

WORLD MARITIME UNIVERSITY
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**THE IMPACT OF COMPETING INTERESTS
AND PRESSURES ON MARITIME
ADMINISTRATIONS IN ASPIRING
MARITIME STATES:
A Critical Analysis**

By

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DECLARATION

I certify that all the material in this dissertation that is not my own work has been identified, and that no material is included for which a degree has previously been conferred on me.

The contents of this dissertation reflect my own personal views, and are not necessarily endorsed by the University.

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ABSTRACT

This dissertation is a study of the competing interests and pressures on Maritime Administrations in aspiring maritime states (AMS) and their impacts on the rights of such states in the discharge of their obligations under international law.

The evolutionary changes in the maritime interests of states are examined including the historical interests of traditional maritime states, the development of the flags of convenience/open registry system, the advent of AMS to maritime affairs in the last 25 years, the nature of their maritime interests and the factors that give rise to them, and the competing interests and conflicts resulting from these changes. The interactions and conflicts of the national interests of AMS, vis a vis the open registry system, with the interests of other state and non-state maritime actors and the impacts of those interactions and conflicts on Maritime Administrations in AMS are analysed.

The rights and responsibilities maritime states in international law, the performance of AMS in the conduct of maritime affairs relative to their rights and responsibilities and the impacts of pressures which impede the performance of Maritime Administrations in AMS are all examined.

The likely changes in competing maritime interests influenced by globalisation and the events of September 11, 2001 are examined and the implications of the choices made by AMS in the conduct of their maritime affairs in light of these anticipated changes and the pressures on AMS are analysed. Finally the impact of competing interests and the pressures on AMS are summarised and measures are recommended to strengthen their Maritime Administrations.

KEYWORDS: Aspiring Maritime States, Competing Interests, Flags of Convenience, Maritime Administrations, National Interests, Open Registry, Pressures

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LIST OF ABBREVIATIONS

AMS	Aspiring maritime states
CMI	Comité Maritime International
CSR	Continuous synoptic record
EEZ	Exclusive Economic Zone
ESCAP	Economic and Social Commission for Asia and the Pacific
EU	European Union
FLASCI	Flag State Conformance Index
FOC	Flag of convenience
FSA	Formal Safety Assessment
FSI	Flag State Implementation
GCOHS	Geneva Convention on the High Seas
IACS	International Association of Classification Societies
ICJ	International Court of Justice
ICONS	International Commission on Shipping
ILO	International Labour Organisation
ILO 147	International Labour Organisation Convention 147
IMO	International Maritime Organisation
ISM Code	International Management Code for the Safe Operation of Ships and for Pollution Prevention
ISPS Code	International Ships and Port Facilities Security Code
ITCP	International Maritime Organisation Integrated Technical Co- operation Programme
ITF	International Transport Workers Federation
Load Lines 66	International Conventions on Load Lines, 1966, as amended
MARPOL	International Convention for the Prevention of Pollution from Ships, 1973/78, as amended
MOU	Memorandum of understanding
MSEP	Maritime Safety and Environmental Protection

NATO	North Atlantic Treaty Organisation
OECD	Organisation for Economic Co-operation and Development
OPA 90	United States Oil Pollution Act, 1990
OTs	Overseas Territories
Paris MOU	Paris Memorandum of Understanding on Port State Control, 1982
PSC	Port State Control
ROs	Recognised Organisations
SAF	Flag State Performance Self-Assessment Form
SOLAS	International Convention for Safety of Life at Sea, 1974, as amended
STCW	The International Convention on Standards of Training, Certification and Watchkeeping of Seafarers, 1978, as amended in 1995 and 1997
SVG	St Vincent and the Grenadines
TMS	Traditional Maritime States
Tokyo MOU	Memorandum on Understanding on Port State Control in the Asia Pacific Region
Tonnage 69	International Convention on Tonnage Measurement of Ships, 1969
UK	United Kingdom
UN	United Nations
UNCCROS	United Nations Convention on the Conditions for Registration of Ships, 1986
UNCLOS	United Nations Convention on the Law of the Sea, 1982
UNCTAD	United Nations Conference on Trade and Development
US	United States of America
WMU	World Maritime University
WTO	World Trade Organisation
WWI	World War I
WWII	World War II

CHAPTER 1

1.0 Introduction

Shipping, regarded by many as the only truly global industry, has long been considered essential to trade and vital to the interests of states. Trade is considered to be the engine of economic growth. Within the last 25 years many states, which have not traditionally been involved in major maritime activities, have opted to become involved in the provision of maritime services. Most of these states have developing economies, characterised by limited financial, material and human resources. Despite these limitations, many have undertaken the highest possible level of responsibilities, becoming flag states with registered tonnages beyond their immediate national requirement, an undertaking which requires an administrative mechanism to regulate and control the activities of their ships globally. These are the aspiring maritime states (AMS) of today. While their choice to enter into maritime affairs is perfectly legitimate, they have been engulfed in a complex array of pre-existing and competing interests.

AMS have been accused of joining the ranks of “flags of convenience” (FOCs) that neglect their duties and obligations to regulate shipping and promote economic gains at the expense of maritime safety and environmental protection (MSEP). The International Transport Workers Federation [ITF] (2000a) views FOCs as subterfuges that encourage substandard shipping, lead to abuse of seafarers and harbour conditions that encourage maritime fraud. Since the 1940's, it has been campaigning against FOCs in the hope that they will eventually cease to exist. Alderton & Winchester (2002, p. 39) opine that new FOCs promote themselves as providers of ship registry services without any notion of regulation and they attract unscrupulous shipowners who only wish to escape regulatory burdens.¹ Citing

¹ The terms ‘open registry’ and ‘flag of convenience’ are used interchangeably throughout this dissertation.

complexities Damas (2002a, p. 63) states “you cannot group (open registries) together and say: `national flags equal good and open registry equals bad.” He presents arguments to show that performance ratings for some FOCs are better than many national or so-called closed registries. The Organization for Economic Co-operation and Development [OECD] (2001, p. 54) is of the view that substandard shipping distorts economic competition and substandard operators gain up to 15% profit over operators who conform to regulatory standards. Whether or not that is true, John Horrocks, Secretary General of the International Chamber of Shipping, states that “open registries are `the only way to compete in the international market”. (Mottley, 2002, p. 64). Following the events of September 11, 2001, Gillis (2002, p. 60) posits that due to the lack of transparency “[s]ome fear flags of convenience serve as conduits for terrorist activities“. Mottley (2002, p. 64) is of the contrary view. He outlines that “probably the best source for absolute transparency and accurate information ... reside with the larger open registries ...”. Despite these arguments against open registries, the percentage of world shipping registered with open registries continues to increase. As at the year 2001, 62.4% of world shipping remains registered with open registries. (Damas, 2002b, p. 62).

The purpose of this study is to determine the impact of the competing interests and pressures on Maritime Administrations in AMS and how it affects the rights of such states in the discharge of their obligations under international law.

In chapter 2, the evolutionary changes in maritime interests are examined beginning with the historical interests of traditional maritime states (TMS). The internationalization of shipping through the open registry system and the commencement of attendant conflicts are explored and the nature of maritime interests is evaluated. The advent of AMS in international shipping, the nature of their interests, the factors which gave rise to them and the conflicts their interests are likely to cause are all examined.

In chapter 3, the rights and duties of maritime states under the existing international legal regime, the sources of international maritime law and their binding obligations on states parties are examined. The duties and responsibilities of flag states,

coastal states and port states with specific focus on the regulation of shipping and the primary responsibility of flag states in this regard are set out. The way in which states and industry combine to provide a safety net around shipping for the purposes of maritime safety and environmental protection (MSEP) is examined.

In chapter 4, the nature of maritime interests, the manner in which they are pursued, the strategies and strategic alliances employed in their pursuit, the resultant competing interests and conflicts and their impacts on AMS, in their primary capacity as flag states, are analysed. Competing interests and conflicts with TMS, ports as well as intra-flag state conflicts with classification societies, overseas representatives and shipowners are also analysed.

In chapter 5, the performance of Maritime Administrations in AMS, against their responsibilities outlined in international law is assessed. The questions of whether AMS have contributed to substandard shipping; if they have provided adequate resources in support of their Maritime administrations; whether their commercial considerations have overridden MSEP; and if AMS have properly utilized the support available under the International Maritime Organization (IMO) Integrated Technical Co-operation Programme (ITCP) are all explored.

In chapter 6, the impact of globalisation and the events of September 11, 2001 on the global maritime and security environment and the changes, strategies, strategic alliances that are likely to cause are examined. The implications of the choices made by AMS in the conduct of their maritime affairs, the competing interests, the prevailing pressures and the strategies and alliances anticipated as a result of the changes in the global maritime environment are examined.

Finally, in the last chapter, it is concluded that competing interests and their associated conflicts are permanent features of international maritime affairs that have had mixed but mostly negative impacts on Maritime Administrations in AMS. It is concluded that it is largely within the power of AMS, by their conduct of their maritime affairs, to control the impact of competing interests and pressures. Many AMS have not lived up to their responsibilities. Their Maritime Administrations have

remained weak and underdeveloped mostly due to their own choices. Measures to strengthen Maritime Administrations in AMS to ensure more effective discharge of their MSEP and security responsibilities and to meet their objectives in keeping with national interests are also set out.

In attempting to objectively assess the performance of AMS in chapter 5, some difficulties were encountered due to the lack of any globally established mechanism for assessing the performance of flag states and establishing benchmarks for what is “substandard”. A table combining flag state ratings from several sources was developed. However, there were still some limitations as information was not available or not applicable in all categories for all registries/flags. It was observed that assessment criteria and results differed even among similar agencies. In some instances, the ratings for a single flag/registry varied significantly where different assessment mechanisms were used. It was however felt that the available information provided a reasonable basis for the assessment.

CHAPTER 2

2.0 The Evolutionary Changes in Maritime Interests

2.1 The Historical Interests of Traditional Maritime States

From the time man became hewers of wood and learnt to strap logs together in the form of rafts, he began to use the sea as a medium for fulfilment of social and other aspirations. History is replete with examples of peoples everywhere using basic transport – rafts, dugout canoes and the like – to cross the seas, to lands near and far, in search of new opportunities and better standards of living. As interests in new lands, riches, economic activities and trade became greater, maritime transport evolved in size, capacity and international importance. Sir Walter Raleigh, describing the early policy operating in traditional maritime states (TMS), stated, “Whosoever commands the sea commands the trade; whosoever commands the trade of the world commands the riches of the world, and consequently the world itself.” (Peele, 1997, p. 61). So, Britain for example, a small country, of relatively limited natural resources, became “Great”, commanding a worldwide colonial empire.

By the 15th through to the 19th century, there was widespread exploration of far off lands and colonization, primarily by European states, that employed centuries-old mercantile practices in trade to extract prized riches from colonies for the enhancement of the colonial powers. These states developed large merchant fleets and naval forces to service and defend the confluence of political, economic, trade and military/strategic objectives inherent in their maritime interests. (Gibson & Donovan, 2000, pp. 11, 26). In the *quid pro quo* which became custom and international law, ships trading under the flag of their state had the right to naval escort that provided protection against piracy and capture by other states. In return they were under obligation to support naval operations through transportation of

troops and war material. Through this strategic alliance, the political, economic and military/strategic objectives of the state and the private commercial profit-making interests of shipowners for financial gain were met.

To support trade, lower risks and ensure reliability of shipping, other maritime industries and services such as shipbuilding, marine insurance and ship surveying also developed within these states. In time, these spin-off industries and services also generated considerable economic activities and wealth. These colonial powers emerged as leading maritime nations and came to be regarded as “traditional maritime states”.

Over the past 50 years, states' economies have become more dependent on trade. In the year 2000, 5.88 billion tons of commodity, estimated to be 90% of world trade by volume, was transported by sea. This figure is projected to rise to 7.13 billion by 2010. (Ma, 2002, pp. 16,18). With economies projected to become even more dependent on trade in the future, there is no rationale for changes to the historical interests of TMS.

2.2 Emergence of the Open Registry System

Open registry has been called by many names including “flags of convenience” (FOCs). “FOCs have otherwise been called ‘flags of necessity’, ‘free flags’, ‘flags of opportunity’, ‘piratical flags’, ‘facilitating flags’, ‘shadow flags’, ‘cheap flags’, ‘flags of accommodation’ and so on”. However, the term used depends on the views, perspectives and interests of the defining party. (Metaxas, 1985, p.14).

A product of states' political, economic and military interests as well as economic interests of shipowners, there is evidence to show that FOCs operated in the Mediterranean during the 18th century involving Greek, French, Turkish, Genovese, Austrian and Russian flags. There is also documentary evidence of shipowners changing flag to minimize costs and of inter-state rivalry for commercial supremacy. The latter evidences political and economic interests, with hegemonic policy objectives. (Metaxas, 1985, pp. 8-11).

2.2.1 The Panamanian Experience

Carlisle (1981, pp. 1-2) credits the genesis of the modern-day open registry to Panama. It started as an accidental by-product of post World War I (WWI) Panamanian governmental initiative. The objective was to stimulate growth in the national maritime sector by encouraging ownership of vessels by nationals and corporate citizens through attractive fiscal conditions. United States (US) owned Panamanian corporations took advantage of the system to register vessels in Panama in order to escape high labour cost in the US and punitive duties on their vessels repaired outside that country.

Following the transfer of *Resolute* and *Reliance*, major passenger liners of prominence and prestige in 1922, the Panamanian government recognized the revenue earning capacity of vessel registration and its potential to positively impact socio-economic development. Panama, in response to requests from shipowners, moved to seize the income generating opportunity, by enacting its 1925 Maritime Code with liberal provisions and slightly higher charges aimed at easing a mid 1920's revenue crisis. (Carlisle, 1981, p. 21). After WWI, US corporate shipowners purchased and registered ex-US government wartime vessels in Panama. Disposal in this way satisfied the private, commercial profit-making interests of shipowners through the removal of government involvement in business "ideas deeply rooted in American ideological perceptions". (Carlisle, 1981, pp. xv).

The transfer of *Resolute* and *Reliance* from the American to the Panamanian registry evoked national and international outcry. Among the reasons the owners gave to justify the transfer was Attorney General Harry Daugherty's ruling on the Volstead Act that prohibited liquor on board thereby rendering them uncompetitive, compared with foreign cruise liners. However, the critical advantage was savings on crew wages of \$17,000 and \$18,000 for each ship. (Carlisle, 1981, p. 17). There was also service convenience. Registration could be accomplished while traversing the Panama Canal without deviation from the Atlantic-Pacific trade routes while US Panamanian subsidiary corporations performed multiple services on behalf of these ships. (Carlisle, 1981, p. 2).

The owners of *Resolute* and *Reliance* also claimed that a study showed that Panama had no interest in developing its navy or merchant marine to compete with the US and that the merchant fleet would be available to the US in times of military necessity.² Retention of vessels by US citizens was vital to US national military/strategic interests and Panama represented no threat to US political and economic interests. The US Government therefore supported registration in Panama. This military/strategic convenience, officially endorsed by the US Government and later called “effective United States control” was used during the early part of World War II (WWII) to circumvent US neutrality laws by having American owned Panamanian registered ships support Allied war efforts. (Carlisle, 1981, pp. 144-148).³ Here, like in early European practices, there was strategic alignment of private and public interests.

Provisions for high labour costs and punitive measures for US registered vessels repaired outside that country were enshrined in its laws. European states had laws providing for large social security payments, large crews with high wages and double taxation (on company profit and on income tax), considered onerous by shipowners. Shipowners in the US and in Europe transferred their ships to the Panamanian registry that had no such charges. Deterrents operating in the US and Europe against use of their own flag appear to have had greater influence on the decisions to change registry than the attractions offered by registration. In the depression years of the 1930's, the Panama registry was a “flag of necessity” providing for “removal of a handicap rather than the gaining of an advantage”.⁴ (Rochdale, 1970, p.52)

² Despite lack of evidence, Carlisle (1981, p.16) is of the view that “[t]his remarkable assertion of private decision-making power of questions of foreign policy suggested that the study had been conducted by the State or War Department or at least in consultation with those departments”. Sullivan and Nelson, legal counsel for the owners of *Reliance* and *Resolute* had been instrumental in arranging the legal details of Panama's independence, characterized by its Panama's dependence on the United States. Prior to 1920, the American military had intervened in Panama on four occasions and had the capacity to do so again if they wished to take by force beneficially owned US vessels to support naval operations.

³ The US Navy concluded that there was “effective control” over US owned vessels registered in Panama, Liberia, Honduras, Venezuela and the Phillipines.

⁴ The Rochdale Report, actually used the term “flags of convenience” and not open registry.

During WWII, US policy on neutrality changed going from covert aid to open cooperation with Britain as the war progressed. The US Government pressured Panama to allow use of its flag for American defined pro-Allied support and preventing it being used by Japan and Germany. Under explicit orders from President Roosevelt on 31 April 1941, US shipowners began arming their ships registered in Panama. (Carlisle, 1981, pp. 78-87). President Arias of Panama, fearing his country would be dragged into war ordered registration of all armed ships cancelled on 7th October 1941. Three days later, while in Cuba on holidays, Arias was overthrown by a faction of his cabinet with US endorsement. US endorsement of the coup d'etat was rewarded by a reversal of the ship registry cancellation order 10 days later. (Carlisle, 1981, pp. 90-95).

In 1948, anti-American riots in Panama led to the rejection, by the Panamanian Assembly, of a treaty to extend US bases in Panama for 30 years. Arias, accused of pro-facist sympathies, was re-elected. Despite being deposed yet again, he was reinstated to office within 7 days. US shipowners feared their ships might be confiscated by Panama. The system that protected their private commercial gain was unreliable. In the face of increased post-WWII shipping competition from European, labour protests, a Panamanian registry system slow to reforms, unstable political conditions in Panama and Panamanian consular services susceptible to corruption, the Panamanian registry was no longer convenient for the interests of US shipowners.

2.2.2 The Rise of the Liberian Flag

With backing from the Liberian government, Edward R. Stettinius, Jr., a former US corporate director and Secretary of State in President Roosevelt's wartime cabinet, established, in 1947, Stettinius Associates – Liberia, Incorporated, as “a profit-sharing arrangement with the Liberian government” to direct private economic aid to “implement plans for Liberian development”. (Carlisle, 1981, p. 118). Several members of Stettinius Associates were former high-ranking US officials that served with Stettinius during WWII in economic and foreign relations and in the military. They had private maritime interests operating tankers under the Panamanian registry.

In 1947, Stettinius Associates, while continuing to reap the benefits of Panamanian registration, quietly set about drafting a tailor-made Liberian maritime code, intended to supplant the Panamanian registry and serve their future interests and to monopolize oil and ore transportation into and out of Liberia. Before being submitted to the government of Liberia for enactment, the draft code was secretly vetted and given “final approval” by US shipping firms, as Stettinius Associates lined up transfers from the Panamanian to the Liberian flag. ESSO, one of the vetting firms, was to participate in the registry operation and to gain revenue from registration of its own ships. (Carlisle, 1981, pp. 119-123).

In a brief to US governmental aides, Stettinius exploited geo-political and military/strategic fears, emphasizing the “strategic position of Liberia from the standpoint of US protection of the Panama Canal and Brazil” from invasion, referring to Liberia as America’s “sole beachhead in Africa” and noting that if the company failed, “Communism already at work in Africa, would rejoice”. (Carlisle, 1981, p. 119). Although the US State Department claimed deliberate, almost fraudulent misrepresentation by Stettinius Associates, the plan was accepted as part of “effective United States control”.

The State Department insisted on a review of the draft maritime code. During the period of the review, Stettinius Associates urged Liberian President Tubman to pass the draft into law, as any delay would jeopardize revenue from ships waiting to be registered. Tubman’s government, considering public developmental interests and under pressure to generate revenue in keeping with electoral promises, hastily passed the draft into law without adequate review.

Unlike the Panamanian Maritime Code and ship registry system that slowly evolved at the urging of American shipowners, the Liberian Maritime Code was meticulously tailor-designed for shipowners, offering the same tax free facilities. The State Department’s thorough review led to rectification of its flaws, providing among other things, the basis for registration of mortgages and issue of certificates of registration. Compared to Panama’s laws, it provided a superior legal and administrative framework. Through a corporate structure, administered by personnel with business

experience, there was better control of ships, conduct of ship registration and prevention of corruption in a politically stable environment. By 1956, Liberia surpassed Panama's tonnage. (Carlisle, 1981, pp.130-133).

2.2.3 Competition, Conflicts and the Image of the Open Registry

As soon as the Liberian flag began to attract vessels to its registry, the Liberian and Panamanian flags became targets of widespread and better organized attacks from labour and from shipowners in TMS. US shipowners who dominated wartime trade faced increased competition from a recovering European shipping industry. European shipowners and labour unions, supported by their governments, protested that Panama and Liberia supported evasion of taxes and currency regulations and lowered safety, social and labour standards.

The European labour protests against "*PanLibHon*"⁵ registries received support from labour unions in the US for many years under the umbrella of the ITF. US seamen were the highest paid in the world. Labour unions there wanted to preserve their power and wealth derived from dues and government subsidies and get back jobs lost to ships under open registry. However, in 1962, when US labour Unions took a case to the US Supreme Court to have US labour law extended to US owned ships, the British Government representative, in order to protect US owned vessels operating under the British flag from US taxation, declared the position of US labour unions harmful to trade. (Carlisle, 1981, p. 166)

Following anti-Panamanian picketing in Boston, the Panamanian Government launched a diplomatic protest against "unfriendly acts" with the "purpose of depriving the Republic of Panama of its sovereign right to register ships". In Panama's view, the picketing was illegal because ships crews were not involved. Although US Government supported open registries, providing legal support to Panama and Liberia in several instances, it had difficulties in responding to Panama's protest. The US had its own internal conflict in deciding whether strategic convenience or labour in support of "the American way of life" should be given precedence.

⁵ According to Carlisle (1981, p. 136), the term *PanLibHon* was developed for easy reference to the Panamanian, Liberian and Honduran open registries.

Some ships were transferred to mask clandestine activities ranging from smuggling, sub-standard operations and illegally transported war material.⁶ There was also corruption by consuls administering the Panamanian registry system. The Panamanian unmatched tax advantage already ran counter to the political and economic interests of European states. With the charges of corruption and shady operations, an International Labour Organization (ILO) Committee, consisting entirely of Europeans, conducted a European initiated investigation of the Panamanian registry and delivered a resounding condemnation, crafted in diplomatic language, despite written recognition that Panama was taking positive steps to enhance its registry administration. (Carlisle, 1981, pp. 140-141). The report was a major propaganda victory that gave that registry a bad image. (Carlisle, 1981, pp. 49-58). The calls for investigations of the Panama registry were made because “[o]pponents and critics of the system hoped to utilize the method of investigation as a weapon of attack, exposing what they perceived as deceptions and evasion of law.” Increasingly, “the issue was seen as one of power and economics, not of ethics”. (Carlisle, 1981, pp. 134-135).

Despite its excellent start in the early 1950s, there were major vessel accidents during the 1960s and 1970s involving Liberian registered vessels.⁷ These accidents reinforced views, particularly within TMS, that open registry states were only interested in economic gain at the expense of vessel and personnel safety and environmental protection.

2.2.4 The Internationalization of Shipping

In the 18th century small shipowners focused on prevention from trading, protection from piracy and protectionism under the aegis of powerful national states. In the 20th century, particularly the latter half, labour cost differentials, varying national

⁶ Greek shipowners sought refuge under British registry from labour and security laws before transferring to the Panamanian flag. An August 1938 U.S. Office of Naval Intelligence report showed that during the Spanish Civil War, of 161 vessels involved in clandestine operations only 11 were Panamanian flagged. The others were European flagged. (See Carlisle, 1981, p. 62).

⁷ The *Torrey Canyon* wrecked in 1967 off Britain’s Cornish coast; the *Ocean Eagle* broke in two off San Juan, Puerto Rico in 1968; and the *Argo Merchant* grounded off Nantucket, in the winter of 1976. (See Carlisle, 1981, pp. 175-183).

taxation structures, credit availability, foreign currency exchange control and avoidance of strict regulatory control became the foremost considerations of shipowners as shipping and maritime services became more internationalized. There has been a loosening of the traditional relation between the national economy and the shipping industry resulting in the creation of new types of shipping operations that are dependent on employment of factors of production on a global basis. This internationalization of shipping firms has taken place within an environment of direct and indirect subsidies and other state support for tonnage registered under the national flag of TMS. (Metaxas, 1985, pp. 2-3).

2.3 The Interests and Activities of Aspiring Maritime States

Since the end of WWII, there has been considerable decolonisation, in keeping with the recognition for self-determination of peoples, giving rise to many new politically independent states. Though politically independent, these new states are generally underdeveloped, economically weak and under pressure due to limited financial and other resources. Some are micro-states, “exceptionally small in area, population and human and economic resources”. (Starke, 1989, p. 97). As they are former colonies, they have no international maritime tradition. Inspired by the successes of Panama and Liberia, and seeking avenues to meet legitimate aspirations for socio-economic development, many have decided to exercise their rights to participate in maritime activities and have become flag states under the existing international legal regime. In this dissertation, the term AMS is used mainly to describe these emerging maritime countries.⁸

Within the last 25 years, many AMS have entered the maritime services sector. Some have moved into ship registration and have become flag states taking on responsibilities for worldwide monitoring and control of ships while others have entered into related activities such as marine insurance and ship financing. (Mukherjee, 2000a, p. 3). For many of these AMS, the sea, its resources and the

⁸ AMS include semi-autonomous overseas territories (OTs) of TMS which have responsibility for their fiscal affairs and which engage in ship registration and other maritime services. It should perhaps be noted that in the case of the United Kingdom, the constitutional position is that most of these territories are colonies.

maritime services support sector are some of the few remaining avenues for their development. But delivery of maritime services by AMS means breaking into markets that for centuries were dominated by TMS, providing them with a significant source of wealth. These developments signal increased competition and conflict of interests.

2.4 Conclusion

From the foregoing, it is clear that maritime interests can be divided into two categories: public interests of state with political, economic, social and military/strategic objectives; and private interests with commercial profit-making objectives. Interests are essentially the same everywhere and remain constant with the passage of time, seeking to enhance well-being through accumulation of wealth, whether private or public. This latter characteristic has caused and will continue to cause conflicts within and among states and other parties involved in maritime activities. Finally, parties with maritime interests are prepared to forge alliances, as they find it convenient, to achieve the objects of their interests.

Considering the new internationalized environment in which shipping operates, the nature of maritime interests, the entry of AMS into maritime activities despite their limited resources and the adverse image of open registries, several questions arise. What are the duties and responsibilities of maritime states? With ship registry now dominated by non-traditional maritime nations, led by Panama and Liberia, what will be the fate of the associated services that revolve around maritime transport? What conflicting interests are caused by this prospective question? Who are the parties with conflicting interests and in what ways do their interests conflict? How are these conflicts of interests being manifested and how are they likely to be manifested in the future? What are the pressures and constraints facing AMS? How are the conflicts of interests and pressures impacting or likely to impact on maritime administrations in AMS? These are addressed in the following chapters.

CHAPTER 3

3.0 The Rights and Responsibilities of Maritime States

Maritime affairs govern the specialised activities related to maritime transport and international seaboard trade. The rights and responsibilities of states with interests in maritime affairs are embodied in a regime of international law with the 1982 United Nations Convention on the Law of the Sea (UNCLOS) providing the umbrella framework. It affirms the right of states to participate in maritime affairs and balances those rights with concomitant duties and responsibilities for maritime safety and environmental protection. The provisions of UNCLOS are elaborated in other conventions made by “competent international organizations” namely, the International Maritime Organization (IMO) on technical conventions dealing with design, construction, manning, equipment and operation of ships; and the International Labour Organization (ILO) on the working and living conditions, social security and other standards for seafarers. Conventions on economic and on private law aspects of shipping have been developed by the United Nations Conference on Trade and Development (UNCTAD) and Comité Maritime International (CMI) respectively.⁹ (Economic and Social Commission for Asia and the Pacific [ESCAP], 1991, pp. 2-3).

3.1 Material Sources of International Law

‘Law-making’ treaties¹⁰ and custom are the main sources of international law although other sources include decisions of judicial or arbitral tribunals, juristic work

⁹ UNCTAD and ESCAP are no longer law making bodies and therefore they do not make conventions anymore.

¹⁰ Treaty is the general name (*nomen generalissimum*) used in international law to signify binding agreements among states. (Starke, 1989, pp. 436, 437). ‘Law-making’ treaties differ from ‘treaty contracts’, the latter being between two or a few states. They therefore cannot be considered to be sources of international law as they do not have universal acceptance. Also not all ‘law-making’ treaties contain rules of universal application. (Starke, 1989, pp. 42-43).

and decisions or determinations of the organs of international institutions. In recent times 'law-making' treaties, such as conventions, which lay down rules of universal or general application, have replaced custom as the main source of international law. (Starke, 1989, pp. 35-46). Customary international law is derived from maritime practices that are so generally and universally accepted over time that they are considered to be legally binding on all States and on their nationals. (Mukherjee, 2002, p. 5). The decisions of organs of international institutions as a source of international law are becoming increasingly important. (Starke, 1989, p. 32,53).

3.2 The Nature of International Law

International law has public and private components. Public international law, which in the majority, consists of the principles and rules of conduct which states feel bound to observe, and do commonly observe, in their relations with each other. It also includes the rules of law relating to the functioning of international institutions or organizations, their relations with each other, and their relations with states and individuals. (Starke, 1989, p. 3).

Conventions are binding multilateral treaties among states. A state which has become party to a convention will be bound to implement that convention by performing it in good faith when it enters into force. Özçaryir (2001, pp. 54-55) points out that treaty obligations are given priority over domestic law so that internal laws may not be used as justification for failure to perform a treaty. A treaty that is in force, requires legislative and enforcement action by a state party to ensure that its obligations are implemented within its jurisdiction. (ESCAP, 1991, pp. 6-7).

3.3 Sovereignty and Jurisdiction

Sovereignty is a fundamental territorial concept of statehood in which supreme authority for law making and jurisdiction over persons and property in its territory is vested in the state to the exclusion of other states. Sovereignty in the relations between states signifies independence regarding the functions of a state. (Starke, 1989, pp.157-158). As international law is binding upon states, and the fact that in most states treaty obligations are given priority over domestic law, the supreme authority of states' sovereignty is modified by treaties to which states have become

parties and by customary international law which is binding on all states. Compared with the 18th century when highly nationalised states had few limitations on their powers under international law, today, “the sovereignty of a state means the *residuum* of power which is possessed within the confines laid down in international law”. (Starke, 1989, p. 100).

According to Özçayir (2001, pp. 61-62) the jurisdiction of a state is an attribute of its sovereignty which is based on five generally accepted principles, namely:

- (i) The territorial principle under which a state has jurisdiction over crimes committed in its territory;
- (ii) The nationality principle under which the state can punish its nationals for offences on the sole basis of their nationality;
- (iii) The protective principle¹¹ by which states may take action in respect of offences committed outside its territory which are prejudicial to its security, integrity or vital economic interest. (There is uncertainty as to how far this principle extends in practice and it is possible that some States may abuse this principle by giving it very broad interpretations.);
- (iv) The passive personality principle where a state may claim jurisdiction to adjudicate in a matter on the basis of the nationality of the actual or potential victims; and,
- (v) The universal principle which empowers states to try crimes of a particular nature, for example piracy, regardless of the nationality of the offender or the place where it was committed.

3.4 Implementation of Conventions

Implementation of conventions, by means of legislative or executive action, to ensure their performance “in good faith”, is an obligatory responsibility of states that are party to them.¹² This requires the dual actions of passage of legislation and of enforcement by the state party, to ensure that its obligations are implemented by ships, shipping companies, individuals and foreign ships within its jurisdiction.

¹¹ Kasoulides (1998, p. 32) uses the term “objective territorial principle”.

¹² Conventions can become binding on a state by several means, namely: signature without reservation as to acceptance; signature followed by ratification, acceptance or approval; and accession. See Starks, (1989, pp. 451-453) and Article 14 of the Vienna Convention on the law of Treaties, 1969.

International maritime law cannot meet its objectives of regulating the maritime activities, if legislation and or enforcement are inadequate. Legislation must properly reflect convention provisions; provide the requisite legal and administrative framework to enable effective discharge of state responsibilities; provide effective sanction against breaches; and provide for control mechanisms such as survey, inspection and certification of ships to ensure compliance with technical standards. Survey and certification functions are usually implemented through a specialised agency of government or inspectorate of shipping although most states nowadays delegate these functions, to a greater or lesser degree, to classification societies. (ESCAP, 1991, pp. 12-13).

3.5 The Maritime Administration

The Maritime Administration is the entity tasked by the government to oversee maritime activities in keeping with national interests and the process of implementation. A Maritime Administration therefore must be structured to effectively discharge the obligations of the state enshrined in its national laws and in conventions to which the state is party; oversee the economic development aspects of shipping; implement technical requirements for safety and environmental protection relating to design, construction, equipment, survey, inspection, operation, manning, and certification of ships and personnel; and, working, living, social and other conditions in relations to seafarers. These interests may vary depending on whether the state is a flag state, coastal state, or a port state.¹³

¹³ In the context of the IMO, “Administration means the Government of the state whose flag the vessel is entitled to fly”. See for example SOLAS chapter 1 regulation 2. Visiting lecturers and Professors of the World Maritime University describe the Maritime Administration differently. Plant (1998, pp.1-5) describes the Maritime Administration as an integral and specialised part of a state’s public administration that is tasked to develop coherent maritime policy; formulate objectives, goals, and work plans; and oversee decision making, and control. According to Vanchiswar (1996, p. ix) maritime administration entails exercise of “management with authority” for satisfactory and efficient undertaking of those functions embodied within the country’s maritime laws and international conventions to which it is party. Chowdhury (2001, p. 1), states “maritime administration” includes oversight of the economic and developmental aspects of shipping and maritime activities including safety of life, property and the marine environment.

3.6 The Rights and Responsibilities Flag States

3.6.1 Nationality and Flag

Article 91 of UNCLOS outlines the prerogative rights and duties of states with regards to nationality and flags of ships. It provides:

1. Every State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships shall have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship.
2. Every State shall issue to ships to which it has granted the right to fly its flag documents to that effect.

It is necessary to address the question of jurisdiction over ships because the high seas are not under the jurisdiction of any state. This principle is enshrined in international law. Article 92 of UNCLOS outlines that “Ships shall sail under the flag of one State only ...”. Based on the territorial principle of jurisdiction, every state has jurisdiction over vessels flying its flag on the high seas. Mukherjee (2000a, pp. 4-5) explains that “without nationality, a ship as a self-contained communal unit, where people live, work and interact, would, metaphorically speaking, float into a legal vacuum”. Therefore, the jurisdiction of the flag state applies under the “extension of territory” otherwise known as the “floating island doctrine” which has been confirmed in a number of cases.¹⁴ Affirming these rights, Article 97 of UNCLOS provides that only the flag state has penal jurisdiction in matters of collision or any incident of navigation on the high seas. Any state which has clear grounds to believe that proper control and jurisdiction is not being exercised may report to the flag state which must then investigate the matter and take the necessary remedial action. The flag state must ensure that there is an inquiry into all accidents on the high seas including those involving nationals from other states.

¹⁴ In the *LOTUS* case, the Permanent Court of International Justice (PCIJ) held that “... a ship on the high seas is assimilated to the territory of the state the flag of which it flies, for just as in its own territory, that state exercises its authority upon it, and no other state may do so.” See (1927), PCIJ. Series A, No. 10, p.25.

Byles, J. referred to “...a ship on the high seas. .. as part of the territory of that nation whose flag she carries; and all persons on board her are to be considered as subject to the jurisdiction of the laws of that nation, as much so as if they had been on land within that territory.” See *Regina v. Anderson*, (1868), II Cox Crim. Cas. 198.

Christiancy J. referred to vessels on the high seas as “elongations of the territory of the nation under whose flag they sail.” See *People v. Taylor* (1859), 7 Mich. 160.

By granting a ship the right to fly its flag, a state signals its intent, in keeping with UNCLOS Article 94 to effectively exercise its jurisdiction and control in administrative, technical and social matters over the ship; maintain a register of ships; assume jurisdiction under its internal law over the ship, its master, officers and crew; ensure safety at sea, with regards to construction, equipment and seaworthiness, manning and labour conditions; and ensure training of the crew in accordance with applicable instruments including the use of signals, communication and prevention of collision.

Consistent with the right of a state to determine the conditions for grant of its nationality, Ready (1998, p. 4) points out that a vessel may possess the nationality of a state if the criteria for nationality is based on nationality of the shipowner. In this instance, the vessel does not need to carry documents evidencing nationality nor fly the flag of the state. The UK Merchant Shipping Act of 1894 before its amendment in 1988 made such provision. Following the 1988 amendments, British character is conveyed by registration only.

3.6.2 Registration of Ships and Mortgages

In contrast with nationality which is a substantive notion in international law, registration is the procedural device through which nationality is conferred on a ship. It is therefore *prima facie* evidence of a ship's nationality. (Mukherjee, 2000a, p. 6). In other words, registration is the administrative act by which nationality and the collateral rights and duties are conferred on ships which have fulfilled the criteria set by the state. Through registration, ships are brought under the jurisdictional authority of the state with obligations to implement the requirements of state laws. Correspondingly, the state undertakes national and international responsibilities in respect of that ship. (Özçayir, 2001, p. 11).

Registration means “the entering of a matter into the public records”. (Ready, 1998, pp. 6-7). It involves the execution of private and public law functions in respect of ships.¹⁵ The public law function is concerned with administrative matters pertaining to national interests comprising *inter alia*: conferment of rights to the ship to fly the flag, to diplomatic protection, naval protection, consular services and engagement in cabotage activities; and duties of the ship to conform to state regulations on matters of safety, pollution control, manning and labour conditions and shipboard discipline. The private law function concerns the protection of private proprietary interests in ships such as providing *prima facie* evidence of title and ownership as well as protection of interests and priority rankings of holders of security interests such as mortgages and hypothèques. (Mukherjee, 1993, p. 32).

While there is the requirement for flag states to operate a register of ships, there are no international conventions in force which specify the form or operation of ship registers. The type of registry operated depends on the interests of the state. From states’ practices many categories of registries have evolved, namely: Traditional (closed) registries; FOC, open or international registries; Secondary or offshore registries;¹⁶ and hybrid registries. (Mukherjee, 2000a, pp. 4-11)

Traditionally, closed registries have been operated primarily by TMS. The basic premise is that flag state control, to ensure compliance with its laws and with international conventions to which the state is party, will be better effected through direct state influence over the shipowner/operator. There is therefore a relatively rigid concept of genuine link¹⁷ in the closed registry system. They allow for the registration of ships owned by nationals of states, or companies with majority ownership and control from within that state.¹⁸ (Mukherjee, 2000a, pp. 7-8).

¹⁵ In ship registration, the public and private law functions have public policy. The public law functions are concerned with national interests relating to the rights and protection of ships. The private law functions affords the public access to information as to who has a propriety right to ships which are entitled to the rights and privileges of the national flag. See Wood, V.C. in the case *Liverpool Borough Bank v. Turner*. (1860), 29 L.J. Ch. 827 at 830.

¹⁶ Li, K.X. & Wohan. (1999). New developments in ship registry. *International Journal of Marine and Coastal Law*, 14, 137 uses the term ‘compromise registry’ instead of secondary registry.

¹⁷ Genuine link is a requirement under UNCLOS. This subject is treated in the following chapter.

¹⁸ Mukherjee (2000a, p. 7) outlines that there are different degrees of “tightness” with closed registries as criteria for determining nationality of individuals and companies vary among states.

Open or international registry system is used by states which permit the registration of ships in their jurisdiction, without any or all of the restrictions imposed by closed registries.¹⁹

Several TMS have established secondary or offshore registries to counteract the attraction of tonnage to open registries from their closed registries. As economic incentive to shipowners, TMS permit hiring of foreign crews, under secondary registries, at wages lower than those paid to domestic crews, to encourage registration at home. Secondary registries purport to provide economic incentives without sacrificing maritime safety. (Mukherjee, 2000a, pp. 8-9).

Hybrid registries appears to have come from the 1986 United Nations Convention on Conditions for Registration of Ships, (UNCCROS),²⁰ which attempted to definitively articulate the meaning of genuine link and to address aspects of its requirements. UNCCROS does not prescribe any qualifications for vessel ownership. It asserts that the conditions set in flag state laws be sufficient to permit the exercise of effective jurisdiction and control over its ships. UNCCROS also permits partial manning of ships by non-national, provided that their level of competence and conditions of employment conform to applicable international rules and standards. UNCCROS requires corporate shipowners to be established and have their principal place of business in the territory of the flag state. Failing this, there must be a representative or management person, natural or judicial, available in the flag state, to meet all legal, financial and other obligations. Many so-called FOCs operate hybrid registries, some of which have higher safety standards than closed registries. (Mukherjee, 2000a, p. 9)

Bareboat charter-in registration of vessels, under conditions specified in UNCCROS, provides for protection of seafarers and for development of national shipping

¹⁹ International registry is the preferred term today, as 'flags of convenience', and to a lesser extent, 'open registry', have become stigmatised, being accused of promoting economic gain at the expense of safety and environmental protection. The 'open registry' system will be discussed in chapter 4.

²⁰ This convention, developed under the auspices of the United Nations Conference on Trade and Development (UNCTAD), is not yet in force. It requires ratification by 40 states which have at least 25% of the world fleet tonnage for entry into force.

industries through promotion of joint ventures. It involves a temporary change of flag for the duration of the charter with mortgages and hypothèques being registered in the state of the shipowner (the flagging-out state or state of registry) and registration for effective vessel control done in the state of the charterer (the flagging-in state or flag state). This form of `parallel registration` or `dual registration` essentially separates the private and public law functions of registration between the flagging-out state and the flagging-in state respectively. The owner earns revenue without having to operate a ship and the charterer gains use of a ship without having to purchase one. The flagging-in state enjoys economic gains from more tonnage added to its fleet, and possibly increased employment of its seafarers. (Mukherjee, 1993, p. 35).

3.6.3 Surveys, Inspections and Certification of Ships

Technical matters governing safety and environmental protection are mainly elaborated in IMO conventions, codes, resolutions and protocols. These instruments outline uniform minimum standards for design, construction, equipment and operation of ships. States are responsible for ensuring compliance by ships flying their flag, through surveys, inspections and by issuing certificate as evidence of such compliance. The principal instruments concerning design, construction and equipment are the International Convention for Safety of Life at Sea, 1974, as amended, (SOLAS), the International Convention for the Prevention of Pollution from Ships, 1973/78, as amended, (MARPOL) and the International Conventions on Load Lines, 1966, as amended (Load Lines 66). Operational standards are set out in SOLAS Chapter IX, titled "Management for the safe operation of ships" and the related International Management Code for the Safe Operation of Ships and for Pollution Prevention (ISM Code). The International Convention on Tonnage Measurement of Ships, 1969, (Tonnage 69) is significant as tonnage is a criterion used to determine applicability of conventions.

These instruments provide that flag state Administrations may entrust surveys, inspections and certification to recognized organizations or surveyors. However, they typically provide, as in SOLAS, Chapter 1, Regulation 6, that "in every case, the Administration shall fully guarantee the completeness and efficiency of the

inspection and survey, and shall undertake to ensure the necessary arrangements to satisfy this obligation.” Guidelines for such delegation are provided in IMO Resolutions A.739(18) and A.789(19). They outline competencies for recognized organizations (ROs) in areas of personnel training, management, technical appraisals and survey inspection and certification of ships. All delegations should be according to legally binding written agreement and based the laws of the flag state. These agreements should be supported by robust administrative and management system internal to the Administration to enable proper monitoring and control of recognized organizations.

3.6.4 Rights and Responsibilities in Relation to Seafarers

In exercise of flag state rights relating to seafarers there are three main socio-economic considerations. The first is the practice whereby a state with a sizeable merchant fleet only permits manning of its vessels by its nationals in order to maximise employment and economic contribution. The second instance is where a state in which crewing costs are high permits employment of non-nationals aboard its ships in the interest of shipowners and the economic benefits to the state from shipowners’ contributions. Third is the practice of states with large seafaring populations and small merchant fleets of seeking socio-economic benefits through employment of seafarers. “ ... [T]his state of affairs, if left unbridled, may lead to economic and labour exploitation and unsafe practices.” International legislation on manning, certification, engagement and welfare of seafarers aim “to regulate potential ills and bring about uniformity in national regimes.” (Mukherjee, 2002, pp. 183-184).

As part of the wider objective of safety at sea, Article 94 of UNCLOS imposes an obligation on flag states to ensure that ships flying their flag are manned by competent crews. The master and officers are to “possess appropriate qualifications” in maritime disciplines and the crew of each ship is to be “appropriate in number and qualifications”. They are to be “fully conversant with and required to observe the applicable international regulations concerning ... ” safety, collision prevention, pollution prevention and management and radio communications. Details pertaining to wages, hours of work, manning, social and living conditions are

elaborated in several ILO Conventions, in particular No. 109. The International Convention on Standards of Training, Certification and Watchkeeping of Seafarers, 1978, as amended in 1995 and 1997 (STCW), sets out the training, qualification and levels of competence for seafarers.

UNCLOS, Article 94 also outlines mandatory requirements for the flag state over ships flying its flag. Paragraph 1 requires the state to “effectively exercise its jurisdiction and control in ... social matters” while Paragraph 3 requires it to take “measures ... necessary to ensure safety at sea with regards, *inter alia*, to: ... labour conditions”. The labour and social conditions are primarily addressed in ILO instruments which flag states are required to implement. They set out minimum employment age; wages, manner of payment, work hours, settlement in the event of work termination and legal recourse for disputes; annual vacation and public holiday entitlements; hours of rest; disposal of property of diseased seamen; occupational safety; health and welfare onboard ship including provision of proper food, water, medical treatment and accommodation; powers of master in matters of criminal offences, discipline, welfare, requisition of provisions and settlement of labour disputes; and, relief and repatriation of seamen and protection from abandonment. (Mukherjee, 2002, pp. 185-186).

3.7 Rights and Responsibilities of Coastal States

A coastal state is any state that is bordered by the sea. UNCLOS provides for the establishment of maritime zones in which coastal states have varying rights and are empowered to exercise varying degrees of jurisdiction. Again, these rights are balanced by responsibilities. The definitions given below are based on UNCLOS.

3.7.1 Internal Waters

The coastal state has full sovereignty over internal waters which includes all waters to the landward side of the baseline from which the breadth of its territorial sea is measured. In internal waters territorial jurisdiction of the state applies regarding law making and enforcement. The state has absolute discretion as to whether or not to admit vessels into its internal waters and the conditions governing such access, subject to the rules of sovereign and diplomatic immunity. Only in two

circumstances is the power of the coastal state modified in internal waters. The first is when the state is obliged by treaty or custom to allow entry of its vessels into its internal waters. The second is where a straight baseline established is in accordance with Article 8(2) of UNCLOS. In the latter case, the coastal state is obliged to allow innocent passage of foreign ships. (Özçayir, 2001, pp. 68-69)

3.7.2 Territorial Sea and Archipelagic Waters

Compared to internal waters, state sovereignty is modified in the territorial seas and in archipelagic waters pursuant to Articles 2 and 49 of UNCLOS respectively. The state has sovereignty over these zones but is subject to foreign vessels' right of innocent passage. Ships must comply with the laws established by the coastal state which may take punitive action against ships for any activities in these zones that are prejudicial or harmful to the peace, good order or security of the coastal state.

3.7.3 Contiguous Zone

The contiguous zone, according to the meaning given in article 33(1) of UNCLOS, describes the waters, having a breadth of 12 nautical miles, that are immediately adjacent to and seawards of the territorial sea. Within its contiguous zone, the coastal state may exercise the control necessary to prevent infringement of its customs, fiscal, immigration or sanitary legislation within its territory or territorial sea. Control is only exercisable in respect of ships entering the contiguous zone. (Özçayir, 2001, pp. 71-72)

3.7.4 Exclusive Economic Zone (EEZ)

The EEZ, a new maritime zone instituted under UNCLOS, may be claimed at the discretion of the coastal state. A state which claims an EEZ has sovereign rights to explore and exploit the living and non-living resources. It also has binding obligations to conserve and manage these resources and to protect the marine environment. The coastal state has legislative jurisdiction over the EEZ but must respect freedom of navigation in respect of foreign ships. As part of its protective role, the coastal state may take measures to prevent or mitigate the threat of pollution from ships. The pollution prevention function is also exercisable in

accordance with the International Convention relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, 1969.

3.7.5 High seas

The high seas is that part of the sea defined in UNCLOS Article 86 as "... not included in the exclusive economic zone, in the territorial sea or the internal waters of a state, or in the archipelagic waters of an archipelagic state." According to Özçayir (2001, p. 73) the high seas are "*res communis*" where all states may exercise freedom with regards to navigation, fishing, laying of submarine cables and pipelines, overflight and the conduct scientific research. However, coastal states may intervene on the high seas to prevent, mitigate or eliminate grave and imminent danger to their coastline or related interests from pollution or threat of pollution resulting from marine accident. They may also act under the universal jurisdictional principle to seize and punish vessels involved in slave trading and piracy.

3.8 Rights and Responsibilities of Port States

It is well accepted that port and harbour works are contained in internal waters which are assimilated to territory bringing the exercise of rights and responsibilities within the ambit of full territorial sovereignty. It is therefore within the prerogative of the port state to decide on the conditions for access into its ports. However, due to accident, stress of weather or *force majeure*, ships may be forced to enter port to seek refuge. Under these circumstances, the ship operators are not punishable for any violations committed unintentionally. The port state is therefore a state in whose port a foreign ship has entered voluntarily and is present for the time being.

UNCLOS Part XII, which expanded the powers of port states in the context of protection and preservation of the marine environment, provides that states may establish particular requirements for the prevention, reduction and control of pollution of the marine environment as a condition for the entry of foreign vessels into their ports or internal waters. The port state may institute court proceedings against vessels voluntarily within its port for pollution damage in any maritime zone falling under its jurisdiction and on the high seas. Within the last 30 years new powers have been ascribed to port states under several IMO and ILO instruments,

for example, under SOLAS, MARPOL, LL66, Tonnage 69, STCW and ILO 147 to prevent the operation of sub-standard ships. Complementary to flag state responsibilities, these conventions allow for limited enforcement of standards in respect of foreign ships. They empower officers of port states to inspect statutory certificates issued under the authority of the flag state. Where there are clear grounds to believe that the ship does not correspond substantially with the particulars of the certificate, the ship may be inspected and if necessary, detained until the particular deficiency is rectified. Guidelines for port state inspections are laid down in IMO Resolutions A.787(19) and A.882(21).

3.9 The Safety Net

The responsibilities of states, if properly executed, amount to the creation of a safety net to prevent substandard ships from trading and presenting risks to the crew, the marine environment and to other ships. Özçayir (2001, p. 93), identifies six main elements of the safety net:

- (i) International conventions of the IMO
- (ii) The conventions of the ILO
- (iii) Flag State control
- (iv) Classification societies
- (v) The marine insurance industry; and
- (vi) Port State control

The primary and inescapable responsibility rests with the flag states. They are to ensure that vessels flying their flag adhere to the standards set in international instruments. Where responsibilities are delegated to classification societies, flag states are to monitor their performance to ensure they meet the required standards. Owners are responsible to the flag state for the condition of their vessels, while insurance companies are to require that only vessels meeting the prescribed standards are insured. Port state control provides a monitoring role in support of flag states and in protection of their interests. Unfortunately, as Özçayir (2001, pp. 94-95) observes, the net is sometimes breached due to callous actions on the part of some parties and this resulted in disastrous human, environmental and economic consequences.

Chapter 4

4.0 The Nature of Competing Interests in Maritime Administration

This chapter further examines the nature of maritime interests, identifies the competing interests and resultant conflicts and their impact on Maritime Administrations from the perspective of aspiring maritime states (AMS), acting in their primary capacity as flag states. To properly engage in this debate, a fuller understanding of the nature and pursuit of interests, the interests in conflict, strategy and strategic alliances, war and politics is necessary.

4.1 The Nature and Pursuit Interests

4.1.1 National Interests

According to Reynolds (2000, p. 15):

The term 'national interest' has traditionally been used as a 'rationale for State action'. Broadly speaking, a national interest is a stake or issue, usually political, legal, economic or military, which has a major impact on the well being of the State and its nationals. National interests then, are the basis on which a State establishes its national objectives. They determine the manner in which a state administers its maritime affairs and its subsequent conduct and functioning in the international arena.

Defending his foreign policy in pursuit of national interests, Lord Palmerston (1989, p.10) in an address to the British House of Commons in 1848 stated: "We have no eternal allies, and we have no perpetual enemies. Our interests are eternal and perpetual, and those interests it is our duty to follow." In pursuit of their national interests, states will cross lines of friendship and enmity to forge strategic alliances. It is also a well known policy, perhaps best espoused by the US, that states will go to war to defend what they consider to be vital national interests.

4.1.2 Strategy and Strategic Alliances

Strategic planning involves the establishment of long-term objectives and the employment of measures necessary, on account of the forecasted environmental changes, to ensure that the objectives are achieved. (Dixon, 2001, p.19). National interests form the basis on which a state develops its policies. Policies in turn lead to the development of objectives. Strategies are the courses of action, tailored to the prevailing environment, that are employed to achieve those objectives. Like states, non-state maritime actors, with private economic and commercial interests, will develop policies, objectives and strategies based on their interests and the prevailing environment. As maritime trade is global, strategic alliances and conflicts can occur between non-state actors of varying nationalities, as occurred during the early years of open registries.

4.1.3 Interests in Conflict

As shown in chapter 2, external situations which are in conflict or inconsistent with a state's national interests could arise in the conduct of maritime affairs. "Conflict of interest" is "the state of incompatibility of goals of two or more actors" and the degree of conflict of interest in a situation affects the behaviour of the actors and therefore affects the outcome of the strategic interaction. (Axelrod, 1970, p. 5). Total conflict of interest, leading to a "zero sum game", exists when in an interaction one party must win and the other must lose. Alternatively, there is the "partnership game" involving no conflict of interest where parties cooperate and attain their preferred objectives. The outcome of any strategic interaction is affected by: the "possibility of communication" among the actors including whether they are able to make binding commitments, or whether their pledges can be broken with little or no consequences; the "complexity of the situation" that may make cooperation difficult even if objectives are compatible; and the "relevance of the interaction" that determines its perceived importance and how vigorously it is pursued. (Axelrod, 1970, p. 7). For the purposes of this dissertation, "conflict of interest" and interests in conflict are synonymous and exist where the national interests of a state conflict with the interests of other maritime actors.²¹

²¹ Although Axelrod uses the term "conflict of interest", the heading "Interests in Conflict" has been selected to avoid confusion with the common usage and understanding of the term conflict of interest.

4.1.4 War

Clausewitz, the noted nineteenth century theorist, points out that “war is not just a political act, but a real political instrument, a continuation of political commerce ... by other means” aimed at fulfilling policy objectives in pursuit of an interest(s). (1982, p.119). He described its characteristics as follows:

- War is the continuation of state policies by other means.
- The object of war is to compel the opponent to submit to ones will.
- To defeat an enemy and have him submit to the desired point of view, it is necessary to overcome the combined resistance of his means and his will.
- The more powerful the motives of a war, the more it affects the people *i.e.* the greater the interests at stake the more widespread and intense the conflicts will be.
- War is peculiar to other conflicts in only one respect; it employs the use of arms and violence as the means to achieving political objectives. (1982, p. 101-122).

4.1.5 Politics

Politics involve the struggle for promotion and acceptance of the ideas/policies of one party (state or non-state) over another's. “Political power ... [is] drawn alternatively or in combination from the strength of leaders and institutions, the will of the people and/or the support the nation state could win from other nation states.” (Rothkopf, 1998, p. 325).

4.1.6 Similarities Between Conflict of National Interests and War

From the foregoing, it can be seen that conflicts of interests of two states vis a vis each other and war, which is armed conflict, bear great similarities. They both involve strategic interactions and a state of incompatible goals. Their intensity affects the behaviour of the parties involved and the outcome of interactions. In the extreme, conflict of interests and war involve one party winning and the other losing. Alternatively, the parties may cooperate to achieve their desired goals. Interactions, especially negotiations, depend on the parties being able to speak to each other and whether agreements are binding or can be easily broken. Cooperation is made more difficult by complexities and the vigour with which conflict of interest and war

are pursued is dependent on the importance of the interest at stake. The only significant variation between conflict of interest and war is that war uses arms and violence to achieve desired goals.

4.1.7 War Redefined

During the colonial era, TMS used war to secure and defend their maritime interests which were both political and economic in nature. By becoming members of the United Nations (UN) through acceptance of its Charter²², states have agreed to bind themselves to resolving their conflicts by means other than war. (United Nations, 1998, pp. 3-5). For the most part this has been the case. The longest, most intense and widespread conflict of the 20th century, the Cold War, was political in nature, employing the use of very little violence. There have been several “trade wars”, economical in nature, not involving use of arms. Global political decisions underpinned by treaty obligations have forced changes in the conduct of war, modifying its characteristics so that the absence of violence does not necessarily mean a cessation of war.

War today may be political, trade, or otherwise related, the defining character being the intensity of the conflict or dispute. Intensity in turn is determined by the importance of the interest at stake. As maritime activities are both political and economic with vast amounts of money at stake, they remain a flash point for war in the modern day context. A state involved in an intensive maritime dispute may feel so embattled that it considers itself to be at war. This would be the case if the stronger party involved in a dispute employs measures aimed at compelling the weaker party to submit to its will. A position adopted by one state may amount to a declaration of war on the other. Given the limited capacities of some maritime states, war will also be defined relative to their means or lack of means.

²² The UN Charter is the treaty establishing that organization which is binding on states parties that have ratified it. The states parties are therefore bound to perform its obligations in good faith.

4.2 The Interests at Stake

The 1990 “British Shipping: Challenges and Opportunities Report” identified economics and defence as the major maritime interests in TMS. It declared that the shipping industry and its linkages with economic activities was a major determinant of policy in Europe. Apart from direct industry earnings and employment benefits, wider maritime interests – today styled ‘maritime clusters’ – include shipbroking, marine insurance, ship financing, ship classification, shipbuilding and repairs, equipment manufacture, port and harbour operations and offshore oil and gas industry. Shipping provides skilled and experienced manpower that directly support other maritime activities. The major concern was that the crewing of ships and associated maritime activities may move to other countries with considerable reduction in the likelihood of their return. According to Landon (2002, p. 12), the United Kingdom (UK) Merseyside maritime cluster has nearly 600 companies employing 6000 people with an annual turnover of £1.3 billion equivalent to US\$2.0 billion.²³ Stares (2002, p. 5) expressed the view “It is not just shipping but the maritime cluster which creates employment”. “If you lose the fleet you will lose the suppliers, the insurance”. He estimates that the European Union (EU) maritime clusters currently employ two (2) million people.

4.3 The Maritime Industry and the Power of States

Over the past 300 years the ability of nation states and their leaders to achieve their aspirations and goals in international relations rested on three pillars: political power, economic power and military power. (Rothkopf, 1998, p. 325). Like a stool on three legs, if any of these pillars is weakened or removed there is corresponding structural weakening or collapse in the power of the state. The military and economic pillars are directly dependent on the maritime industry while political power affects those pillars and are influenced by them.

The merchant navy has been the mainstay for logistic support during major war efforts. This was demonstrated during WWI, WWII, the Falklands War and most

²³ The 1990 British Shipping: Challenges and Opportunities Report (pp. 6-7) estimated foreign exchange earnings in 1989 from the British shipping industry at £3.0 billion with net earnings of £1.1 billion while maritime related activities in London earned £1.22 billion.

recently during the Gulf War. States through legislation such as section 902 of the US Merchant Marine Act, 1936, are able to requisition ships flying their flag in times of military necessity. There is the assumption, at least within the US, under its policy of “effective control”, that states having US beneficially owned ships on their registries will not object to their requisition. No agreements to this effect exists and requisition does cover crewing of ships. (Schubert, 2002, p. 3).

Shipping, with its economies of scale, is the preferred mode of international trade. It carries the vast majority of traded commodities. It will continue to retain its importance as world economies become more interdependent and trade increases. It positively impacts balance of payments through employment for seafarers and generation of foreign exchange through direct earnings and maritime related industries.

It follows therefore that maritime activities are of great importance to politics as war which the merchant marine directly supports is an instrument of politics, aimed at achieving political objectives, and economics is a factor which strongly influences the shaping of political objectives. Any factor which wrests control of ships and seafaring activities from TMS, constitutes a direct threat to their power. Such is the nature of open registries and associated maritime activities conducted by AMS.

4.4 Traditional Maritime States Versus Open Registry States

4.4.1 From Raleigh to Rochdale

The 1970 (Rochdale) Committee of Inquiry Into Shipping criticized FOCs for: taking risks with sub-standard ships that resulted in a record of loss during the 1960's that was substantially higher than the world average; not having trade union protection nor uniformed and guaranteed national standards for condition of service for seafarers; harbouring conditions in which could lower global maritime safety standards; and failing to exercise effective jurisdiction and control over their ships. (Rochdale, 1970, pp. 53-54).

Along with its criticisms, the Rochdale Report concluded that shipping from developing countries, though a threat to British interests, was legitimate in its

aspirations; the vast majority of ships under FOCs did not constitute sub-standard shipping; although there was issuance of fraudulent certificates, FOCs attracted British officers because the living, working standards were on balance equivalent to European standards with better fringe benefits and security; and deterrents in TMS, more than attractions by open registries, were the reasons for FOC ascendancy. (Rochdale,1970, pp. 52-53). In short, there was the recognition that FOC registries were exploiting legitimate competitive advantages. Why then the criticisms?

Control of the sea, trade and the riches of the world, as described by Raleigh, brought great economic prosperity to Britain. It embodied Britain's legitimate aspirations to become a wealthy and powerful nation at a period in history when it was acceptable to use naval superiority to close off lines of communications and distribution points, choking the vitality out of other states that competed for control of riches and resources.

From 1812 to 1912, with industrial revolution and its population exploding from 12 to 41 million, Britain was unable to produce enough food to feed its population and raw materials to supply its industries. The very existence of the British people, their wealth, industries and economic life were entirely dependent on shipping which ensured access to foreign markets and supplied seven eighth of their food and raw materials. In that period, shipping quintupled reaching over 12 million tons and nearly 21,000 ships, 4000 of which were ocean going. (Doughty, 1982, pp. 1-4).

Following WWI and WWII, British shipping laid in ruins with American shipping gaining dominance over the war years. British efforts to rebuild its shipping industry were frustrated by the advent of Panama and Liberia registries which had United States support. Its efforts along with other European states to import genuine link into the 1958 Treaty on the High Seas to allow them to determine whether they recognize the nationality of ships was unsuccessful. Attempts to exclude Panama and Liberia from the IMO Council had failed, the International Court of Justice (ICJ) ruling in favour of Panama and Liberia. London was the global centre of maritime activities but Liberia's fleet overtook the UK fleet in 1966 to become the largest in the world. FOCs represented a credible threat to British shipping but the current

code of conduct dictated peacetime behavior. Use of arms to settle conflicts over maritime interests was now reprehensible in light of widespread acceptance of the UN Charter. The Committee of Inquiry Into Shipping was launched. Critical of FOCs, the Rochdale report identified their features to as follows:

- (i) The country of registry allows ownership and / or control of its merchant vessels by non-citizens;
- (ii) Access to the registry is easy. A ship may usually be registered at a consul's office abroad. Equally important, transfer from the registry at the owner's option is not restricted;
- (iii) Taxes on the income from the ships are not levied locally and are low. A registry fee and an annual fee, based on tonnage, are normally the only charges made. A guarantee or acceptable understanding regarding future freedom from taxation may also be given;
- (iv) The country of registry is a small power with no national requirement under any foreseeable circumstances for all the shipping registered, but receipt from very small charges on a large tonnage may produce a substantial effect on its national income and balance of payment;
- (v) Manning by non-nationals is freely permitted;
- (vi) The country of registry has neither the power nor the administrative machinery effectively to impose any government or international regulations; nor does it have the wish or the power to control the companies themselves. (Rochdale,1970, p. 51).

While Raleigh, a Briton, underscored the legitimate aspirations of Britain, and any other country, to become prosperous, the Rochdale Report appears to accept this position, while at the same time importing a presumption that countries with FOC registries are less entitled to pursue economic well being than Britain. The suggestion that the country of registry has no national requirement "under any foreseeable circumstances"²⁴ for all the shipping registered is a refusal to accept that these countries, like Britain, are entitled to become a great power over time. It disassociated FOC states from the possibility of achieving sustainable development based on maritime activities. It is perhaps the most damaging statement in the Rochdale Report to the interests of FOC states because it branded their legitimate aspirations illegitimate. Moreover, this illegitimacy which stigmatized the long term

²⁴ Underlined for emphasis.

developmental aspirations of the FOC state used as its basis for attack, the short term and immediate positive financial benefits of ship registration: “receipt from very small charges on a large tonnage may produce a substantial effect on its national income and balance of payment.” This sub-paragraph of the Rochdale Report prosecuted and summarily convicted the legitimate aspirations of FOC states on a trumped-up charge of illegitimacy, while it simultaneously garnered international support for their public execution.

Failure to effectively enforce maritime laws in respect of vessels flying their flag was the main argument against FOCs competitors. With centuries of British know-how, experience and sufficiency of maritime resources these criticisms were valid. The Report did not give any consideration to the possibility that performance of maritime administration by FOCs may have been hampered by resource constraints. Instead, it stigmatized FOCs by advancing the argument that they were unworthy competitors. An opponent, as shown earlier from Clausewitz, has a resistance comprising both will and capacity. That “[t]he country of registry has neither the power nor the administrative machinery effectively to impose any government or international regulations; nor does it have the wish or the power to control the companies themselves” makes it a competitor *infra dig*, unworthy of participating in maritime affairs.

There was some justification in criticising registration at consuls’ offices. That system was plagued with corruption and could not have ensured completion of the requisite pre-registration surveys. Through easy transfer in and out of registries, operators of sub-standard ships could continue undetected and clandestine activities could be easily masked. However, it would have been folly for FOCs to overly restrict ease of transfers. Doing so would have created strictures similar to those operating in TMS. Such restrictive conditions would have undermined the advantage enjoyed by FOCs. Practical difficulties could arise if the ship, for example, required naval protection. Many FOC states could not provide such services. Therefore, provision for easy transfer along with an understanding of low or no tax when the ship returns to the registry made good business sense. British consuls also registered ships at their offices.

The criticisms of FOCs raised in the Rochdale Report were not without justification. An unfortunate series of underperformances by FOC states and the loss of two Liberian tankers in the preceding decade, including *Torrey Canyon* which polluted British shores, only served to strengthen its arguments. The bottom line however was economics. If shipowners did not have the FOC option “they might have registered some of their tonnage under the UK flag, with the consequential benefit to the employment opportunities open to UK seafarers and possibly to ... [UK] balance of payments.” (Rochdale, 1970, p. 52). The Rochdale Report came at the dawn of the information age shortly after many British colonies which gained independence became maritime competitors and many were to follow. It was a shot across the bow of FOCs, a new kind of artillery in the arsenal of TMS, designed for an era of redefined warfare. It successfully stigmatised existing and potential FOCs and would serve as a launching pad for future propaganda battles in the war to protect the maritime interests of Great Britain with support from other TMS and non-governmental organizations with like interests.

4.4.2 The ITF Lobby

The International Transport Workers Federation (ITF) has been involved in anti-FOC campaigns, representing the interests of seafarers since the 1940's. Its message surrounds the morality issue of preventing exploitation of seafarers from developing countries – so-called ‘crews of convenience’ – who work in squalid conditions aboard ships from neglectful FOC registries and are paid cheaply by shipowners. ITF advocates employment based on union negotiated contracts to prevent exploitation of seafarers. Its record and reports can validly authenticate its successes in unearthing corruption and fraudulent practices in some FOC administrations and rescuing abandoned crews on ‘ships of shame’. It has championed the cause of the underdog seafarer, intervened where legal processes are slow and successfully recouped millions of dollars in income and compensation illegally withheld from seafarers, some of whom are deceased or disabled and their families left to suffer untold hardship. (ITF, 2000b).

Kasoulides (1998, pp. 106-108) paints another picture. He shows that money rather than morality has been the driving force behind ITF's lobby with its campaign being

orchestrated by western affiliates concerned with ensuring conditions of employment suitable for their members. ITF's campaign and boycotts since the 1970's have been directed almost exclusively at FOC ships including those which it acknowledges that conditions aboard are among the best in the world. Meanwhile vessels from other flags, known to be in worse conditions, are not targeted. The National Union of Seafarers of India was suspended from ITF in 1978 and unions from Bangladesh, Pakistan, the Phillipines, Singapore, Hong Kong and South Korea suffered similar exclusion. These unions saw lower wages as providing a competitive advantage for their members and a means of sustaining foreign exchange earnings. ITF, on the other hand, wants standardized wages worldwide, a situation that would whittle away the advantages of seafarers from developing countries.

Vivekanand (2001, p. 96) considers the argument of low wages to be a big lie. He points out that a master from Japan or Europe, whose annual income of \$64,000.00 is a middle income earner, but is barely able to save five to ten percent of his earnings. In contrast, a master from India, paid \$35,000,00, "lives like a king" and is able to save up to sixty percent of his income. He argues that the better standard of living, despite lower wages in absolute terms, will attract better talent to seafaring in India than in the west. It is noteworthy that the number of seafarers from Europe, USA and Japan continues to decline despite higher wages enjoyed by them.

The arguments put forward by Kasoulides and Vivekanand suggest that although the labour lobby appears to show great success in protecting seafarers from developing states, it has been manipulated by western factions within ITF to cause distraction, by emphasizing the negative aspects of FOC registries. This tactic has been employed to mask their real objective of strategically disrupting mechanisms for fair trade to prevent developing countries from realizing and sustaining the benefits of competitive advantages associated with low labour costs. ITF's designation of FOCs based on nationality of beneficial ownership rather than

effective jurisdictional control, clearly supports the intent to ensure that economic benefits from shipping accrue to TMS and western affiliates.²⁵

4.4.3 The Confusion Surrounding Genuine Link

The concept of genuine link as it relates to the nationality of ships and the reciprocal rights and duties of shipowners and flag states was first introduced into international maritime law through the Geneva Convention on the High Seas (GCOHS). It stemmed from a ruling in the *Nottebohm case* adjudicated by the ICJ, to determine whether Liechtenstein could exercise diplomatic protection for Mr Nottebohm vis à vis Guatemala. Guatemala had expropriated the property of Mr Nottebohm, formerly a German, who had acquired Liechtenstein nationality just before the outbreak of WWII. Nationality, the ICJ concluded, "... is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interest and sentiments together with the existence of reciprocal rights and responsibilities". The ICJ ruled in favour of Guatemala concluding that there was the absence of a genuine connection between Mr Nottebohm and Liechtenstein. "Nottebohm had adopted Liechtenstein nationality simply to substitute for his status as a national of a belligerent State that of a neutral State". (Ready, 1998, p. 11). Carlisle (1981, p. 154) regards the ruling as being against "citizenship of convenience".

In 1956-58 Dutch and British lawyers sought to extend genuine link to ships even though social attachment as described in the *Nottebohm case* was not applicable to ships. This move was in response to labour interests that were opposed to FOCs. "By establishing the principle of genuine link the haemorrhage of tonnage to the open registries could be stemmed." (Ready, 1998, p. 11). TMS also wanted genuine link between the state and the ship enshrined in international law "for purposes of recognition of the national character of a ship by other states". (Carlisle, 1981, p.155). The aim here was to overturn nationality of ships based on the notion of the flag state which was already established in international law. If nationality

²⁵ OECD (2001, p. 57) gives costs of selected ships in 2000 as: 140,000 dwt Suezmax US\$51m; 155,000 dwt Capesize bulk carrier US\$38m; and a 3,500 TEU container vessel US\$41m. World bank (2000) gives the GDP of some AMS as follows: Sao Tome Principe US\$46m; Marshall Islands US\$96m; Tonga US\$153m; Vanuatu US\$212m; St. Vincent and the Grenadines US\$333m. Ownership of such vessel by nationals of these AMS is unrealistic.

could be redefined based on beneficial ownership, Panama and Liberia, with the third and eight largest tonnage would diminish in significance and would not be entitled to seats on the IMO Council.

In a study undertaken for the ITF, in year 2000, Churchill sought to establish the meaning of genuine link requirements in relation to the nationality of ships. He utilized all of the tools available for treaty interpretation including: *Travaux préparatoires* to appreciate the intent of the drafters of GCOHS, UNCLOS and UNCCROS in which there is the genuine link requirement; the “object and purpose” of those conventions regarding genuine link; the “subsequent practice” of parties to GCOHS and UNCLOS to determine whether there is a common understanding of genuine link; the decision of courts to determine if there is uniformity of interpretation; and, the views expressed in the writings of scholars.

He found that although GCOHS and UNCLOS provide for the mandatory existence of a genuine link between the flag state and ships having its nationality, they do not “state explicitly what is meant by a ‘genuine link’ nor ... [do they] ... specify what consequences follow in the absence of such a link.” (Churchill, 2000, p. 42). The *travaux préparatoires* revealed the same uncertainties. UNCCROS which stipulates conditions of participation by nationals in the ownership and or manning of ships, endorses flag state prerogative to decide on such matters. The degree of concordance in subsequent practice by parties of GCOHS and UNCLOS was so diverse that no common understanding was evident. It is also not clear whether genuine link is a pre-condition for the grant of nationality or a duty which arises out of the grant of nationality.

The ICJ ruling in the *IMCO Reference case*²⁶ asserted that the nationality of ships was based on conditions set by the flag state, discarding attempts by European AMS to overturn this principle. In respect of the consequence of non-recognition

²⁶ The IMCO reference case was adjudicated by the ICJ to determine if Panama and Liberia were among the eight “largest shipowning nations” and therefore entitled to sit on the IMO Council. The international Maritime Consultative Organization (IMCO) is the former name for the International Maritime Organization (IMO).

advocated by TMS, Churchill (2000, p. 49) cites the decision of the International Tribunal on the Law of the Sea in the *M/V Saiga (No.2) Case (St. Vincent and the Grenadines v. Guinea)* that genuine link is intended to secure effective implementation of flag state obligations “and does not establish criteria by reference to which the validity of registration [and hence nationality] of ships may be challenged.” Other case rulings, typified by the European Court of Justice, showed total lack of uniformity in legal interpretations of genuine link.

The opinions of scholars are so diverse that no dominant view emerges. (Churchill, 2000, p. 37). Lamenting the obscurity and elusiveness of the meaning of genuine link, Mc Connell (1985), writing in the *Journal of Maritime Law and Commerce*, titled her publication: “... Darkening Confusion Mounted Upon Darkening Confusion: ...”.

Churchill (2000, p. 4-5) concludes that “there is no consensus ... as to what is meant by genuine link or the consequences that flow from its absence ...”. State discretion rather than any single or obligatory criterion characterises the genuineness of the link between the flag state, the ship and its crew. The existence of genuine link, though not a prerequisite for the grant of nationality, is best demonstrated through effective flag state survey and certification and other controls.

The introduction of genuine link into international maritime law has resulted in more confusion than enlightenment. Driven by defence of national interests with objectives to curb the growth of open registries, TMS attempted to apply court decisions concerning diplomatic protection in the *Nottebohm case* to nationality of ships. This concept of convenience was ill conceived. After 40 years genuine link has yet to be established as an effective precept in international law and there is great uncertainty that it ever will.

4.5 Port States Versus Open Registry States

In light of flag state underperformances referred to earlier, provisions for control of ships by port states were enshrined in international maritime conventions in the 1970's. Worried about incidents which could pollute their coasts and ports as a result of incompetent foreign crews on sub-standard ships, western European states,

along with Canada, became dissatisfied with enforcement by FOCs. In 1982 these states established the Paris Memorandum of Understanding on Port State Control (Paris MOU) which they regarded as the final safety net for control of ships. (Özçaryir, 2001, p. 93). Several port state memoranda, styled after the Paris MOU, have since been established. Hindell, in a damning exposé of FOC failures, called for the existing ship regulatory regime to be strengthened. In his view:

When the member states of the IMO put on their rule-making hats they are at their most benign and most constructive. It is when they go home to exercise their `national sovereignty` by applying these regulations that the feet of clay appear. Failure to carry out their pledges and their obligations can be excused as `sovereign independence` or `self-government` but it ought to be described bluntly as incompetence, idleness greed or indifference to the consequences of inaction. (Hindell, 1996, p. 371).

Ships were arriving in European ports in astonishingly poor condition. Most of the FOC “commercial registries” were more concerned with attracting tonnage for revenue generation while they took a relaxed view of their obligations to regulate ships. The Paris MOU, brought the most effective and uniform enforcement to international shipping. Its success lay in the eventual adoption of a public name and shame policy, although the European port state control (PSC), initially fearful of being sued by flag states, was slow to point the finger. (Hindell, 1996, p. 374)

The Paris MOU has continued this publicity policy with reports publicising sub-standard ships as “rust bucket of the month” detailing ship detentions, rating flag states into categories ranging from very high risk to low risk and placing them into black, grey and white lists. Paris MOU, US Coast Guard and the Tokyo MOU statistics show a pattern of underperformance by most AMS. Echoing the same concerns as Hindell, the Paris MOU (2001, p. 5) concludes that “notorious flags” are concerned more with revenue collection than safety standards while others seem satisfied to remain on the black list.

Despite his condemnation of FOCs, Hindell (1996, p. 380) exposes UK conflict of interests embodied in a proposal to IMO, albeit under the euphemistic labels of “tactical error” and “whingeing”. A March 1996 UK proposal to an IMO drafting

group, aimed at raising the standard of flag state performance, suggested that registries should submit themselves to independent audit and those that did not improve should have their activities restricted. In it, the UK complained that FOCs had an unfair advantage.

Hindell also contradicts himself. Exposure of UK anti-FOC interests along with his statement that European PSC “does not really want the work without the revenue” (1996, p. 380) runs counter to his earlier statement that “traditional flags ... prime purpose is to promote shipping and employment and to regulate the industry to a proper standard, rather than make money” (1996, p. 373). Apart from this direct contradiction regarding revenue/money, Hindell seems not to take cognisance of the fact that promotion of employment in shipping is about economic gain.

Hindell attributes abatement of European PSC fear of legal action by flag states solely to the strategy of publicly exposing FOC shortcomings. However, Kasoulides (1993, p. 21) explanation that “[t]he authority of port states has also been limited by the reasonable expectation that excessive measures by port state would result in regulatory retaliation by other states” is a factor for consideration. Although FOCs have the majority of ships on their registries, port states are at the centres of commercial activity. So even if European PSC act over zealously, as they are often accused of doing, they are no longer fearful of retaliation that could be significantly injurious to their economies. PSC threat of detaining or banning a ship holds enough economic persuasive power to ensure compliance with their wishes. Cases are known where PSC officers have detained ships and ordered them to purchase replacement equipment from their private firms. The prospect of ships being banned from European ports or detained at considerable revenue loss may be considered too high a price to pay for attempting to expose or take legal action for PSC excesses.

4.5.1 The Maritime Aspirations of the United States

After the US won its independence from Britain in 1790, it went into isolation and began putting in place institutions designed to ensure its sustained development. By the early 20th century, the US had developed its naval resources and expanded

its political sphere of influence in the Americas. It enacted legislation such as the Merchant Marine Act of 1920, commonly known as the Jones Act, which required all vessels transporting cargo between ports to be built, crewed and owned by US nationals. The objective was to maintain a shipbuilding and ship repair industrial base, a trained pool of merchant mariners, and assets to respond to national security emergencies.

By the turn of the 20th century also, the US had become the world's largest economy, however, shipping was still dominated by European TMS. From the 1920s to the 1970s, the US supported FOC registries that it considered to be under its effective control. This suited US interests in dealing with shipping competition from Europe. But by 1975, when FOC registries had clearly moved into a position of primacy, the US became the foremost and most ardent advocate for expansion of port state powers. (Özçayir, 2001, p. 76).

The US Coast Guard Qualship 21 initiative is meant to recognize and reward quality ships. However, one criterion for the award is that the ship must fly the flag of a state which has less than the three year rolling average of detentions in US ports. So, for example, if a shipowner chooses to register his ships in the state of his nationality, his ships can never be recognized under Qualship 21 if ships from his country's flag have more than the average number of detentions in US ports. This clearly limits the shipowner's freedom of choice.

While efforts to eliminate sub-standard ships and flags must be commended and encouraged, US PSC activities raises questions about hegemonic intent given that US strategy to attain world primacy involved preventing other powers from becoming equally as strong in their respective regions. It does appear that as part of a wider US strategy of countering European competition and controlling world tonnage, FOCs were manoeuvred into positions of prominence, only to later come under attack from the US as they were perceived to be less formidable competitors.

Schubert (2002, p. 5), making proposals for homeland defence in response to the September 11, 2001 terror attacks, called for US to become a strong flag state.²⁷ In this regard, he identified open registries as the biggest threat to US national interests and suggested that highest consideration be given to state incentives to woo ships back to the US flag. In light of US dominance in military political and economic spheres, these activities are likely to create serious concerns for AMS.

4.6 Coastal States Versus Flag States

The power of the coastal state to deny entry into its ports and territorial waters, to ships which could endanger safety security and the marine environment, is closely akin to the power of port states. Recent examples of such conflicts have been manifested the cases of *MV Tampa* and *MV Castor* which were regarded as 'lepers of the sea'. The master of the *Tampa* had conformed to the time honoured custom of rescuing people in distress at sea. The ship was refused entry into Australia. The rescued personnel were unwanted refugees. *Castor*, a gasoline tanker, developed cracks in its deck during a violent storm. It spent 35 days at sea in the Mediterranean as states refused to give access to ports or sheltered waters to enable a salvage team to repair its hull. The conflict in the *Castor* case, which has placed ports of refuge high on the IMO agenda, is best summed up in the words of the International Salvage Union: "[g]overnments have the fundamental obligation to act in the public interest". "It is not in the public interest to take decisions which at best pass on risks to neighbouring states and at worse may lead to environmental catastrophe". (Fairplay International Shipping Weekly, 2002)

Other conflicts could arise from potential hazards due to excesses by port/coastal states. US prohibition laws directly conflict with innocent passage. It not only outlawed landing of alcohol in its territory but rendered illegal its carriage into territorial seas. The Jones Act provides for compensation to seamen injured in the course of their duties outside US ports. This conflicts with flag state supremacy supported in court cases since 1860's and codified in GCOHS and UNCLOS. (Kasoulides, 1993, p. 25).

²⁷ Schubert's statement was made on June 13, 2002, to the Special Oversight Panel on the Merchant Marine of the Armed Services Committee of the US House of Representatives.

In a pollution incident, the master and crew of a vessel could be subject to concurrent jurisdiction of several states. This could lead to a multiplication of punishment. There are suggestions that jurisdiction could be exercised by the state where the “primary effect” is felt more directly and substantially. This is still fraught with difficulties as the effect may be equal in more than one state. As there are no international rules governing limitation of concurrent jurisdiction this is an area of potential conflict between flag states and port/coastal states. (Kasoulides, 1993, pp. 32-33).

4.7 Intra-Flag State Conflicts

Revenue versus safety obligations has been the single greatest intra-flag state conflict. AMS have been accused by TMS and the more established PSC regimes of being concerned only with revenue collection. Other conflicts arise due to pressures created by resource constraints. AMS are forced to give priority to social and infrastructure development over maritime activities.

4.7.1 Overseas Representatives

Most AMS are away from the main centres of shipping and commercial activities. They lack the requisite financial, human and technical resources to properly operate their maritime administrations. Consequently, they operate their maritime administration as offshore registries staffed by non-national overseas representatives. Severe conflicts arise as some overseas representatives are more interested in private commercial gain than proper discharge of flag state responsibilities. Hindell (1996, p. 272) describes the overseas representative of St Vincent and the Grenadines (SVG) as a “family firm as flag state”. He writes:

Besides his official duties, the Commissioner for Maritime Affairs not only registers his own ships but has turned the organization into a family business by appointing his son to run one office and his daughter to run another. He is not only a proud father but also a shipowner, regulator and a profitmaker. ... St Vincent is not a small insignificant register. In 1995 it claimed 1300 vessels totalling 6.5 million gross tons. It also had one of the worse casualty rates in the business: 24 total losses in the last four years.

SVG has been operating its registry under this arrangement since 1982. As at January 2000, SVG operated the worlds eighth largest open registry, nineteenth in overall size, with 9.65 million tonnes registered. (Institute of Shipping and Economics Logistics [ISL], 2001, pp. 26-27, 222). After 20 years it is still rated as high risk on the Paris MOU and is above the three year rolling average for detentions in the US. Between 1995 and 1999 there were 24 total losses of SVG flagged vessels. (ISL, 2001, p. 51).

Recent newcomers to ship registration reveal a new breed of “dotcom” commercial registrars that have used internet promotions to attract tonnage and carry out online registration without `due diligence´ being performed in respect of ships. The Tongan registered vessel *Monica*, which was intercepted on 17 March 2002 with 928 Kurdish refugees, sailed under 11 different names. (Osler, 2002a, p.1). Paris MOU (2001, p. 5) reported that Sao Tome and Principe, Cambodia and Tonga found their way to the top of the black list in a single year. Safety at Sea International (2002, p. 4), referred to Cambodia as the world’s worst registry. In its fleet there were 25 ships wrecked or stranded, 41 collisions, 9 shipboard fires and 45 arrests since 1995. These registries are all managed by overseas representatives.

4.7.2 Classification Societies

The major classification societies have been in existence longer than most flag states. They have at their disposal far greater expertise than any flag state today, maintaining a worldwide network of offices staffed by technical personnel, particularly naval architects. Lalis (2001, p. 38) sees the source of conflict with classification societies as coming from their dual nature: “one of a semi-public body entrusted with the task of public interest and one of a normal company seeking profit where it can”. In their public role, classification societies, appointed as ROs by flag states, carry out regulatory functions of surveying and inspecting ships and issuing statutory certificates as evidence of compliance with the flag state laws and international maritime instruments to which those states are party. In their private commercial capacity, classification societies function in the interests of shipowners, by whom they are paid, to ascertain conformance by their ships to the quality standards necessary to remain `in class´ and obtain insurance coverage.

Lalis raises the question of compatibility of roles: can classifications societies perform both roles without compromises as public regulators given that revenue generated from their private commercial activities finances their regulatory function in respect of the same ships. Sceptics abound and perhaps on justifiable grounds. In the last quarter of 1995, two of the major classifications societies, Lloyds Register and Bureau Veritas each classified and certified one fifth of all ships that were detained more than once in two years. (Hindell, 1996, p. 374). Paris MOU reports for 2000 and 2001 each report that “class related detentions” amounted to 22% of all detentions.

Other commentators have accused members of the International Association of Classification Societies (IACS) of in-fighting, citing a preoccupation with self-promotion, rather than embracing a unified approach towards maritime safety. Osler (2002b, p. 1), quoting Mr Anne, head of the French Classification Society, Bureau Veritas, regarding vessel safety stated: “IACS is united behind that aim, but that unity is strained, and global ship safety suffers, when members try, for commercial advantage, to portray themselves better than others.” While the in-fighting among IACS members continues, they are accused of acting slowly with respect to the revision of standards for structural strength of hatch covers for bulk carriers. Failure of forward hatch covers was responsible for the loss of *MV Derbyshire* and is suspected of being the primary reason for the loss of bulk carriers which have the highest rate of loss among all ships types. (Speares, 2002, p. 2).

4.7.3 Shipowners

The intentions of a small percentage of shipowners who transfer registration of their vessels to open registries have been less than honourable. There is historical evidence, as shown from Carlisle in chapter 2, that some Greek owners transferred their vessels to British and Panamanian flags to mask their involvement in smuggling activities. In the recent case of *Monica* highlighted above, it is assessed that its operation under 10 different flags and 11 separate names was intended to mask clandestine activities. (Osler, 2002a, p. 1). Such shipowners often abuse the confidentiality associated with open registries by ‘disappearing into the woodwork’ behind corporate veils to escape from their liabilities, often leaving crews unpaid.

Their ships are often poorly maintained, the primary objective being commercial gain. This has led the Mercantile Marine Department of India to conclude that “[s]ub-standard shipping is a result of a commercial decision by someone, somewhere”. (International Commission on Shipping [ICONS], 2000, p. 71).

Shipowners have otherwise attempted to manipulate states. During the 1970’s oil crisis, the Independent Tanker Owners Association lobbied the US Government for the establishment of anti-pollution legislation. The real objective was private commercial gain. They were hoping that the tankers which were owned by marginal operators would be used as floating port reception facilities. In this way, the multinational companies and independent operators with higher capital resources would be able to dominate the trade. (Carlisle, 1981, pp. 183-184). Mukherjee (2000a, p. 25) relates a case where a powerful shipowner brought pressure upon a flag state to force it to revise its list of ROs, a move that was not in the interest of the flag state and created unease for other shipowners.

4.8 Conclusion

This chapter showed that maritime conflicts resulting from competing interests are multi-directional and are reflective of the wide array of states, their agents and subjects as well as multinational non-state actors involved in maritime activities. The magnitude of the political, economic, military and social interests at stake has led to and will continually see their pursuit in warlike fashion. In this regard, new strategies and strategic alliances of convenience have emerged and will continue to evolve as the environment changes. Propaganda warfare waged by states and non-state multinational actors has given open registries a negative image. Unresolved conflicts between coastal states and flag states related to safety and pollution prevention have constrained flag states in discharging their responsibilities. Within the jurisdiction of flag states, conflicts of interests between private commercial gain and flag state obligations have hindered Administrations in the effective discharge of flag state responsibilities. Overall these conflicts have had and will continue to have a debilitating effect on the performance of Maritime Administrations in AMS. Attending to these conflicts require time and resources which they can ill afford.

CHAPTER 5

5.0 Performance of Maritime Administration in Aspiring Maritime States

Having examined the responsibilities of maritime states as enshrined in international law in Chapter 3 and the competing interests and their attendant conflicts in Chapter 4, this Chapter seeks to objectively assess Maritime Administrations in AMS, in terms of their responsibilities, in spite of the conflicts and pressures upon them. The assessment aims to ascertain if charges that FOCs have contributed to an atmosphere of secrecy in shipping that encouraged substandard ships, is applicable to AMS. Also, given the accusations of underperformance and bearing in mind that maritime activities generate significant revenue, the assessment endeavours to determine how AMS have utilized the funds generated from registry and other activities; if their commercial considerations override safety; and if AMS have properly utilized the support available under the ITCP.²⁸

For the purposes of this dissertation the term pressure refers to any political, economic, social or other circumstance, whether temporary or permanent, that constrains AMS when performing their obligations set out in international law and when pursuing objectives identified in connection with their national interests. Pressure includes competing priorities internal to AMS.

5.1 The Impacts of Economic Pressures

Economic constraints facing AMS dictate that health, education, physical infrastructure and other pressing needs must take priority over maritime affairs. As

²⁸ The mission of the ITCP is: “To help developing countries improve their ability to comply with international rules and standards relating to maritime safety and the prevention and control of maritime pollution, giving priority to technical assistance programmes that focus on human resources development and institutional capacity-building”.

a consequence, limited funds are appropriated in support of maritime administration. The resulting financial constraints have had adverse knock-on effects in all aspects of resource allocation to and performance of maritime administration. Notwithstanding economic constraints, the inescapable responsibility for maritime safety rests primarily on flag states. This responsibility transcends delegated authority, imposing an ever-present obligation on AMS to assure the global community that ships flying their flags conform to the safety, pollution prevention and labour standards prescribed in international instruments.

5.2 Assessment Mechanisms

While the expressions “substandard ships” and “substandard flags” have gained wide use in international shipping, there is no globally established mechanism which assesses the performance of flag states and determines benchmarks for what is “substandard”. Assessment criteria differ even among similar agencies. However, regional PSC, maritime statistical institutes, intergovernmental organizations and international shipping associations all agree that maritime safety and pollution prevention standards are steadily improving.

Table 1 is developed for use in the assessment of AMS. It combines Flag State Conformance Index (FLASCI),²⁹ 2001 maritime administration details, PSC reports and country economic indicators for selected registries/flag states. Although this table is adequate it has limitations. Some information was not available or not applicable in all categories for all flags/registries assessed. The FLASCI ratings and PSC rating for some flags/registries, for example Liberia, show significant variation confirming the differences in assessment criteria. The PSC ratings for some of the smaller flags/registries show noticeable variation. This may be attributable to differences in assessment criteria, regional concentration of their fleets or both.

²⁹ Alderton, T. & Winchester, N. published the results of a partially completed study that developed a new Flag State Conformance Index (FLASCI) as “a highly accurate and robust means of measuring the performance of flag states in a wide range of variables” with respect to compliance with their international maritime obligations. See Alderton, T. & Winchester, N. (2002). Globalisation and de-regulation of the maritime industry. *Maritime Policy and Management*, 26,(1), 35-43. AMS straddle the categories of ‘new FOCs’ and ‘old FOCs’. For a listing of flags/states by FLASCI categories see: Alderton, T. & Winchester, N. (2002). Flag states and safety: 1997- 1999. *Maritime Policy and Management*, 29, (2), 161.

Table 1
Maritime Administration Details and Ratings for Selected Flags/Registries

COUNTRY	FLASCI			ADMINISTRATION STRUCTURE & FLEET STATISTICS							ECONOMIC INDICATORS		PARIS MOU				USCG		TOKYO MOU	
	Rank from 37	Score	Category, Score Range & General Characteristics	WMU Grad	RO	Registry Offices		No. of ships 2001	Ave Age yrs	Ton-nage 2001 '000 tons	Ship & '000 ton loss 2001	GDP for 2001 in US \$bn	GDP Per Capita US \$'000	Rank from 77	Category	Risk Level	Excess factor	Rank from 25	3-yr % Detention (Ave 2.70%)	Detention % (Ave 7.76%)
						Home	Over Seas													
Norway	1	84	High: 72 – 84 "Traditional maritime nation and second registers that are centrally operated and controlled".	N/E	5	1	0	1,601	26	3,586	3 (1.52)	165.46	27.7	9	White list	--	-0.9	N/R	N/R	1.69
United kingdom	2	80		N/E	6	1	0	1,462	21	6,029	7 (1.47)	1406.31	22.8	1	White list	--	-1.72	N/R	N/R	1.32
DIS (Denmark)	3	77		N/E	6	1	0	472	17	6,603	1 (0.30)	162.81	25.5	N/R	N/R	N/R	N/R	N/R	N/R	N/R
NIS (Norway)	3	77		N/E	6	1	0	762	16	19,005	1 (1.68)	165.46	27.7	N/R	N/R	N/R	N/R	N/R	N/R	N/R
Netherlands	5	76		N/E	6	1	0	1,337	15	5,605	0	373.98	24.4	6	White list	--	-1.05	N/R	N/R	0.85
GIS/Germany	6	75		N/E	10	23	0	906	19	6,300	1 (0.21)	1873.85	23.4	N/R	N/R	N/R	N/R	N/R	N/R	N/R
Kerguelen Is. (France)	7	72		N/E	10	2	0	108	10	3,088	0	388.41	24.4	N/R	N/R	N/R	N/R	N/R	N/R	N/R
Hong Kong	8	64	Medium -High: 58 – 64 "Semi-autonomous second registers".	1	8	1	9	646	12	13,710	0	162.64	25.4	20	White list	--	-0.21	N/R	N/R	1.99
Isle of Man*	8	64		N/E	6	1	0	275	10	6,057	0	1.51	18.8 ^a	N/R	N/R	N/R	N/R	N/R	N/R	0
Bermuda*	11	63		N/E	6	1	0	121	16	5,312	0	2.62	33.0	16	White list	--	0.37	N/R	N/R	4.65
Cayman Islands*	12	62		N/E	6	1	2	144	16	2,054	0	0.93	24.5 ^b	46	Grey list	--	0.81	2	3.03	2.63
Latvia	13	60		1	6	1	0	160	22	68	0	7.55	7.2	48	Grey list	--	0.83	17	11.11	0
Estonia	15	58	2	7	1	0	191	23	347	0	5.28	10	35	Grey list	--	0.44	N/R	N/R	N/R	
Singapore	15	58	3	9	1	0	1,729	11	21,023	2 (137.3)	92.3	26.5	14	White list	--	-0.43	N/R	N/R	2.49	
Cyprus	17	50	Medium 41-50 "More established open registers with higher scores belonging to those states seeking EU membership. National registers".	14	14	1	11	1,407	16	22,762	2 (178.5)	8.70	16	56	Black list	Med	1.6	4	3.21	6.49
Malta	18	49		5	9	1	0	1,421	19	27,053	5 (58.1)	3.57	14.3	59	Black list	Med	1.99	7	3.63	6.89
Netherlands Antilles	18	48		6	8	1	0	176	13	1,250	0	2.40	11.4	31	Grey list	--	0.22	N/R	N/R	0
Russia	19	48		3	1	1	0	4,727	21	10,248	7 (13.1)	309.95	7.7	53	Black list	Med	1.04	5	3.27	11.66
Philippines	21	46		66	10	1	0	1,697	24	6,030	1 (1.48)	71.44	3.8	28	Grey List	--	0.11	N/R	N/R	2.84
Vanuatu*	22	44		3	10	1	14	316	17	1,496	0	0.21	1.3	29	Grey list	--	0.17	1	2.92	2.9
Bahamas	23	43		1	12	1	1	1,312	16	33,386	2 (41.2)	4.82	15	22	White list	--	-0.15	N/R	N/R	3.15
Liberia	23	43		24	10	1	7	1,566	12	51,784	1 (9.33)	0.52	1.1	11	White list	--	-0.75	N/R	N/R	3.05
Antigua and Barbuda*	25	42		2	9	1	1	840	12	4,688	0	0.66	8.2 ^b	19	White list	--	-0.35	3	3.05	5.93
Barbados*	25	42		5	12	1	1	68	18	687	0	2.60	14.5	25	White list	--	-0.04	N/R	N/R	0

Table 1
Maritime Administration Details and Ratings for Selected Flags/Registries (Continued)

REGISTRY/ FLAG	FLASCI			ADMINISTRATION STRUCTURE & FLEET STATISTICS							ECONOMIC INDICATORS		PARIS MOU				USCG		TOKYO MOU	
	Rank from 37	Score	Category, Score Range & General Characteristics	WMU Grad	RO	Registry Offices		No. of ships 2001	Ave Age yrs	Ton-nage 2001 '000 tons	Ship & '000 ton loss 2001	GDP for 2001 US \$bn	GDP Per Capita US \$'000	Rank from 77	Category	Risk Level	Excess factor	Rank from 25	3-yr % Detention (Ave 2.70%)	Detention % (Ave. 7.76%)
						Home	Over Seas													
Panama	27	41		19	23	1	1	6,245	16	122,352	16 (138.6)	10.17	6	58	Black list	Med	1.94	8	3.78	5.5
Turkey	27	41		14	8	1	0	1,146	24	5,897	5 (4.65)	147.63	6.8	68	Black list	V. high	6.28	15	6.77	9.09
Marshall Islands*	29	36	Low – Medium: 35-36	1	11	0	7	360	14	11,719	0	0.96	1.67	21	White list	--	-0.18	N/R	N/R	2.54
Ukraine	29	36		2	N/A	N/A	N/A	838	22	1,407	0	37.59	3.85	60	Black list	Med. high	2.89	N/R	N/R	0
Honduras	31	35	"Newer open registers".	9	16	1	0	1,183	29	967	3 (5.93)	6.39	2.7	74	Black list	V. high	9	21	18.18	16.34
Lebanon	31	35		3	N/A	N/A	N/A	99	33	302	0	16.71	5.0	72	Black list	V. high	8.07	N/R	N/R	0
Bolivia	33	30	Low: 19-30	2	N/A	N/A	N/A	78	31	174	0	7.96	2.6	76	Black list	V. high	12.46	25	42.86	41.67
St. Vincent and the Grenadines*	33	30		2	17	0	7	1,318	23	7,073	8 (32.9)	0.34	2.8	62	Black list	High	3.93	12	6.11	6.86
Belize*	35	27		"New entrants to the open register market".	0	24	1	41	1,516	23	1,828	0	0.80	3.2	67	Black list	V. high	5.57	23	23.08
Equatorial Guinea*	36	24	3		N/A	N/A	N/A	60	21	37	0	1.85	2.0	N/R	N/R	N/R	N/R	N/R	N/R	N/R
Cambodia*	37	19	11		12	0	1	564	26	2,000	0	3.38	1.3	70	Black list	V. high	7.1	24	30.77	29.48
Saõ Tome Principe*	N/R	N/R	N/R	3	6	0	1	64	31	190	0	0.047	1.1	75	Black list	V. high	11.45	N/R	N/R	23.08
Tonga*	N/R	N/R	N/R	1	10	0	2	165	31	338	0	0.142	2.2	65	Black list	V. high	5.24	N/R	N/R	9.09

Source: Alderton, T., & Winchester, N. (2002); Hanson, M. E., & Miller, V. C. Jr. (Eds) (2002); International Monetary Fund (2002); Lloyd's Register-Fairplay Ltd. (2002); Offshore Online Limited (2002); Paris MOU (2002); Tokyo MOU (2002); United States Central Intelligence Agency (2002); US Coast Guard (2002); World Bank (2002); World Maritime University (2001).

Notes: * Aspiring maritime states; ^a 1997 estimate; ^b 1999 estimate; N/A Not available; N/E Nationals not entitled to fellowships to attend the World Maritime University. (Nationals of other countries in this Table may also not be entitled); N/R Not rated.

The combined indicators rate AMS in the medium-high, medium, medium-low and low FLASCI categories which generally correlate with 2001 PSC reports. Table 1 also shows that TMS with developed economies generally have higher performance ratings. Conversely, AMS with weaker economies are rated lower. This seems to support the view that economic and other resource constraints adversely impact Maritime Administration in AMS. Overseas Territories (OTs) of TMS also show higher ratings, suggesting that there is a positive impact on their Maritime Administrations by the “inheritance” of legal and administrative frameworks from their parent countries whose laws are binding on them. Parent country experience and superior resources for managing maritime affairs have accrued to OTs.

5.3 Convention Making and Implementation

Maritime conventions are negotiated among states which span the entire spectrum of national development. Conventions therefore represent compromises consistent with varying national interests. (OECD, 2001, p. 29). IMO records show that participation by AMS in convention negotiation is less than desirable. IMO conference papers reveal a dearth of submissions from AMS, reflecting an under-representation of their national interests. Participation by AMS in meetings of the IMO Assembly, Council, Committees and Sub-committees is often scanty, even though a primary function of these fora is to amend existing conventions, many of which have costs and other implications for national interests. The records of the 75th Meeting of the Maritime Safety Committee which deliberated on a draft mandatory International Ships and Port Facilities Security (ISPS) Code, show 59 of IMO’s 158 member states were not in attendance. Among them were Tonga and Sao Tome and Principe both of which are blacklisted and rated as high risk by the Paris MOU, and Barbados. (International Maritime Organization [IMO], 2002a). Seven of the AMS listed in Table 1 did not participate in the Working Group which discussed the pending ISPS Code. (IMO, 2002b, p. 1)

Starke (1989, p. 457) identifies several reasons for the non-implementation of conventions even after they have been signed by states. They include resource and priority constraints, poor participation in convention negotiations and lack of interest. Administrative/governmental complications in arriving at a decision to ratify a

convention, shortage of parliamentary time, the need for new legislation and increased expenditure are related to resource and priority constraints. Discovery of serious defects and difficulties with the instruments only after they have been signed reflects poor participation in convention negotiations, probably as a result of participation by inexperienced representatives. Even when AMS participate in convention negotiations, the absence of clear policy objectives that are consistent with their national interests seems to be an underlying factor which leads eventually to difficulties in enacting and enforcing implementing legislation. Based on the IMO status of convention as at July 31, 2002, the independent AMS listed in Table 1 had ratified 43% of IMO conventions compared to 73% by the five top rated TMS/registries.³⁰

Mukherjee (2002, p. 264) outlines that several newly independent states from the former eastern block, Caribbean states, and at least one state in Africa have up to date legislation made possible through the ITCP. However, his earlier observation, (2000a, p.17) that “the principal criticism levelled against the open registry states is that implementation and enforcement of the standards have been lacking” points to the gap between enactment and enforcement of legislation by AMS. This failure to enforce uniform minimum convention standards, manifested through inaction and inadequate sanctions, frustrates international maritime regulatory objectives.

A Flag State Performance Self-Assessment Form (SAF) developed by the IMO Flag State Implementation (FSI) Sub-Committee, to assist states in assessing how well they are implementing maritime conventions, and to help in identifying areas for possible assistance through the ITCP, has had an unsatisfactory response. In part, many open registries have not submitted SAFs because they fear it would reveal their failures to properly implement convention standards. As at 13 May 2002, only seven SAF for AMS were submitted to IMO. Of these, only five met the January 19, 2001 deadline. (H. Hoppe, personal communication, August 14, 2002).³¹

³⁰ OTs are bound by conventions entered into by their parent states. OTs would therefore have 73% ratification rate. The percentage shown for all AMS would be higher if values of OT's are included.

³¹ SAF for AMS include submissions by the UK on behalf of its OTs. For independent AMS, four submitted SAF and two met the deadline.

5.4 Management and Administration

AMS are accused of failing to reinvest sufficient funds in maritime administrations to train staff including inspectors and surveyors and to hire experienced professionals who can develop sound policy, advise on convention negotiations and provide legal counsel. The virtual absence of publicly declared financial reinvestment policies for maritime activities leaves observers to conclude that some AMS are “collecting the golden eggs but starving the goose that lays them”. AMS which have made least use of the ITCP to secure training in maritime administration for their nationals at the World Maritime University (WMU), generally have the lowest all round rating by PSC and other assessment mechanisms. As at 2001, Belize had no WMU graduates, Tonga had one, St Vincent and the Grenadines two and Sao Tome and Principe three. In contrast, states with the highest graduate count per unit of registered tonnage generally have better higher ratings. There are some exceptions. Cambodia which has 11 WMU graduates as at December 2001, but is rated among the world worst flags/registries, appears to validate the conclusion made by Morrison (1997, pp.197-198) that failure to benefit is due to “bureaucratic inertia”, where the advice which is or can be provided by those graduates is not appreciated by persons in authority. As shown in chapter 4, Cambodia also has problems related to overseas representatives.

The Maritime Administrations of the TMS that are rated higher in Table 1 are all semi-autonomous bodies with clear mandates, within which, or from which, the assignment of commercial and regulatory functions are separated. This supports the view that tightly structured Administrations that are less hindered by bureaucracy are better able to achieve MSEP and commercial objectives, in response to the dynamic needs of the maritime industry. In contrast, the Administrations of lower-rated AMS are often very small and staffed by generalists who are required to provide oversight for both regulatory and commercial activities. This introduces conflict prioritising functions which is exacerbated when they have to control multiple overseas agents.

Where AMS have appointed representatives and agents to act on their behalf, “[i]t is incumbent upon each flag state [A]dministration to have at least that degree of

resident expertise that is necessary to discharge the oversight function". (Mukherjee, 2000b, p.113). Table 1 reveals that this is not the case in many instances. Some AMS have no home-based Administration to carry out oversight functions while others appear overwhelmed with multiple overseas representatives and ROs.

While overseas representatives have been accused of pursuing private commercial gain and ignoring the regulatory obligations of flag states, some AMS have tacitly endorsed their actions by failing to establish mechanisms to monitor and control their activities. Overseas representatives can only run amok where they are given the latitude to do so by flag states. Table 1 supports the conclusion that flag state responsibilities are better discharged when overseas agents are held accountable. This is best demonstrated by the cases of Belize and SVG which consistently have lower ratings. Belize, a relative newcomer to maritime affairs, has 24 ROs and 41 overseas representatives, management of whom clearly overwhelms its single home-based office. SVG, a virtual veteran of 20 years, has 17 ROs and seven overseas offices which operate without control from at home. AMS which have better ratings by PSC and other indicators, for example, OTs, Antigua and Barbuda and Barbados, have home-based offices, fewer ROs and less overseas agents.

`Flag hopping´ in the absence of `due diligence´ and stringent registration procedures have encouraged maritime fraud associated with `phantom ships´, where vessels and their cargoes `disappear´ and are resold without trace. With their histories expunged and shipowners untraceable behind shell companies, these ships become potential `instruments of terror´ to be use in armed robbery, piracy and worse deeds. This has prompted development of an IMO resolution and calls from the IMO Secretary General urging governments "to exhaust all means available" to verify the identity of ships before registering them and to accept "only original papers documents or electronically submitted documents whose authenticity has been verified, and to encourage greater vigilance ...". (IMO, 2001a, p.18). According to Osler (2002a, p. 1) *Monica* referred to in chapter 4, sailed under 10 different names registered with seven (7) different flag states, five (5) of which are AMS listed in Table 1. The absence of `due diligence´ has led to accusations of harbouring substandard ships. Lower rated AMS in Table 1, which rely exclusively

on overseas representatives, have older fleets. This appears to support the conclusion that there is less than judicious pre-registration vetting of ships.

5.5 Technical Services

Given their limited technical resources and relative inexperience, AMS have delegated the vast majority of ship surveys and certification to classification societies which they have designated as ROs. There are many classification societies worldwide with a wide range of standards. The larger, more established classification societies that are members of IACS are, supposedly, more reputable as they have a common written code of ethics. "However, in the absence of flag state supervision, and control some societies are known to have accepted ships that have been in breach of regulations ...". (OECD, 2001, p. 30). Paris MOU (2002, p.5) attributes 78% of all class related detentions to classification societies acting on behalf of black listed flags. Table 1 also shows that AMS which have fewer and more established classification societies as ROs have better performance ratings. EU states, having assessed the power and influence of classification societies, have elaborated common standards to monitor their performance rather than attempting to control classification societies on their own.

Survey and certification of smaller ships to which many technical conventions do not apply on account of their small size is not a lucrative activity. They have therefore been avoided by classification societies. These ships must therefore be surveyed and certified by national Administrations. ITCP has assisted with the development of procedures and training of personnel in survey and certification for these 'non-convention ships'. The ITCP Report for 2001 reveals that some AMS still depend exclusively on classification societies for convention size ships and have not developed home-based Administrations with the requisite vessel survey and certification expertise. They are therefore unable to discharge their obligations under international law for maritime safety in respect of 'non-convention ships'.

Regional PSC, established with support from ITCP, also record a very low level of involvement by AMS. In the Pacific, the Marshall Islands are not members of the Tokyo MOU. The Tokyo MOU 2001 report does not attribute any PSC inspections

to Vanuatu which is a member state. In the Caribbean, Cayman Islands and Barbados are the only AMS that are members of that regional MOU and conduct PSC activities. Belize, Bermuda and SVG still have not accepted the regional PSC MOU. They only have observer status. They do not conduct any PSC activities. Antigua and Barbuda and the Netherlands Antilles are members but they do not conduct any PSC activities. These AMS all have PSC inspectors trained under the Caribbean Ship Inspector Training Programme which is supported by the ITCP. (L. Bennett, personal communication, August 20, 2002).

5.6 The Human Factor, Safety and Environmental Protection

5.6.1 The Regulatory Mechanisms

The summation below made in a 1991 study commissioned by the Marine Directorate of the UK Department of Transport, followed the investigation of accidents involving tragic loss of life.³²

While casualties can never be completely eliminated there is nevertheless a growing feeling that present rates of casualty are still unreasonably high. When everything else has been looked at and tried – newer designs, better technical aids, the increase in evermore regulations and enforcement systems at every level – one thing remains about which there is, almost universally, agreement as to the underlying cause of casualties – the human factor. (Eriksson and Mejia, 2000, p. 7).

The study concluded that “the human element was found to be present in over 90 per cent of collisions and groundings and 75 per cent of contacts and fires/explosion”. (Eriksson and Mejia, 2000, p. 8). Following the *Piper Alpha* accident, the UK presented a report to the IMO calling for “Formal Safety Assessment” (FSA) as “a means to ensure strategic oversight of safety and pollution prevention”. (Eriksson and Mejia, 2000, pp. 23-24). The UK reports influenced a departure from IMO’s almost exclusive reliance on technical standards and technology research as a means of promoting safety at sea. They led to adoption by IMO of the ISM Code, FSA, revisions to the STCW Convention, the 1997 Code for the Investigation of Marine Casualties and Incidents and other instruments

³² The accidents include the *Herald of the Free Enterprise* which capsized on March 06, 1987 with the loss of 188 lives and the July 06, 1998 fire and explosion on oil production platform *Piper Alpha* stationed off Aberdeen, Scotland, that resulted in the loss of 167 lives and massive marine pollution.

whose combined application along with ILO instruments embody the concept of safe manning which requires oversight by flag states.

The ISM Code emphasizes corporate safety and environmental policy for safe ship operation and pollution prevention with commitment from top management. It places the onus on companies to develop a safety management system through the involvement of ships' and shore-based personnel, supported by clear lines of communication, procedures and guidelines. Flag states are under obligation to provide diligent oversight through auditing and certification.

FSA introduced a structured and systematic methodology to hazards identification, risk assessment, risk control, decision making and cost/benefit assessment. It considers vessel and project over their entire life span to ensure that hazards do not exceed acceptable limits.

The Code on casualty investigation provides uniform guidelines and procedures for resource allocation, investigation, reporting and cooperation among states. Properly applied, it provides a feed back mechanism that enables lessons learnt from investigation of human error in earlier accidents to be shared among states through the IMO.

The 1995 amendments to the STCW Convention changed its knowledge-based criteria for seafarer assessment to competency-based criteria. This Convention also emphasizes adequate rest, medical fitness and clear communication amongst the crews, especially watchkeepers.

Eriksson and Mejia (2000, p. 36) also show that IMO's work focuses on preventing accidents as a result of fatigue which is defined as "reduction in physical and/or mental capability as the result of physical, mental or emotional exertion which may impair nearly all physical abilities including strength, speed, reaction time, coordination, decision making or balance". They state that the US Coast Guard research identifies fatigue as "a contributory factor in 33% of all critical vessel casualties and 16% of personal injury casualties".

5.6.2 Regulation of The Human Element by AMS

As at May 23, 2002, most AMS, with the notable absence of Cambodia and Sao Tome Principe, were on the STCW “white list” having communicated information to the IMO which demonstrated that they had given full and complete effect to that Convention.³³ This is a manifestation of their participation in the technical, legislative and training support provided by the ITCP and the improvement of their legal and administrative infrastructure relating to human element and maritime safety. However, there are concerns that “white list” status and implementation of other instruments are mere paper exercises. After almost seven years since the 1995 amendments to STCW were adopted, the February 01, 2002 deadline for implementation of new certificates had to be extended by six months as had not completed the mandatory re-certification of seafarers.

In a January 2001 address to the ninth session of the IMO FSI Sub-Committee, IMO Secretary General O’Niel stated: “[w]e should not allow it [the ISM Code] to become merely a paper exercise”.³⁴ (IMO, 2001, p. 8). While it is still too early to evaluate how the Code has been implemented by AMS, the Paris MOU (2002, p. 5) recording of a 150 % increase in ISM related defects over the last three years is cause for concern.

Eriksson and Mejia (2002, p. 2) conclude that documents and instruments concerning the human element are based on research conducted primarily by “a limited number of [TMS] delegations and organizations, despite the fact that deliberations are open to all member states of the IMO”. Non-participation by AMS in this research seems attributable to resource constraints. However, there is concern that the prevention objective of casualty investigation is hardly realised as few accidents are properly investigated by AMS and even fewer reports are made to the IMO to share lessons learnt.

³³ The “white list” is the list of parties to the STCW Convention, confirmed by the IMO Maritime Safety Committee to have communicated information which demonstrates that full and complete effect is given to the relevant provisions of the Convention.

³⁴ From 1st July 1998, the ISM Code became mandatory for all passenger ships, passenger high-speed craft, oil tankers, chemical tankers, bulk carriers and cargo high-speed craft of 500gt and above. It became mandatory for all remaining ships greater than 500gt from 1st July 2002.

The International Commission on Shipping [ICONS] (2000, pp. 37-65) outlines a litany of woes concerning the global labour market for seafarers. Seafarers have been abused or blacklisted and debarred from employment for speaking out against unfavourable working conditions. Manning agents illegally demand 'kick-backs' from seafarers as a condition for their recruitment. Untrained 'passport holders', most often with limited education and fraudulent certificates, are sent to foreign countries to join ships, thereby circumventing screening processes. They are among the most exploited, being paid the lowest salaries and having to work for excessive hours without recourse to redress. Due to their lack of training they render ships unsafe, and are more likely to sustain injuries and be abandoned without compensation. AMS are not the main suppliers of seafarers. However, the probability of situations of abuse occurring aboard vessels flying their flags increases greatly if records of seafarers are not properly managed and diligently monitored by their Administrations. The performance of overseas representatives in this area does not engender confidence.

According to ITF (1999, p. 11), there is a clear correlation between FOCs, substandard ships, failure to protect seafarers' rights, absence of social services, abandonment and accidents. In its opinion, shipowners, hidden behind shell companies, that register vessels under FOCs are likely to operate substandard ships which do not meet minimum standards working conditions. This leads to worker fatigue and higher casualties. As shell companies have very little assets, their ships are usually of low value and are quickly abandoned whenever there are claims against them. Seafarers do not benefit from the social services and their rights are not protected due to the failure or inability of FOC's to exercise their responsibilities as flag states. This is made worse by the large numbers of non-domiciled seafarers employed on ships flying FOCs. Figures for 1994 to 1997, show that 10 out of 13 states with the worst records for abandonment were FOC's and seven of these FOCs were among the 10 flags with the worse fleet tonnage loss in 1997. (ITF, 1999, p. 13). Of these, three (3) were AMS.

5.7 Conclusion

Maritime Administrations in AMS have varied but mostly low levels of performance in flag state responsibilities. Weak performances stem mainly from the pressures of resource constraints that have left Maritime Administrations underdeveloped. Many AMS have not taken full advantage of support available under the IMO ITCP to strengthen their Administrations nor have they properly utilized the support provided. Many AMS have failed to reinvest sufficient funds into their Maritime Administrations to ensure recruitment, development and retention of qualified professionals. This has constrained their Maritime Administrations in the area of policy development with adverse consequences in the areas of convention negotiations, implementation and enforcement. This in turn, has led to an over-reliance on overseas representatives and on ROs with little or no control over them. As a result, overseas representatives, have, to a large extent, focused on private commercial gain to the detriment of flag state obligations for maritime safety, security and environmental protection. Exclusive reliance on ROs has resulted in AMS not being able to fulfil their obligations for survey and certification of 'non-convention ships' and PSC. Use of less reputable ROs has also adversely affected the quality of their fleets. Regulation of the human element and safety has also had adverse effects that have led to conditions favourable for abuse and abandonment of seafarers and to unsafe conditions and accidents. The foregoing has exposed AMS and their Maritime Administrations to accusations of being concerned with commercial gain over maritime safety and has undermined their credibility as responsible members of the international maritime community.

CHAPTER 6

6.0 Aspiring Maritime States and the Implications of their Choices

Having assessed the Maritime Administrations of AMS in chapter 5, this chapter will examine the implications of their choices in the performance of maritime affairs in light of their responsibilities under international law and the competing interests and prevailing pressures. In the assessment, due recognition is given to the unchanging nature of interests, the unrelenting manner in which interests are pursued and the relation between strategies, strategic alliances and environmental changes. This chapter therefore seeks to develop an understanding of current and likely changes in the global maritime environment, the strategies, strategic alliances and conflicts that are emerging and likely to emerge and their implications for Maritime Administrations in AMS.

6.1 The Impact of Changes in the International Environment

6.1.1 Globalisation, Safety and Environmental Protection

The virtual world shrinkage caused by globalisation in the current information age has resulted in the internationalization of individual interests beyond the jurisdictional limits of their national states. Protecting the seas and oceans is increasingly viewed as an individual right. Reactions to visual depictions of birds and sea life covered in oil thousands of miles away are as strong as if it happened in immediate locales. Private and public intolerance to non-performance in MSEP, particularly to pollution, is manifestly overt. Green campaigns are becoming stronger and more widespread. The Royal Caribbean Cruise Lines was fined the incredible sum of US\$18million in 1998 for pollution incidents in US waters. The images of *Exxon Valdez* and *Erika* are permanently etched on the minds of maritime and non-maritime personnel. In reaction to the *Exxon Valdez* spill, the US passed its Oil Pollution Act of 1990 (OPA 90) that banned the entry of single hull tankers into its waters. The EU states have installed a range of initiatives following the

pollution caused on the southern coast of France by the *Erika*. US and EU unilateral and regional stances following these incidents have influenced binding provisions under MARPOL for global phase out of single hull tankers and their replacement with double hull tankers.

6.1.2 The Impact of September 11, 2001

The tragic terrorists attacks of September 11, 2001 in the US were “a shocking loss of homeland sanctity” that resulted from a breach of its national security. (Barnett, 2002, p. 43). The US, hitherto a sleeping, *laissez faire* giant, awoke with the intent of finding and punishing the perpetrators and putting in place measures to prevent any recurrence. “Fear of more attacks in the future on an even more devastating scale, has given the US new motive for global activism, while persuading other countries, ... not to stand in its way--at least for the time being”. (Emmott, 2002). US plans to act decisively on this matter received international backing. Quoting UN Secretary General, Kofi Annan, the Secretary General of IMO stated: “there can be no acceptance of those who would seek to justify the deliberate taking of innocent civilian life, regardless of cause of grievance. If there is one universal principle that all people agree on, surely it is this”. He outlined that “safety and security [are] now inextricably linked”. (O’Niel, 2001, p. 4). In June 2002, the IMO Council provisionally endorsed a proposal to expand the Organization’s role under a new strategic plan that will embrace security and change its theme from “safer shipping and cleaner oceans” to “safe secure and efficient shipping on clean oceans”. (IMO, 2002c).

According to Walt (2002, pp. 9, 14). “The end of the Cold War left the United States in a position of power unseen since the Roman Empire.” “This ... gives the United States greater freedom of action and greater influence over the entire agenda of global issues”. The US has clearly demonstrated the resolve to use its economic, political and military primacy to influence the global security agenda. It has signalled its intent to prevent ships from being used by organised syndicates for piracy and armed robbery; to traffick in arms; to commit acts of terrorism; or to transport weapons of mass destruction. Schubert (2002, p. 3) sees the lack of transparency in open registries as an underlying condition which could “inadvertently open the door for criminal and terrorist activity”. He is of the view that the US Government

should undertake measures to influence a return of US owned ships to its fleet. This will ensure that US security, economic and political interests are served. Ships will be available for military missions, US influence over security agendas in the IMO, OECD, and World Trade Organization (WTO) will be strengthened and the US will have a basis for intervening in disputes with foreign governments to protect American maritime businesses and commercial interests.

New security measures will be implemented under the auspices of the IMO through a revised SOLAS Chapter XI providing for special measures to enhance maritime safety **and security**. They propose to remove the lack of transparency regarding vessel ownership and prevent the use of ships for illegal immigration by 'would-be' terrorists. It will become mandatory for each vessel to carry a continuous synoptic record (CSR), prepared and updated by its flag state, which details information about the vessel operator. The draft ISPS Code contemplates the eradication of fraudulent certificates, pre-screening of ships' crews through positive and verifiable identification cards, long range identification of ships before their entry into national jurisdictions and a raft of port security measures designed to prevent unauthorised persons gaining access to ships while they are in the port of any state.

Lloyd's List of 14 February 2002, puts it succinctly: "transparency is in and ... opacity and secrecy, for what ever reason, is out and will be automatically treated with a certain amount of suspicion". The events of September 11, 2001 galvanised intolerance for underperformance in MSEP, adding a security overtone that is rooted in justifiable fear.

6.1.3 New Strategies and Strategic Alliances

Fearful of the implications of maritime terrorism, western European states under the auspices of the North Atlantic Treaty Organization (NATO) will remain aligned with the US on security. As the primary port states, they will rigidly adhere to the ISPS Code for pre-screening of crews and identification of vessels as conditions for entry into their ports. Banning of all vessels flying the flag of an AMS could be a possible response if they are thought to be non-compliant.

From an economic perspective, western states will seize the opportunity to act through the OECD to oppose FOCs which, in their view, distort competition, increase social cost and cause them to lose revenue. Tonnage tax, cited by Storey (2000, p. 48) as "... arguably the single most important development for the future ..." and other forms of economic incentives will be proffered to woo ships away from FOCs and back to the flags of the US and TMS. Reyes (2001, p. 1) reported that the British fleet grew by 65% over the previous three years while Porter (2001, p. 1) reported that EU fleet grew from 16% to 17.2% of the world fleet between 2000 and 2001.

Panama, the world's largest open registry, has responded to the EU tonnage tax with sweeping cuts in registration fees and annual taxes of up to 50% and 35 % respectively. This signals further increases in competition among flag states.

Shipping associations, trade unions and others non-state entities, will seek to align their private commercial interests with public security interests. Already, ICONS and ITF representatives have testified before a US Congressional Committee seeking to promote their organizations' points of view.³⁵ ITF has intensified its propaganda warfare with continued attempts to claim moral high ground. It has highlighted the 'evils' and 'potential evils' of FOCs ranging from lack of good governance, greed and obscurity.³⁶

³⁵ ITF Secretary General, David Cockroft, and ICONS Chairman, Hon. Peter Morris testified to a Special Oversight Panel on Merchant Marine Committee on Armed Services, US House of Representatives, in Washington D.C., on 13th June 2002.

³⁶ As an example, during a UN investigation in late 2001 of how Liberia utilized funds from its registry to purchase arms contrary to UN Security Council resolution, ITF blamed the US based Liberia International Ship (LISCR) and Corporate Registry. The US State Department's view was that the Liberian Government, not the registry was at fault. See Nelson, R. (2001, October, 22). US set to defend Liberia Registry against UN action. *Lloyds List*, p. 3. The ITF Secretary General in his testimony sought to continue to discredit LISCR. See Cockroft, D. (2002, pp. 5-15) at http://www.itf.org.uk/media/releases/pdf/Merchant_Marine_Panel_Testimony_Updated.pdf. In July 2001, Osler, D. reported that Royal Caribbean Cruises decision to consider removing its ships from the Liberia registry when threatened with an ITF publicity drive highlighting human rights abuses in Liberia was a "publicity coup of the ITF campaign even before its official launch". See Royal Caribbean warns Liberian register *Lloyd's List* of July 25, 2001, p. 1. Brewer, J. (2002, July 15) Liberian flag to lose Celebrity cachet *Lloyd's List*, p. 3 reported that Royal Caribbean Cruises Line and Celebrity Cruises had re-flagged their ships to the Bahamas in response to ITF publicity threats.

In some quarters the events of September 11th also represent an opportunity for economic actions conceived decades ago to be taken under the guise of security. The ITF has put forward arguments for “restoring the ‘genuine link’ between the vessel and the flag it flies and, in so doing, eliminate the flag of convenience system” (Cockroft, D. 2002, p. 20). This argument is representative of ITF’s relentless pursuit to replace nationality of the ship based on its flag state with nationality of the shipowner, the ultimate aim being to change the centuries old regime which was endorsed by the ICJ ruling concerning the nationality of the ship.

The International Confederation of Free Trade Unions (ITFCU) to the 75th Meeting of the IMO Maritime Safety Committee in May 2002, sought to reintroduce arguments for the inclusion of information about the beneficial owners of ships in continuous synoptic record (CSR) which are to be part of the new security provisions in SOLAS Chapter XI. (IMO, 2002b, p. 9). In earlier deliberations at the IMO, it was concluded that information about ship operators is sufficient to meet security objectives.

The arguments for inclusion of information on shipowners in CSR are advanced on the grounds of safety and security. However, open registry states and shipping associations oppose its introduction on the grounds that there are economic/financial motives, intent on discovering the identity of shipowners, their income and their assets so that taxes could be imposed upon them. They affirm that the vast majority of owners who have ships registered with open registries are responsible operators. They mainly wish to protect themselves from ‘deep pocket’ fines and awards granted by courts which they consider to be outrageously high. If they cannot pay these fines and awards, their assets will be liable to seizure if they are within the jurisdiction of the state in which the award is made. Many shipping companies are also of the view that taxes in developed countries are excessive. Open registries have been successful because their legal systems have been tailored to provide the services required by shipowners. They have separated, as far as is practicable, commercial considerations from safety obligations. In some open registry jurisdictions, unauthorised disclosure of information is illegal.

According to Spurrier (2002, p. 3), the OECD “has launched an investigation into the covert ownership and control of ships which could lead to proposals for a reform of registration procedures used by flag states.” Its work may go on “to look at ways of combating opacity ... through the provision of guidelines on how to make ownership and control transparent and at the same time preserve lawful commercial confidentiality.” While these objectives all appear to be in concord with the interests of AMS, they hold the potential, if misused, to undermine the nationality of ships based on the notion of the flag state; and, commercial confidentiality which is essential to registry operations in AMS.

Similar to CSR, the “underwhelming” response to the submission of SAFs has not been merely a matter of neglect. AMS are concerned that some parties, which are opposed to the open registry system, may seek to utilize their weaknesses indicated to the IMO in the SAFs as fuel for propaganda warfare, aimed at achieving economic advantage.

While the positions taken by some maritime actors are more strident, the creeping expansion in PSC jurisdiction is equally a threat to the interests of AMS. As greater jurisdiction is ascribed to port states, flag state jurisdiction is eroded. This strengthens the hand of port states for possible unilateral and regional actions which could be harmful to trade and economics. Concerned with the possibility of US unilateral actions and their adverse effects, several states have petitioned the US to wait on the IMO security initiatives instead of acting unilaterally.

6.1.4 The Struggle for Supremacy

The post cold war supremacy enjoyed by the US will not remain unchallenged. EU States have declared their intention to become the most competitive economy by 2010 with a subordinate transport policy that outlines maritime objectives for the same target date. This signals superpower competition to US primacy from an emerging EU confederation. As EU Shipping Commissioner Mrs de Palacio outlines, the EU has asked for accession to the IMO to enable it to “use its full political and economic weight to keep fair competition open through adopting a co-ordinated approach and stance, using where appropriate political and shipping power”. (Gray,

2002). Much of this is concerned with US protectionism under the Jones Act which currently enjoys exemption from challenges under current WTO rules. Recent EU Commission court actions against France for failing to meet PSC inspection quotas makes clear its intent to vigorously implement sanctions allowed under legally binding instruments when, in its view, competition is distorted.

Former eastern block countries have entered the maritime arena. Schubert (2002, p. 6), notes that Russia and China are rapidly becoming dominant as labour supply countries. Russia, a fallen superpower, will be seeking to become resurgent. China, the world's most populous country, will be seeking to secure a place in modern history as superpower. Recent experience where bids for 350 million shares in China's largest shipping company were oversubscribed 488 times to the value of US\$48.4 billion evidences China's maritime potential. (Wallis, 2002, p. 2). The member states of the Association of South East Asian Nations, acting together, will be a formidable regional block that will present a significant challenge for maritime dominance.

6.2 Choices and their Implications

6.2.1 The National Brand – Quality or Notoriety?

Mukherjee, (2000b, p. 110) posed what he considers a “provocative” question: “in order to realise the most alluring aspects of the open registry system, namely the financial advantages ... can interested parties [open registry states] afford to compromise standards?” He also provides the answer: “Reputation and competitiveness do not lie at opposite ends of the spectrum. To remain competitive, reputation has to be maintained”. “It is an unequivocal fact that compromising standards does not pay”. (Mukherjee, 2000b, pp. 113-114). Quality in the new environment requires clear, unambiguous and consistent demonstration by AMS of effective jurisdictional control over their fleets. They will be required to give full and complete effect to the international instruments which provide the regulatory framework for MSEP and security. The litmus test for the veracity or inaccuracy of the Rochdale Report concerning the lack of will on the part of FOCs in controlling shipping companies and substandard ships, will be judged by the rigour or lack thereof with which they oversee implementation of the ISM Code.

Conventions will have to be promptly and consistently implemented through a domestic legislative framework which provides adequate sanctions for offences. Consistency is particularly important, given that a flag state can go from relative obscurity to international notoriety on account of a single accident. Although ISL (2001, p. 51) shows that the Bahamas, Cyprus and Panama all had significantly higher accident rates than Malta in 1999, none of them attracted the adverse publicity Malta did on account of the *Erika* alone. Lack of consistent quality will further fuel vociferous lobbies for the exclusion of AMS from flag state activities.

Wilson's (2001, p. 113) statement directed to shipowners, that reputation is a precious but uninsured commodity, is equally valid for flag states. The buck stops with flag states regarding the choice to be a reputable flag. They have the primary and perpetual responsibility to ensure that shipping is safe and secure. The ability to secure, retain and expand a share of the maritime market will depend on flag reputation which will be the major determinant in AMS success or failure. On this issue of reputable flags, "to be or not to be" is still the question.

6.2.2 Sustainable Development

The *raison d'être* for AMS participation in international maritime affairs is to satisfy the socio-economic needs and aspirations of their peoples. This could be best realised through trade, particularly, maritime trade on which their economies heavily depend. Ships which trade in states that fail to implement future port security measures under the pending ISPS Code could invite the possibility of being banned from entering major port states and trading centres. The interests of shipowners for commercial gain, without undue attention and adverse publicity that can ruin their reputation, will remain unchanged. They will therefore avoid non-compliant states rather than be banned. AMS finding themselves in the category of the non-compliant could face trade isolation and eventual economic ruin.

Trade isolation will lead to dependency on grant aid. While aid is needed, useful and most welcome, the world's leading economic institutions have affirmed that the economic impact and benefits of trade to developing states far out weigh aid. As aid is increased, philanthropy and national interests will come into conflict in donor

states. Larger aid packages will come with more rigid conditions, acceptance of which could so limit the political options of recipient states that it runs the risk of perpetuating states that are independent by name but dependent by nature. In these circumstances, their legitimate aspirations and socio/economic developmental objectives would never be achieved.

6.2.3 Structure and Performance of Administrations

Maritime Administrations will be at the centre stage in protecting the interests of AMS and in preventing risks to the maritime trade/economic activities. They will have to lead the way in national policy development and in ensuring compliance with international regulations. Theirs will be the responsibility to lead negotiations on maritime conventions to ensure that the interests of AMS are served. Proactive strategies will be required with Administrations being mindful that economic actions can be taken under the guise of 'security'. Actions taken under a 'security' umbrella will have less recourse to appeal or redress as it is an area where states are not prepared to relinquish sovereignty. Also, only carefully conceived strategies will aid in mitigating the potential collateral damage from the regional/superpower rivalries and alliances which lie ahead. Failure to negotiate effectively through the IMO may bring home the unfortunate realities of the African parable: 'when the elephants fight it is the grass that suffers and when the elephants make love it is also the grass that suffers'. The timely return of SAFs, highlighting assistance required under ITCP will also be in their charge. It has been recognized that the range of security measures required under the proposed ISPS Code will result in substantial costs. The 75th Meeting of the IMO Maritime Safety Committee, in June 2002, recommended that the ITCP be used as the main vehicle for providing assistance to developing states to enable them to implement security provisions.

Retention of unresponsive, bureaucratic, Administrations which fail to perform will not be in the interest of AMS. Administrations will therefore need to be reviewed and restructured to ensure optimal performance in all aspects of MSEP and security in respect of convention size ships, 'non-convention size ships' and PSC. Commercial and regulatory functions will have to be assigned to avoid internal conflicts. ROs and overseas representatives who place private commercial gain

ahead of flag state obligations will have to be weeded out. IMO guidelines to monitor and control ROs will have to be strictly adhered to. Professional staff will have to be employed. Funds generated from maritime activities will have to be set aside for development of maritime administration. In this regard, the Cambodian Government has commenced the overhaul of its Maritime Administration by bringing the registry under direct government control, thereby removing its reliance on the overseas representative. (Associated Foreign Press, 2002).

Osler (2002c, p. 1) reports concerning Tonga and the vociferousness of the propaganda campaigns. In the embarrassment suffered following intercept of *Karine A* with 50 tonnes of munitions and *Monica* with nearly 1000 refugees, Tonga was forced to announce closure of its registry. The registry operator correctly pointed out that illegal trafficking in arms, narcotics and immigrants are the decisions and responsibilities of shipowners. He felt that the Tonga registry was being made a scapegoat by more powerful states. He argued that the Tongan registry was the only one that made vessel ownership information available over the Internet. ITF however was “delighted” with “the defeat of those who know that criminal activities are best carried out under an FoC”. In ITF’s view “[a] government had realised that being a flag of convenience is incompatible with good governance”. Tonga felt the considerable impact of having a tarnished reputation, born of suspicion, in a changed security environment where its overseas registry representative failed to exercise ‘due diligence’ and control over ship operators.

6.3 Conclusion

Globalisation, the information age and the events of September 11th 2001 have defined a new era of maritime affairs where safety and security are synonymous and competition among maritime actors has intensified. There is increased intolerance for underperformance in MSEP and security and a demand for full compliance with existing maritime and pending security instruments. This requires consistent delivery of quality service by AMS that must be manifested in effective jurisdictional control over their fleets. In many cases, AMS would need to engage in swift reform of their Maritime Administrations to bring quality management to their maritime activities and to ensure that their national interests are properly represented. Maritime

Administrations in AMS will have to employ proactive strategies piloted through IMO in order to protect national interests. Tonnage tax advantages held by open registries are being steadily eroded and their basis being attacked. Information technology has given new possibilities for propaganda warfare aimed at eliminating open registries. The consequences of failure are trade isolation, economic ruin and non-achievement of the legitimate socio-economic and political aspiration of their peoples. The price for inaction and underperformance in MSEP and security is too high even to risk it.

CHAPTER 7

7.0 Conclusions

Traditionally, maritime interests, which provided a significant source of wealth, had been advanced and defended by means of outright war. Public and private interests were allied under the flag of TMS. The internationalization of shipping through the registry system led to the participation in maritime affairs by non-traditional maritime states including AMS. This resulted in increased competition and conflicts of interests among state and non-state maritime actors with public and private commercial interests respectively. The open registry system threatened the political, economic and military foundations of power in TMS and undercut economic wealth which they exclusively enjoyed.

Although acceptance of the UN Charter constrained states in the methods used to defend their national interests, new forms of warfare were employed. Efforts to use conventions to overturn the rights enshrined in the existing international legal regime, under which AMS participate in maritime affairs, have been relentless. Consequently, the nationality of ships based on the flag state has come under sustained attack. In the last 30 years, the jurisdiction of port states, as outlined in international maritime instruments, has steadily increased. A relentless propaganda warfare has been unleashed to influence public opinion against the open registry system in an attempt to secure its eventual elimination.

Many TMS are now operating international registries with fee structures and incentives similar to open registries. Panama, the largest open registry state, has responded with fee cuts. These developments will lead to increased competition and conflicts in maritime affairs. Future alliances and conflicts between existing and emerging maritime powers could adversely affect the interests of AMS. Globalisation and the events of September 11, 2001 have resulted in increase

intolerance for under-performance in MSEP and security which are now twinned. New maritime security measures contemplated under the pending ISPS Code will institute sanctions which could result in trade isolation, economic ruin and subversion of the developmental aspirations of AMS. These measures also import the potential for misuse to achieve economic objectives.

Conflicts that resulted from competing interests have had a mixed but mostly negative impact on Maritime Administrations in AMS. Publicity campaigns by port states and international organizations and the response of the international public to safety and environmental issues have resulted in a steady rise in maritime safety and environmental standards. By keeping AMS embattled, the conflicts have resulted in the use of resources they can ill afford. Unresolved conflicts between flag states, on the one hand, and coastal and port states on the other, hold the potential to constrain AMS in executing their duties and responsibilities. Concerns about economic action being taken under the guise of safety issues have made AMS slow to accept measures proposed in international maritime fora. While conflicts and competing interests have adversely affected the performance of Maritime Administrations in AMS, they will in reality, remain a permanent feature of international maritime affairs.

AMS have demonstrated varying levels of performance but some have under-performed in all aspects of maritime affairs. This has resulted primarily from weak, underdeveloped Maritime Administrations that are generally constrained by resource limitation characteristic of their developing economies and their limited maritime experience. Weaknesses in Maritime Administrations have been compounded to a large degree by failure to properly utilize available technical support through the ITCP; insufficiency of funds reinvested in maritime activities; and over-reliance on and inadequate controls over ROs and overseas representatives, who have neglected flag state obligations to serve their private commercial interests. The failure to reinvest in Maritime Administrations, along with inadequate monitoring and control of their agents, have opened AMS to criticisms of neglecting their maritime obligations for commercial gain and undermined their credibility within the international maritime community.

Ultimately, successful discharge of AMS maritime responsibilities must be consistently manifested in effective jurisdictional control over their fleets and in optimal performance in all aspects of MSEP and security in respect of convention size ships, `non-convention size ships´ and PSC. This will influence their reputation which will in turn determine their success or failure. The power to determine quality, reputation and eventual success or failure resides primarily with AMS through the choices they make in the conduct of their maritime affairs.

Given the potential for disruption of trade and economics and their resultant adverse impact on the general well being of the peoples of AMS, it is incumbent upon AMS to ensure, as a matter of highest priority, that their Maritime Administrations have the resources to properly discharge state responsibilities and to promote and defend national interests. They must be equipped with the necessary human, financial, technical and material resources to support the delivery of quality services in all spheres of maritime affairs.

Having appropriately qualified professional staff will be the single most important factor for Maritime Administrations. They must be supported with the necessary material resources, including IT resources, required to service technical and administrative needs. As a matter of standard policy, a proportion of the funds generated from maritime activities should be set aside for reinvestment in and development of Maritime Administrations and to enable participation in the deliberations of international organizations to promote and defend national interests.

Support available under the ITCP should be utilized to the fullest possible extent, particularly in the areas of human resources development through WMU, regional programmes for training of inspectors and implementation of security measures that will become mandatory under the pending ISPS Code.

Administrations should be reviewed and restructured to ensure that they are responsive to the safety and security needs of the maritime industry and the international community as a whole. Where they have not yet done so, AMS should establish their Administrations as semi-autonomous home-based entities with

commercial and regulatory functions separated internally. Home-based, centrally controlled, Maritime Administrations will better facilitate the development of policies consistent with national interests and objectives. They should be structured to ensure optimal delivery in the areas identified below.

Registry services should be strengthened to ensure that there is 'due diligence' prior to the registration of ships. This will lower the probability of accidental breach of the safety and security net and the possibility of human, environmental, and economic consequences of disastrous proportions. Registration should be done only on the strength of verifiably authentic documents and receipt of confirmation that vessels are not registered under any other flag. Vessel particulars should be verified through physical checks. Overseas representatives should be kept to the minimum necessary. AMS should sever the services of overseas representatives who place private commercial gain ahead of flag state obligations. Ship operators must be held to properly account for their operations. They must conform to standards laid down in national and international law.

Technical services delivered through ROs should strictly adhere to IMO guidelines, using written agreements as their basis. Only reputable classification societies which are able to provide high quality services and which conform to a code of ethics, acceptable to AMS, should be designated as ROs. National home-based inspectorates should be developed to discharge state obligations in respect of 'non-convention ships' and PSC.

Monitoring and control are integral to quality assurance upon which the reputation and eventual success or failure of ASM will depend. All AMS should establish the capacity to regularly monitor ROs and overseas representatives through regular audits and surprise inspections to verify that they are performing in accordance with agreed standards.

Seafarer services will be key to the reputation of AMS and vital to their success. First and foremost they must be protected on humanitarian grounds from abuse and exploitation. Seafarers also give open registries an economic advantage through

the freedom of choice given to shipowners to hire internationally. Without seafarers, the attractions held by open registries will significantly diminish. Services for seafarers must be holistic, embodying the social conditions of their employment and qualifications in keeping with STCW. Maritime Administrations should maintain detailed personal records of all seafarers including information about their competencies/certifications. They should confirm that all personnel are qualified for the positions in which they are to serve. The use of verifiable identification cards and tamper proof certificates should be introduced as means of eliminating maritime certificate fraud. Records of manning agents should also be maintained to facilitate control and prevent exploitation. The social conditions of ships should be verified to ensure that they conform to the required ILO standards.

Security services will be required in tandem with other services. Administrations should have the capacity to respond to security inquiries and information requests on a full time basis. Protocols and procedures for requesting and exchanging information should be developed to ensure timely responses. These must be consistent with the national interests of AMS and must meet the needs of the international community. Access to immediate legal advice will be vital, making home-based Administrations all the more necessary. The new international maritime safety regime will have to be underpinned by a domestic legal framework which makes provision for extradition of perpetrators of maritime crimes and for sanctions befitting the severity of such offences.

Strategies and strategic alliances will have to evolve as the environment changes. To aid in promoting and defending their national interests, in light of the magnitude of the threats, AMS should forge alliances among themselves, with other open registry states and with other maritime actors which have compatible goals. AMS would need to vigilantly monitor proposed security reforms in ship registration procedures, collectively through the IMO and other fora, to ensure that they do not undermine the nationality of ships based on the notion of the flag state; and commercial confidentiality which is essential to their registry operations.

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