freight rates on exports. The Code of Conduct for Liner Conferences achieves this goal and is a current success story of developing countries. It has been a compromise between developed countries which supported continued self-regulation for shipping lines and those developing countries seeking government control.

Third world states also wish to establish and expand national merchant fleets. The 1986 U.N. Convention on Conditions for Registration of Ships is trying to achieve this goal. The Convention has been seen by developing countries as solving the lack of genuine link problem between a state and ships flying its flag. Therefore, through the 1986 Convention on the Conditions for Registration of Ships developing countries expect to establish an ordered, balanced development in world shipping fleets, to strengthen international maritime cooperation and to ensure more effective participation by developing countries in world shipping activities.

The final goal is to re-write international shipping legislation and the basic framework of shipping regulations. Developing countries maintain that since today's maritime law
evolved at a time when they did not have the opportunity to express their views and needs, it favours shipowners at the expense of cargo owners. UNCTAD has proved to be the most useful international forum for discussion on shipping requirements of third world countries. UNCTAD has emerged as the chosen vehicle for fulfilling third world shipping goals. Other international organizations seem to have surrendered the mantle to it. Finally, using UNCTAD as the main "think tank" today precludes division among other international bodies who might deal with the same set of questions.
ENDNOTES


4 See the Charter of Economic Rights and Duties of States (1975) 14 International Legal Materials (1975) 251-261.

5 Ibid.

6 Id., article 10.

7 Id., article 27. (emphasis added).

8 See also articles 10; 14; 17; 20; 25 and 26.

9 UNCTAD's major and evolving role as a principal instrument of the General Assembly for negotiations on relevant areas of international trade and related issues of international economic co-operation, particularly in the context of negotiations on the establishment of the New International Economic Order has won clear recognition and endorsement by the international community. These basic international mandates have been further elaborated and reinforced by a number of resolutions and decisions on substantive questions adopted not only by the General Assembly from year to year, and the UNCTAD conferences convened at three to four years intervals, but by the trade and development board and its permanent committees in their continuing work. See R. Krishnamurti, "UNCTAD as a Negotiating Institution", 15 Journal of World Trade Law, (1981) 3-4.


11 Liner conferences are alliances of vessel-operating carriers that provide to the general shipping community a regular, international service for the carriage of cargo on particular routes according to mutually agreed terms among carriers covering such matters as rates, schedules, membership, cargo-sharing and self-policing. See W. Conley, "Canadian Shipping Policies and the United Nations Conference on Trade and Development: An Analysis of UNCTAD V", 16 Journal of Maritime Policy and Management (1982) at 35.
S. Zamora, "UNCTAD III The Question of Shipping", 7 Journal of World Trade Law (1973) at 93.


A more detailed analysis of the Convention will be made in the following chapter.


The IMO was known until 1975 as the Inter-Governmental Maritime Consultative Organization (IMCO).

ILO-Joint Maritime Commission


PART II

LEGAL IMPLICATIONS OF THE NEW CONDITIONS
FOR THE REGISTRATION OF SHIPS
CHAPTER 3
Registration and Genuine Link
as the Main Objectives of the Convention

1. Existing Customary International Law

(1) The Importance of Registration and the Different Types
Allowed by International Law.

A shipowner's decision to adopt a nationality for a ship is
revealed to the public in a variety of ways. The three customary
means for ship immatriculation decision, and, simultaneously,
allocate national character, are: registration, documentation,
and flying the flag. The use of any one of these in isolation is
sufficient to satisfy the condition for recognition.(1) These
elements are very important since an unidentifiable object of
traffic would elude responsibility for its acts of omission and
commission, and thereby challenge the maintenance of law and
order, particularly in the context of the open sea, which is not
subject to the jurisdiction of the sovereign states.

Registration, according to generally accepted laws, aims to
determine: a) the ownership of the vessel and all encumbrances
and mortgages b) the exact type of the vessel, i.e., its
dimensions, specifications; and c) the distinguishing marks. In
short, its ultimate purpose is to keep the vessel suitably
identified throughout its operational life, so that it may
enjoy any benefits accruing to it, or, as is more frequently the
case, acquit itself of any burdens imposed on it.
International law requires that the identification for ships include: a) the name and the number of the ship (2); b) the maritime flag of the state (3); and c) ship papers or documents and certificates (4).

Even though the maritime flag is a matter of great legal consequence (5), the most acceptable criterion to determine the nationality of ships today lies in its registration in the flag state (6). Boczek defines the purpose of a ship’s registration:

...It is to declare the nationality of a vessel engaged in trade with foreign nations and to enable it to assert that nationality whenever found. The practice of registering ships has become universal and it is an established rule of international law that all maritime states make registration a formal condition of their nationality, the only exception being small craft which are not intended for long-distance navigation.(7)

Various international conventions also recognize the principle of registration as a test of a vessel's nationality. For instance, for the purposes of the Load Lines Convention, the Safety of Life at Sea Convention, and many ILO conventions (8), ships are treated as belonging to the country of registration, and alternative links are thought to be impracticable.

The maritime flag, the ship papers, and the names and numbers as identification marks of vessels, are a direct result of the registration of ships. A ship has to be registered in some country in order to get authorization to fly its flag and carry on board its national documents. When a ship complies with a maritime state's formal conditions of registration, flag and documents are issued by the state, and merely indicate that the vessel is properly registered in accordance with municipal law.
Traditional doctrine, as well as international conventions, have held that each state, in accordance with the concept of national welfare, has the undisputed right to establish prerequisites for the assumption of its nationality.(9) This internationally accepted principle has led national legislation to adopt one of the following systems: a) the Closed Registry form, which allows a state to bestow national character only to ships wholly owned by state citizens and manned primarily by a national crew. Argentina and Denmark are typical closed registry states.(10) b) The Hybrid Registry form, a modified version of closed registry, makes provision for reciprocity to nationals of qualifying states. The hybrid form represents an attempt to reconcile the extreme requirements of both the closed and open registry. It is practised by the majority of nations. (11) Ownership and manning requirements are limited only to the majority of flag-states citizenry. c) The Open Registry form allows the conference of national character on ships regardless of ownerships, control or manning.

Some authors have pointed out that inside the open registry system there are practical subdivisions. It is difficult to know when one group starts and others stop. (12) This situation, as will be discussed below, may well have been one of the many reasons why the Convention on the Conditions for the Registration of Ships, 1986, accepted that the open registry system would survive and, indeed, was part of the solution.

Open registry expresses the maximum and literal application of articles 5(2) of the 1958 High Seas Convention, and
article 91 of the 1982 United Nations Convention on the Law of the Sea. This policy, concerning the liberalization of national character, has generated the purported genuine link controversy. The 1986 Convention on the Conditions for the Registration of Ships attempts to resolve this controversy through the imposition of some minimum international rules.

(2) International Responsibility of Flag States Arising from the Registration Procedure

Generally, a ship can be said to be owned in an individual capacity if, for example, it is owned by an individual, a partnership, a corporation, or a government. However, a ship is also thought of as belonging to a particular country.

In the realm of public international law, the legal position of merchant shipping is based upon the principle of national ownership in conjunction with the principle of individual ownership (13). Whatever the factors of registration may be, it is the act of state to register a ship which alone confers the maritime flag. The flag indicates, *inter alia*, where responsibility lies for a given aspect of a maritime matter.

Accordingly, the 1958 Geneva Convention on the High Seas (14), the 1982 United Nations Convention on the Law of the Sea (15), and the 1986 United Nations Convention on the Conditions for the Registration of Ships (16), have established the concept of the "maritime flag" under which all vessels of a country's merchant marine are expected to sail. Since these conventions
associated the maritime flag's concept with the rights and responsibilities of a sovereign independent state, national registration can only be the result of the act of a sovereign state. Among the leading cases on the subject we must mention The Constitution of the Maritime Safety Committee of the Inter-governmental Maritime Consultative Organization, 1959, and Lauritzen v. Larsen, 1953. (17) In both cases the importance of the flag and the registration was specifically upheld by the International Court of Justice and the Supreme Court of the United States, respectively. Again, the term "nationality" is used in connection with ships and is merely a shorthand way of expressing that a ship is juridically connected with a state.

Although national registration and maritime flag constitute the primary source of state responsibility in relation to a ship, there are other important factors involving state responsibility which might arise from the ownership. (18) For example, if the nationality of a ship were the same as that of its owner, the nation indicated by the flag or registration would be responsible in every respect. However, this is not always the case. For instance, if a ship was registered to fly the flag of State A but was owned by a national of State B, there could be a conflict of interests. On the basis of ownership of the vessel, State B would be interested in protecting the property of its national, whereas, for instance, State A, which had granted the flag of nationality, would be responsible for complying with the international navigation rules of safety of life at sea. (19)
Before we address the problem of conflict of interests and dual nationality, we will briefly present some important aspects of state responsibility for ships.

a) Every state accepts the authority and the responsibility that result from a ship's nationality. This is essential for the maintenance of minimum order on the sea (20). Thus, article 94 of the 1982 United Nations Convention on the Law of the Sea provides for the duties of the flag (21).

b) It is generally accepted that the flag state has a responsibility toward both the navigation and the manning of ships flying its flag. Such responsibility has been established in detail by article 94, paragraphs 3 and 4 of the 1982 United Nations Convention on the Law of the Sea (22). There are also certain acts in relation to the use of the high seas which are prohibited according to the accepted conduct of states. It is the responsibility of every flag state to take measures to prevent the occurrence of these acts. In this respect, the 1982 United Nations Convention on the Law of the Sea demands that flag states prevent or officially punish piracy (23), illicit traffic in narcotic drugs or psychotropic substances (24), and unauthorized broadcasting from the high seas (25).

c) For the purposes of fixing responsibility on states that are signatories to international conventions, the criterion of registration is of paramount importance. Consequently, with regard to the responsibility for the enforcement of ratified conventions, ships registered and flying the flag of a state must
observe international conventions to which the flag state becomes party. In this connection, it is also important to keep in mind the Advisory Opinion of the International Court of Justice of June 8, 1960, (26) in which it was expressed that as a direct result of registration of ships by a state, the national tonnage under state control also increases. As a result, all responsibility arising from such ownership has to be shouldered by the state which registers the ship and gives it its national flag.

d) It is well established by customary and conventional international law that registration in a state is the source of that state's jurisdictional rights over the ship and the acts which occur on board. Article 92(1) of the 1982 United Nations Convention on the Law of the Sea reads:

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". (27)

Also the 1978 Convention Concerning Minimum Standards in Merchant Ships states:

... each Member which ratifies this convention undertakes ... inter alia, to exercise effective jurisdiction or control over ships which are registered in its territory in respect of: (i) safety standards, including standards of competency, hours of work and manning, as prescribed by national laws or regulations; (ii) social security measures as prescribed by national laws or regulations, (iii) shipboard conditions of employment and shipboard living arrangements as prescribed by national laws or regulations".(28)

Finally, it is important to mention the famous decision of the Permanent Court of International Justice in the case of the S.S. Lotus (29) which confirms the fact that, apart from certain
special cases defined by international law, vessels on the high seas are subject to the exclusive authority of the state whose flag they fly. It also confirms the principle of freedom of the seas which specifically implies that no state may exercise jurisdiction over foreign vessels. The flag state has the same rights over its ship as over its territory, but no more. Acts taking place on board a ship on the high seas must be considered as having taken place within the territory of the flag state (30).

e) It is an established rule of international law that every ship must be registered in one state or another. It is also generally accepted that registration within a state carries with it the right to fly that state's flag, and that registration confers upon a ship the nationality of the state in which it is registered. Therefore, it is possible to conclude that only the state in which a ship is registered may protect it. This, in fact, is the general rule concerning the protection of shipping, and it usually justified by considerations of convenience, by the necessity of keeping order on the high seas, and by its compatibility with the requirement the corporal of international law which stipulates that a state may only present a claim in respect of an injury to its nationals. (31)

(3) The Protection of Merchants Ships

The protection of ships, like any other claim to protect forms of wealth or human beings, may be established through a variety of different procedures, including claims to and by consular authorities, claims before the United Nations and
other intergovernmental bodies, claims in national courts and administrative agencies; claims by diplomatic representation between foreign offices, and, of course, suits in international courts and arbitral tribunals. The ability to protect rights is an important corollary to the enjoyment of those. Since the competence of states to attribute national character to ships can in fact be raised in any dispute (32) the right to state protection is often uncertain.

There are two schools of thought on the international protection of merchant ships. The first maintains that if a ship is registered in accordance with the national laws of a state and the national flag is properly flown, it constitutes \textit{prima facie} evidence of the ship's nationality which gives to the flag state or the ship owning state the right to protect tonnage that forms part of its fleet. This is the registration approach to the problem of the protection of merchant ships.(33) The other school of thought consists of those who, inspired by the Nottebohm decision, divorce protection from nationality, adopt actual ownership as the basis for protection of ships, and reject registry (34). The followers of this latter school believe that if the ownership of a vessel is in the hands of foreign nationals, the right of protection would also accrue to the state whose nationals own the ship irrespective of where it has been registered. In the words of Professor Watts:

\ldots the right to protect a ship does not necessarily belong to the State whose nationality that ship has, nor is the legitimacy of ascribing to a ship a nationality of its own acceptable without question. (35)
This difference of opinion with respect to the protection of merchant ships has its origin in the Nottebohm decision of 1955. (36) There, contrary to the generally understood principle that states are entitled to act on behalf of any of their nationals, the International Court of Justice ruled that Liechtenstein was not entitled, under customary international law, to protect one of its nationals because that national lacked a genuine connection with the state. (37) The International Court of Justice held that a state may espouse the case of its nationals if two conditions are satisfied: a) the person in question must be considered a national of the protecting state under its municipal law, and b) the nationality must be real and effective, and based on a genuine link between the person and the state. (38)

Previous to the Nottebohm case, there was only one notable maritime case in which a tribunal clearly expressed the view that mere nationality was insufficient, and that a more definitive link was required. (39) In the "I'm Alone Case," (40) the vessel concerned was sunk by a United States customs ship on the high seas after it had been engaged in smuggling operations in U.S. waters. The "I'm Alone" was registered in Canada and owned by a Canadian company. All the shareholders were Canadian. The Canadian government protested to the United States, and in default of any settlement, the issue went to a Special Claims Commission. The Canadian argument was based on the grounds that a vessel, being owned by a Canadian company and registered in Canada, was entitled to Canadian protection, namely an international claim to recover compensation for the loss of the vessel. However, the
United States, while admitting ownership by a Canadian company and equally, that all the shareholders were Canadian, contended that this company was held in trust for U.S. citizens. Americans citizens held effective control and received the primary benefits accruing to the vessel. The Commissioners decided in favour of the United States and held that no compensation should be paid with respect to the loss of the ship or the cargo, even if the act of sinking the ship was unlawful. Canadian registry was, therefore, of little avail to the owners. Furthermore, the Canadian attempt to protect them was shown to be of little worth. (41)

After the Nottebohm Judgement, the Geneva Convention on the High Seas, in 1958, introduced the "Genuine Link" doctrine. Having stated that "... Ships have the nationality of the state whose flag they are entitled to fly," article 5(1) of the Geneva Convention stipulates that "there must exist a genuine link between the state and the ship ... ". (42)

There are authors who disagree with the view that ownership can be used as grounds for protection. For example, Professor McDougal states that:

The practice of States provides abundant and convincing evidence of the traditionally honored competence of every State to extend its protection to ships which bear its national character, irrespective of the nationality of the owners or any other possible relation between the ship and same state other than that of national character.(43)

Professor Boczeck also states that: "The State of the vessel's nationality has the right to extend its protection to the vessel. This is the rule."(44) As Rienow observes, the right of
protection based on ownership is an imperfect one because of the special nature and quality of maritime vessels. It can be effective so long as it does not conflict with the control of the state to which the vessel legally belongs. (45) This position has been upheld many times. (46) The most important is the Barcelona Traction Case, (47) where the International Court of Justice held that Belgium could not bring proceedings against Spain without demonstrating a greater link with the injured corporation. Although most of the company's shares were owned by Belgian nationals, Canada had in the past extended diplomatic protection to the corporation and retained the legal right to do so. Indeed the Court held that Canada was Barcelona Traction's national state. And that incorporation is the fundamental test for protection. (48) Moreover, the Court also referred to the international recognition of Barcelona Traction's Canadian character, particularly, the Anglo-Hispano-Canadian Commission, and Belgium's previous acceptance of Canadian nationality. (49)

While the Court's judgement as a general rule is acceptable, there are many remaining questions unanswered in international law on this topic. It is not at all clear today that the registration or incorporation act of a company could provide the "genuine link" with a particular state. Second, no one knows what a genuine link means or how much of that link is necessary in order to establish grounds for protection. Third, due to the special nature of the multinational corporation, there could be a concurrent competence for protection. A shipowning state could have the right to protection by virtue of the registration of the
ship and the flag which it flies. Similarly, a state whose nationals have suffered damage would have the right to sponsor the cause of its nationals.

As long as the shipowning state, which is entitled to exercise the right of protection in the case of damage cause to its ships, is the state whose nationals own that ship, there is no conflict. One and the same state would exercise the right of protection both in relation to the injury caused to the flag of that state as well as the property of its nationals. However, if the vessel is registered by a state whose nationals do not own it, there would be two states making claims with regard to the same ship. Furthermore, if a third state is involved, there appears to be no legal impediment to two different states making a claim against a third state in the case of the same incident. (50) It is not the same, though, if the claim made by two respective state is against each other rather than against a third state.

The 1986 Convention on the Conditions for the Registration of Ships has tried to resolve all of these problems by defining the genuine link, and by establishing the conditions for the registration of ships. The Convention has attempted to achieve an ideal via the formation of a generally accepted and universally applicable legal regime governing nationality of ships. The 1986 Convention on the Conditions for the Registration of Ships is striving to unify differing national laws. Ostensibly, this would integrate varying national
approaches to shipping questions and arrest any potential future problems.

2. A New Scheme for Registration and Genuine Link under the Convention.

The main objective of the 1986 Convention on the Conditions for the Registration of Ships (51) is to restrict the recognized principle of international law that all states have a "conclusive unilateral competence" (52) to grant nationality to merchant vessels. The Convention wants to establish legislation at the international level to ensure, and where appropriate, to strengthen, the genuine link between a state and the ship flying its flag. These procedures would enable the state to effectively exercise its jurisdiction and control over ships, especially governing the management, technical, economic and social aspects of shipping.

This section reviews the 1986 Convention on the Conditions for the Registration of Ships' ability to deal with the question of registration and the genuine link.

(1) Important Definitions and Concepts

The 1986 Convention devotes a complete article to several important definitions. The most important of these is the definition of a ship. This definition will determine the scope of the Convention and, therefore, will establish which ships have to be registered in accordance with the Convention. The definition reads as follows:

"Ship" means any self-propelled seagoing vessel used in international seaborne trade for the transport of goods,
passengers, or both with the exception of vessels of less than 500 gross registered tons. (53)

Theoretically speaking, the word "ship" had very broad implications and can be applied to any vessel navigating the waters. (54) The 1986 Convention circumscribes its definition by linking certain requirements necessary for its application. First, the ship has to be self-propelled; this excludes floating islands, or any other floating craft towed by another vessel. Second, it has to be a sea-going ship used in international seaborne trade and does not apply to military ships, ships involved in domestic and coastal trade only, or ships involved in fishing, etc. Third, the Convention only applies to merchant ships of more than 500 gross registered tons. (55)

Other definitions of less importance, but which should be mentioned here, include "State of registration" meaning the state in whose register a ship has been entered; and "flag state" referring to a state whose flag a ship flies and is entitled to fly. (56)

The term genuine link is used only once in the Convention and that, in a general sense in article 1. It is expressed in the key economic and legal links between a ship and the flag state that are prescribed in article 8 concerning the participation of nationals in the ownership of ships; article 9 on manning of ships; and article 10 concerning the role of flag states in respect of the management of shipowning companies and ships.
Article 7 of the Convention on the Conditions for the Registration of Ships states that:

With respect to the provisions concerning manning and ownership of ships as concerned in paragraphs 1 and 2 of article 8 and paragraph 1 to 3 of article 9, respectively, and without prejudice to the application of any other provisions of this convention, a state of registration has to comply either with the provisions of paragraph 1 to 3 of article 9, but may comply with both. (57)

In essence, article 7 stipulates that either the provisions of article 8 or article 9 must be applied. The article is mandatory and represents the "package proposal" that the Group of 77 had requested in the negotiations of the Convention. (58) The idea was to introduce a provision which did not blatantly insist on an obligatory genuine link. This article is obviously the result of a successful compromise between very persistent and committed state representatives.

This element of flexibility was introduced in order to account for the different conditions prevailing in flag states. Some states lack sufficient skill or manpower among their nationals or persons domiciled or lawfully in permanent residence within their territory, to provide for significant participation by nationals in the crews of ships flying their flag; while others might not have sufficient capital to participate effectively in ship ownership. In an effort to promote national fleets and accommodate a ship and a flag state, article 7 was inserted. This article reflects the compromise struck during the conference, namely, that, that a state of registration has to comply either with the ownership provision of article 8 or the manning provision of article 9, paragraphs 1 to 3, although it
may comply with both.

(2) The Ownership of Ships.

Concerning ownership, article 8 of the Convention on the Conditions for the Registration of Ships states:

"1. Subject to the provisions of article 7, the flag state shall provide in its laws and regulations for the ownership of ships flying its flag.

2. Subject to the provisions of article 7, in such laws and regulations the flag states shall include appropriate provisions for participation by that state or its nationals as owners of ships flying its flag or in the ownership of such ships and for the level of such participation. These laws and regulations should be sufficient to permit the flag state to exercise effectively its jurisdiction and control over ships flying its flag." (59)

This article deals with both the genuine link question and state responsibility. It maintains that the laws and regulations of a flag state, shall expressly facilitate the participation of its nationals in the ownership of its registered ships. (60)

The decision as to what is to be regarded as an appropriate level of participation, is left entirely to the flag state to determine, subject to the effective jurisdiction and control clause in the Convention. Accordingly, the second part of paragraph 2, article 8, states that the national laws and regulations of that country should be sufficient to allow a flag state to exercise efficiently its jurisdiction and control on its ships.

The article is quite confusing and controversial. Taking into account that a flag state has a free hand in establishing rules
on appropriate level of participation, it would be difficult to
determine, before a specific legal challenge, whether the
jurisdiction and control which a flag state has are effective.
In other words, a flag state could apply such regulations as it
sees fit with regard to its interests and the general
Convention's interests, and nevertheless evade the real
jurisdiction and control the Convention is seeking to impose.

The article could also give rise to controversial
interpretations. If we interpret the article alone and
not in the context of the Convention as a whole, we could very
well conclude that effective jurisdiction and control do not
depend on registration, but on ownership. Furthermore, a flag
state, which chooses to set up its genuine link through rules in
relation to manning, is then absolved from the need to exercise
effective jurisdiction and control. Obviously, one may doubt
whether the above interpretation was the intention of the
deleagtes at the Convention. Nevertheless, that is what the
Convention expressly states in article 8 and article 9. The
legal consequences of such an interpretation could prove
disastrous. (61)

There are three primary schools of thought concerning the
interpretation of agreements. There are those who assert that the
primary aim and goal of treaty interpretation is to ascertain the
intention of the parties (subjective approach). There are others
who start with the conviction that there must exist a presumption
that the intention of the parties is reflected in the text of the
treaty and that the primary goal of treaty interpretation is to
ascertain the meaning of this text (objective approach). And there are those who maintain that the decision-maker must first ascertain the object and purpose of a treaty, and then interpret it, to give effect to that object and purpose (teleological or object and purpose approach). These three schools of interpretation are not mutually exclusive. (62)

However, the only criteria upheld in the Vienna Convention on the Law of Treaties, 1969 is the contained in article 31.(63) The Vienna Convention’s general rule for interpretation reads as follows:

1. ... A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. 

2. ... The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes. ...(64)

Furthermore, article 32 of the Vienna Convention on the Law of Treaties, which concerns supplementary means of interpretation, states:

Recourse may be had to supplementary means of interpretation including the preparation work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: a) leaves the meaning ambiguous or obscure; or b) leads to a result which is manifestly absurd or unreasonable. (65)

Analysis of these two provisions reveals the importance of good faith in the interpretation of an agreement. Indeed, the concept of good faith underlines the entire process of interpretation, but usually playing only a residual role, as
its primary function is to forestall an abuse of rights and to confirm that the treaty terms were intended to mean something rather than nothing. (66)

According to article 31, paragraph 1 of the Vienna Convention on the Law of Treaties, a treaty shall be interpreted "in accordance with the ordinary meaning to be given to the terms of the treaty in their context". As a result, it is important to appreciate that treaty terms are not drafted in isolation, and that their meaning can only be determined by considering the entire treaty including texts, titles, preambles, and annexes. In this regard, the European Court of Human Rights stated in the 1975 Golder Case that:

In the way in which it is presented in the general rule in (VCT Art. 31), the process of interpretation of a treaty is a unity, a single combined operation; this rule, closely integrated, places on the same footing the various elements enumerated in the four paragraphs of the Article. (67)

An excellent and detailed statement of the ICJ's methods and means of interpretation can be found in the 1971 Namibia Advisory Opinion in which the Court states that an international instrument has to be interpreted and applied within the framework of the entire system prevailing at the time of interpretation. (68) Accordingly, article 8 should be broadly interpreted and should go beyond a simple objective or textual approach.

The Convention's title indicates three areas of negotiation. First, the conditions which countries should apply when registering vessels under their flag. The second objective is, as stated in the preamble of the Convention "to help ensure that all states apply similar minimum conditions when accepting ships
on their registers and that all states effectively exercise their jurisdiction and control through a competent maritime administration." (69) This clarifies article 8's apparent meaning that the genuine link between a state and a ship is confined to the element of ownership alone.

In fact, there are, as we have already mentioned, six new components in the genuine link: 1) the national maritime register in which ships are entered; 2) the national maritime rules; 3) the national maritime administration; 4) the identification and accountability of the real owners and operators of ships; 5) the participation of nationals in the ownership and/or manning of vessels; 6) national participation in the management of ship-owning companies. (70)

Third, as mentioned earlier in this chapter, international law generally considered registration as the necessary link between a state and the ship which flies its flag, in the creation of nationality. The 1986 Convention defines minimum conditions of registration. If a state does not meet these six requirements, it cannot register a ship under the 1986 Convention, because this does not create a genuine link between the registering state and the ship. In the eyes of the drafters of the Convention the state could not exercise a complete jurisdiction and control over the ship unless all six elements are applied.

The travaux préparatoires of the Convention support the above contention. The travaux préparatoires, even though they do
not deal directly with the question, contain several suggested interpretations of the Convention as a whole. (71) More specifically, the developing countries had always proposed in their "package deal convention" that there should be one choice on the main provisions of the Convention, manning and ownership. (72)

Finally, we should mention that this clause

State shall include appropriate provision for participation by that State or its nationals as owners of ships flying its flag or in the ownership of such ships. ...(73)

was the subject of great debate during the negotiations of the Convention. (74) Such wording was incorporated in order to accommodate the long-standing legislation of Greece, a traditional and major maritime nation, to the requirements of the Convention (75), and thereby enabled Greece, eventually, to become party to it. (76) The difficulty lay in the fact that the initial draft text of the agreement concerning ownership seemed to insist on the incorporation of the shipowning company in the state of the registration. Actually, there were two difficulties. The first was that this limited the options that the draft agreement was intended to offer, i.e., ownership and manning. The second difficulty derived from the fact that the article on management of shipowning companies conflicted with the requirement for the incorporation of the shipowning company in the state of registration because it did provide for such "offshore systems," as well as we will see later in this chapter.

Despite the strong need for a truly genuine link on ownership, article 8 proves to be vague and weak. It is
vulnerable to the problems of interpretation that international law is currently plagued by, at least in regards to the enforcement of the Convention and the diplomatic protection of ships.

(3) Manning of Ships

Article 9 of the Convention on the Conditions for the Registration of Ships, in its first part, lays down the following:

1. Subject to the provisions of article 7, a state of registration when implementing this convention, shall observe the principle that a satisfactory part of the complement consistent of officers and crew of ships flying its flag to be national or persons domiciled or lawful in permanent resident in that State... (77)

The general principle that "a satisfactory part of a ship's complement should be nationals or persons domiciled or residing in the flag state"; and, in particular, the phrase "lawfully in permanent residence in that State..." is particularly noteworthy. This qualification was a compromise which addressed the Canadian concern regarding the different legal definition of "domicile" and "residence." The "domicile" of a person, in common law, determines what legal regime applies to that person. A person may actually reside at a place other than his domicile and yet not lose his domicile as long as he intends to return to it. Interestingly, in the civil law system, "domicile" has a meaning similar to the expression "residence" in the common law system. In common law, "residence" is defined as a physical phenomenon and may include the intention to reside in that place for a long period of time. (78) Although this distinction was understood at
the Conference, Group B felt that the use of the term "residence" alone would not be acceptable to other Groups. Accordingly, the expression "lawfully in permanent residence" was selected as a compromise. It could be argued that a person could be "lawfully in permanent residence" in one state for the time being, while remaining domiciles elsewhere. However, the prevailing or existing compromise satisfied common law countries. (79)

The application of the principle set out in paragraph 1 is subject to certain fundamental considerations. These would include the availability of qualified seafarers, existing and legally enforceable multilateral or bilateral agreements, and the sound and economically viable operation of a ship. (80) If not properly used, these qualifications could rid the genuine link of all meaning and provide the necessary justification for open registry operators to choose their crews from wherever they wish. Moreover, what is "satisfactory" is undefined and there is no implied minimum, as in the case of laws and regulations on ownership.

Article 9, paragraph 3, provides that a state may implement these provisions on a ship, company, or fleet basis. Seemingly, a state could enact legislation wherein a shipping company could meet the manning requirements, either on a ship or company basis, at its own discretion. Likewise, the laws of a state could require that 20 percent of the crew be nationals, on a ship or company basis, and thereby allow the company to choose the option it prefers. This paragraph was introduced as a result of a
demand from Group B to provide some flexibility to open registry countries in order to allow for one or two ships with national crews and the rest with foreign crews. (81) Thus, it could then be argued that they met the requirement on a fleet basis. Such flexibility is appropriate if the shortage of sufficiently qualified technical personnel throughout the economies of most developing countries are taken into account.

Obviously, the developing countries' demand to insist upon a high percentage of national crew members could in the long run become a handicap. (82) As high technology ships come into service, developing countries may need to employ highly skilled personnel to man their vessels. The stipulation that the provisions could be implemented "on a ship, company or fleet basis," could prove sensible, and indeed essential, if responsible owners of open registry tonnage found these flexible provisions an incentive to promote the education and training of enough nationals to satisfy the condition. (83) Unfortunately, the conditions could also be employed in manner which could produce harmful results and these provisions could be used to destroy the whole intent of the Convention.

One point of extreme interest is paragraph 4 of article 9, in which the 1986 Convention states:

The State of registration, in accordance with its laws and regulations, may allow persons of other nationalities to serve on board ships flying its flag in accordance with the relevant provisions of this Convention. (84)

Obviously, this paragraph refers to the "multilateral or bilateral agreements" mentioned in paragraph 2 article 9. It is another safeguard for the use of foreign crews. But the
interesting aspect of the provision concerns the multilateral or bilateral agreements or other types of arrangements into which the flag state and the labour-supplying state could enter. Indeed, not only does article 9, paragraph 4 allow a flag state and a labour-supplying country to enter into an agreement, but article 14 makes this possibility explicit. (85)

Such an agreement produces several major problems in regard to international law and the 1986 Convention on the Conditions for the Registration of Ships. First, if a state of registration has an agreement with another labour-supplying country or countries, such a measure would necessarily attenuate the genuine link which the 1986 Convention seeks. It would be advisable, though, that the agreement itself could address the legal question of when a country would be entitled to protect the vessel, or which country would be held liable for the payment of wages and other benefits, and which country would accept the responsibility for labour issues, in the event that the shipowner failed to honour his engagements. Finally, in the case that one country is party to the 1986 Convention and the other is not, or in the case that both states have conflicting national shipping legislation, which legislative regime supercedes the other. (86) In other words, the question is raised, which country should have the control of the ship? It is evident that in providing some flexibility for the open register countries, the 1986 Convention, by itself, has not managed to resolve certain major legal questions.

Finally, the last paragraph regarding the article of manning imposes a number of obligations on the state of registration both
in the observance of international conventions and the presence of adequate legal procedures. The article mentions the level of competence of manning, the terms and conditions of employment of seafarers, the existing legal procedures, and finally, adequate recourse procedures. The provision is not selective but general and applicable to all countries -- open registry or not. Unmistakably, this provision will impact on Group of 77 countries, because it will force them to spend money and to accept international agreements which they have not ratified.

(4) The Management of Shipowning Companies

Article 10 of the 1986 Convention on the Conditions for the Registration of Ships deals with the role of flag states in the management of shipowning companies and ships. Hence, the first paragraph reads:

1. The State of registration, before entering a ship in its register of ships, shall ensure that the shipowning company or a subsidiary shipowning company is established and/or had its principal place of business within its territory in accordance with its laws and regulations. (87)

Clearly, the intention of this paragraph is to end the practice of companies being represented by a name plate and nothing more. In doing so, the 1986 Convention would have created an effective genuine link between the flag state and the shipowning company and would have made an efficient civil and third party responsibility system. (88)

Unfortunately, there are many problems which need to be attended to. The phrase "shipowning or a subsidiary shipowning company" is, at first glance, a little confusing. A
subsidiary company which owns ships is also supposed to be termed a shipowning company. Hopefully, the introduction of the word "shipowning" beside the term "subsidiary," will prove beneficial. Otherwise certain abuses will proliferate, namely, the establishment, within the flag state, of a subsidiary which is not actually engaged in shipping activities but merely satisfies the provisions of the Convention and is obviously nothing more than a name plate.

It is unclear precisely how the 1986 Convention is going to apply the objective of this article, namely, the elimination of a name plate company, as long as a company that is registered in the flag state is not required, by law, to do anything other than establish itself. Once again, we return to the problem of how far a flag state is obliged to comply with the letter and spirit of the Convention. This flexibility is not very conducive to the establishment of a genuine link between the flag state and the shipowning company. If a state, on becoming a contracting party, needs to adopt certain laws and/or regulations since the 1986 Convention does not have a monitoring system, it is the flag state alone which can judge the adequacy of its newly enacted legislation.

Meanwhile, there are many countries in which domestic legislation permits a company to be incorporated and to register ships in a foreign country. (89) If the Convention, requires a company, a subsidiary shipowning company, or a representative management person inside of the country, (90) then many of these
countries would have to promulgate new registration laws in order to meet this requirement.

The other part of article 10, paragraphs 2 and 3, provides that where the company, subsidiary shipowning company or the principal place of business of the shipowning company is not established in the flag state, this state shall ensure that there is a representative or management person who shall be a national of the flag state or domiciled therein. Moreover, the state of registration should also ensure that the person accountable for the management and operation of a vessel on its register is in a position to meet the financial obligations that may arise from the operation of such ship in international maritime transportation in respect of damage to third parties this would be best done through insurance or equivalent means. Then, paragraph 3 specifies that the flag state should ensure that the ships in question are in a position to provide, at all times, documents proving that an adequate guarantee has been arranged and that an appropriate mechanism exists to cover wages and related monies owed to seafarers. (91)

Even though the purpose of the paragraph is, again, to establish a genuine link between the state of registration and the shipowning company, with the intention of imposing responsibility, it is evident that the legal vocabulary that is employed is very weak. Since no state which wanted to continue an open registry system would become a contracting party to a strong convention, the Convention favoured a certain flexibility in the hope that countries would adopt it in spirit and would subsequently increase their legal requirements for registration.
3. **Conclusion**

We have seen that registration is the most acceptable criterion for identifying the nationality of vessel engaged in trade with a foreign nation. When a ship complies with a maritime state's formal conditions of registration, the flag and documents are issued by the state, indicating that the vessel is properly registered in accordance with national law.

For didactic purposes, we have classified the main types of registration in: the closed registry form, which allows a state to bestow national character only to ships wholly owned by state citizens and manned mainly by national crew; the hybrid registry form, which is a modified version of the closed registry system that makes provisions for reciprocity to nationals of other qualifying states; the open registry form, which allows a state to imprint its nationality upon ships regardless of ownership control or manning.

Although national registration and the maritime flag constitute the primary sources of state responsibility in relation to a ship, there are other important factors involving state responsibility which might arise from ownership. The concept of ownership could be controversial if a ship were registered to fly the flag of state A but were owned by a national of state B. State B would be interested in protecting the property of its national, whereas state A, which has granted the
flag of nationality, would be responsible for complying with the international navigation rules of safety of life at sea. It is also possible to conclude that only the state in which a ship is registered may protect it, because registration carries with it the right to fly a certain state flag and confers nationality to a ship. This in fact is the general rule concerning the protection of ships. It is usually justified by considerations of convenience, by the necessity of keeping order on the high seas, and by its compatibility with the requirement of international law which stipulates that a state may only present a claim in respect of an injury to its nationals.

These are two schools of thought on the international protection of merchant vessels: one school holds that registration constitutes prima facie evidence of the ship's nationality and therefore a state of registration has the right to protect the tonnage that forms part of its fleets; the other more recent school adopts actual ownership as a basis for the protection of ships and thus rejects registry.

The International Court of Justice as well as distinguished publicists have not been unanimous on the subject of the protection of merchant vessels. In the Nottebohm case of 1955, the International Court of Justice rejected nationality as the basis for protection and required a genuine link between the country and its national. In the Barcelona Traction case of 1970 the International Court held that Canada was Barcelona Traction's national state on the ground that incorporation was the fundamental test for protection.
Because of this difference of judicial opinion, International Law has been grappling with three important questions: (1) Is the genuine link essential for the exercise of diplomatic protection? (2) What does genuine link mean or how much of that link is necessary to establish sufficient capacity for protection? (3) Which state has the right to protect a claim from a merchant vessel, the country of registration or the country whose nationals have suffered the damage? Conflicts on the protection of merchant vessels are inevitable with flags of convenience. If a vessel is registered by a state whose nationals do not own it, there would be two states making claims with regard to the same ship or two states claiming damages against each other.

The 1986 U.N. Convention on Conditions for Registration of Ships, by defining the genuine link and by establishing the conditions for the registration of ships, attempts to integrate the applicable law on the nationality of ships. Its objective is to end the existing anarchy associated with flags of convenience.

The 1986 Convention has three essential provisions: a) Article 8 concerning the role of nationals in the ownership of ships; b) Article 9, on the manning of ships; and c) Article 10, relating to the role of flag states in respect of the management of shipowning companies and ships. These provisions outline the main objective of the Convention. By ensuring an effective genuine link, the Convention would better achieve its other goals: i.e., the need to avoid maritime malpractice and fraud;
the need to comply with international standards; and the need to promote maritime joint ventures.

The Convention introduced an optional system using obligatory and precise articles, to cover both ownership and manning. In this system, countries can register their ship even when they might lack sufficient manpower to provide for significant participation by nationals in the crews of ships flying their flag. A state may elect to proceed under article 8 or article 9 or both. Countries which might not have sufficient capital to participate effectively in ship ownership are not consequently disadvantaged. These countries can choose to be bound by article 9 and still register their ships under the Convention.

Article 10's importance is that it attempts to establish a genuine link between the state of registration and the shipowning company with the intention of imposing responsibility on the state for the company. This provision not only deserved special treatment due to its vital importance to the Convention, but also because the legal implications of ownership, manning and the management of shipowning companies vis-a-vis the genuine link and nationality in customary law have been discarded.

In this chapter we have mentioned relevant areas of confusion in the Convention with respect to the protection of merchant ships. The main criticism is that the Convention does not improve the existing customary law. a) It remains uncertain which country would protect and/or control a ship when the
country of registry is different from the state whose nationals own the ship and/or the state manning the vessel, b) on the effective jurisdiction and control of ships. This article of the Convention fails to indicate which country would have the responsibility of disclosing information and going behind the corporate veil; c) on the lack of a monitoring authority at the international level. It is a system very much needed in order to guarantee that the genuine link established by the Convention will be correctly implemented. Therefore we suggest to legally approach all of these problems in order to guarantee that the Convention's most important provisions are put into effect in an effective and progressive way.
ENDNOTES

1 According to Meyers, "registration should be used to indicate the recording (or the entry into a card index) on land and under the supervision of a government body, of the allocation of the users of a given ship, this with a view to the cognisobility and the demonstrableness of that allocation." H. Meyers The Nationality of Ships (1967), p. 129.


5 See article 92 of the Convention on the Law of the Sea (1982), which is the one that points out the importance of the flag over other marks. Furthermore, the 1982 Convention on the Law of the Sea also regulates when no flag, false flag or two flags are flown or even when a flag is changed. See also the United Nations Convention on the Condition of the Registration of Ships. U.N. 2 TD/RS/CONF/23. February 7, 1986. Reprinted in 26 International Legal Materials (1987) at 1229. Hereinafter referred to as the Convention annexed.

6 As will be seen later in this Chapter, it is a very controversial statement. See D. O'Connell; II, The International Law of the Sea (1984) at 753.

7 A. Boczech Flags of Convenience. An International Legal Study (1962) 110-111.


10 See for example The National Coastal Merchant Shipping Act, No. 12950, 1944 and the Shipping Act No. 319 of May 1937 respectively, quoted in: United Nations Legislative Series. Laws Concerning the Nationality of Ships St/Leg/Ser. B/5.

11 Canada provides an excellent sample of the hybrid form. Under the Canadian Shipping Act (1983), Canadian national character is conferred upon ships a) owned by Canadian or British subjects, b)
owned by companies incorporated under the laws of a Commonwealth

country, c) whose majority of ownership is resident in Canada and
d) whose officers are Canadians or landed immigrants.

12

See the cases of Surinam, Cayman Islands, Hong Kong,
Singapore, etc., which, even theoretically speaking, are open
registers, are not always referred to by the UNCTAD Maritime
Transport Review as such.

13


14

See articles 5, 6, and 18.

15

See articles 91, 92, 94 and 232.

16

See the preamble and articles 4, 5, and 11.

17

See supra footnote 31 in Part I, Chapter I. See also Advisory
Opinion on the Constitution of the Maritime Safety Committee of
the Inter-governmental Maritime Consultative Organization and
Orders (1960). 150-175.

18

There are many others which could involve state
responsibility too, such as the shipowner’s base of operations;
the place of the wrongful act; the allegiance domicile of an
injured seaman or even the place where the contract of employment
was made. Nevertheless, the most common cases of conflicts of
protection have been on ownership and registration in public
international law as will be shown in the next section of this
chapter.

19

L. Goldie. “Recognition and Dual Nationality -- A problem of
Flags of Convenience,” 39 British Yearbook of International Law

20

See N. McDougall, W. Burke and I. Vlasic, “The Maintenance of
Public Order at Sea and the Nationality of Ships,” 54 The
American Journal of International Law (1960) at 26, 27.

21

See also article 5 of the Geneva Convention on the High Seas
(1958).

22

See also articles 10, 11 and 12 of the Geneva Convention on
the High Seas (1958).

23

See articles 105 and 107 of the United Nations Convention on
the Law of the Sea (1982).

24

See article 108 in the United Nations Convention on the Law of
the Sea (1982).

25

Id., article 109.

26

See supra footnote 31. Part I Chapter I. See also: Advisory
Opinion on the Constitution of the Maritime Safety Committee of
the Inter-Governmental Maritime Consultative Organization (1960).

See also article 6 of the Geneva Convention on the High Seas (1958).

Convention concerning Minimum Standards in Merchant Ships
Article 12 adopted on October 29, 1976 reprinted in 15
International Legal Materials (1976) at 1288.

The Lotus Case (France vs. Turkey) (1927) P.C.I.J. Series A,
no. 10.

See the Lotus Case (France vs. Turkey) (1927) P.C.I.J. Series
A., no. 10 at 25, in which the Court declared that "a corollary
of the principle of freedom of the seas is that a ship on the
high seas is assimilated to the territory of the State of its
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."

See L. Oppenheim. 1. International Law. A treatise (H.
Lauterpacht, ed. 1955) at 597. See also E. Borchard. The
Diplomatic Protection of Citizens Abroad (1927) at 349. See also
the I'm Alone Case (Canada vs. United States) (1935) in Claim of
British Ship "I'm Alone" Documents. Canada, Department of
External Affairs, Ottawa (1935) at 64-65.

Genuine link controversy

Mainly sustained by A. Boczeck, M. McDougal and W. Burke.

Mainly sustained by A.D. Watts.

A. Watts, "The Protection of Merchant Ships" 33 British
Yearbook of International Law (1957) at 52.

The Nottebohm Case (Liechtenstein vs. Guatemala) (1955) Second

Although reference is made throughout the case to companies,
the discussion applies in most respects to juristic persons
generally and many authors agreed that it could be used on ships
too. See A. Boczeck, Flags of Convenience. An International
Legal Study (1962) Chapter VII. See also M. McDougal and W.
Burke, The Public Order of the Oceans. A Contemporary
International Law of the Sea. (1962) 1008-1137. See J. Kunz "The
Nottebohm Judgement" 54 American Journal of International Law
(1960) at 566.

The Nottebohm Case (Liechtenstein vs. Guatemala) (1955) (Second
Phase) I.C.J. Report 4 at 22-23.

It is not the situation in the rest of the cases related to
protection in which practice of states provides abundant evidence
of the traditionally honoured competence of every state to extend
its protection to ships which bear its national character, irrespective of the nationality of the owners or any other possible relation between the ship and some state other than that of national character.

40 See the "I'm Alone" case (Canada vs. United States) in Claim of British Ship "I'm Alone" Documents. Canada, Department of External Affairs, Ottawa (1935) at 64-65.

41 Ibid. See also J. Knicely, "Diplomatic Protection" 12 Harvard International Law Journal (1971) at 115.


44 A. Boczek Flags of Convenience. An International Legal Study (1962) at 228.

45 R. Rienow The Test of the Nationality of a Merchant Vessel (1937) at 104-105.

46 See the Virginus Case (1870) in F. Wharton 3 A Digest of the International Law of the United States (1886) at 148. See also the Colonel Lloyd Aspinwal Case (1870) in J. Moore, 2 History and Digest of the International Arbitrations to which the United States has been a Party (1898) at 1007.


48 Id., at 41-42.

49 Id., at 44-48.

50 A. Boczek Flags of Convenience. An International Legal Study (1962) 92-93.

51 See Article 1 of the Convention annexed.

52 see supra 50.

53 see article 2 of the Convention annexed.

54 see: D. Walker, The Oxford Companion to Law (1980) at 1142. Note also that the Convention on Conditions for the Registration of Ships only applies to ships according to the theoretical definition in contrast to the registration of rights in respect of vessels under construction. See, for example, the Convention Relating to Registration of Rights in Respect of Vessels Under Construction. May 27, 1967. International Transport Treaties.
54 See article 2 of the Convention annexed.
56 Ibid.
57 See article 7 of the Convention annexed
59 Article 8 of the Convention annexed. (emphasis added)
60 Id. Article 8, paragraph 2
61 See supra point 1 (3) "International Responsibility of Flag States Arising from the Registration Procedure." at 52.
64 Id. article 31
65 Id. article 32
69 See preamble of the Convention annexed.


Particularly in the domestic rules of Greek registration.


See article 9 paragraph 1 of the Convention annexed.


See Article 9 paragraph 2 of the Convention annexed.


Article 9, paragraph 5 of the Convention annexed.

See article 9 paragraph 4 of the Convention annexed

See article 14 of the Convention annexed. It will be discussed below.

Assuming that he had received contradictory orders from the government of the flag state and from his owners.

See article 10, paragraph of the Convention annexed.


90 See article 10, paragraph 2 of the Convention annexed.

91 Id., article 10, paragraph 3.
CHAPTER 4
Avoiding Fraud, Complying with International Standards and Promoting Joint Ventures

1. The Need to Avoid Maritime Malpractice and Fraud

There is no legal definition of maritime fraud. However, we can say that such activity may take the form of simple theft, sometimes accompanied by force. Alternatively, it may take one of many more subtle forms where goods or their monetary value are diverted to the perpetrator's use, or where the ship is lost in apparently accidental circumstances in order to reap a benefit from insurance. A further possibility is the use of registration provisions of certain jurisdictions to raise successive mortgages on a ship.\(^1\) In books on international maritime fraud, the phrase "flags of convenience" often has a pejorative meaning. One author suggests that if the flag of convenience were abolished, so too would crime associated with carriage of goods by sea.\(^2\)

This concern is understood. Previous research undertaken by the UNCTAD secretariat indicates that the beneficial owners of open registry are basically unknown to the governments of their home countries. Anonymity of ownership has been advertised as one of the advantages of open registration. A paper published with respect to incorporation of companies in Liberia states that:

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Anonymity is easily preserved since: 1) all or part of the stock issue may be in the form of registered or bearer shares; 2) after incorporation, any change of officers and directors need not be recorded in a public register; 3) the Resident Business Agent is not required to file any reports with the Government regarding corporate activities.

Unless the registered owner is a reputable company, it is impossible to ascertain from the shipping registers who really owns or controls a vessel, who is responsible for any failure to observe laws relating to safety and labour conditions, and even whom to sue in the event of a civil action. It is not just a problem of open register countries. In other countries, with well-developed legal and administrative systems, it is often difficult to know exactly who owns what. Business interests pay lip service to the desirability of transparency but use the present system for their own benefit. Unless the watchdogs can detect every loophole it is a fact of life that corporate lawyers will find ways to enable shipowners to maintain a high level of privacy. Characteristic of open registry practice is a lack of identification and accountability rules, as well as the flexibility provided for internationalizing the contemporary maritime firm. This has led to what some authors have called "the formation of a regime of immunity" damaging the maritime industry.

The 1986 Convention on the Conditions for the Registration of Ships struggles for a solution to this problem, introducing articles such as those on the registration of ships and the accountability of shipowners' companies.
(1) The Registration of Ships. Article 11

Article 11, paragraph 1, provides that:

A state of registration shall establish a register of ships lying its flag, which register shall be maintained in a manner determined by that State and in conformity with the relevant provisions of this convention...

Paragraph 2 goes on to require the inclusion in the register of a great deal of information, inter alia, the ship, its owners and any recorded encumbrances or similar charges on the ship.

Hence, article 11, paragraph 2, in mandatory language requires the recording of

a) the name of the ship and the previous name and registry if any; b) the place or port of registration or home port and the official number or mark of identification of the ship; c) the international call sign of the ship, if assigned; d) the name of the builders, place of build and year of building of the ship; e) the description of the main technical characteristics of the ship, such as her type; hull’s material; type of rigging; propelling power of engines; principal measures; number of bridges; decks; masts and funnels.

In effect, all the details useful to a complete identification of the vessel. Furthermore, it is necessary to provide the date of deletion or suspension of the previous registration of the ship, and it is imperative that, before entering a ship in its register, a state must assure itself that the previous registration, if any, is deleted.(5)

It is worth noting that provisional registration, an old and commonly used feature in the registration of ships (6), is not directly regulated in the Convention. The reason could be that, by definition, provisional registration of vessels enables registration to be effected quickly in circumstances where lack of time, or the port in which the vessel is lying, prevent the
normal formalities being carried out. Admittedly, this is what the Convention is trying to hinder. It is true that the Convention does not prohibit the provisional registration practice directly. Thus it can be interpreted that the practice is allowed. This is supported by the following example: Article 5 of the 1986 Convention provides for a national maritime administration that does not have to be located within the territory of the flag state. (7) The national maritime administration can thus be outside of the registering country and provisionally register any vessel.

The latter assumption diminishes the genuine link for which the Convention is looking and creates problems in international law. It is, for example, easy to abuse the provisional registration if owners continually re-register provisionally under different flags to avoid undergoing the normal verification of ships: This creates the problem of fraud and substandard vessels. It is also important to take into account that provisional or temporary allocations are just that, and that even papers issued by a consul or any port are often called documents, in contrast to the extracts from control shipping registers, which are referred to as certificates of registry. (8) Therefore, the former has a different level of importance from the latter as far as protection and responsibility on the ship are concerned.

Since provisional registration is a grant of limited duration, there are authors who have argued that it is not really a problem in international shipping. As a rule the term
"nationality" is not referred to in municipal systems of law. The terms "temporary grant of a flag", "provisional licence", or "temporary pass" are therefore preferred expressions. The "nationality", on the whole, is reserved for cases in which allocations that are normal according to the national conceptions are concerned. If no nationality exists, then no right of protection can apply.\(^9\) According to some authors, the problems issuing from the provisional registration are not from the actual conditions or registration but from the associated procedural regulations and, therefore, have no implications in international law.\(^{10}\)

Paragraph 2 also stipulates that information about the owners of the vessel be given. It provides that such register shall record the name, address and, as appropriate, the nationality of the owner or owners; where there is more than one owner, the proportion of the ship owned by each; and the name, address and the nationality if the operator is not the owner or the bareboat charterer.\(^{11}\) Ensuring the accuracy of such registers would require some fairly strict national regulations and possibly penalties for non-compliance which the 1986 Convention does not have.

The 1986 Convention, article 11, calls for a record of the particulars of any mortgages or other similar charges upon the ship, as stipulated by laws and regulations. This provision is important because the possibility of using a marine mortgage to commit fraud is, in theory, quite simple. Once the mortgage has been granted, the vessel is removed from any part of the world
where the mortgage can effect an arrest. (12) Such fraud may be compounded by selling the vessel in another jurisdiction, or by re-registering it in another state and taking out a further mortgage there. The main obstacle to such practices is that many jurisdictions require evidence usually by way of certificates of de-registration (13) in one jurisdiction as a prerequisite of registration of a foreign vessel. Such a de-registration certificate is not required for registering a foreign vessel in other jurisdictions. (14) Therefore, a valid registration of a foreign vessel may be made, notwithstanding that the vessel remains on the register of another jurisdiction, and is subject to liabilities there.

The 1986 Convention did not consider a number of problems that could be related to maritime fraud. The registration of rights of ships under construction and the problem of existence, validity and priority of a mortgage on a vessel are examples. This last problem is quite serious and common because some countries settle the question by applying the *lex situs* of the property, that is, the law of the vessel's flag at the time when the right was alleged to have been created. Other countries apply the law of contracts, *lex loci contractus*, or where the contract was made. (15) Finally, article 11 paragraph 5 states that "In the case of a ship bareboat chartered-in a State should assure itself that the right to fly the flag of the former flag State is suspended..." (16)

In much the same way the 1986 Convention is not only trying to prevent possible frauds with this paragraph but it is also
seeking the deserved protection of a long-term charter. Indeed, through this paragraph as well as article 12, the Convention has created a system of registration of charter parties that did not have acceptance.

Article 12 introduced a necessary regulation, namely, the assimilation of the bareboat chartered vessel to an owned vessel. Even though the attempt had to be made as the only way to try to prevent the use of bareboat charters from nullifying the provisions of the Convention on ownership, it seems doubtful that it can succeed in a general context. This is due to the fact that a ship-operating company duly established in the country with national participation in the capital could operate as the owner of one or more bareboat chartered ships, with the charter rate fixed at such a level as to ensure that the actual operation of the company yielded no profit, with no benefit flowing to the economy of the register country. Even when the genuine link requirement would be met with a national company involvement, the only beneficiary would be the real owner of the ships, that is, a foreign company. (17)

It is relevant to mention that paragraph 5 of article 12 provides that the state where the ship is bareboat chartered notify the former flag state of the deletion of the registration of the bareboat chartered ship. The substance of this is important because securing speedy answers to requests for information amongst different jurisdictions is a common problem. Obviously, delay in obtaining the information as well as its quality and veracity can cause injury to the integrity of the genuine link which the Convention is pursuing.
(2) Identification and Accountability.

As we have mentioned, article 6 takes care of both identification and accountability. This provision must be seen as a complement of article 11. Article 6, *inter alia*, provides for general requirements that the flag state should take to ensure that the owner or operator of a ship flying its flag can be easily identified. Article 11 refers to the information to be recorded concerning the identification of owners and operators.

Article 6 is important for four reasons: (1) it helps governments to verify observance; (2) it helps the governments to produce an accurate and meaningful register of the ships and their owners; (3) it helps to exercise full jurisdiction over ships that fly the national flag; (4) it helps to make owners accountable for the maintenance of standards and the welfare of their crews as well as for fiscal obligations.

In general, the aim of the article is to identify corporate owners at least to the point of identifying a corporate owner of some substance, as distinct from a mere nominal company. If knowledge of ownership and managers were limited to knowledge of nominal owners, the verification of equity requirements would be prevented and a national shipping register rendered meaningless, even if technically accurate, the exercise of jurisdiction in instances where managers act on instructions or pressures from the real owners would be limited; and accountability in general would be weakened. Canada, in particular, had a bad experience trying to identify and hold accountable the owners of the "Arrow" in 1970. (18) Thus, article 6 attempts to make
considerable effect in the promotion of an identification and accountability system. Some problems, however, remain.

When considering whether a flag state exercises jurisdiction over its shipowners, a distinction needs to be made between nominal jurisdiction and effective jurisdiction. Nominal jurisdiction involves consideration of whether the flag state’s rules on the application of its laws dictate that the shipowner is subject to its rules even when outside the physical boundaries of the flag state.(19) However, the concept of effective jurisdiction concerns whether decisions of the flag state, be they administrative or court decisions, can be enforced against the shipowner.

Even though the latter jurisdiction is the goal of the 1986 Convention, article 6 lacks a compulsory insurance clause (20) which would best make a shipowner accountable. Evidently, the Convention was aware of this since it stated in article 10 that:

the State of registration should ensure that the person or persons accountable for the management and operation of a ship flying its flag are in a position to meet the financial obligations that may arise from the operation of such a ship to cover risks which are normally insured in international maritime transportation...

Yet the Convention does not mention or make any reference to compulsory insurance in article 6, which, at the risk of repetition, is essential for the purpose of accountability.

Another problem with article 6 is paragraph 3 in which it is stated that:

Registers of ships should be available to those with a legitimate interest in obtaining information contained therein, in accordance with the laws and regulations of the flag State.(22)
First, the Convention does not specify who has a legitimate interest in obtaining information contained in the national register. Second, the Convention does not say who is going to determine who really has a valid "legitimate interest". Third, taking into account that the majority of open registry countries have secrecy laws (23) and the loose language of paragraph 3, it is possible that many open registry countries will not alter their protective registration systems. Consequently, the process of identification will continue to be problematic.

Furthermore, paragraph 5, which addresses the use of log books on ships and their retention after sale, also confirms the right of persons having a legitimate interest in obtaining information to inspect or copy the log book.(24) Again, there are two problems with this paragraph. The first is that the Convention does not say which log book must be retained. Even if it is interpreted to mean all log books, there could be a second problem, which is the confidentiality constraints of some jurisdictions. (25) There are official log books that are kept by the flag state for future reference, and which are the property of the state of registration. There also exist deck logs and engine logs, which are the property of the ship's owner and are often confidential.

2. **The Need to Comply with International Standards.**

(1) The National Maritime Administration.

To cover the matter of safety standards, article 5 of the 1986 Convention states:
The flag State shall have a competent and adequate national maritime administration, which shall be subject to its jurisdiction and control. (26)

The purpose of the administration is mainly to implement applicable international rules and standards concerning, in particular, the safety of ships and persons on board and the prevention of pollution of the marine environment. (27)

Paragraph 3 of article 5 (28) places an obligation on the maritime administration of the flag state providing that it shall ensure:

b) That ships flying the flag of such States are periodically surveying by its authorized surveyors in order to ensure compliance with applicable international rules and standards.

c) That ships flying the flag of such State carry on board documents, in particular those evidencing the right to fly its flag and other valid relevant documents, including those required by international conventions to which the State of registration is a Party.

d) That the owners of ships flying the flag of such State comply with the principles of registration of ships in accordance with the laws and regulations of such State and the provisions of this Convention. (29)

This article is essential for those countries that support the view that genuine link is definitely achieved by effective jurisdiction and control through a competent and adequate maritime administration, rather than ensuring the existence of a link through the nationality of owners, managers and crews. (29)

There are, however, other facets to be considered. There is, for example, no indication of where the "national maritime administration shall be located. Contrary to what had been planned (30), this provision will not only ensure the continued
existence of "flags of convenience" shipping (31), but it also will require, particularly from those developing countries that want their own national fleets, a lot of capital in order to have an effective national maritime administration abroad that really cares about safety at sea and the protection of the marine environment. This latter point indicates that a completely new system needs to be created which will require the assistance and cooperation of developed countries in order to be successful.(32) Furthermore, if the national maritime administration is located outside the country of registry, the possibility of conflict of legal jurisdiction in relation to extraterritorial discovery of information and to the genuine link problem continue to exist.

In the former situation, for reasons of obvious convenience, it is possible that many national maritime administrations are going to be located either in London or New York. Thus, taking into account that the information is going to be outside the countries that have secrecy laws, an extraterritorial request for information to a country with secrecy laws will not be needed.(33) Therefore, it would be dangerous for shipowners interested in privacy to have information in the United States, for example. We all know that the United States' protection of business of trade secrets in litigation is relatively limited. Thus, according to Rule 26(c) of the Federal Rules of Civil Procedure, the only way to resist discovery is for the party to establish that the information is a trade secret within the definition of Rules 26(c) (7) (2) and that its release might be harmful. Yet, the judge is given virtually unlimited discretion
to determine when protection should be provided, and a protective order often has only a temporary effect because even information protected during discovery frequently must be revealed at trial. (34) Regardless of the jurisdictional problems of the secrecy laws it is evident that if the national maritime administration is in a country that is not the flag state nation of the ship, this element of the genuine link will lose a large measure of its intended force.

Another ambiguity in article 5 is that it neither specifies what an adequate national maritime administration is nor says who is charged with judging the competency of a maritime administration. The article does provide in paragraph 2 that the flag state shall comply with applicable international rules and standards as concerns the safety of ships and persons, the prevention of pollution, and the frequency and standards of survey. This provision should be taken with caution because the application of international rules and standards are enshrined in international conventions and are applicable only to those countries that have become contracting parties to those conventions. It would have been more practical to have created a system homologous to the port state enforcement that currently exists in the United Nations Convention on the Law of the Sea 1982, article 218. (35)

There, article 218 was seen as a compromise between the flag state and the coastal state in an effort to improve the enforcement of vessel-source pollution rules and regulations. Hence, a state, when a vessel is voluntarily in its port, may
investigate and commence proceedings where there has been a polluting discharge that violated international rules outside the state’s jurisdiction.

Thus, instead of a national maritime administration, what we are proposing here is the same general principle established in article 216 of the Law of the Sea but with few modifications. All the main functions of a national maritime administration could be assumed by a port state inspection system that could take care of compliance with a minimum standard of laws and regulations concerning registration of ships; compliance with a minimum international standard of applicable international rules as concerns the safety of ships and persons, the prevention of pollution and the frequency and standards of survey; compliance with the provision concerning documents on board evidencing the right to fly the flag and other valid relevant documents. (36)

The intention is that the port state would not impose its own registration rules and regulations but rather the minimum principles in accordance with the provisions of this 1986 Convention. If a system such as this were implemented, it would be cheaper than a national maritime administration (37) and more accessible, effective and efficient (38). Through it marine safety, prevention of pollution, navigation surveillance, control and enforcement can be promoted. The absence of routine inspections, laxity on the part of a classification society, the slowness of the investigation of serious complaints, the inattention from governments to complaints of individual seafarers as distinct from complaints raised by trade unions, and even poor management practices on a ship can also be avoided.
(2) Labour Exploitation and Measures to Minimize Adverse Economic Effects.

The 1986 Convention deals with both labour exploitation and measures to minimize adverse economic effects in an interrelated form in articles 14 and 15 as well as in Resolution 1 and Resolution 2 annexed to the Convention.

Article 14 is most concerned with safeguarding the interests of the labour-supplying countries and minimizing labour displacement and consequent economic dislocation. To this end it provides that consideration should be urgently given to the implementation of the measures contained in Resolution 1 annexed to the Convention. This Resolution goes beyond article 14 and shows more concern for the protection of the interests of seafarers than the wording of the Convention. It reads as follows:

It is recommended that labour-supplying countries should regulate the activities of the agencies within their jurisdiction that supply seafarers for ships flying the flags of another country in order to ensure that the contractual terms offered by those agencies will prevent abuses and contribute to the welfare of seafarers. (39)

Further on, reference is made to the provision in article 10 regarding an appropriate mechanism to cover wages and related monies owed to seafarers. The Resolution as well as article 14 recommended that labour-supplying countries should ensure that the terms and conditions of employment do not lead to exploitation, while the flag state should ensure that an appropriate mechanism exists to cover cases of default of payment by employers. (40)
It is true that labour exploitation is lamentable. In international labour, however, particularly in the international shipping industry, it is difficult to tell what is and is not exploitation. (41) There are, for instance, some western labour unions that blame open registry countries that have labour exploitation and that it is a characteristic of open registries to have labour exploitation. (42) But, there are many kinds of labour exploitation, and other types of registries do have such problems. Secondly, paying a sailor from a third world country less than one from Sweden, United States or Canada should not be called labour exploitation. As Mr. Blanpain puts it,

the divergence school of thought, maintained that labour relations are a subsystem of political systems and mostly reflect prevailing national conditions and cultural values. (43)

Third, it is well known that a key factor for multinational enterprises in deciding where to invest or disinvest are the labour laws of each country. It is because a multinational company located in various countries is subject to the laws of these countries. Thus, multinationals should respect local law and practice and not try to transplant head-office principles that do not respect the local climate. Furthermore, it is important to note that conditions of low pay frequently exist with the connivance, even the encouragement, of national recruitment agencies in the labour-supplying countries, which want to ensure that high wages and good conditions will not be passed to national shipping lines. (44)

A point of contention was raised during the negotiation of article 14 and the Resolution 1. At the fourth part of the
Conference on the Conditions for the Registration of Ships(45) the ambiguous nature of the definition of the term "labour supplying country" was raised: according to the definition in article 2, almost all countries would qualify. This is despite the article 2 definition which defines a labour-supplying country as "...a country which provides seafarers for service on a ship flying the flag of another country."(46) Article 14 and Resolution 1 seem to consider the labour-supplying countries as a special and particular kind that deserve exceptional treatment in the Convention. This was done, perhaps, in an attempt to reflect the anxiety of the representatives of Egypt and the Philippines who unsuccessfully tried to qualify the labour-supplying country definition.(47)

Concerning measures to minimize adverse economic effects, article 15 and Resolution 2 annexed to the Convention were the result of tough negotiations. A proposal was submitted by Panama and followed by the Group of 77 that created a conflict in two ways: (1) on the location of the proposal, meaning, either in the body of the Convention or outside of the Convention through a Resolution annexed to it; and (2) on the legal consequences of imposing obligations upon international organizations and agencies which could not become contracting parties of the Convention.

Hence Panama, to minimize possible economic dislocation within countries, in the process of adjusting and implementing the requirements established in the Convention, called upon international organizations and agencies, including inter
alia, UNCTAD, UNDP, IMO and the ILO, to provide assistance upon request.

Indeed, Annex II, Resolution 2 of the Convention is a replica of the Panamanian proposal bringing with it the above-mentioned difficulties in the negotiation. Accordingly, it was decided that article 15 of the Convention would refer to Resolution 2 as follows:

urgency should be given to the implementation, inter alia, of the measures as contained in Resolution 2.

In that way the Panamanian proposal would have at least recommendatory value by virtue of being contained in a Resolution annexed to the Convention which is referred by the Convention itself.

Legally speaking, it is not clear whether one faces a legal, non-legal or quasi-legal pronouncement. The confusion was intentional. The words "urgency" and "should" used in article 15 to make reference to Resolution 2 are exact opposites in terms of compulsion. A resolution outside the Convention has merely a recommendatory, and not a mandatory, value. (48) Therefore, article 15 and Resolution 2 will have very little impact despite the real need for technical and financial assistance to counter adverse effects which may be caused by making their registers less open when becoming a party to the Convention. For these provisions to have real effect, it would be necessary to set up a fund to be used to render such assistance. This has never been proposed and it will not be established because the developed countries, which are the ones which could provide such assistance and finance see no reason to change the existing system.
3. The Need to Promote Maritime Joint Ventures.

According to Black's Law Dictionary, a joint venture is:

a legal entity in the nature of a partnership engaged in the joint prosecution of a particular transaction for mutual profit.... It requires a community of interests in the performance of the subject matter, a right to direct and govern the policy in connection therewith, and duty which may be altered by agreement, to share both in profit and losses.... Unlike a partnership, a joint venture does not entail a continuing relationship among the parties. (49)

The belief that the only rational solution to current problems in the maritime sector is the recommendation for cooperation and joint ventures is reflected in the Convention.(50) We share the opinion if we consider that in the shipping industry very often no single enterprise has at its disposal all the elements necessary to succeed on its own such as capital, experienced management, trained operational personnel and access to cargo. A joint venture might be the solution to the problems of land-locked states whose ocean-borne trade is limited, and which in order to avoid dependency on a single neighbour, channel their trade through the ports of more than one transit country thereby reducing the concentration of shipments through one country.(51) Article 13 is trying to achieve an availability of capital, which is an enormous problem in developing countries. Capital can be made available through a joint venture because a multinational shipping enterprise, in contrast to a national shipping company, would have access to finance or guarantees for investments from several countries. It would also have greater advantages in respect of maritime subsidies. Thus a joint venture may get preferential terms
for loans from international institutions, terms which may not be available to national shipping lines. (52) A joint venture should be like a marriage: success depends on it being a union of compatible needs in which neither party is a net giver or receiver. It has the advantage of sharing. Countries involved are not only expected to share commercial risks that would bring reduction of demand for merchant marine services and the pressure of competition, but also need to satisfy the criteria related to the transfer of technology and skills through a close working relationship between the partners. (53) As we have seen, one of the major problems facing the Third World in developing their national fleets is the lack of manpower. Another advantage of a joint venture is that a multinational enterprise can draw on the manpower resources of all the participating countries for managerial, clerical and seagoing personnel. Finally, according to Mr. Odeke the joint venture would also solve the problems of flag discrimination and flag preferences because joint ventures would allow harmonization of cargo-reservation and an ease of international tension for cooperation. (54)

Despite the vagaries of article 13, its goals are quite understandable. Moreover, one could state that it is the only article of the Convention that, in the long run, will truly promote the national shipping industry. (55) Nevertheless, special problems may arise concerning the policies and objectives of the multinational enterprise. There could be, for instance, a great opportunity for problems due to conflicting national legislation and the choice of location of incorporation and
registration of the multinational enterprise. In exactly the same fashion as in other articles of the Convention, there could also be problems concerning which country is going to register the ships, which country has the proper genuine link with the vessel or fleet, which country is entitled to protect the ship, and which is going to have the national quotas or equitable representation from all the participating countries regarding the recruitment of personnel.

Such a joint venture provision to help developing countries' shipping will be a challenge not only from the legal point of view, if they are to avoid the various pitfalls, but also from the economic point of view to avoid the commercial cooperation ending up in exploitation. Past experience of joint ventures would suggest the need for caution in this regard.(56)

4. Conclusion

In this chapter we have examined the Convention's provisions which represent a secondary group set of goals. The successful implementation of these articles will mean an effective genuine link on the *sine qua non* provisions mentioned in chapter 3. This chapter has focused on three subjects: 1) the avoidance of fraud; 2) the compliance with international standards; and 3) the need to promote maritime joint ventures.

In the books on international maritime fraud, the phrase flags of convenience almost always used as a pejorative term. This is so, because according to UNCTAD beneficial owners of open registry countries are basically unknown to these governments.
So, unless the registered owner is a reputed company of substance and not merely a brass-plate company, it is impossible to ascertain from the shipping registers who really owns or controls a vessel; who is really responsible for any failure to observe laws relating to safety and labour conditions, and even whom to sue in the event of a civil action.

The 1986 Convention on Conditions for Registration of Ships is struggling for a solution to this problem by introducing provisions such as article 11 on the registration of ships; article 12 on the bareboat charter and article 6 on the identification and accountability.

In this chapter we have seen how article 11 is completely silent regarding the common practice of provisional registration. This could have happened because provisional registration of vessels enables registration to be effected quickly in circumstances where lack of time prevents the normal formalities being carried out. This is precisely the practice that the 1986 Convention is trying to hinder. However, the 1986 Convention did not deal with the problem, perhaps because the idea was to allow the provisional registration as a matter of domestic legislation. The effect of not dealing with this problem not only diminishes the genuine link which the Convention is seeking but it also creates problems in international law.

There are also other problem that article 11 does not mention such as the registration of rights in respect of ships under construction and the problem of existence, validity and
priority of a mortgage on a vessel. This latter is quite serious and common because some countries apply the law of the vessel's flag at the time when the right was alleged to have been created. Other countries apply the law of contracts, i.e. where the contract was made.

Article 12 introduced a new system of registration of charter parties, namely, the assimilation of the bareboat chartered vessel to an owned vessel. The system in much the same way is trying to prevent possible frauds. However, as much as in other articles of the Convention the fact that there is not a monitoring authority established will hinder a fair implementation of the provision.

Similarly, the aim of article 6 is to identify corporate owners of some substance, as distinct from a mere nominal company, in order to exercise a complete and effective jurisdiction and control over their ships. It is essential for a provision on identification and accountability to have a compulsory insurance clause. Another problem is the imprecise and confusing language used in this article. This could not only cause problems of interpretation but it also could create serious international legal difficulties.

To cover the matter of safety and the prevention of pollution a national maritime administration was created by article 5 of the Convention. We have noticed, however, some disadvantages. For instance, there is no indication of where the national maritime administration should be located. This will give room to keep the flag of convenience register and
obviously this could be the cause of conflicts between different legal jurisdictions, particularly in the extraterritoriality discovery of information issue. Furthermore, the possibility of having a national maritime administration abroad could work as a handicap for developing countries. This is so because they will need a lot of capital, technology and skilled labour in order to have an effective national maritime administration. To improve this provision we are recommending the adoption of a different approach to the subject. The idea is to create a state port enforcement system which could take care of compliance with the minimum standard of regulation established by the Convention.

The need to comply with international standards also involve problems of labour exploitation. These problems have been raised by the 1986 Convention in an inter-related manner. Thus, article 14 on measures to protect the interests of labour supplying countries is a complement of Resolution I annexed to the Convention. Article 14 and Resolution I seem to consider the labour supplying countries as a special type of states that deserve exceptional treatment in the Convention. This is done to help developing countries to become important crew suppliers in international shipping.

Article 13 on joint ventures and article 15 on the measures to minimize adverse economic effects take care of the possible economic dislocation at the national and international level.

Article 15 and Resolution II were designed to minimize economic problems that could emerge in the process of adjusting and implementing the requirements of the Convention. Article 13 calls for cooperation and collaboration through a joint venture.
ENDNOTES


4. Thus, a Norwegian or Greek citizen may be the sole shareholder of a Panamanian company owning a vessel X; the Panamanian company registers vessel X under the Liberian or the Cypriot flag. Vessel X is managed by a shipbroking office in New York or London and is chartered on a long term basis to a Japanese firm. The Japanese firm sublets to Formosan charters and so on. See B. Metaxas, *Flags of Convenience* (1985) at 172.

5. See article 11 paragraph 4 of the Convention annexed.

6. This kind of temporary allocation has been used for many countries and it is granted by international law. For instance, article 91 of the 1982 *Convention on the Law of the Sea* which duplicates article 5 of the *Geneva Convention of the High Seas* of 1958 established the term registration as meaning the recording of the allocation, including the mention of all the encumbrances in a register kept somewhere on land. It does not matter whether it takes place in a central register or in the local books of a port or of a consul's office. See H. Meyers, *The Nationality of Ships* (1967) at 167-171.

7. This will be examined below in Section 2(1).


9. *Id.*, at 167-171.


11. See article 11 paragraph 2 of the Convention annexed.


13. Certificates with all the record of mortgage or other similar charges.


See article 11 paragraph 5 of the Convention annexed.

See Id., article 12 paragraph 3.


These difficulties were amply illustrated by the Amoco Cadiz incident, in which an owner's representative being a non-national and residing outside the jurisdiction, initially refused to testify at an inquiry conducted by the flag state and subsequently only agreed to respond to some questions at a closed hearing conducted at the flag state's embassy in Washington. See The Sunday Times (London), March 19, 1978 at 1. co. 1 and 2. See also The New York Times Feb. 14, 1977 at 14.

Or any other clauses which assure the existence of funds or other property in the flag state which can be seized to satisfy a fine or judgement.

See article 10 paragraph 3 of the Convention annexed.

See article 6 paragraph 3 of the Convention annexed.


Article 6 paragraph 5 of the Convention annexed.


See article 5 paragraph 1 of the Convention annexed.

See Id., article 5 paragraph 6.
It is one of the strongest provisions of the Convention. See article 5 paragraph 3 (b), (c) and (d) of the United Nations Convention annexed.

We believe that the Convention should be seen as a package and all its elements, therefore, as a complement to one another.


Since there is no obligation of the flag state to ensure that its national maritime administration is located within its territory.

Inter alia, there is going to be needed: a technical surveyor’s staff; a sophisticated communication technology; an inspection staff for complaints; etc.

See Restatement of the Law, Second, Foreign Relations Law of the United States (1965) Section 40, which provides: "Where two States have jurisdiction to prescribe and enforce rules of law and the rules they may prescribe require inconsistent conduct upon the part of a person, each state is required by international law to consider, in good faith, moderating the exercise of its enforcement jurisdiction...". See also an excellent explanation of recent developments on the problem in J. Castel, "Compelling Disclosure Secrecy Laws: Recent Developments in Canada-United States Relations." The Canadian Yearbook of International Law (1985). 261-284.


See article 5 paragraph 3 of the Convention annexed.

Also to avoid burdening taxpayers with the costs of inspecting other nation's ships, it is proposed that fees be levied on ships on which deficiencies are noted so as to cover the total costs of the inspection system.

In contrast to a land-locked country’s national maritime administration. For instance, port inspectors could effectively check where managers have appointed officers who lack the experience necessary to operate certain types of ships or equipment; officers working an excessive number of hours, etc.

See article 14 paragraph 1 of the Convention annexed.
See id., Annex 1, Resolution 1.

Obviously we are not making reference to the flagrant violation of the international labour rules such as the "Convention Covering Wages, Hours of Work on Board Ship and Manning" (Revised) 1958 (109 of 1958) or to the violation of the domestic labour laws of the ship.


The Supply of labour to open registry ships is arranged either by direct contract between the shipowner and the employee or some agency that supplies labour or by arrangement between the shipowner and the government of the labour supplying country. See Report of the United Nations Conference on Conditions for Registration of Ships on its Third Part, TD/RS/CONF/19/Add.1 (1985) at 13.


See article 2 in the Convention annexed.

See supra 45.

"A resolution is not a law but merely a form in which a legislative body expresses an opinion." See H. Black, Black's Law Dictionary (The Publisher's Editorial Staff eds. Fifth edition 1963) at 691.

Id., at 435.


Id., at 310.

See Article 13 paragraph 2 in the Convention annexed.

It is important to mention that although the objective of joint ventures is the transfer of capital and technology from rich to poor as was identified in the Caracas Declaration, there are other possible combinations such as South-South; or even South-North. See P. Bartlett, "Fixing a New Maritime Order", Seatrade October 1985 at 22.

See in the definition quoted at 49 that the objective of a joint venture is not to establish a permanent relationship.

CHAPTER 5

Achievements and Pitfalls

1. Achievements

(1) General Importance of the 1986 Convention

The Convention on the Conditions for the Registration of Ships is important to the international community in general for the following reasons:

(a) It is the first international agreement in which by consensuses the great majority of countries fully support the conditions for entering vessels in national shipping registers. In other words, the 1986 Convention harmonizes the conditions for registration of ships by states.

(b) The Convention is the first international instrument which defines the elements of the genuine link that should be established between a ship and the state whose flag it flies. Not practically but theoretically, the Convention filled a major gap not only in international maritime jurisprudence but also in the international shipping industry because the components of the genuine link had never been identified.

Even though the 1958 Geneva Convention on the High Seas (1) and the 1982 United Nations Convention on the Law of the Sea (2) had mentioned that there must exist a genuine link, it was the United Nations Convention on the Conditions for the Registration
of Ships that established the following constituent elements of a genuine link between the ship and its flag state, namely:

(a) the national maritime register; (b) the national maritime laws and regulations; (c) the national maritime administration;
(d) the transparency and responsibility of the real owners and operators of ships; (e) national participation in the ownerships;
(f) national participation in the management of shipowning of ship-operating companies. (3)

Therefore, if the Convention enters into force and a state purports to confer its nationality on ships by allowing them to fly its flag, without assuring that they meet such test as management, ownership and/or manning, jurisdiction and control, other states will not be bound to recognize the asserted nationality of those vessels.

(c) Since shipping is an international activity, it is highly amenable to international action in addition to national action. Thus the 1986 Convention was extremely beneficial as a first step toward a more ordered and better balanced development, in world shipping, to strengthen international maritime cooperation in all its essential aspects and to ensure more effective participation by developing countries in world shipping activities.

(d) Despite the enormous legal loopholes already mentioned through the thesis, our opinion is that the Convention achieved an outstanding importance as a political exercise.

Wisely, despite hard negotiations during the Conference, the Convention managed to establish a complex package deal which
provided for each country's interest. Thus we have found in the
Convention optional provisions (4); articles which make reference
to Resolutions outside of the Convention (5); as well as
mandatory and recommendatory provisions. Yet, the intention of
the Convention is not to allow reservations(6). The legal price
paid for such benevolence and flexibility was of course very
high. Indeed, perhaps too high: some areas of the Convention
amount to no more than a simple wish.

The Convention represents a first and positive step in
the negotiation of a truly genuine link, i.e., reaching an
international agreement establishing a common denominator
acceptable to all nations on a subject on which countries have
had totally different philosophies, interests and rules for years
(7). But the Convention has kept the legal status quo on many
international legal questions which were unanswered. Indeed, in
the rush and cheer of the political accord those questions might
have been entirely forgotten.

(e) The international community via the 1986 Convention
places so much importance and emphasis on the registration of
ships that it could be argued that, given the requirements of the
1986 Convention, registration may, effectively, be the only
criterion for protection and control of merchant vessels.

(2) Importance to Open Registry Countries.

The 1986 Convention on the Conditions for the Registration
of Ships is particularly important for open registry countries.
After all, the Convention was made in order to affect them.

The issue of open registry countries was raised in UNCTAD as
a result of concern over the fact that almost one-third of the
world fleet was owned by non-national open registries owners who had little or no connection with the states whose flag their ships flew and whose precise role in world shipping was uncertain. Subsequently in 1974, the Shipping Committee of UNCTAD adopted a resolution which stated that open registry operations constitute a device which enabled the traditional maritime countries to maintain ownership and control over world shipping despite the fact that they could not operate economically under their own flags, and pointed out the inherent dangers of anonymity of open registry ownership. (8)

In 1978, the Working Group on International Shipping Legislation addressed the question of a genuine link and reached a unanimous conclusion that the expansion of open registry fleets had adversely affected the expansion of other fleets, including those of developing countries. (9) Following further debate in 1981 UNCTAD adopted resolution 43 (S-111) by majority vote (10), calling for the establishment of an Intergovernmental Preparatory Group to propose a set of basic principles concerning the conditions upon which vessels should be accepted on national shipping registers. Consequently, the General Assembly, in its resolution 37/209 of 20 December 1982, decided to convene a plenipotentiary conference early in 1984, to be preceded by a preparatory committee. The Preparatory Committee met in November 1983 and the work for an international agreement on conditions for registration of vessels was further advanced.

The objective of the exercise was very clear, the elimination of the open registry system. (11) However, in the
last part of the negotiations of the Convention those objectives were fundamentally changed. The negotiations no longer centred on the emotive subject of "phasing out" open registries but as we have seen they concentrated on the minimum conditions for accepting vessels on national registers through internationally accepted standards.

This shift in the focus of the discussion might have been because the only way to get an international agreement was by accommodating the view of all interested parties, or because the developing countries (Group of 77) had realized the importance of open registries on the free market system or the economic efficiency criteria which are a very strong argument for the coordination of developed countries' capital and labour in open registry fleets. Whatever the reason might have been, the fact of the matter is that the open registry system has been allowed and legalized through the Convention.

Nevertheless, it is far from being perpetuated. Before one builds a wall one should find out what one wants to keep in or keep out. It is true that open registry countries have won this battle but the war against them continues. In the words of the President of the Conference on the Conditions for the Registration of Ships:

...the new Convention would not radically and immediately change the face of the oceans or the underlying interplay of forces, but it did offer States and the international community an opportunity to bring about the necessary changes, one step at a time, by a gradual but irreversible process. (12)

He was convinced that, far from legitimizing current practices, the implementation of the Convention would result in a
standardization of national maritime registers.

The idea is to transform gradually and progressively the regime of open registry by a process of tightening the conditions under which open registry countries retain or accept vessels on their registers. This is a process which may be done by a number of international conventions in different areas. Open registries will continue to exist until the disadvantages caused by the regulations which try to resolve them become more widely generalized.

We agree with the tactic of external regulation of the vessels, which is much more acceptable in terms of international law than direct elimination of open registries. But the whole social, political, legal and economical circumstances of the countries affected must be remembered. The problem has not been resolved and it is still too complex for either developing countries or developed countries. While open registries may have imperfections, phasing them out would be a mistake. If every imperfect maritime fleet in the world were eliminated, ocean transportation would cease to exist.

We disagree with the elimination of open registries at the present time for the following reasons: First, if open registries were in fact eliminated, there would be an increase in subsidy programs and protectionist measures resulting in higher cost national flag vessels. Second, all state-controlled fleets particularly the Soviet fleet with 16,767,526 G.R.T. (13), would have a decided cost advantage in direct competition with the rest of the free market world in international bulk trade. Third, for obvious reasons, new subsidy programs aiming at
shielding high-cost vessels from international competition, would lead to a proliferation of cargo preference laws which would result in inflated costs for shippers and consumers. (14) The inherent flexibility in open registers permits the most efficient possible allocation of the world's maritime resources; this flexibility in turn provides the market place with relatively low cost, reliable and efficient bulk shipping services. A report prepared for the government of Liberia in 1979 concluded that:

the fundamental argument in favour of the flags of convenience shipping is that it provides an economical and efficient means of transporting the world's products, particularly the bulk commodities. Without flag of convenience shipping it is inevitable that costs will rise... Flag of convenience shipping is responsive to free market requirements and enforces balance of supply over demand. (15)

(3) Importance to Land-Locked States

The Convention proclaimed the effective exercise of jurisdiction and control over ships, especially regarding management and technical, economic and social aspects. (16) The 1986 Convention appears to establish that the right of the state to grant nationality to ships is limited by the state's ability to control effectively such ships. For instance, article 5, dealing with the national maritime administration can be read to infer that a state with no ports could not have its own fleet, as it would not possess the necessary facilities for policing such fleet navigation. It seems contrary, then, that the Convention has established land-locked states the right to fly their national flags on their vessels. It is specifically mentioned in article 4, paragraph 1, that:
every State, whether coastal or land-locked, has the right
to sail ships flying its flag on the high seas. (17)

The Convention clearly establishes inalienable rights
of land-locked states on the high seas in almost the same
fashion as the Geneva Convention on the High Seas 1958 and the
United Nations Law of the Sea 1982. (18) Both Conventions were
merely a codification of an earlier Declaration Recognizing the
Right of Flag of States having no Sea Coast, which reads:

The undersigned, duly authorized for the purpose, declare
that the States which they represent recognize the flag
flown by the vessels of any State having no sea-coast which
are registered at some one specified place situated in its
territory. (19)

Furthermore, the right of land-locked states to fly their
national flag on their own ships was confirmed in the Convention
on Transit Trade on Land-locked States.

Principle II declares that:

In territorial and on international waters, vessels flying
the flag of land-locked countries should have identical
rights and enjoy treatment identical to that enjoyed by
vessels flying the flag of coastal States other than the
territorial State. (20)

Consequently, the 1986 Convention on Conditions for Registration
of Ships accords with international customary and conventional
law. As a result, it has won the affection of Switzerland and
Austria. These countries had striven at the Conference for a
formulation which would not diminish their ability to meet the
obligations imposed on the flag state to the same extent as
costal states. (21)
2. **Pitfalls**

Some international legal problems arising from the 1986 Convention on the Conditions for Registration of Ships are as follows:

(1) **The Entry in Force**

According to article 19 the Convention shall enter into force:

"... 12 months after the date on which not less than 40 States, the combined tonnage of which amounts to at least 25 per cent of world tonnage, have become Contracting Parties to it in accordance with article 18. For the purpose of this article the tonnage shall be deemed to be that contained in annex III to this Convention."(22)

Therefore the Convention will enter into force when ratified by 40 States representing 25 per cent of relevant gross registered tonnage.

The formula's negotiation belies its simplicity. The requirement for 40 contracting states was not contentious. But Group B - Panama, Liberia and Bahamas - considered minimum tonnage requirement to be absolutely essential.(23) Thus their support for the minimum of 40 contracting states was conditional upon the acceptance, by other Groups, of a double-trigger mechanism incorporating a minimum tonnage requirement. It is not a coincidence that the tonnage described in Annex III to the Convention is: "Merchant fleets of the world, ships of 500 grt. and above as at July 1985".(24) It was an attempt to balance the different group-forces in the Convention. It was thought that even though it is possible to make many combinations of countries which would secure the entry into force, this was not likely to
happen by generic groups. For instance, the developing countries cannot do it on their own. The current open registry countries as defined by UNCTAD could do it. However, they would not have any interest in doing it. The interest of open registry countries is to improve their image but not to become Contracting Parties which may force them into measures they would rather not take. The EEC alone also falls short of the tonnage needed to meet the 25% condition.

The entry into force of the 1986 Convention is thereby menaced. It is very possible that this explains the the 25% requirement introduced by the Group B in the negotiations. Together Group B and open registry countries account for over 70% of world tonnage over 500 G.R.T. Therefore, they are in absolute control of the Convention. Unless more than one of these countries become Contracting Parties it is unlikely that the Convention will enter into force.

(2) Review and Amendments in the Convention

Article 20 of the 1986 Convention sets out the circumstances in which review and amendments can be considered.

1. After the expiry of a period of eight years from the date of entry into force of this Convention, a Contracting Party may... propose specific amendments to this Convention and request the convening of a review conference to consider such proposed amendments. (25)

The proposed amendments and the request for a review conference shall be circulated to all Contracting Parties. Indeed, no amendments may be considered except at a review conference which would mean, effectively, another Convention. Furthermore, the 1986 Convention cannot be amended for at least
10 years after the conditions for entry into force are met. In practical terms the period is even longer: one year must elapse between the satisfaction of conditions for entry into force and the entry into force itself (26); eight years between entry into force and the date at which a review conference can be requested (27); one year from the date of circulation of the request to Contracting Parties and the receipt of their replies (28), and at least six months must pass prior to the opening date of the conference, when the Secretary General of the United Nations shall circulate to all Contracting Parties the texts of any proposals for, or views regarding, amendments. (29) The knowledge that a country will be bound for such a long period of time is likely to discourage countries from becoming Contracting Parties. However, it is one of the few rigidities of the Convention.

The intention of the Convention is not to allow reservations as legally defined in international law:

... The term reservation may be defined as a formal declaration by which a state, while accepting a treaty in general, excludes from its acceptance (or modifies) certain dispositions by which it does not wish to be bound ... (30)

or (as defined by the Vienna Convention on the law of Treaties in article 2(1)(d)):

(d) "reservation" means a unilateral statement, however phrased or named, made by a state, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that state;" (31)

Nevertheless, the EEC has repeatedly stated that even though the governments of the member states of the European Economic Community were satisfied with the contents of the Convention as
regards the strengthening of the real link between ships and their flag states, they would be able to sign the Convention only in conformity with the Treaty of Rome setting up the European Economic Community (32) because of the potential conflict between certain provisions of the Convention and the rights and obligations of EEC States under the Treaty of Rome.

We understand the concern of the representative of the Netherlands who spoke on behalf of the member states of the European Economic Community at the negotiations because, on the one hand, in traditional international law, if a later treaty is in conflict with a prior one, the earlier treaty takes priority. (33) Thus, that part which is in conflict with a prior commitment shall not be applied. On the other hand, we can also cite the ancient international law maxim which dictates that "Lex specialis derogat legi generali." (34) The special rule prevails over the general rule. But here one now has the problem of which convention is the general or the more special one; the rule which binds few states, as opposed to a Convention with many parties; or a rule can also be special, in that it furnishes, in comparison with the lex generalis, the deeper, more detailed, perhaps exceptional, regulations on the same subject matter. In any event, it was unnecessary for the Convention to speak with regard to reservations because the flexibility of its provisions, indirectly achieves the same end.
(3) Signature and Ratification

Article 18 of the 1986 Convention establishes that

All States are entitled to become Contracting Parties to this Convention by: a) signature not subject to ratification, acceptance or approval b) signature subject to and followed by acceptance or approval or c) accession.

At first glance the article is a little confusing because it does not mention that the phrase "subject to" means subject to the constitutional requirements of each state or depending on the country's legal system. The expression of commitment to an international obligation involves several closely related elements, each of which is very difficult to separate for purposes of discussion and analysis. However, it is extremely important because questions arise as to what obligations, if any, are incurred by Contracting Parties after they sign the Convention but prior to ratification.

In order to resolve this question, it is convenient to mention that signature of a treaty, contrary to popular belief, does not establish consent to be bound, unless, of course, the specific intention of the party is to establish consent to be bound. In the latter case, the treaty is not subject to ratification, acceptance, or approval. Otherwise, a signature is regarded by that state as signifying that it is in agreement in principle with the purposes of a treaty and article 18 of the Vienna Convention on the Law of Treaties may be applied.

Article 18 paragraph (a) says:

A state is obliged to refrain from acts which would defeat the object and purpose of a treaty when:
(a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or
(b) ..... (35)

Thus, even though a signature does not create an obligation to ratify, it is possible to infer from article 18 paragraph (a) of the Vienna Convention on the Law of Treaties that signature encourages the signatory state to proceed to ratification, acceptance, or approval and creates an obligation of good faith to refrain from acts calculated to frustrate the objects and purpose of the treaty. In other words, a state which has signed the treaty has exchanged instruments constituting the treaty subject to ratification, acceptance or approval has not expressed its consent to be bound by the treaty, and even when it can at any time make its intention clear not to become party to the treaty, it may have to refrain from active or passive conduct which would run counter to the treaty.

From that perspective, it is obvious that for some countries the signature of the 1986 Convention could present problems because, as we have seen, the purpose and objective of the Convention is much broader than the strengthening of the genuine link between a state and ships flying its flag; it is the tightening up of the conditions on registration of ships which process is eventually to eliminate open registries.

(4) The "Shall" and "Should"

Although states are willing to address problem areas collectively, they often limit the constraints to which they subject themselves. We have identified two main techniques used
by states and international organizations in the pursuit of conflicting goals. First, states will retain discretion over the definition of the obligation they undertake. Second, they will avoid legal obligations. (36)

An example of the latter is provided by the 1986 Convention which sadly has some important provisions which contain the word "should" instead of "shall". For instance, article 10 paragraph 3, in which the question of "should" and "shall" warrants a digression. There are also other important articles. Article 8 paragraph 2 as well as article 10 paragraph 2, and article 11 paragraphs 4 and 5. The presence of the word "should" provides an escape clause because of the weakness of the command.

According to A Standard Dictionary of the English Language, "shall" means inter alia, "expression of subjection to a command, intention, constraint, obligation, promise or permission"(37) in contrast with "should" which means, inter alia, "an obligation in various degrees usually milder than ought; as you should be obedient."(38) These definitions are consistent with their popular meaning, i.e. the former is prescriptive in nature and the latter recommendatory.

This problem of prescription and recommendation is better illustrated in the French version of the 1986 Convention on the Conditions for the Registration of Ships. Thus, in the place of "should", the French text reads "devraient" in the articles above mentioned, and in the place of "shall", the French text directly enunciates the respective obligation.
The word "should" allows the state owing the obligation to continue to agree in principle to the obligation while also claiming that in a particular instance the obligation is not exigible. Therefore, where there is a "should escape clause", there will not be a justification for enforcement of the norm and thus, even political enforcement will be prevented. (39) It is possible to say that if a state practices a recommendatory provision in good faith, that kind of soft law will be legitimized, and it is widely recognized that soft law justifies and legitimizes conforming conduct. (40)

3. Conclusion

Chapter 5 has been a global analysis of the achievements and pitfalls of the Convention. We have mentioned the general importance of the Convention to the international community and in particular its relevance to open registry countries and landlocked states. The success of the Convention is directly proportional to how far states are prepared to comply with the provisions of the Convention as a whole.

We have argued in this chapter that the Convention is important for the international community for the following reasons: (1) The Convention is the first international agreement in which by consensus the great majority of countries harmonize the conditions for registration of ships. (2) The Convention is the first international instrument which defines the elements of genuine link. (3) The Convention is the first step toward ordered and balanced development in world shipping. (4) The Convention represents an outstanding political achievement for the
international community. This is so because it is the first time that a very complex issue such as the flags of convenience topic has been negotiated by all interested parties. The Convention proves that the matter is negotiable and future advances on the subject are now foreseeable.(5) The Convention places so much emphasis on registration that it could be implied that registration may be the only definitive criterion which produces nationality.

We have also mentioned that the Convention is a great accomplishment for the open registry countries. Even though the Convention tried to stop the use of flags of convenience, this practice has survived. The international community was unable to furnish conclusive evidence that the use of flags of convenience had retarded the growth of developing countries' fleets.

During the negotiations, those who opposed the practice of flags of convenience were assuaged. Instead of phasing out flags of convenience definitively, as was intended at the outset of the Convention negotiations, the international community through UNCTAD shifted the focus of the discussion to a flexible convention. The international community favoured a gradual and progressive transformation of the regime of flags of convenience into "normal" registers. This transformation would be achieved by a process of tightening the conditions under which open registry countries retain or accept vessels on their registers. The process is envisaged to merely start with the 1986 U.N. Convention on the Conditions for Registration of Ships to be
followed by more specific conventions on areas related to the matter of flags of convenience. Flags of convenience are allowed to exist in the Convention. They will continue to exist until the hurdles erected by the international regulations make flags of convenience disadvantageous to shipowners.

The Convention also signifies a great deal of success to land-locked states. The 1986 Convention very strongly sets up the inalienable rights of land-locked states to fly their national flags on their vessel but also several provisions of the Convention imply that a state with no port is allowed to have its own fleet.

To summarize, the pitfalls in the Convention include the article regulating the entry into force, the article concerning the review and amendment of the Convention, and the article dealing with signature and ratification. The analysis of these provisions has been separated due to their particular ability to affect the Convention per se in contrast to directly influencing the subject-matter of the Convention.

Article 12 treats of the entry into force system. It is a double-trigger mechanism incorporating a minimum tonnage requirement. The idea was to balance the different group forces in the Convention. Blocs of countries will not control the entry into force of the Convention. The disadvantage of the double-trigger mechanism is that through this provision Group B and open registry countries, which together account for over 70% of world tonnage over 500 G.R.T., are in absolute control of the Convention. Unless more than one of these countries becomes
Contracting Parties it is unlikely that the Convention will enter into force.

Article 20 describes the circumstances of review and amendment. The pitfall here is that countries which become parties to the Convention will have to wait for a very long time to change the Convention. The knowledge that a country will be bound for such a long period of time is likely to militate against countries becoming Contracting Parties. Indeed, not only may no amendments be considered except at a review conference, involving almost another Convention, but article 20 specifically declares that the Convention cannot be amended for at least eight years after the conditions for entry into force are met.

Another menacing pitfall is the signature and ratification procedures. This chapter argues that for some countries, i.e., flag of convenience countries, the signature of the Convention is unattractive due to the real purpose of the 1986 Convention: the tightening up of the conditions on registration of ships and the elimination of open registries. We have based the argument on the premise that although a signature does not oblige any state to comply with the Convention, it is possible to infer from article 18 on the Vienna Convention of the Law of Treaties that a signatory state is expected to act in good faith toward the Convention and should refrain from actions calculated to frustrate the objects and purpose of the treaty.

The non-mandatory language used in the convention is also viewed in this chapter as a pitfall for the effective legal significance of the Convention. The 1986 Convention should have used the word "shall" instead of "should" in many important
provisions. The word "should" permits the state owing the obligation to continue to agree in principle to the obligation while also claiming that, in a particular instance, the obligation is not compulsory. These weakened provisions will not justify legal enforcement of the norm. Furthermore, political enforcement of the Convention will be hindered.
ENDNOTES


4  See articles 8 and 9 of the Convention annexed.

5  See article 14 and Resolution 1 of the Convention annexed. See article 15 and Resolution 2 of the Convention annexed.

6  A provision on reservations had been included in article 5 of the draft negotiation agreement. However, it was thought that article 5 was not necessary as it could in this situation lead to the weakening of the genuine link. See Report of the United Nations Conference on Conditions for Registration of Ships on the Fourth Part of its Session TD/RS/CONF/24 (1986) at 23.

7  See for example: United Nations, Laws Concerning the Nationality of Ships 1955. See also Report by the United Nations Conference on Trade and Development Secretariat, Conditions for Registration of Ships TD/B/AC 34/2 January 22, 1982, in which it is shown that the social, legal and economic conditions in all the countries of the world are very different and similarly the ship registration requirements of each sovereign state too. Therefore, there is an urgent need for an international convention which harmonizes those rules to achieve international minimum criteria.

8  See Report of the Committee on Shipping on its Sixth Session TD/B/521 Annex I (1974) at 21 (VI).


10  49 in favour, 18 against and 3 abstentions. The countries voting against were 16 countries, mostly members of Group B, together with Israel and Liberia; Belgium, France and Turkey abstained.


From a Canadian perspective it is interesting to note that the existence of the open registry system operates to Canada's advantage because it has "made available a large amount of relatively low-cost tonnage, maintained a downward pressure on freight rates, mainly in the bulk trades, and provided a means for Canadians to operate competitively in international shipping." See A. Popp, "Transportation-Maritime Law" Queen's Law Journal, International Law Critical Choices for Canada 1985-2000 (1985) at 447-448. See also T. Heaver, National Flag Shipping. An Analysis of Canadian Policy Proposals (1982) at 2, 68-69.

International Maritime Associates Inc., Economic Impact of Open-Registry Shipping (1979) at V-1; 2.

See article 1 of the Convention annexed.

Id., article 4 paragraph 1.


Declaration Recognizing the Right to a Flag of States having no Sea Coast, 7 League of Nations Treaty Series 74 (1921).


See article 19 paragraph 1 of the Convention annexed.


Annex III of the Convention annexed.

See article 20 paragraph 1 of the Convention annexed.

Id., article 19.

Id., article 20 paragraph 1.

Ibid.

Id., article 20 paragraph 2.


33 See R. Higgins, The Development of International Law through the Political Organs of the United Nations (1963) at 274.

34 See the Continental Shelf Case (Tunisia/Libya). I.C.J. Reports 1982 at 38 paragraph 24.

35 The Vienna Convention on the Law of Treaties article 18(a).


38 Id., 1659.

39 We believe that political enforcement, as opposed to enforcement through legal process is more likely to occur in the case of the Convention because as we have seen the Convention lacks the mechanism for legal enforcement.

CONCLUSIONS AND RECOMMENDATIONS

Conclusions

Given the crucial importance of shipping to export driven economies, international legal questions regarding maritime transport certainly deserve our undivided attention. The 1986 U.N. Convention of Conditions for Registration of Ships endeavours to resolve many of the more daunting international shipping issues. Even this valiant global effort left certain questions unanswered while raising even additional legal queries.

Nevertheless, the 1986 Convention remains an excellent testament to the diligent work of UNCTAD in the field of international shipping law. Straightforward and persistent, UNCTAD has assiduously attempted to shape the legal regime governing international maritime law to more adequately reflect the will and aspirations of the third world and consequently move towards the New International Maritime Order.

From a legal perspective, we can assert that one of the most complicated problems of international shipping law is the registration of merchant vessels. In customary international law every state has a conclusive unilateral competence to grant its nationality to merchant vessels.

A natural corollary to this principle is the proliferation of flags of convenience. The existence of flags of convenience or open registries has created a generally disorganized shipping industry and in particular has hindered the development of
developing countries' merchant fleets. Consequently, the international legal community has endeavoured at various times to quietly curtail this practice.

The first effort was made by the Institute of International Law in 1896. It sought to narrow the traditional principle of freedom of the seas which holds that each state may determine for itself the conditions on which it will grant its nationality to a merchant vessel.

The second attempt was the 1958 Geneva Convention on the High Seas which sought to impose limits on the open registry practice. It imported into the Law of the Sea the controversial concept of the Genuine Link from the Nottebohm case of 1955.

The third attempt was the IMCO dispute of 1959 which constituted a direct assault on the practice of flag of convenience. The International Court of Justice in its advisory opinion established the ownership of the individual or a corporate body, as well as the ownership of the state as an overall concept of national tonnage.

The fourth attempt, the 1982 Convention on the Law of the Sea, sought to make the open registries so disadvantageous that nobody would be interested in their convenience. The idea was to tighten up the laws and regulations on navigation in general and thus to indirectly affect the flags of convenience. The fifth attempt began in 1978 when the developing countries through UNCTAD blamed the practice of flags of convenience for retarding the development and expansion of third world merchant fleets. An international convention on conditions for registration of ships was thought to be essential to correct the problem.
Consequently, the 1986 U.N. Convention on Conditions for Registration of Ships was born. It attempts, once again, to impose regulation on the registration of ships so that, irrespective, of their location, ships would be linked to the flag state at all times. In other words, the objective is to ensure a genuine link between a state and ships flying its flag, in order that the state can exercise effectively its jurisdiction and control over ships. According to the 1986 Convention a state's jurisdiction covers the identification and accountability of shipowners and operators, as well as the administrative technical, economic and social aspects of maritime transport.

Thus, for the first time, an international convention contains what are assumed to be the elements of the genuine link: a) national register of ships; b) national maritime ownership and manning; c) national maritime law and regulations; d) national maritime administration; e) national participation in in the management of shipowning or ship-operating companies; f) the identification and accountability of the real owners and operators of ships.

Unfortunately, the vagueness and legal flexibility pervading the Convention have prevented the drafting of clear guidelines for establishing the genuine link. Furthermore, there are still many important legal problems left unanswered in the Convention. For instance, it is just as troublesome now to determine which state is responsible for the injurious conduct of a vessel, and which state may protect a vessel against alleged unlawful acts.
Both legal issues are subsidiary to the questions of nationality and genuine link.

Two schools of thought have emerged on the questions of international protection of merchant vessels. The first school says that registration constitutes *prima facie* strong evidence of the ship's nationality. Therefore the state of registration has the right to protect the tonnage that forms part of its fleets. The second view adopts actual ownership as the basis for protection of a ship and thus rejects the registry theory.

The International Court of Justice as well as authors on the protection of merchant vessels have not been unanimous on the subject. In the Nottebohm case of 1955, the International Court of Justice rejected nationality as the basis for protection and required a genuine link between the country and its national demanding protection. In the Barcelona Traction case of 1970 the same International Court of Justice held that Canada was Barcelona Traction's national state with incorporation being cited as the fundamental test for protection. Conflicts may currently abound as non-nationals register their vessels around the world. Inevitably this will lead to two states making claims with regard to the same ship or two states claiming damages against each other.

The 1986 Convention on Conditions for Registration of Ships only marginally improves customary law. Moreover, the Convention does not even specifically address the problem of protection of merchant ships. Nevertheless the Convention attempts to establish a genuine link without setting out strong, obligatory
and precise articles. It creates an optional system in two of its main provisions. These provisions are article 8 on ownership and article 9 on the manning of vessels. The idea was to help either developing countries which might lack sufficient manpower to register their ships in the Convention through article 8 and provide for significant participation of its nationals in the ownership of ships flying their flag or developing countries which might not have sufficient capital to participate effectively in ship ownership. In this case, these countries can choose to be bound under article 9 and register their ships under the manning provision of the Convention. As we can see these articles not only are confusing the protection of merchant vessels issue but they also create problems with respect to the effective jurisdiction and control of ships.

Furthermore, article 10 on the management of shipowning or ship-operating companies does not clarify to any extent which country would have responsibility for disclosure of information and the lifting of the corporate veil, thus diminishing the genuine link that the Convention is seeking. A state can apply the Convention's rules as it sees fit, depending on the states' particular laws and regulations. This is mainly because the Convention does not have a monitoring authority or an enforcement mechanism in order to guarantee an effective genuine link in the Convention. There is also no indication of where the national maritime administration shall be located and the agreement is silent on the practice of provisional registration as well as on the problem of the existence, validity and priority of mortgages on merchant vessels.
Similarly, this Convention does not have a compulsory insurance clause on identification and accountability, and the imprecise and confusing legal language does not favor a serious implementation of a genuine link.

All of this makes it possible to argue that from the legal point of view the Convention is a simple wish. The Convention not only does not improve the legal system governing the registration of ships but it is also likely to bring about confusion, uncertainty, arbitrary decisions and even a lack of harmony in matters dealing with the registration of ships.

This is not to say that the 1986 Convention is a complete failure. Far from it. We can conclude that, albeit indirectly, it has achieved another unwritten goal. It is a political success. It has been another UNCTAD achievement. Thus, UNCTAD, through the application of the principles established by the New International Economic Order, creates another international convention which moves toward the New International Maritime Order.

UNCTAD as an international forum has always been very successful in averting the demands of developing countries in the area of international shipping. UNCTAD has been creating a New International Maritime Order elaborating on the Declaration on the Establishment of a New International Economic Order and the principles reflected in the Charter of Economic Rights and Duties of States.

UNCTAD has spearheaded the first international agreement in which by consensus the great majority of countries have
agreed to harmonize the conditions for registration of ships. It represents a fundamental step towards a more ordered and balanced development of the shipping world. The 1986 Convention, for the first time in over thirty years, has agreed upon an internationally acceptable definition of the components of the genuine link. It proves that negotiations on the flags of convenience issue, a highly controversial and divisive topic, can be fruitful with the participation of all interested parties. From this perspective, the 1986 Convention signifies a major achievement in resolving the controversy over flags of convenience.

Recommendations

1. We recommend the creation of an international monitoring institution which would supervise the implementation of the conditions set out in the 1986 Convention, i.e., a) national register of ships; b) national maritime administration; c) national maritime ownership and manning; d) national participation in the management of shipowning and ship-operating companies; and e) transparency and responsibility of owners and operators of ships.

If an international monitoring institution is created, it would ensure, within the terms of the Convention, collaboration and harmonization of policies in a legal and technical way, and would also avoid the complete phase-out of open registries. It is relevant to say that the future of the open registry practice is under strong challenge. Even though open registries have been allowed in the Convention, the final aim of the movement is the elimination of such a registry.
2. We recommend, to open registry countries in particular, to fight either for the complete fulfillment of Resolution 2, Annex II of the 1986 Convention on the measures to minimize adverse economic effects or for the maintenance of the status quo in international shipping.

3. Instead of just one complex Convention which deals with many different subjects in a confusing manner, it would have been better to deal with each subject separately in its own institution. For instance, the labour problems should have been dealt with at the International Labour Organization; the environmental and technical problems at the International Maritime Organization; and the political problems emerging from the need to expand the merchant fleets of developing countries in UNCTAD. This, of course, must take into account the real relevant factors, i.e., lack of capital, lack of qualified labour force, lack of technology, lack of promotional laws in the field, etc. This would have been more technical and less political. Moreover, the affected parties would have been fully consulted and it would have been easier to deal with all the subjects related to the problem. As we have seen, the Convention is a poor and incomplete package of complicated devices to attack a single, although multi-faceted, problem.

4. It has been suggested throughout this thesis that the possibility of the flag state's having a national maritime-administration abroad be eliminated. We are proposing a national port inspection system similar to the one currently in existence
in the United Nations Convention on the Law of the Sea, 1982, article 218. Therefore, all the main functions of a national maritime administration could be assumed by a state port inspection system that could take care of compliance with a minimum standard of laws and regulations concerning registration of ships. It would enforce a minimum international standard of applicable international rules as concerns the safety of ships and persons, the prevention of pollution and the frequency and standards of survey, the compliance with the provision of on board documents evidencing the right to fly the flag and other valid relevant documents.

It is important to clarify that the purpose of the system recommended here is to ensure that the port state could not impose its own registration rules and regulations. It would have to abide by the minimum principles in accordance with article 5 of the Convention.

If such a system is adopted, it would be cheaper, and more accessible than a national maritime administration abroad. It would also control the slowness of investigation of serious complaints from the flag state's government. This system would guarantee a more efficient and effective way of handling complaints from individual seafarers.

5. Now that the idea is to expand developing countries' fleets, many more countries would have interests in, as well as the duty of, exercising diplomatic protection over ships. Hence, we recommend the clarification of the problem of protection of merchant vessels. We also want to determine which country would
ANNEX

"United Nations Conference on Trade and Development"

UN2 TD/RS/CONF/23

United Nations
Convention on Conditions
For Registration of Ships

Adopted by the United Nations Conference on
Conditions for Registration of Ships
on February 1986
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Annex I - Resolution 1 - Measures to protect the interests of labour-supplying countries

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Annex III - Merchant fleets of the world
The States Parties to this Convention,

Recognizing the need to promote the orderly expansion of world shipping as a whole,

Recalling General Assembly resolution 35/56 of 5 December, 1980, the annex to which contains the International Development Strategy for the Third United Nations Development Decade, which called, inter alia, in paragraph 128, for an increase in the participation by developing countries in world transport of international trade,

Recalling also that according to the 1958 Geneva Convention on the High Seas and the 1982 United Nations Convention on the Law of the Sea there must exist a genuine link between a ship and a flag State and conscious of the duties of the flag State to exercise effectively its jurisdiction and control over ships flying its flag in accordance with the principle of the genuine link,

Believing that to this end a flag State should have a competent and adequate national maritime administration,

Believing also that in order to exercise its control function effectively a flag State should ensure that those who are responsible for the management and operation of a ship on its register are readily identifiable and accountable,

Believing further that measures to make persons responsible for ships more readily identifiable and accountable could assist in the task of combating maritime fraud,

Reaffirming, without prejudice to this Convention, that 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,

Prompted by the desire among sovereign States to resolve in a spirit of mutual understanding and co-operation all issues relating to the conditions for the grant of nationality to, and for the registration of, ships,

Considering that nothing in this Convention shall be deemed to prejudice any provisions in the national laws and regulations of the Contracting Parties to this Convention, which exceed the provisions contained herein,

Recognizing the competences of the specialized agencies and other institutions of the United Nations system as contained in their respective constitutional instruments, taking into account arrangements which may have been concluded between the United Nations and the agencies, and between individual agencies and institutions in specific fields,

Have agreed as follows:
Article 1

Objectives

For the purpose of ensuring or, as the case may be, strengthening the genuine link between a State and ships flying its flag, and in order to exercise effectively its jurisdiction and control over such ships with regard to identification and accountability of shipowners and operators as well as with regard to administrative, technical, economic and social matters, a flag State shall apply the provisions contained in this Convention.

Article 2

Definitions

For the purposes of this Convention:

"Ship" means any self-propelled sea-going vessel used in international seaborne trade for the transport of goods, passengers, or both with the exception of vessels of less than 500 gross registered tons,

"Flag State" means a State whose flag a ship flies and is entitled to fly,

"Owner" or "shipowner" means, unless clearly indicated otherwise, any natural or juridical person recorded in the register of ships of the State of registration as an owner of a ship,

"Operator" means the owner or bareboat charterer, or any other natural or juridical person to whom the responsibilities of the owner or bareboat charterer have been formally assigned,

"State of registration" means the State in whose register of ships a ship has been entered,

"Register of ships" means the official register or registers in which particulars referred to in article 11 of this Convention are recorded,

"National maritime administration" means any State authority or agency which is established by the State of registration in accordance with its legislation and which, pursuant to that legislation, is responsible, inter alia, for the implementation of international agreements concerning maritime transport and for the application of rules and standards concerning ships under its jurisdiction and control,

"Bareboat charter" means a contract for the lease of a ship, for a stipulated period of time, by virtue of which the lessee has complete possession and control of the ship, including the right to appoint the master and crew of the ship, for the duration of the lease,
"Labour-supplying country" means a country which provides seafarers for service on a ship flying the flag of another country.

Article 3

Scope of application

This Convention shall apply to all ships as defined in article 2.

Article 4

General provisions

1. Every State, whether coastal or land-locked, has the right to sail ships flying its flag on the high seas.

2. Ships have the nationality of the State whose flag they are entitled to fly.

3. Ships shall sail under the flag of one State only.

4. No ships shall be entered in the registers of ships of two or more States at a time, subject to the provisions of paragraphs 4 and 5 of article 11 and to article 12.

5. 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.

Article 5

National Maritime Administration

1. The flag State shall have a competent and adequate national maritime administration, which shall be subject to its jurisdiction and control.

2. The flag State shall implement applicable international rules and standards concerning, in particular, the safety of ships and persons on board and the prevention of pollution of the marine environment.

3. The maritime administration of the flag State shall ensure:
(a) That ships flying the flag of such State comply with its laws and regulations concerning registration of ships and with applicable international rules and standards concerning, in particular, the safety of ships and persons on board and the prevention of pollution of the marine environment,

(b) That ships flying the flag of such State are periodically surveyed by its authorized surveyors in order to ensure compliance with applicable international rules and standards,

(c) That ships flying the flag of such State carry on board documents, in particular those evidencing the right to fly its flag and other valid relevant documents, including those required by international conventions to which the State of registration is a Party,

(d) That the owners of ships flying the flag of such State comply with the principles of registration of ships in accordance with the laws and regulations of such State and the provisions of this Convention,

(e) The State of registration shall require all the appropriate information necessary for full identification and accountability concerning ships flying its flag.

**Article 6**

**Identification and accountability**

1. The State of registration shall enter in its register of ships, inter alia, information concerning the ship and its owner or owners. Information concerning the operator, when the operator is not the owner, should be included in the register of ships or in the official record of operators to be maintained in the office of the Registrar or be readily accessible to him, in accordance with the laws and regulations of the State of registration. The State of registration shall issue documentation as evidence of the registration of the ship.

2. The State of registration shall take such measures as are necessary to ensure that the owner or owners, the operator or operators, or any other person or persons who can be held accountable for the management and operation of ships flying its flag can be easily identified by persons having a legitimate interest in obtaining such information.

3. Registers of ships should be available to those with a legitimate interest in obtaining information contained therein, in accordance with the laws and regulations of the flag State.
4. A State should ensure that ships flying its flag carry documentation including information about the identity of the owner or owners, the operator or operators or the person or persons accountable for the operation of such ships, and make available such information to port State authorities.

5. Log-books should be kept on all ships and retained for a reasonable period after the date of the last entry, notwithstanding any change in a ship's name, and should be available for inspection and copying by persons having a legitimate interest in obtaining such information, in accordance with the laws and regulations of the flag State. In the event of a ship being sold and its registration being changed to another State, log-books relating to the period before such sale should be retained and should be available for inspection and copying by persons having a legitimate interest in obtaining such information, in accordance with the laws and regulations of the former flag State.

6. A State shall take necessary measures to ensure that ships it enters on its register of ships have owners or operators who are adequately identifiable for the purpose of ensuring their full accountability.

7. A State should ensure that direct contact between owners of ships flying its flag and its government authorities is not restricted.

**Article 7**

*Participation by nationals in the ownership and/or manning of ships*

With respect to the provisions concerning manning and ownership of ships as contained in paragraphs 1 and 2 of article 8 and paragraphs 1 to 3 of article 9, respectively, and without prejudice to the application of any other provisions of this Convention, a State of registration has to comply either with the provisions of paragraphs 1 and 2 of article 8 or with the provisions of paragraphs 1 to 3 or article 9, but may comply with both.

**Article 8**

*Ownership of ships*

1. Subject to the provisions of article 7, the flag State shall provide in its laws and regulations for the ownership of ships flying its flag.
2. Subject to the provisions of article 7, in such laws and regulations the flag State shall include appropriate provisions for participation by that State or its nationals as owners of ships flying its flag or in the ownership of such ships and for the level of such participation. These laws and regulations should be sufficient to permit the flag State to exercise effectively its jurisdiction and control over ships flying its flag.

Article 9

Manning of ships

1. Subject to the provisions of article 7, a State of registration, when implementing this Convention, shall observe the principle that a satisfactory part of the complement consisting of officers and crew of ships flying its flag be nationals or persons domiciled or lawfully in permanent residence in that State.

2. Subject to the provisions of article 7 and in pursuance of the goal set out in paragraph 1 of this article, and in taking necessary measures to this end, the State of registration shall have regard to the following:

   (a) the availability of qualified seafarers within the State of registration;

   (b) multilateral or bilateral agreements or other types of arrangements valid and enforceable pursuant to the legislation of the State of registration;

   (c) the sound and economically viable operation of its ships.

3. The State of registration should implement the provision of paragraph 1 of this article on a ship, company or fleet basis.

4. The State of registration, in accordance with its laws and regulations, may allow persons of other nationalities to serve on board ships flying its flag in accordance with the relevant provisions of this Convention.

5. In pursuance of the goal set out in paragraph 1 of this article, the State of registration should, in co-operation with shipowners, promote the education and training of its nationals or persons domiciled or lawfully in permanent residence within its territory.
6. The State of registration shall ensure:

(a) that the manning of ships flying its flag is of such a level and competence as to ensure compliance with applicable international rules and standards, in particular those regarding safety at sea;

(b) that the terms and conditions of employment on board ships flying its flag are in conformity with applicable international rules and standards;

(c) that adequate legal procedures exist for the settlement of civil disputes between seafarers employed on ships flying its flag and their employers;

(d) that nationals and foreign seafarers have equal access to appropriate legal processes to secure their contractual rights in their relations with their employers.

Article 10
Role of flag States in respect of the management of shipowning companies and ships

1. The State of registration, before entering a ship in its register of ships, shall ensure that the shipowning company or a subsidiary shipowning company is established and/or has its principal place of business within its territory in accordance with its laws and regulations.

2. Where the shipowning company or a subsidiary shipowning company or the principal place of business of the shipowning company is not established in the flag State, the latter shall ensure, before entering a ship in its register of ships, that there is a representative or management person who shall be a national of the flag State, or be domiciled therein. Such a representative or management person may be a natural or juridical person who is duly established or incorporated in the flag State, as the case may be, in accordance with its laws and regulations, and duly empowered to act on the shipowner's behalf and account. In particular, this representative or management person should be available for any legal process and to meet the shipowner's responsibilities in accordance with the laws and regulations of the State of registration.

3. The State of registration should ensure that the person or persons accountable for the management and operation of a ship flying its flag are in a position to meet the financial obligations that may arise from the operation of such a ship to cover risks which are normally insured in international maritime transportation
in respect of damage to third parties. To this end the State of registration should ensure that ships flying its flag are in a position to provide at all times documents evidencing that an adequate guarantee, such as appropriate insurance or any other equivalent means, has been arranged. Furthermore, the State of registration should ensure that an appropriate mechanism, such as a maritime lien, mutual fund, wage insurance, social security scheme, or any governmental guarantee provided by an appropriate agency of the State of the accountable person, whether that person is an owner or operator, exists to cover wages and related monies owed to seafarers employed on ships flying its flag in the event of default of payment by their employers. The State of registration may also provide for any other appropriate mechanism to that effect in its laws and regulations.

**Article 11**

**Register of ships**

1. A State of registration shall establish a register of ships flying its flag, which register shall be maintained in a manner determined by that State and in conformity with the relevant provisions of this Convention. Ships entitled by the laws and regulations of a State to fly its flag shall be entered in this register in the name of the owner or owners or, where national laws and regulations so provide, the bareboat charterer.

2. Such register shall, *inter alia*, record the following:

(a) the name of the ship and the previous name and registry if any;

(b) the place or port of registration or home port and the official number or mark of identification of the ship;

(c) the international call sign of the ship, if assigned;

(d) the name of the builders, place of build and year of building of the ship;

(e) the description of the main technical characteristics of the ship;

(f) the name, address and, as appropriate, the nationality of the owner or of each of the owners;

and, unless recorded in another public document readily accessible to the Registrar in the flag State:

(g) the date of deletion or suspension of the previous registration of the ship;
(h) the name, address and, as appropriate, the nationality of the bareboat charterer, where national laws and regulations provide for the registration of ships bareboat chartered-in;

(i) the particulars of any mortgages or other similar charges upon the ship as stipulated by national laws and regulations;

3. Furthermore, such register should also record:

(a) if there is more than one owner, the proportion of the ship owned by each;

(b) the name, address and, as appropriate, the nationality of the operator; when the operator is not the owner or the bareboat charterer.

4. Before entering a ship in its register of ships a State should assure itself that the previous registration, if any, is deleted.

5. In the case of a ship bareboat chartered-in a State should assure itself that right to fly the flag of the former flag State is suspended. Such registration shall be effected on production of evidence, indicating suspension of previous registration as regards the nationality of the ship under the former flag State and indicating particulars of any registered encumbrances.

**Article 12**

**Bareboat charter**

1. Subject to the provisions of article 11 and in accordance with its laws and regulations a State may grant registration and the right to fly its flag to a ship bareboat chartered-in by a charterer in that State, for the period of that charter.

2. When shipowners or charterers in States Parties to this Convention enter into such bareboat charter activities, the conditions of registration contained in this Convention should be fully complied with.

3. To achieve the goal of compliance and for the purpose of applying the requirements of this Convention in the case of a ship so bareboat chartered-in the charterer will be considered to be the owner. This Convention, however, does not have the effect of providing for any ownership rights in the chartered ship other than those stipulated in the particular bareboat charter contract.

4. A State should ensure that a ship bareboat chartered-in and flying its flag, pursuant to paragraphs 1 to 3 of this article, will be subject to its full jurisdiction and control.
5. The State where the bareboat chartered-in ship is registered shall ensure that the former flag State is notified of the deletion of the registration of the bareboat chartered ship.

6. All terms and conditions, other than those specified in this article, relating to the relationship of the parties to a bareboat charter are left to the contractual disposal of those parties.

Article 13
Joint ventures

1. Contracting Parties to this Convention, in conformity with their national policies, legislation and the conditions for registration of ships contained in this Convention, should promote joint ventures between shipowners of different countries, and should, to this end, adopt appropriate arrangements, inter alia, by safeguarding the contractual rights of the parties to joint ventures, to further the establishment of such joint ventures in order to develop the national shipping industry.

2. Regional and international financial institutions and aid agencies should be invited to contribute, as appropriate, to the establishment and/or strengthening of joint ventures in the shipping industry of developing countries, particularly in the least developed among them.

Article 14
Measures to protect the interests of labour-supplying countries

1. For the purpose of safeguarding the interests of labour-supplying countries and of minimizing labour displacement and consequent economic dislocation, if any, within these countries, particularly developing countries, as a result of the adoption of this Convention, urgency should be given to the implementation, inter alia, of the measures as contained in Resolution 1 annexed to this Convention.

2. In order to create favourable conditions for any contract or arrangement that may be entered into by shipowners or operators and the trade unions of seamen or other representative seamen bodies, bilateral agreements may be concluded between flag States and labour-supplying countries concerning the employment of seafarers of those labour-supplying countries.
Article 15

Measures to minimize adverse economic effects

For the purpose of minimizing adverse economic effects that might occur within developing countries, in the process of adapting and implementing conditions to meet the requirements established by this Convention, urgency should be given to the implementation, inter alia, of the measures as contained in Resolution 2 annexed to this Convention.

Article 16

The Secretary-General of the United Nations shall be the depositary of this Convention.

Article 17

Implementation

1. Contracting Parties shall take any legislative or other measures necessary to implement this Convention.

2. Each Contracting Party shall, at appropriate times, communicate to the depositary the texts of any legislative or other measures which it has taken in order to implement this Convention.

3. The depositary shall transmit upon request to Contracting Parties the texts of the legislative or other measures which have been communicated to him pursuant to paragraph 2 of this article.

Article 18

Signature, ratification, acceptance, approval and accession

1. All States are entitled to become Contracting Parties to this Convention by:

   (a) signature not subject to ratification, acceptance or approval; or

   (b) signature subject to and followed by ratification, acceptance or approval; or

   (c) accession.

2. This Convention shall be open for signature from 1 May 1986 to and including 30 April 1987, at the Headquarters of the United Nations in New York and shall thereafter remain open for accession.
3. Instruments of ratification, acceptance, approval or accession shall be deposited with the depositary.

Article 19

Entry into force

1. This Convention shall enter into force 12 months after the date on which not less than 40 States, the combined tonnage of which amounts to at least 25 per cent of world tonnage, have become Contracting Parties to it in accordance with article 18. For the purpose of this article the tonnage shall be deemed to be that contained in annex III to this Convention.

2. For each State which becomes a Contracting Party to this Convention after the conditions for entry into force under paragraph 1 of this article have been met, the Convention shall enter into force for that State 12 months after that State has become a Contracting Party.

Article 20

Review and amendments

1. After the expiry of a period of eight years from the date of entry into force of this Convention, a Contracting Party may, by written communication addressed to the Secretary-General of the United Nations, propose specific amendments to this Convention and request the convening of a review conference to consider such proposed amendments. The Secretary-General shall circulate such communication to all Contracting Parties. If, within 12 months from the date of the circulation of the communication, not less than two-fifths of the Contracting Parties reply favourably to the request, the Secretary-General shall convene the Review Conference.

2. The Secretary-General of the United Nations shall circulate to all Contracting Parties the texts of any proposals for, or views regarding, amendments, at least six months before the opening date of the Review Conference.
Article 21

Effect of amendments

1. The decisions of a review conference regarding amendments shall be taken by consensus or, upon request, by a vote of a two-thirds majority of the Contracting Parties present and voting. Amendments adopted by such a conference shall be communicated by the Secretary-General of the United Nations to all the Contracting Parties for ratification, acceptance, or approval and to all the States signatories of the Convention for information.

2. Ratification, acceptance or approval of amendments adopted by a review conference shall be effected by the deposit of a formal instrument to that effect with the depositary.

3. Any amendment adopted by a review conference shall enter into force only for those Contracting Parties which have ratified, accepted or approved it, on the first day of the month following one year after its ratification, acceptance or approval by two-thirds of the Contracting Parties. For any State ratifying, accepting or approving an amendment after it has been ratified, accepted or approved by two-thirds of the Contracting Parties, the amendment shall enter into force one year after its ratification, acceptance or approval by that State.

4. Any State which becomes a Contracting Party to this Convention after the entry into force of an amendment shall, failing an expression of a different intention by that State:

   (a) Be considered as a Party to this Convention as amended; and

   (b) Be considered as a Party to the unamended Convention in relation to any Contracting Party not bound by the amendment.

Article 22

Denunciation

1. Any Contracting Party may denounce this Convention at any time by means of a notification in writing to this effect addressed to the depositary.

2. Such denunciation shall take effect on the expiration of one year after the notification is received by the depositary, unless a longer period has been specified in the notification.
IN WITNESS WHEREOF the undersigned, being duly authorized thereto, have affixed their signatures hereunder on the dates indicated.

DONE at Geneva on 7 February 1986 in one original in the Arabic, Chinese, English, French, Russian and Spanish languages, all texts being equally authentic.
Annex I

Resolution I

Measures to protect the interests of labour-supplying countries

The United Nations Conference on Conditions for Registration of Ships,

Having adopted the United Nations Convention on Conditions for Registration of Ships,

Recommends as follows:

1. Labour-supplying countries should regulate the activities of the agencies within their jurisdiction that supply seafarers for ships flying the flag of another country in order to ensure that the contractual terms offered by those agencies will prevent abuses and contribute to the welfare of seafarers. For the protection of their seafarers, labour-supplying countries may require, inter alia, suitable security of the type mentioned in article 10 from the owners or operators of ships employing such seafarers or from other appropriate bodies;

2. Labour-supplying developing countries may consult each other in order to harmonize as much as possible their policies concerning the conditions upon which they will supply labour in accordance with these principles and may, if necessary, harmonize their legislation in this respect;

3. The United Nations Conference on Trade and Development, the United Nations Development Programme and other appropriate international bodies should upon request provide assistance to labour-supplying developing countries for establishing appropriate legislation for registration of ships and attracting ships to their registers, taking into account this Convention;

4. The International Labour Organisation should upon request provide assistance to labour-supplying countries for the adoption of measures in order to minimize labour displacement and consequent economic dislocation, if any, within labour-supplying countries which might result from the adoption of this Convention;

5. Appropriate international organizations within the United Nations system should upon request provide assistance to labour-supplying countries for the education and training of their seafarers, including the provision of training and equipment facilities.
Annex II
Resolution 2

Measures to minimize adverse economic effects

The United Nations Conference on Conditions for Registration of Ships,

Having adopted the United Nations Convention on Conditions for Registration of Ships,

Recommends as follows:-

1. The United Nations Conference on Trade and Development, the United Nations Development Programme and the International Maritime Organization and other appropriate international bodies should provide, upon request, technical and financial assistance to those countries which may be affected by this Convention in order to formulate and implement modern and effective legislation for the development of their fleet in accordance with the provisions of this Convention;

2. The International Labour Organisation and other appropriate international organizations should also provide, upon request, assistance to those countries for the preparation and implementation of educational and training programmes for their seafarers as may be necessary;

3. The United Nations Development Programme, the World Bank and other appropriate international organizations should provide to those countries, upon request, technical and financial assistance for the implementation of alternative national development plans, programmes and projects to overcome economic dislocation which might result from the adoption of this Convention.
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