

Flagging out Spurs the Growth of Global Shipping Regulations – a Critical Look at Newly Established Open Registries

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Maritime shipping is inherently an international industry, an industry central to world trade, transporting, as it does, well over 90% of internationally traded goods – and flagging out (registering a ship in an open registry) is the inevitable consequence of the workings of market forces.

A newly established open registry, like all other modes of shipping, has certain built-in drawbacks that must be guarded against, as all open registry owners vie head-on with the practitioners of closed registries and the so-called second/international registries.

To put it another way, as the power and influence of older and better-established open registries grow exponentially, care must be taken to avoid repeating the mistakes they made when they were new entrants in international shipping.

Indeed, the extraordinary growth of new entrants to the shipping business can be matched only by the grim repercussions their entry has had for safety at sea, conservation and marine life generally. And, this in turn has given rise to an ever-increasing growth in global regulations.

It is often said that ocean shipping is the most affordable and efficient way of transporting goods, given the large volumes and the astonishing range of merchandise that both massive and inconsequential vessels can carry for long distances at a fraction of the cost of other modes of transport like rail, roads, pipelines and air.

The paper sets out to discuss in light detail, a regulatory phenomenon in the bulk and fishing sectors of the shipping industry - a phenomenon which began in the mid-1960s, gathered pace in the 1980s, and continued into the 1990s and the early 2000s

– historically, a short period in which a number of key global shipping regulations were made in an effort to mitigate the negative impacts of ‘flagging out’.

It is my view that many, and perhaps even most, of the maritime regulations generated during this short time have their genesis in the twin pursuits of transporting crude oil in tankers flagged under newly established open registries (new entrants), and the desire on the part of some unscrupulous ship owners to engage in IUU (illegal, unreported and unregulated fishing) activities.

To illustrate this view, the author attempts to link major oil spills and IUU to global shipping regulations and conventions.

In this paper, new entrants refer to both nascent (new) open registries and recently established international/second registries.

To start with, let us see why regulations in the seaborne trade are important and necessary.

The importance of Regulatory Regimes in International Shipping

In our last essay we named four regulatory regimes that function in the shipping world: flag states, port states, coastal states and classification societies.

Classification societies are the industry’s internal governing system. The strength of their authority is found in the certificates that they issue to “new buildings” (newly built ships). The mainstay of their authority also lies in the regular surveys and certificates that they give to ships throughout their lifetime.

Without a certificate from a recognized classification society, a seagoing vessel cannot obtain insurance to operate; thus, has scant commercial value. Increasingly, classification societies are viewed as the industry’s most important and largest technical body – a specialized conglomerate that plays an indispensable role in the regulation of safety and security.

And as intimated in one of the author’s earlier essays, flag states make rules and regulations which govern the commercial and civil activities of their merchant ships. Given this, as would be expected, different states have different maritime laws.

Even though each state has the right to make its own shipping laws with respect to matters as many and diverse as safety at sea, design of new buildings, collision avoidance, ballast water, noise level, chemical applications, types of fuels, oil and air pollutions, and the certificates of competency – the reader would certainly agree

that it would be a “law of the jungle” on the high seas– a hopelessly impractical, anarchic situation - if there were no international accords like UNCLOS/LOSC (the International Law of the Sea Convention), and institutions like the IMO (International Maritime Organization) and the ILO ((International Labour Organization). The ILO and the IMO were, as they are today, the main organizers, sponsors and drivers of maritime agreements.

Between the 1960s and the 1990s key conventions and regulations were hammered out to improve navigation, enhance safety at sea, advance the general welfare of seamen, ameliorate sea-related working conditions, protect the environment and the ecosystems, and regulate the construction of new vessels and their maintenance, *inter alia*.

Most, if not all, of the concerned maritime laws and regulations were triggered by a “chain” of marine accidents caused mainly by nascent flagged ships during these few decades.

What followed this difficult and awkward period (mid-1960s up to the late 1990s) in international shipping history can justly be described as a paradigm shift in the industry. As discussed below, the international community, mainly IMO and a few powerful maritime states (i.e., the US) stopped the rot by modifying old maritime laws and instituting new ones.

Today, international merchant shipping is amongst the world’s most regulated industries. As indicated above, regulations on matters such as construction standards, navigational rules, safety and environmental requirements are put in place to safeguard and goad the global industry.

The alternative to these international measures would be a barrage of conflicting national self-interests resulting in commercial snags and utter administrative confusion, which would readily sap the efficiency and agency of global commerce, thereby, ushering in complete anarchy at sea. Surely, nobody would like that.

With hindsight, however, one would probably be right to suggest that these maritime mishaps were blessings in disguise - for it were ship owners, frightened of losing the advantages under the Liberian flag, who pressurized the Liberian Government to create an effective inspection regime – a regime that gave rise to current-restructured Liberian Registry. Fortunately, the loss of life and the enormous damaged to the marine eco-systems aside, all of this led to the increased standards we enjoy today.

Oil Spills and Other Environmental Catastrophes Give Rise to a Raft of Global Shipping Regulations

It is perhaps safe and accurate to say that the myriad of maritime conventions that was drawn up between mid-1960s and the late 1990s was, for the most part, geared at streamlining the industry and giving it the space to “reform and begin afresh”.

Still, today, it is telling that there is near consensus within the ocean trade that low standards continually exist largely because new entrants to the ship-registration market tend to operate at the bottom of internationally accepted regulatory standards. This is because in their quest to attract shipping companies, they tend to cut corners, engage very old ships, under-maintain their vessels, and employ poorly trained seamen – seamen with disdain for internationally accepted shipping regulations – while better operated open registries like Liberia and Panama are making efforts to raise their standards.

Simply put, there is a tendency for shipping registries (especially ones from developing states) to raise environmental, labour and regulatory standards over time, but at their inception, many of them tend to flout international regulations and standards.

Having stated this fact - and for the purposes of this write-out, this article from now onwards, refers to all new entrants as third world registries or TWRs.

It is a well-known and a well-established adage that the shipping industry is preeminent in our globalized world, transporting some 90% of world trade. It is an industry divided between two main sectors. One sector, which is named closed registry, is owned and operated by rich, Western nations, while the other type is called open registry. It is worth noting that ships in this registry are owned predominantly by rich Westerners but are operated under developing countries' flags.

Since its inception in the mid-1920s, open registries have had exceptional growth rates. For instance, they had five percent of world shipping tonnage in 1950, 31% in 1980, 15.8% in 1998 and 48% in the year 2000 (World Development Report, 2009). But according to the UNCTAD 2017-2018 report (United Nations Conference on Trade and Development), the share of ship-owning and ship operation by the traditional maritime states in Europe and North America is decreasing year-on-year, while flagging out and gross tonnage growth in developing countries continue to increase.

Further, UNCTAD points out that developing countries account for most global seaborne trade flows, both in terms of exports (goods loaded) and imports (goods unloaded). Developing countries shipped 60 per cent of the world's merchandise trade by sea in 2017 and unloaded 63 per cent of the said trade in the same year.

By contrast, developed countries saw their share of both types of traffic decline over the years, representing about one third of world seaborne imports and exports -34 per cent of goods loaded and 36 per cent, unloaded. This trend remained unchanged in 2018.

In short, it can rightly be argued that the umpteenth attempts by traditional maritime states and by the International Transport Workers' Federation Union (ITF) to stem out the so-called flag of convenience business practice, a developing country competitive advantage, have failed. The percentage of vessels registering under open registry flags has grown dramatically year-on-year and continues to do so. Simply put. Like gravity, open registries are here to stay.

Undeniably, as any International Relations or maritime student would tell you, this phenomenal growth and inexorable progress **has** been matched only by the number of serious accidents that can be attributed to ships registered under TWR flags, accidents that gave rise to a raft of international maritime regulations. For many years, especially from the 1970s and through the 1990s, TWR oil spills like that of the *Torrey Canyon* left a legacy of global regulations in their wake. Although closed registry flagged vessels had accidents as well during this period, the ones attributed to TWR ships were more spectacular as they were many.

The nexus of global shipping regulations can be viewed as hinging on five main considerations: pollution of the seas, protection of the environment and wildlife, security for individuals, especially for and people in coastal cities, quality and maintenance vessels, and the safety of those working at sea and in ports.

The practice of making regulations for shipping stretches back to the days when naval power was the primary factor. Then, a powerful naval country made rules for its vessels flying its flag. It soon, however, became clear that it was necessary to harmonize individual practices and establish new ones in an effort to avoid misunderstanding and conflicts at sea.

This accepted principle took on added dimension when a formal regulatory treaty was hammered out and ratified under the aegis of the United Nations. This

international treaty called the United Nations Convention on the Law of the Sea (UNCLOS), which was drawn up between 1973 and 1982, came into force in 1994 after 60 countries ratified it. United States, the sole superpower in our contemporary world, along with a handful of countries, including Iran, Israel, Syria and North Korea, has not acceded to the U.N. Convention on the Law of the Sea.

UNCLOS, sometimes called the Law of the Sea Convention (LOCS), is the locus of international maritime law. It provides an all-embracing framework for the regulation of the oceans, the limits of national jurisdiction, access to the seas, freedom of navigation, and the protection and preservation of the marine environment, inter alia.

Given the above context, one can safely assert that the primary objective of international maritime regulators is to ensure that ship owners abide by the same high safety and environmental standards which apply on land.

And given the above argument, it can be inferred that although nations make unilateral maritime regulations, for example the American Congress Oil Pollution Act of 1990, the Law of the Seas suffices as a ‘constitution’ of sorts – a comprehensive framework that is the under-structure of today’s international maritime laws, laws that international shipping companies must adhere to if they wish to be seen as responsible business concerns.

Liberia - Today’s Epitome of International Shipping, Once a Basket Case

Essentially, open registries are regular businesses – and some of the oldest and better established ones are well-managed. Generally, their attractiveness to major shipping companies depends on the quality of service they offer and how they enforce key international maritime regulations. This, palpably, suggests their port-state detention rates must be relatively low.

Recent shipping history shows that during the 1960s OPEC oil crisis a good number of opening registries, including the Liberian Ship Registry, had many “rusty buckets” (a euphemism for old, unsafe ships) that were striving to make quick money in the oil glut. Hence, disasters were bound to happen.

Indeed, from the early 1970s onwards, as in the decades before, the rising prominence of TWRs registries had an associated set of problems, cardinal among them was oil spill accidents. Take Liberian flagged vessels for example, while it is

true that the West African country has now become synonymous with high shipping standards, its rise was not seamless. Liberian flagged ships were involved in some of the worst oil spill accidents in the industry. For many years, especially in during the 1970s and the 1990s, its oil tankers contaminated coastal waters around the world, and caused massive environmental devastation, as will be seen later in this essay.

During this period, the IMO and powerful maritime countries agilely amended their international shipping laws or formulated new ones whenever tragic spills happened, particularly when they occurred in Western coastal waters. Such regulations were not just aimed at shipping companies themselves but also at cluster companies of the industry.

For instance, in reaction to the seemingly endless tanker oil spills of the 1980s, the European Commission amended the European Union's Legislation (as embodied in Council Directive 94/57/EC), under which the union's shipping standards were harmonized and the financial liability on classification societies increased to "no limit" if they are found to be guilty of willful omission or gross negligence.

These new legislations also allow the putting of sanctions on any classification societies that do not adequately enforce standards. Such sanctions entail suspending the union's recognition of a society's right to classify ships in all EU countries.

Similarly, when a TWR registered ship, the *Exxon Valdez* ran aground of the Alaskan coast in 1989; the United States Congress enacted the US Oil Pollution Act in 1990. This law asserts that shipping companies must have a plan for accidents that may occur and must have a detailed containment and cleanup plan for oil spills.

Additionally, the Act requires that ships ordered after June 1990 or delivered after January 1994 must have double hulls. Further, it prohibits any vessel that, after 1989, has caused a spill of more than one million gallons in any marine area, from operating in the coastal seas of Prince William Sound, the coastal city where *Exxon Valdez* spilled the crude oil.

Like the Americans, when the Liberian flagged *Torrey Canyon* ran aground and spilled her entire cargo of crude oil while sailing in the English Channel, the IMO started a convention in 1969 that eventually led to the formation of MARPOL, the International Convention on the Prevention of Pollution from Ships.

Similarly, the spills of Maltese flagged *Erika* in 1999 and the Liberian flagged *Prestige* in 2002 resulted in the IMO Marine Environmental Protection Committee

making further amendments to MARPOL. Additionally, following the 1978 disaster of another Liberian ship, the *Amoco Cadiz*, new regulations were added to the SOLAS Protocol by IMO, and the EU drafted the Hague Agreement, which focused on safety and pollution.

Memoranda - the Gatekeepers of the Sea

The environmental disaster caused by the 1978 sinking of the MV *Amoco Cadiz*, another Liberian flagged oil tanker, gave rise to a vigorous political and public outcry up and down Europe – spurred the creation of a new type of maritime enforcement in 1982, namely, the Paris Memorandum of Understanding (MOU).

An MOU is a port state control mechanism that allows for the inspection of merchant ships in foreign ports. These inspections cover issues such as living conditions aboard ships, safety of life at sea, the prevention of pollution by ships, inspections that often lead to the detention of ships.

The Paris MoU led to the creation of

In 2018, member states of the Paris MOU conducted 17,858 inspections with deficiencies, which resulted in 595 detained vessels and 11 banned.^[18] Member states of the Tokyo Memorandum of Understanding conducted 17,269 ship inspections in 2015, recording 83,606 deficiencies which resulted in 1,153 detentions

Maritime Shipping – a Savagely Competitive Business

The shipping is a fiercely competitive industry divided between the developed and developing world, the so-called flags of convenience registries and traditional/closed registries and the nascent registries, with each side pushing hard to secure competitive advantage (mainly labor and overhead costs) at the expense of others.

And, as it is often said a state's competitiveness is contingent on the capacity of its key industries to innovate and upgrade. Companies gain competitive advantage or absolute advantage against the world's best rivals primarily because of pressure and challenge within an industry, and a demanding, ambitious clientele.

Undoubtedly, it was at this nexus that the Liberian shipping industry found itself as fledgling industry, particularly during the late 1960s and the early 1970s, when Liberia was considered as the "sick man" of the shipping world, and its ships referred to as "rusty buckets".

True, Liberia used to be the postal boy – the standard example of the worst problems associated with what was loosely but disparagingly termed flag of convenience shipping. A few short decades ago, Liberian flagged vessels were more disposed than average to accidents, and had older vessels that was not expressly well-operated and well maintained.

Today, the Liberian Registry has some of the safest, best looked-after ocean going vessels - for example, its petroleum tankers are amongst the least polluting bulk transporters of gas and oil products in the world; and has far better compliance and safety records than some old maritime registries.

In other words, with hindsight, one would probably be right to suggest that these shipping accidents and related mishaps under the Liberian flag were blessings in disguise during this period of the country's maritime history. In addition, in retrospect, kudos must be handed to Liberian ship owners - particularly the Greek and American ship owners at the time, who, frightened of losing the advantages of operating under the Liberian flag, pressurized the Liberian government and the Liberian registry to axe all substandard shipping companies.

Liberian maritime and marine literature indicates that during this challenged period, key Liberian flagged customers relentlessly urged and goaded the Liberian Government to create an inspection regime that would sue for higher standards in a bid to protect the overarching reasons for flagging out under the Liberian flag (namely: low operating costs, international mariners, and handsome profits).

Indeed, the loss of life and the enormous damaged to the marine eco-systems aside, all of this led to the increased standards we enjoy today both within the Liberian maritime fleet and the entire shipping world.

Fighting Illegal Fishing is No Fishy Matter

It is safe to suggest that the above argument holds true for the range and number of global fishery regulations that have been adopted since the 1970s. Indeed, most have all been geared at curbing the excesses of TWR fishing vessels, for it is quite commonplace to see that when faced with either domestic or international fishery regulations, some unscrupulous and slippery fishing trawlers elect to operate under flags that are not signatories to the relevant international fishing agreements or are unwilling to adhere to them.

Some fishing vessels even “flag hop”. That is, they move from one TWR to another until they found a registry that does not give sufficient attention or thought to issues related to IUU fishing.

Given this predicament, amongst other doubly problematic matters, the European Commission created a mechanism in 2012 for naming and shaming countries implicated in IUU. The cardinal aim of the commission is to stop IUU by cajoling, and if need be, goading concerned states to stop IUU practices. First, like in football, the commission gives the offending country a “yellow card”, then, it gives a “red card”, if the offending state does not improve its fishing methods. Albeit, a “green card” is eventually issued, if major and sufficient improvements are made.

The commission’s latest report, dated 8 January 2019, named TWR registered fishing vessels operating under the flags of Cambodia, Comoros, and St. Vincent and the Grenadines respectively, as failing (up to the date of the report) to take sufficient measures to lift the yellow or red cards handed to them sometime back.

The Food and Agriculture Organization of the United Nations (FAO) joined the fray against IUU in June 2016 when it instituted the Agreement on Port State Measures (PSMA), an internationally binding mechanism that seeks to deter, prevent, and curb IUU fishing by preventing fishing trawlers engaged in illicit fishing from using foreign ports and landing their ill-gotten catches. (IUU entails over-fishing.)

Liberia became the 61st member of the PSMA on 21 June 2019. The hope is that the ratification of this important agreement would gingerly goad Liberia’s National Fisheries and Aquaculture Authority (NaFAA) and the Liberian National Coast Guard into adeptly combatting and illegal, unreported and unregulated fishing in

Liberia's internal waters and territorial sea - everywhere short of the country's Exclusive Economic Zone (EEZ).

It is worth noting that Liberia recently (late September 2019) hosted the West African Task Force (WATF) Meeting of the Fisheries Committee for the West Central Gulf of Guinea (FCWC) region as part of plans to combat IUU, and strengthen the practical implementation of PSMA in the Central African/Gulf of Guinea (GoG) region.

It is also noteworthy that at their recent (28-29 June 2019) Meeting in Osaka, Japan, the G20 members (the Group of Twenty most industrialized countries) reaffirmed their commitment to end IUU fishing worldwide, as a means of sustaining the world's marine life.

Concluding Thoughts

Arguably, the ambit of the preceded arguments suggests that there are distinct differences within the open registry sector of the maritime industry. New entrants tend to more lax in their approach to formal regulations, while being keen on attracting and retaining shipping companies.

Ostensibly, it is a banal postulation that new entrant registries are used by low standard shipping companies to flout generally accepted international maritime regulations, standards, principles and procedures because such new entrant shipping registries have a more lax and don't care attitude toward the enforcement of global shipping laws and respect for (best) traditional maritime practices. And the precious little they heed, vary widely from one TWR registry to another.

As a direct result of this relaxed posture, TWR registries tend to have many substandard vessels that are prone to horrific accidents. The era between the early 1970s and mid 1990s was particularly pronounced in terms of such accidents. This short but bleak period in international shipping history saw the imposition of successive international regulations aimed at curtailing mishaps and serious marine accidents in the global seaborne transport business, in the end, fortunately – for a lack of a better term - the imposition of new tougher maritime regulations helped usher in many of the high standards the industry enjoys today.