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# FLAG STATE REGULATION OF GREENHOUSE GAS EMISSIONS

REGULATORY AUTHORITY OF FLAGS OF CONVENIENCE  
AND FRANCHISED REGISTRIES

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*By Alyssa Kutner and Meredith Wilensky*

SABIN CENTER FOR CLIMATE CHANGE LAW  
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*About the authors:*

*Alyssa Kutner is a law student at Washington University School of Law and was a 2014 SCCCL summer intern. Until October 2014, Meredith Wilensky was Associate Director at SCCCL.*

Sabin Center for Climate Change Law  
Columbia Law School  
435 West 116<sup>th</sup> Street  
New York, NY 10027  
**Tel:** +1 (212) 854-3287  
**Email:** [columbiaclimate@gmail.com](mailto:columbiaclimate@gmail.com)  
**Web:** <http://www.ColumbiaClimateLaw.com>  
**Twitter:** @ColumbiaClimate  
**Blog:** <http://blogs.law.columbia.edu/climatechange>

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### I. Introduction

International shipping accounts for approximately 2-3% percent of global anthropogenic greenhouse gas emissions (GHG).<sup>1</sup> Under business as usual conditions, emissions from the sector are expected to double by 2050.<sup>2</sup> The quantity of GHG emissions from shipping combined with the potential for reductions using existing technologies make the sector a strategic target for mitigation measures.<sup>3</sup>

In February of 2014, the Sabin Center for Climate Change Law published a white paper that concluded that sovereign states have broad authority under international law to regulate GHG emissions from vessels within their registry.<sup>4</sup> However, many registries are structured such that the flag state has limited connection to or exercises limited control over registered vessels. For example, many flag states franchise their registries to private corporations that manage the registration of ships. In addition, with the rise of “flags of convenience,” a number of flag states have only weak ties with ships registered under their

<sup>1</sup> Buhang et al., International Marine Organization (IMO), Prevention of Air Pollution from Ships - Second IMO GHG Study 2009 - Update of the 2000 IMO GHG Study 1 (2009).

<sup>2</sup> Pew Center for Climate Change, Climate TechBook: Marine Shipping 1 (Mar. 2010).

<sup>3</sup> International Marine Organization (IMO), Prevention of Air Pollution from Ships - Second IMO GHG Study 2009 - Update of the 2000 IMO GHG Study 54 (2009) (finding that improved efficiency through technical and operational measures could reduce emissions from 25% to 75% of current levels).

<sup>4</sup> See Meredith Wilensky, AUTHORITY OF PACIFIC ISLAND STATES TO REGULATE GREENHOUSE GASES FROM THE INTERNATIONAL SHIPPING SECTOR, SABIN CENTER FOR CLIMATE CHANGE LAW 26 (February 3, 2014), available at [http://web.law.columbia.edu/sites/default/files/microsites/climate-change/files/Publications/Fellows/cccl-shipping\\_emissions\\_in\\_the\\_pacific\\_white\\_paper.pdf](http://web.law.columbia.edu/sites/default/files/microsites/climate-change/files/Publications/Fellows/cccl-shipping_emissions_in_the_pacific_white_paper.pdf).

flag. This has led to questions as to how the structure of a registry affects states' capacity to regulate.

This white paper delves further into the issue of flag state authority to regulate GHG emissions particularly with respect to franchised registries and flags of convenience. This white paper assesses how these characteristics may affect the power of states in this regard and concludes that the presence of an open or franchised registry does not affect regulatory authority. However, developing nations with limited resources may face challenges promulgating effective emissions reductions regulations.

## **II. Flag State Authority under the UN Convention on the Law of the Sea**

Established in 1982, the United Nations Convention on the Law of the Sea ("UNCLOS" or the "convention") was intended to serve as a constitution regulating the resources and use of the seas.<sup>5</sup> The convention represents the input of more than 160 sovereign states in its creation and has been widely ratified since its inception, though, notably, the United States has not ratified UNCLOS.<sup>6</sup> Under UNCLOS, all vessels must adopt the nationality of a state by registering under and flying a state's flag.<sup>7</sup> The state with which a vessel is registered is known as the flag state.<sup>8</sup>

Under UNCLOS, the flag state has principal jurisdiction over all vessels flying its flag.<sup>9</sup> UNCLOS not only permits flag states to regulate flagged vessels, but also obligates flag states to:

... adopt laws and regulations to prevent, reduce and control pollution of the marine environment from or through the atmosphere ... to vessels flying their flag or vessels or aircraft of their registry, taking into account

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<sup>5</sup> Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, United Nations, *Third United Nations Conference on the Law of the Sea*, The United Nations Convention on the Law of the Sea (A Historical Perspective) (1998), available at

[http://www.un.org/Depts/los/convention\\_agreements/convention\\_historical\\_perspective.htm](http://www.un.org/Depts/los/convention_agreements/convention_historical_perspective.htm).

<sup>6</sup> United Nations, United Nations Convention on the Law of the Sea Status, available at

[https://treaties.un.org/Pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg\\_no=XXI~6&chapter=21&Temp=mtdsg3&lang=en](https://treaties.un.org/Pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XXI~6&chapter=21&Temp=mtdsg3&lang=en) (last visited Oct. 17, 2014).

<sup>7</sup> 1982 United Nations Convention on the Law of the Sea (UNCLOS) art. 92. 21 ILM 1261 (1982).

<sup>8</sup> Division for Ocean Affairs and the Law of the Sea, *supra* note 5.

<sup>9</sup> UNCLOS art. 94.

internationally agreed rules, standards and recommended practices and procedures...<sup>10</sup>

Since GHGs are atmospheric pollutants, this provision demonstrates that the authority to regulate GHGs from ships is encompassed within flag state jurisdiction under UNCLOS. Flag state authority to regulate GHG emissions is further evidenced by the International Convention for the Prevention of Pollution from Ships, known as the MARPOL agreement, the primary international convention addressing vessel marine pollution.<sup>11</sup> The May 2005 amendment to the MARPOL agreement, Annex VI, aims to reduce GHG emissions from shipping by setting minimum energy efficiency standards for new ships and encourages improved energy efficiency through fleet efficiency.

UNCLOS gives states discretion to regulate and legislate in the manner they determine is appropriate as long as regulations do not violate any principle of UNCLOS.<sup>12</sup> Thus, a flag state could choose to impose emissions standards, set technological or structural requirements for flag ships, or employ market mechanisms to reduce GHG emissions.<sup>13</sup>

States may apply new regulations not only to new ships joining the registry, but also to ships already flying the state's flag. A state could ensure that all ships joining the registry comply with emissions reductions regulation by requiring proof of compliance.<sup>14</sup> Flagged vessels can also be subject to any new conditions imposed by the flag state. For example, when MARPOL Annex VI was annexed, vessels registered under the flags of the states that annexed the agreement became subject to the GHG regulations, and flag state became responsible for implementing these regulations.<sup>15</sup>

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<sup>10</sup> UNCLOS art. 212.

<sup>11</sup> International Convention for the Prevention of Pollution from Ships, November 2, 1973, 12 I.L.M. 1319 [hereinafter cited as MARPOL], available at [http://www.imo.org/About/Conventions/ListOfConventions/Pages/International-Convention-for-the-Prevention-of-Pollution-from-Ships-\(MARPOL\).aspx](http://www.imo.org/About/Conventions/ListOfConventions/Pages/International-Convention-for-the-Prevention-of-Pollution-from-Ships-(MARPOL).aspx).

<sup>12</sup> UNCLOS art. 91.

<sup>13</sup> See Wilensky, *supra* note 4, at 26.

<sup>14</sup> Sompong Sucharitkul, *Liability and Responsibility of the State of Registration or the Flag State in Respect of Sea-Going Vessels, Aircraft and Spacecraft Registered by National Registration Authorities*, 54 AM. J. OF COMP. LAW 409, 421 (Suppl., Fall 2006).

<sup>15</sup> U.S. Department of Homeland Security, *MARPOL Annex VI* ("Because the United States is subject to the regulations in MARPOL, "Annex VI enters into force for the United States on January 8, 2009. Starting on that date, U.S. ships operating anywhere and foreign-flag ships operating in United States waters must comply with the requirements set out in MARPOL Annex VI."), available at <https://homeport.uscg.mil/mycg/portal/ep/contentView.do?channelId=->

### III. Regulating Vessels Flagged under FOCs

#### A. The Rise of Flags of Convenience under the Law of the Sea

According to UNCLOS, a ship must have a “genuine link” with a state to be granted the state’s nationality.<sup>16</sup> A genuine link can be established through a contractual agreement or closer ties such as the nationality of the ship’s crew or owner, or the ship’s origins. The convention does not provide guidance as to what type of link is “genuine,” and the question has been the subject of substantial debate. Despite efforts to limit what is considered a genuine link, the term remains ill-defined, allowing ships substantial flexibility in selecting a flag for registration.<sup>17</sup>

Since ships must usually pay a fee to join a registry, states have an economic interest in attracting ships to their flag. The lack of meaningful restrictions in selecting the nationality for a vessel has allowed for the development of “flags of convenience” (FOCs).<sup>18</sup> FOCs take advantage of the unclear nature of the “genuine link” concept and create low barriers to registration to build up their registries. These features attract parties seeking convenience, tax and regulatory benefits, as well as trade opportunities that might otherwise be prohibited for political reasons.<sup>19</sup> Certain flag states may have lower labor, safety, and environmental standards, affording vessel owners and operators tax and regulatory benefits.<sup>20</sup> For example, the difference in crew costs to operate a modern VLCC-tanker between Liberia, an FOC state, and Sweden, a non-FOC state, was estimated at 700,000 – 900,000 Euros per year as of

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18346&contentId=159304&programId=132092&programPage=%2Fep%2Fprogram%2Feditorial.jsp&pageType=eId=13489&contentType=EDITORIAL&BV (last accessed October 17, 2014).

<sup>16</sup> UNCLOS art. 91.

<sup>17</sup> Brian Baker, *Flags of convenience and the gulf oil spill: Problems and Proposed Solutions*, 34 HOUS. J. INT’L L. 687, 695 (2012). The International Transportation Workers’ Federation (hereinafter “ITF”) has expressed the belief that there should be a stronger definition of “genuine link” between a vessel and its flag state; D’Andrea, Ariella, *The “Genuine Link” Concept In Responsible Fisheries: Legal Aspects and Recent Developments*, FAO Legal Papers Online #61, 1 (2006), available at [http://www.fao.org/fileadmin/user\\_upload/legal/docs/lpo61.pdf](http://www.fao.org/fileadmin/user_upload/legal/docs/lpo61.pdf).

<sup>18</sup> Judith Swan, *Fishing Vessels Operating Under Open Registries and the Exercise of Flag State Responsibilities*, FAO FISHERIES CIRCULAR. No. 980. FAO, 2 n. 11 (2002) (“The relevant international instruments do not provide a legal definition for “open register” or “flag of convenience”), available at [atftp://ftp.fao.org/docrep/fao/005/y3824e/y3824e00.pdf](ftp://ftp.fao.org/docrep/fao/005/y3824e/y3824e00.pdf).

<sup>19</sup> Jessica Ferrell, *Controlling Flags of Convenience: One Measure to Stop Overfishing of Collapsing Fish Stocks*, 35 ENVTL. L. 323 (2005).

<sup>20</sup> Ebere Osieke, *Flags of Convenience Vessels: Recent Developments*, 73 THE AM. J. OF INT’L L. 1 (1979).

1999.<sup>21</sup> Thus, by reflagging their ships, vessel owners can continue to operate and escape certain legal requirements.<sup>22</sup>

To meet the “genuine link” requirement, FOC vessels are often run through a shell corporation created for the sole purpose of establishing nationality.<sup>23</sup> These shell corporations are easily created online through a registry website.<sup>24</sup> FOC registries emphasize ease of registration, and in many FOC states the registration period can be as little as 24 hours.<sup>25</sup> Whether the relationship between the corporation and the flag state creates a “genuine link” is the subject of debate.<sup>26</sup> Critics point out that this system allows vessels to fly the flag of a state without ever entering its ports. Still, states participating in reflagging maintain that the practice is within their sovereign power and complies with international law.<sup>27</sup>

In 1970, the Rochdale Commission, a body commissioned by the British Government, studied FOC countries and defined six elements common to FOC states:

- (1) Non-citizens may own and/or control merchant vessels;
- (2) It is easy to join or transfer from the registry. Registration may usually be conducted at a consulate abroad;
- (3) Income taxes are low or not levied at all. There is usually a registration fee and an annual fee based on tonnage;

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<sup>21</sup> European Parliament, Directorate General for Research Working Paper on Outflagging and Second Ship Registers: Their Impact on Manning and Employment, 8 (1999).

<sup>22</sup> Louis R. Harolds, Some Legal Problems Arising out of Foreign Flag Operations, 28 *Fordham L. Rev.* 295, 296 (1959), available at <http://ir.lawnet.fordham.edu/flr/vol28/iss2/5>.

<sup>23</sup> Foster Pepper PLLC “Choosing a Vessel Registry” at 1 (2011), available at <http://www.foster.com/pdf/Choosing-a-Vessel-Registry.pdf>. Foster Pepper PLLC discusses in a brochure available to parties seeking to register a vessel the process of forming a single-asset entity to isolate the shipowner and their assets from liability.

<sup>24</sup> International Registries, Inc. “Incorporate Online.” Available at <https://www.register-iri.com/index.cfm?action=incorporate>. The IRI website is an example of a FOC registry website with easy access to incorporation materials. The IRI website provides a link on the main page to incorporation, then provides a simple three step key to incorporating online. There is also a link to an online form. This resource makes incorporating online easy, and its being paired with the registry services also available on the IRI’s site make clear that vessel owners seeking to register their ships with the Marshall Islands may also be seeking to incorporate online in the same transaction.

<sup>25</sup> E.g. International Registries, Inc. *FAQs: Maritime* (“The corporation that operates the Marshall Islands registry specifies on its website that “a Provisional Certificate of Registration for a vessel may be obtained in one business day provided that all the required information, proof of ownership and initial registration fees have been paid.”), available at <https://www.register-iri.com/index.cfm?action=page&page=117&fromPage=53>.

<sup>26</sup> Baker, *supra* note 17, at 695.

<sup>27</sup> Osieke, *supra* note 20, at 604-05.

- (4) The country of registry is a small power such that registry fees substantially affect the state's national income;
- (5) Non-nationals may man ships; and
- (6) The country of registry has neither the power nor the administrative capacity to impose regulations or control the registries themselves.<sup>28</sup>

FOC states often have one or more of the Rochdale criteria, but it is not necessary that they have all six.<sup>29</sup> These criteria reflect the benefits of registering in a FOC state, which center around the ease of registration and economic and political benefits to flagged vessels.

Examples of FOC states include Panama, Liberia, and the Marshall Islands.<sup>30</sup>

## **B. Quasi-FOCs**

While FOCs by their very nature impose little regulation on registered vessels, this designation does not impact a state's authority to regulate ships flying its flag. The minimal regulation of FOCs is in part a choice to encourage ships to join and in part a product of many developing state's lack of administrative capacity to effectively impose regulations. Neither of these reasons inhibits a state's authority to regulate ships within its registry. Thus, FOC states are able to adopt international agreements and promulgate national regulations at will.

In fact, there is precedent for FOC states establishing a higher degree of control. "Quasi-FOC" states are states that have imposed a level of regulation on their registries above that which would be expected of a normal FOC state but below that of a traditional registry.<sup>31</sup> One of the most notable quasi-FOC states is Singapore. In 1981, Singapore passed regulations requiring companies to incorporate in Singapore in order to register their vessels under its flag and establishing safety and environment requirements, including the adoption

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<sup>28</sup> David Garfield Wilson, *Interdiction on the High Seas: The Role and Authority of a Master in the Boarding and Searching of his Ship by Foreign Warships*, 55 *Naval L. Rev.* 157, 162-63 (2008).

<sup>29</sup> Illiana Christodoulou-Varotsi & Dmitry Pentsov, *Maritime Work Law Fundamentals: Responsible Shipowners, Reliable Seafarer*, SPRINGER SCIENCE & BUSINESS MEDIA 17 n. 78 (2007).

<sup>30</sup> The International Transport Worker's Federation, "Flags of Convenience," available at <http://www.itfglobal.org/en/transport-sectors/seafarers/in-focus/flags-of-convenience-campaign/>.

<sup>31</sup> Rex Toh and Sock-Yong Phang, *Quasi-Flag of Convenience Shipping: The Wave of the Future*. 33 *TRANSPORTATION J.* 31, 35 (1993).



of MARPOL.<sup>32</sup> This regulatory reform was designed to respond to criticism of FOC registries, but Singapore still retained tax incentives and a relatively low barrier to registration to maintain the attractiveness of its registry.<sup>33</sup> As in the case of Singapore, quasi-FOCs tend to balance higher safety standards with tax-benefits and relative ease of entry to draw registration.

Other flag of convenience states that have imposed regulations on ships include Honduras, Belize, and Malta.<sup>34</sup> Honduras has a requirement that international fishing vessels cannot fish for tuna before registering to do so; Belize requires applications for vessel registration to include a fishing vessel data form; and Malta requires vessels to receive fishing authorization before being registered under its flag.<sup>35</sup>

### C. Flag-shopping and reflagging

Since FOC states attract ship registration by imposing few regulations, increased regulation in quasi-FOC states may deter vessels from registering with the state or encourage registered vessels to transfer to another FOC registry. Flag-shopping is the practice of seeking states with minimal regulations to evade unfavorable or costly legislation or to otherwise maximize gains for the vessel owner.<sup>36</sup>

Because a vessel owner is free to seek out the registry with the most economic and political benefits,<sup>37</sup> increased regulatory standards associated with state's registry may make it less attractive than other FOC nations. FOC states encourage this type of movement and aim to facilitate transfer by keeping registry costs low. Re-domiciliation is the act of changing the nationality of a corporation to that of new jurisdiction. FOC states facilitate redomiciliation or construction of shell-corporations to encourage vessels to join their

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<sup>32</sup> *Id.* at 34.

<sup>33</sup> *Id.*

<sup>34</sup> See The International Transport Worker's Federation, *supra* note 30.

<sup>35</sup> Food and Agriculture Organization of the United Nations, *Report of the Expert Consultation on Fishing Vessels Operating Under Open Registries and Their Impact on Illegal, Unreported and Unregulated Fishing Appendix F*, (September 2003), available at <http://www.fao.org/docrep/006/y5244e/y5244e00.HTM>.

<sup>36</sup> Swan *supra* note 18, at 18.

<sup>37</sup> Baker *supra* note 17, at 696.

registry.<sup>38</sup> Not all countries allow redomiciliation.<sup>39</sup> However, this does not necessarily prevent reflagging; it simply incentivizes a corporation to consider more costly methods, such as creating a new shell corporation in the target flag state instead of redomiciling the existing corporation. Costs of redomiciliation include new trading certificates, new classification, insurance, new licenses for officers and crew, possibly the charterer's consent to changing the flag (depending on the scheme of ownership and rental).<sup>40</sup> In addition, while vessels can leave registries at will, they may have to pay a fine.<sup>41</sup> If costs associated with transferring registries are less than new regulations, ship owners may be incentivized to leave a registry. Consequently, emissions regulations may encourage flag shopping and subsequent registry transfer of vessels.<sup>42</sup>

For example, after Honduras increased its regulations, its registry diminished to less than one million tons in 1991.<sup>43</sup> In comparison, states with less stringent regulations like Liberia and Panama had registries with 52.43 gross million tons and 44.95 gross million tons, respectively.<sup>44</sup> On the other hand, more stringent regulations coupled with low taxes and low barriers to entry can be more attractive to ships that wish to maintain higher operation quality, especially for newer ships for which compliance is relatively easy in comparison with older ships that may demand higher costs for refitting antiquated machinery. In addition, military arrangements between Republic of the Marshall Islands (RMI) and Liberia with the United States to protect ships, as well as other governmental and economic ties may discourage redomiciling out of these FOC states.

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<sup>38</sup> For example, the well-known FOC open registry in Liberia provides free redomiciliation to incoming vessels. The Liberian Corporate Registry pamphlet, 8. *available at* <http://liberiancorporations.com/wp-content/files/liberiancorporateregistry.pdf>.

<sup>39</sup> The Hong Kong and Singapore registries have barriers to redomiciliation.

<sup>40</sup> Sucharitkul, *supra* note 14, at 428.

<sup>41</sup> The Liberian Shipping registry specifies that there may be “taxes, fees and expenses in connection with the deregistration of the vessel from its previous registry.” Liberian Registry, *Question Listing for Vessel Registration*, *available at* <https://www.liscr.com/liscr/Maritime/MaritimeFAQ/VesselRegistration/tabid/109/Default.aspx>.

<sup>42</sup> *See Baker, supra* note 17, at 696.

<sup>43</sup> Phang, *supra* note 31, at 34.

<sup>44</sup> *Id.* at 33.

## IV. Franchised Registries

### A. Franchising Management of Shipping Registries

Registries with low genuine link requirements, including FOCs, are more often found in developing countries. Since these states often have less capacity to handle wide-scale business with vessels wishing to operate under their flag, states sometimes “franchise” out the state flag to a corporation.<sup>45</sup> The corporation then has the duty of taking the registrations of vessels and flagging the vessels under the registry’s contracted flag. Registries are franchised through an act of parliament that gives the registry company exclusive rights to the state flag.<sup>46</sup> The franchising corporation is usually based in a different state than the state whose flag they have franchised, but the registry and flagged vessels are subject to the rules and regulations for registration in the flag state.<sup>47</sup> States that have franchised out their registry to a commercial entity include Liberia, RMI, St. Vincent and the Grenadines, and Vanuatu.

Liberia was the first major FOC country to franchise its flag. As one journalist referred to the practice, Liberia “outsource[d] the marketing of its sovereignty to a private American corporation.”<sup>48</sup> The Liberian registry was originally formed in 1948 under the name The Liberia Company, which later developed into International Registries, Inc (IRI). Former Secretary of State Edward Stettinius and a larger group of leading American entrepreneurs and politicians who were seeking to create a registry with extremely low vessel taxes and barriers to registration were instrumental in the creation of the registry.<sup>49</sup> The agreement allowed Liberia to receive 40% of the corporation’s revenue.

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<sup>45</sup> Swan, *supra* note 18, at 20.

<sup>46</sup> The RMI has an agreement with their registry through an agreement with parliament. The 1990 Marshall Islands Maritime Act (MI-107), a joint partnership parliamentary act created by the RMI government in affiliation with IRI and The Trust Company for the Marshall Islands, Inc, details maritime law and procedure in the state, *available at* <http://www.register-iri.com/forms/upload/MI-107.pdf>.

<sup>47</sup> UNCLOS art. 94.

<sup>48</sup> Khadija Sharife, *Flying a Questionable Flag: Liberia’s Lucrative Shipping Industry*, 27 WORLD POL’Y J.116 (Winter 2010/2011).

<sup>49</sup> H. Edwin Anderson, *The Nationality of Ships and Flags of Convenience: Economics, Politics and Alternatives*, 21 TUL. MAR. L.J. 139, 159 (1996).

The RMI registry was franchised to IRI after Liberia regained control of its registry.<sup>50</sup> The IRI is currently based out of Virginia.<sup>51</sup> The RMI offers unique benefits to vessels registering under its flag, including zero taxes easy and quick incorporation procedures, and redomiciliation into and out of the RMI's jurisdiction – all attractive qualities to vessels looking to minimize costs and exert minimal efforts in registration.<sup>52</sup>

## **B. Regulating Vessels Registered under a Franchised Flag**

Franchising a registry does not impinge on a state's right to regulate vessels flying its flag. While the corporation manages the registry, the flag state retains jurisdiction under UNCLOS and thus has the power to regulate registered vessels.<sup>53</sup> RMI exercised such authority by adopting MARPOL, including Annex VI concerning the Prevention of Air Pollution by Ships.<sup>54</sup> Upon ratification of the annex, RMI notified shipowners, operators, masters, officers of merchant ships, and recognized organizations that it would implement the agreement.<sup>55</sup> The notice released by the IRI details methods by which MARPOL can be followed and lays out compliance procedures and standards for vessel owners.

Once a flag state with a franchised registry implements new requirement for registered vessels, the registry may enforce those standards through requiring proof of compliance for registration. For example, the IRI registry requires proof of liability insurance, including oil pollution and bunker pollution.<sup>56</sup> It is not clear, however, what obligation the registry has to otherwise ensure compliance with regulations. This duty would likely be stipulated in the contract between the flag state and the franchising corporation.

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<sup>50</sup> See discussion *infra* Part C.

<sup>51</sup> International Registries, Inc. webpage, available at <http://www.register-iri.com/index.cfm?action=page&page=107>.

<sup>52</sup> *Id.*

<sup>53</sup> UNCLOS art. 94, specifying that “Every state shall effectively exercise its jurisdiction and control in administration, technical and social matters over ships flying its flag.”

<sup>54</sup> IMO Documentation on MARPOL PROT 1997, (November 2014), available at <https://imo.amsa.gov.au/public/parties/marpol97prot.html>.

<sup>55</sup> Republic of the Marshall Islands Office of the Maritime Administrator, *Implementation of MARPOL Annex VI, Regulations for the Prevention of Air Pollution from Ships*, available at <https://www.register-iri.com/forms/upload/MN-2-013-8.pdf>.

<sup>56</sup> International Registries, Inc. Maritime Services: Vessel Registration, available at <http://www.register-iri.com/index.cfm?action=page&page=53&fromPage=5>.

### C. Regaining Control of a Franchised Registry

Just as a parliament permits the franchising of a registry through an act of parliament, the parliament may abolish a franchise agreement by repealing the act. States that have regained control from franchised registries include Liberia and Cambodia. With respect to Liberia, it is not clear whether IRI or Charles Taylor, then President of Liberia, initiated the switch.<sup>57</sup> IRI had administered the Liberian registry until Liberia transferred control to an alternative U.S. based company.<sup>58</sup> Since breaking the contract with IRI, Liberia still has the second largest flag of convenience registry in the world.<sup>59</sup>

Cambodia also cancelled its contract with the Cambodia Shipping Corporation (CSC), a Singapore-based private corporation.<sup>60</sup> According to some reports, international allegations of drug transportation surrounding Cambodian flagged vessels sparked controversy in the early 2000's and placed pressure on the Cambodian government to take action against the registry.<sup>61</sup> When more allegations arose in 2002, the Cambodian Prime Minister revoked the license and authority of the CSC to manage the registry.<sup>62</sup> The New York Times reported a slightly different story, stating that Cambodia canceled the right of its Singapore agents to register ships after discovering the extent of disrepair of ships within the registry and after France accused a Cambodian-registered ship and its crew of transporting cocaine.<sup>63</sup> Either way, control of the registry was transferred to a new registry created in cooperation with the South Korean Cosmos Group and Cambodian government.<sup>64</sup>

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<sup>57</sup> According to multiple news sources and articles, Taylor dropped IRI after it failed to comply with demands to divert greater sums of revenue to finance the civil war Taylor had launched. Sharife, *supra* note 48, AT 116.

<sup>58</sup> Swan, *supra* note 18, at n.179.

<sup>59</sup> International Maritime Organization, INTERNATIONAL SHIPPING FACTS AND FIGURES- INFORMATION RESOURCES ON TRADE, SAFETY, SECURITY, ENVIRONMENT, Maritime Knowledge Center (March 2012), available at

<http://www.imo.org/KnowledgeCentre/ShipsAndShippingFactsAndFigures/TheRoleandImportanceofInternationalShipping/Documents/International%20Shipping%20-%20Facts%20and%20Figures.pdf>.

<sup>60</sup> FLAG STATE REPORT—CAMBODIA. SEAFARER'S INTERNATIONAL RESEARCH CENTER 83 (2003), available at <http://www.sirc.cf.ac.uk/uploads/cambodia2003.pdf>.

<sup>61</sup> Michael Richardson, *Cambodia-listed ship was Carrying Cocaine: Raid at Sea Highlights Flag Abuses*, THE NEW YORK TIMES (June 24, 2002), available at [http://www.nytimes.com/2002/06/24/news/24iht-a5\\_64.html](http://www.nytimes.com/2002/06/24/news/24iht-a5_64.html).

<sup>62</sup> Seng Sokthary, *Cambodia Ship Registry*, Cambodia Inland Waterway Navigation Ministry of Public Works and Transit, available at [http://www.ciwn.mpwt.gov.kh/index.php?option=com\\_content&view=article&id=72](http://www.ciwn.mpwt.gov.kh/index.php?option=com_content&view=article&id=72).

<sup>63</sup> Keith Bradsher, *North Korean Ploy Masks Ships Under Other Flags*, THE NEW YORK TIMES (October 20, 2006). Available at [http://www.nytimes.com/2006/10/20/world/asia/20shipping.html?\\_r=0](http://www.nytimes.com/2006/10/20/world/asia/20shipping.html?_r=0).

<sup>64</sup> Sokthary, *supra* note 63.

Cambodia and Liberia likely demonstrate that FOCs can cancel contracts franchising their registry, but it may be the case that the suspected illegal activity allowed the Cambodian government to escape the terms of the existing contract or the political instability in Liberia made abiding by contractual obligations infeasible. Regardless, FOC governments should be able to repeal legislation allowing the franchise of their registry. Depending on the terms of the franchise agreements, however, repudiation of the contract may leave the governments at risk of liability for violation of terms of the contract. A contract could limit the circumstances under which the state has the right to cancel the franchise. Without access to the terms of the contract, this risk cannot be assessed. It is also possible that the contract could stipulate that the country must buy back the registry at the time of cancellation. This could be accomplished directly or through contracting with an outside corporation more amenable to the flag state.

Where a state regains control of its registry, the franchising corporation may choose to move their registry to a new FOC state. Since registering with a state requires domicile (to establish a genuine link) and following the standards of that state, if a registry were to move to another nation the ships would still be legally registered with the former FOC state. The only way for the vessels themselves to move with the registry would be for them to redomicile and reflag under the state to which the registry moved.<sup>65</sup> For example, when Liberia took back its registry, IRI contracted to franchise the RMI registry. However, the massive Liberian registry of ships stayed with the state under new management, the Virginia-based Liberian International Ship & Corporate Registry.<sup>66</sup>

If a state did take back over its registry, it could remain an open registry. In fact, Malta and Cyprus both have state-owned open registries. One potentially negative consequence of taking control of a registry is that the state-owned registry would not have the wealth of resources and multiple global office locations that large companies like IRI use to attract new vessel owners.<sup>67</sup> Nonetheless, low costs and ease of registration may be more

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<sup>65</sup> UNCLOS art. 92 (“A ship may not change its flag during a voyage or while in a port of call, save in the case of a real transfer of ownership or change of registry.”).

<sup>66</sup> Liberian Registry, “Points to Compare,” *available at* <https://www.liscr.com/liscr/AboutUs/AboutLiberianRegistry/PointstoCompare/tabid/214/Default.aspx>.

<sup>67</sup> For example, IRI claims that their “worldwide network of Nautical Inspectors conducts in-port inspections and responds to shipowner and operator needs” and that their “decentralized operations provide customers with

important to vessel owners than the entity maintaining the registry. Moreover, a reduction in the size of a state's registry may be offset by the state's increased profit share compared with a franchise agreement.

#### **D. Potential Liability for Flag Ships**

One concern for states considering regaining control of their registry is that they might become liable for insufficient regulation or lack of enforcement should a ship flying its flag cause damage. However, taking control of a registry is unlikely to impact risk of liability for FOC states.

Under UNCLOS, states have a duty to regulate vessels registered under their flag. However, risk of liability for lack of regulation appears relatively low in practice. President Obama called the Deepwater Horizon oil spill of 2010 the worst environmental disaster in U.S. history.<sup>68</sup> The oil rig involved in the disaster was registered under the RMI flag. While the disaster resulted in thousands of lawsuits, no cases were filed against RMI. One reason may be that the RMI simply does not have the deep pockets to make such litigation worthwhile, especially when BP and other multinational corporations are alternative defendants. RMI's duty to regulate ships registered under its flag exists regardless of whether it has franchised control of the registry. Consequently, there is little reason to believe that RMI would have been sued if it had control over its registry.

Similarly, state control of its registry is unlikely to affect liability based on the state's failure to enforce international law. Flag states have a duty to conform with generally accepted international standards in terms of safety, pollution, design, and communication, as well as any other normally accepted standard for vessels under UNCLOS. States may be liable for breaching these obligations.<sup>69</sup> Flag states that are "grossly and persistently" non-

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24-hour service from IRI's 26 worldwide offices in Asia, Europe and the United States International Registries, Inc." *Maritime Services: Unique Advantages*, available at <https://www.register-iri.com/index.cfm?action=page&page=44>.

<sup>68</sup> Remarks by the President to the Nation on the BP Oil Spill (June 15, 2010), available at <http://www.whitehouse.gov/the-press-office/remarks-president-nation-bp-oil-spill>.

<sup>69</sup> UNCLOS art. 94 (detailing the duties of the flag state and the standards of enforcement of provisions under UNCLOS).

compliant with their duties are subject to suspension of normal privileges.<sup>70</sup> The duty to enforce international standards is not waived because a state has franchised its registry. Thus, it should not impact potential liability to subsume control of the registry. Moreover, the risk of liability is low to begin with, because there is no generally accepted standard for registration of vessels and no uniformity in controls between nations.<sup>71</sup> The high degree of variability among states means that flag states are not usually found legally responsible for non-compliance.<sup>72</sup>

## V. Enforcement

The easiest way for a flag state to ensure compliance with new regulatory requirements is to require proof of compliance at the time of registration. This method, however, does not address compliance for vessels that are already in the registry when the regulations are developed. Enforcement of these vessels can be difficult because ships can be anywhere across the globe.

One potential means of enforcement is to ensure compliance of those ships their flag that enter the state's ports.<sup>73</sup> When ships enter a state's port, the state has authority under UNCLOS to investigate and prosecute offenses committed outside areas of the state's coastal jurisdiction under certain conditions.<sup>74</sup> However, this may only account for a small portion of ships within a given registry, especially in FOC states, since the basis for a ship's genuine link is often minimal.

Regional action may improve enforcement capacity. Port state authority under UNCLOS applies to both foreign and domestic ships.<sup>75</sup> In practice, port state controls have proven to be a common enforcement mechanism in a number of international agreements

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<sup>70</sup> UNCLOS art. 185 ("A State Party which has grossly and persistently violated the provisions of this Part may be suspended from the exercise of the rights and privileges of membership by the Assembly upon the recommendation of the Council.").

<sup>71</sup> While thorough research did not uncover examples of flag state responsibility, the potential still remains. See Sucharitkul, *supra* note 14, at 421.

<sup>72</sup> *Id.*

<sup>73</sup> UNCLOS art. 218.

<sup>74</sup> Michelle Cuttler, *Incentive for Reducing Oil Pollution from Ships: The Case for Enhanced Port State Control*, 8 GEO. INT'L ENVTL. L. REV. 175, 192 (1995).

<sup>75</sup> UNCLOS art. 218.



pertaining to shipping.<sup>76</sup> Since climate change poses a substantial threat to all Pacific island states, these nations may benefit from a regional agreement to set GHG standards and to enforce these standards across all ports. This could be an attractive proposal as port states have a strong economic interest in encouraging shipping and will want to ensure regulations do not hinder maritime trade.<sup>77</sup> Further, the more states that impose similar provisions, the less opportunity there is for flag-shopping or reflagging for ships looking to avoid new regulations.

## **VI. Conclusion**

Flag states have principal authority over ships in their registry and, as such, have wide discretion to regulate GHG emissions of ships registered under their flag. Such legal authority applies to all states regardless of status as a FOC state or the decision to franchise the registry. Still, FOC states and franchised registries may face practical obstacles in promulgating and enforcing GHG emissions regulations. In the case of FOC states, more stringent regulations may make a FOC state's registry less attractive and lead to a reduction in the size of the registry. In addition, limited resources may make it difficult to properly ensure compliance with regulations.

Franchised registries must consider the willingness or duty of the company managing the registry to ensure compliance. Depending on the state's contract with the registry, it may be preferable to regain control of the registry. While the flag state has legal authority to cancel the agreement franchising the registry, it may face a monetary penalty or be required to buy back the registry depending on the terms of the contractual agreement. This price may be worthwhile, as it would secure for the state total control over ships within its registry and full proceeds from ship registration and fees. In sum, states wishing to regulate have many options but must plan strategically to overcome challenges in terms of efficacy and enforceability.

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<sup>76</sup> Carmen Casado, *Vessels On The High Seas: Using A Model Flag State Compliance Agreement To Control Marine Pollution* 35 CAL. W. INT'L L.J. 203, 218 (2005). The Paris Memorandum of Understanding and Tokyo Memorandum of Understanding are examples of international agreements enforced largely through port state control. As of 2005, "20 maritime administrations have joined the Paris Memorandum, which initiates about 18,000 checks a year."

<sup>77</sup> Daniel Bodansky, *Protecting the Marine Environment from Vessel-Source Pollution: UNCLOS III and Beyond*, 18 ECOLOGY L.Q. 719, 740 (1991).

