



The “Genuine link” Concept: Is It Possible to Enhance the Strength?

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ABSTRACT

The article focuses on ways and means of strengthening the real connection between a ship and a state of registration. The author emphasizes the prerequisites, the conditions, and the consequences of the registration of sea-going ships in the alternative registries. He notes the complex nature of the genuine link and criticize the consideration of the registration of ships in states as activities aimed exclusively at generating income. The author considers public and private aspects of the registration of ships, its functions, and some mechanisms for preventing violations related to the link between a state of registration and a ship”. The negative impact of open registers and flags of convenience on genuine link strengths arises from the business approach to the choice of jurisdiction adopted both of shipowners and “convenient” registers. Thus, “convenient registers” view relaxation of requirements as a specific service that they provide and as a competitive advantage against other registers.

The issue can be mitigated by coordinating steps taken by international maritime organizations and port states. The author notes the weakness of the steps taken to strengthen the genuine link, the inefficiency of norms of the international agreements in this sphere, assess the proposed mechanisms for strengthening it, and note the need to toughening control within the limits of the inspection according to the procedures of the Port State Control.

The keywords: *genuine link, flag state, flags of convenience, jurisdiction, pollution, prevention, open register, port state, coastal state, Port State Control.*

Introduction

The genuine link between a ship and a state of registration is the main element of the principle of freedom of navigation. There is no precise definition of what is meant by the genuine link in the Conventions of 1958 and 1982. Its objectives and purpose emerge from the obligations of a flag state enumerated in article 10 of the Convention on the High Seas and article 94 of the UNCLOS'82. It should be noted that the genuine link was originally intended as an economic and a social connection between the owner of a ship and a state of registration (D'Andrea, 2006, p. 1), and was not limited to only one fact of entering ships in the register. The legal significance of the registration of sea-going merchant ships is reduced to two instants: public and private. In the first case, the registration accurately reflects the actual and the legal situation of the national merchant fleet, in the second – serves to ensure public control over transactions made with ships (Kokin, 2008, p. 5).

Despite being enshrined in the global international treaties, the genuine link does not work correctly today. It is “eroded”, its significance is distorted, and questions about its presence and effectiveness arise mainly in situations involving significant violations in the sphere of marine activities (IUU fishing, accidents, pollution). This is due to the “broad” practice of the alternative ship registers and “flags of convenience” (FoC) of their states. Studies of FoC attractiveness primarily suggest economic considerations; so far, such countries have comparably easy and quick processes of registration, lax tax regulations, no minimum wage or less

minimum wage for crews, lack of ship maintenance regulations, weak regulations on labor and environmental laws, and lack of infrastructure in vessel monitoring, control, and surveillance capacity (Petrossian et al., 2020). The latter makes FoC attractive, not merely for economic reasons but also for performing different illegal activities, from avoiding shipping regulations to criminal activities such as smuggling or human trafficking.

Although the Convention on the Conditions for the Registration of Ships was adopted 35 years ago, the prospects for its entry into force are still vague. At the same time, the complicated problem arises of finding the ultimate beneficial owners of ships participating or becoming the causes of offenses and finding ways to compensate for the caused damage – the problem of strengthening the genuine link, ensuring its strength.

Methodology

The article analyses the practice of weakening the genuine link between a ship and its registration state and searches for ways to strengthen it and increase efficiency. The first part of the article describes the modern concept of the genuine link and defines causes and conditions of deviation from the requirements of its ensuring. The authors consider the essence and the criteria of the genuine link, note its complexity, and criticize profit-making as sometimes the only aspect of registration formalities. The second part of the article deals with the right of interference in navigation, classifies the public and private legal aspects of the registration of ships. The third part of the article is devoted to finding solutions to strengthen the genuine link between a ship and a state of registration to counter sea pollution.

1. The genuine link: essence, criteria, deviations

The registration of ships exists, with some differences, in almost all modern states, both coastal and landlocked, which is regarded as

a form of state supervision of ships. States utilize the registration when ships have the right to sail under a state flag to overview their number, compliance with national legislation on alienation and transfer as security, safety standards, and other rules in the sphere of navigation (Shuibao, 2020, p. 10). The special literature recognizes that the registration of ships and rights on them is an “important state function” (Georgiev, 2008).

The ship’s registration in one or another state implies the genuine link between them. The norms of the UNCLOS’82 on the genuine link – are the most common standards for acceding states, which at their discretion develop a mechanism for implementing and complying with these standards¹ (part 1 of article 91 of the UNCLOS’82). The fulfillment of the duties of a flag state indicated in Article 94 of the UNCLOS’82 is the realization of the genuine link between it and a ship listed in its register. Moreover, the genuine link between a ship and a flag state should be ensured in any case: by the registration, both mainly and in the alternative registers. At the same time, the UNCLOS’82 does not contain any instructions on this matter and does not imply the existence of several registers of the ships. According to Negret (2016, p. 27), the above-mentioned economic and social connections arising from the registration, , can combine the following aspects: 1) the shipowner’s fleet contributes to the national economy of the open registry; 2) the open registry nationals are employed on the ships; 3) the shipowner has a base of operations (i.e. offices and land-based employees) in the open registry country; 4) the ships periodically visit the ports of the open registry nation. The author reasonably assumes the complex character of the genuine link. At the same time, profit from the registration or the flag state’s discharges of its duties towards registered ships as the primary and sometimes the only significance of the registration

¹ The separate document was planned to adopt to concretize the international rules for the vessels’ registration further.

cannot be recognized as the main one. Especially it is in the sense of article 94 of the UNCLOS'82. Of course, because of attracting shipowners, additional revenues from the country's budget will be easier conditions of the registration, but this cannot and should not be the primary purpose of their registration. In addition, the registration of ships cannot be a revenue-generating activity at all. Furthermore, the established registration fees should provide exclusively for the administrative expenses of registering ships and maintaining a staff of registration service.

In the separate opinion, attached to the decision of the United Nations International Court of Justice on the case "Barcelona Traction", 1970, judge F. Jessup pointed out that the concept of "the genuine link" connected with the citizenship of the individual and corporation. Regarding the nationality of the ship, F. Jessup believed that it could be established by assessing the presence or absence of such elements as management, ownership, jurisdiction, and control (Separate opinion of judge Jessup, p. 188).

The relatively "soft" nature of the norms of the UNCLOS'82 and its predecessor, the Convention on the High Seas 1958, on the genuine link, has led to the proliferation of the practice of FoC. In addition, at the end of the 20th century, the international ("second", "open", "alternative", or "parallel") ship registries with special, simplified rules of registration were created in the traditional maritime states.

This measure resulted from the search for a compromise option, designed to deter domestic shipowners from transferring ships from national jurisdiction to economically more attractive open registers of "convenient flag" countries. They have emerged as a means of introducing a more flexible than national registration system for ships engaged in the international merchant navigation (Grejner, 2003, p. 16).

The FoC is a phenomenon that does not have a clear legal definition but exists and has been recognized by all states of the world for more than one decade. The International Federation

of Transport Workers uses the term “flag of convenience” most actively. ITF introduced this term into its official documentation agreements) (Flags of convenience; ITF agreements). From the ITF perspective, the identification of FoC is a trifold judgment demanding to consider such factors as the number of foreign-owned vessels, the social record for human and trade union rights, and the safety and environmental record of the state. This judgment-based binary classification approach currently declares 32 countries to be FoC (Ford & Wilcox, 2019, p. 299).

One of the most thorough analyses of FoC practices was conducted by experts from the North Atlantic Fisheries Intelligence Group and published by the Nordic Council of Ministers as a report titled “Chasing Red Herrings: Flags of Convenience, Secrecy and the Impact on Fisheries Crime Law Enforcement.” (Chasing Red Herrings: Flags of Convenience, Secrecy and the Impact on Fisheries Crime Law Enforcement, 2017) Due to that report, the FoC common features include:

- utilization of open registries through extending conditions of granting nationality to ships to foreign-owned vessels;
- facilitation secrecy or the anonymous ownership of vessels allowing the registration of vessels owned by business entities with no traceable beneficial ownership;
- setting a regulatory regime that mitigates the risk of detection and penalties for shipowners by exploiting gaps or differences in interpretation of international legal framework for flag states’ obligations to exercise jurisdiction over vessels on their registers (de Coning, 2020).

The practice of the “convenient” flags is very dynamic and has been enshrined in the national legislation. The first to introduce a preferential registration regime for the ships of Panama in 1925 (Gonzales Solis, 1987, p. 51-52; Piniella et al., 2017, p. 14), and its foundations were laid in 1916, when an open register of foreign ships was established, which allowed registering the Panamanian

companies owned by foreigners (Rhea, 2010, p. 19). Liberia and Honduras followed its example in 1948, which were the first used by the US shipowners to avoid restrictions related to the American flag (The Effect of the United States Labor Settlement on the Flag-of-Convenience Fleet: the Regulation of Shipboard Labour Relations and Remedies against Shoreside Picketing, 1960, p. 498-499). The economic incentive for such legislative changes, according to A. Kokin, did not contradict the international law of that time. The practice of registering ships and allowing them to sail on the high seas under that state's flag was considered the exercise of sovereign powers and public interests. The Panama Ship Register has become open to foreign shipowners, and the Panamanian flag has proved to be "convenient" for them, i.e., well adapted for the benefit of certain persons (Kokin, 2008, p. 10). The "especially valuable" was the role of the Panamanian flag for passenger ships during the "dry" law in the United States (Why so many shipowners find Panama's flag convenient, 2014; Flag state responsibilities and seafarers' rights, 2014). Thus, "convenient" flags made it possible to "get away" from various kinds of "troubles" associated with a particular jurisdiction – from control by official authorities to significant bureaucratic registration procedures.

In the second half of the 20th century, considering the norms of the Convention on the High Seas 1958, the registration of ships under the "flags of convenience" became a landslide character. In 1967, Liberia's Register exceeded the UK Register and received the status of the largest register in the world (The birth of the modern Flag State, 2018). In the 1970s and 1980s, an increasing number of countries tried to open their registers for access to the ships, controlled by persons who were non-citizens of them. Approximately thirty states worldwide currently operate an open registry, that are an essential enabler of cheap and fast maritime shipping, with upwards of 70% of global deadweight tonnage (DWT) sailing under such flags (Watterson et al., 2020).

In the late 1980s and 1990s, there was a rapid growth of the second registries in countries where there were significant and sufficiently large main registries (Grejner, 2003, p. 16). The main impetus for creating such registries was the collapse in the 1980s of the merchant fleet under the flags of traditional maritime states, especially Western European states, amid a cyclical crisis in the world shipping and low freight market conditions. Norway was one of the first to use this form of exit from the crisis, which created the Norwegian International Ship Register in 1987, thanks not only to which the transition of the Norwegian ships to foreign flags practically stopped, but the deadweight of the Norwegian fleet doubled in four years, simultaneously increasing revenues to the country's budget (The Norwegian flagged foreign fleet is growing, 2018; the Norwegian International Ship Register Act of June 12 1987).

The attempts to control the “convenient” flag in international law were unsuccessful at the First UN Conference on the Law of the Sea, within the UNCTAD, and some national associations of the law of the sea. They were not effective at the Third UN Conference on the Law of the Sea. Consequently, the activities of states at the international level have gradually shifted from direct criticism, the practice of prohibitions or direct control of the navigation of ships under the FoC to the desire to consider and to solve the main problems arising from the exploitation of ships, regardless of which flag they sail under (Kokin, 2008, p. 25-26).

Subsequently, the practice of establishing international registries was widely used. The most active period of their implementation was in 1986-1997, when Denmark, Italy, Spain, Portugal, Brazil, Germany, France, Japan, and some other countries created their registries (Report on Recruitment and Placement of Asian Seafarers, 1989). About half of today's international registries belong to the offshore group. They are established in the dependent island territories, which are subject to the jurisdiction of metropolises. Most of the entire merchant fleet under the state flag is concentrated

here. It is characteristic that in other countries, questions were also raised about the choice of island territories as a possible location for new registers: in Norway – island Spitsbergen, in Germany – island Helgoland, in Finland – the Aland Islands. As a rule, this choice greatly facilitated the legislative side of introducing new registries since it is possible to use the autonomous rights of island territories concerning preferential taxation and other conditions for the registration of ships. Such flags are called “quasi-convenient” (Lugovec, 1999; Yur’ev, 1998; Metaxas, 1985, p. 15).

The “open” registries have helped shipowners reduce costs, increase competitiveness in the global freight market and prevent the transition of national tonnage to the “convenient” flags. When registering in the “second” register, ships raise not the “convenient”, but their national flag, are under the jurisdiction of their state, but at the same time, tax and legislative requirements are similar “convenient”, but there is one obligation – the use of such ships only in the international navigation. There is an equalization of competitive positions in the global freight market while simultaneously solving the strategic tasks of a state and more legal security of shipping companies and seafarers. Also, foreign shipowners can get into such registries on preferential terms and receive. As a result, the recognized flag of the leading maritime state. In this case, registration in such registries is similar to “convenient”. Their significant advantage can be considered the absence in the “black lists” of states, ships flying which flags are subject to priority inspections under the terms of the regional agreements on the Port State Control. For a state in which the second register is created, the positive effect of its implementation is that the transition of ships of domestic shipowners under foreign flags is practically stopped, foreign shipowners are involved, the deadweight of the fleet under the national flag increases, and, as a result, revenues increase to the budget.

At first glance, the return of ships to the main registers or the created “second” registers may look attractive, but if the return of

ships to the national flag after that will result in taxation of profits from shipping at full tax rates, then the prospect of such return may be less attractive. Therefore, the leading maritime states of Europe have developed an alternative way of taxing shipping companies. In particular, the option of abandoning the primary tax legislation was proposed, and the calculation of income tax for shipping companies was introduced only based on the gross capacity of their ships. The amount of tax thus calculated payable is significantly less than it would have been when applying standard corporate taxation. This combination of flexible registration requirements of ships and low taxation of shipping companies stopped the decline of merchant shipping in traditional maritime states and, in some cases, even led to a slight increase. The Netherlands was the first to equalize existing tax legislation by introducing a tonnage tax in 1996 (Grejner, 2003, p. 16; Merk, 2020, p. 523-524).

The work of the reviewed registries led to their classification according to the genuine tight link in the economic, administrative, and legal spheres:

- the first group – is the “flag of convenience” states, where there is almost no economic link between a state and a ship, and the administratively-legal links are fragile (Panama, Liberia, the Bahamas);

- the second group – is the so-called “second” registries, which are divided into the dependent (offshore) and the international (alternative). A distinctive feature of the dependent registries is their creation in the territories, although they are part of a country but have a specific legal and economic independence and registration conditions, and, accordingly, can be more liberal than in the main register of a country (island Maine (Great Britain)), Luxembourg (only for the Belgian ships), Kerguelen (France), Madeira (Portugal), Curacao (the Netherlands Antilles islands, the Canary Islands);

- the third group – is the main registries of the traditional maritime states, which have a high degree of economic, administrative, and

legal connection of a ship with a state of registration but are more economically unattractive for both shipowners and investors, since the operation of ships, registered in such registries is associated with high crew costs and a high level of taxation of results of activities (Burkinskij & Kotlubaj, 2006, p. 58).

To specify general norms of the UNCLOS'82 and attempt to overcome the practice of the “convenient” flags, in 1986, the UN adopted the Convention on the Conditions for the Registration of Ships, the purpose of which is

“ensuring or, as the case may be, strengthening the genuine link between a State and ships flying its flag, and in order to exercise its jurisdiction and control over such ships effectively concerning identification and accountability of shipowners and operators as well as concerning administrative, technical, economic and social matters, a flag State shall apply the provisions contained in this Convention” (the Art. 1).

The new agreement consolidated several opportunities for “parallel” registration of ships operated under a bareboat charter agreement. In particular, following the rule of article 12 of the Convention, “a state may register and grant the right to sail under its flag to a ship chartered without a crew by a charterer in that state for the duration of the charter contract” (under its laws and regulations a state may grant registration and the right to sail under its flag to a ship bareboat chartered-in by a charterer in that state, for the period of that charter). This approach is, of course, aimed at establishing (strengthening) the genuine link of a state of the entity operating a ship under the bareboat charter agreement with this ship and, as a result, at ensuring proper control over such ship (Shemiakin, 2000, p. 216-236). Such a “parallel” registration is not a “second” (“additional”) registration of a ship, since, firstly, it can take place only with the consent of a state of the main registration, and secondly, for the duration of the “parallel” registration, the main one is suspended. At the same time, the “parallel” registration does not affect the establishment, registration, transfer,

modification, and the abolition of lien and other property rights on a ship to which the legislation continues to apply of a state where this right was drawn up, and changes regarding such rights do not affect “parallel” registration (Shemiakin, 2004, p. 151-152). There are many other “enhanced” norms in the Convention compared to the UNCLOS’82 norms on the genuine link (the art. 6-11). They formed the criteria for the genuine link:

- the participation of a state of registration or its natural/legal persons in the ownership of a ship;
- the laws and regulations of a state should be sufficient for the effective exercise of jurisdiction and control over ships sailing under its flag;
- the obligation of a state of registration to establish requirements so that a specific part of a crew will be nationals of that state;
- ensuring the proper administration of ships through an authorized subject domiciled in a state of registration;
- ensuring the proper identification and accountability of shipowners and ship operators.

However, the Convention of 1986 reaffirms that each state independently regulates the right to sail its flag, and only the obligation to create the genuine link is provided as a sanction for the lack of it.

According to the UNCTAD, at the beginning of 2021, more than half of all ships owned by Japanese entities were registered in Panama; of the ships owned by Greek entities, 25 per cent were registered in Liberia and another 22 per cent in the Marshall Islands. Panama (344 million dwt), Liberia (300 million dwt) and the Marshall Islands (274 million dwt) represented the leading flags of registration. Hong Kong SAR and Singapore followed in fourth and fifth place, respectively. Among these five, the Marshall Islands recorded the most substantial increase in registrations over the last decade (UNCTAD Handbook of Statistics 2021 – Maritime transport, p. 2).

Modern shipping, especially in marine pollution with plastic and other components, is not inherent to marine ecosystems by ships under the “convenient” flags. The coastal areas – due to the environmentally unfriendly utilization of ships and the proliferation of abusive practices of changing their registration shortly before the end of the exploitation term; the IUU fishing of ships under the “convenient” flags, exterminating populations of marine inhabitants, again updates the issues of strengthening the genuine link and developing mechanisms for its fundamental provision and increase of efficiency.

2. The functions of registration of ships and the mechanisms for prevention of violations

Freedom of the high seas, as a fundamental principle of the law of the sea, implies that all states have six internationally recognized freedoms: navigation, fishing, laying submarine cables and pipelines, erecting artificial islands, installations, and structures, flying over the high seas, conducting marine scientific research. Freedom of navigation, as a right for each state to that, ships sail on the high seas under its flag, is being developed in possibility independent determination the conditions for granting them its nationality and, accordingly, registration. As A. Kolodkin noted, two different aspects of the legal situation of a ship cannot be mixed: its state-legal status and its international legal regime. In the first case, the nationality and the ownership of a ship are concerned. This status of a ship is constant and does not change depending on the ship’s location (Kolodkin, 1961, p. 31). It is based on its public legal status, fixed through registration.

The central public and legal functions of the ship registration are a) linking a ship to a specific state and extending jurisdiction to it in order to ensure compliance with the rules of safety of navigation, manning of crews, and ensuring discipline on board of a ship; b) granting the right to sail the flag of a state of registration;

c) granting the right to diplomatic protection and consular protection of a flag state; d) the rights to protect the naval forces of a flag state; e) the right to carry out certain activities in the territorial sea of a flag state, for example, coastal fishing or traditional transport between ports of a flag state (coastwise navigation); f) the application of the rules of war and military operations and neutrality to a particular ship (Bekyashev, 2021, p. 13-14). As R. Rhea notes (2010), some of the different public law attributes of ship registration include jurisdiction, state obligations, and ship responsibilities (p. 9-10). Among the private law attributes of ship, registration are: 1) the protection of title for the registered owner; 2) the protection of title for persons with securities; 3) the protection for third parties (Rhea, 2010, p. 12).

The legal regime of a ship in different maritime spaces varies and involves regulation not only of its national but also of international and/or foreign law (Kolodkin, 1961, p. 31). The submission of a ship to the flag state's law erects due to its nationality and the genuine link with it. The jurisdiction of a ship's flag state is exclusive (article 92 of the UNCLOS'82). However, there are some exceptions where the right to freedom of navigation can be interfered with at the high seas: there are reasonable grounds to suspect that a ship is suspected of piracy, slave trade, unauthorized broadcasting, has no nationality, or has doubts about its nationality and a flag (the article 110 of the UNCLOS'82). Although, it is not only UNCLOS'82 that establishes the grounds for intervention in the cases of illegal actions at sea, including pollution.

However, the erosion of genuine link arises from the model of ship registration as a business decision. Hence, shipowners choose the convenient jurisdiction providing the best registration services of a flag state that will minimize costs and reduce risk, preferably by providing corporate structures and a legislative and institutional framework that will protect vessels' operators' privacy shield its operations from scrutiny (de Coning, 2020, p. 511). This is also

aggravated by dependency of many open register authorities from technical expertise and financial resources of private companies. In aggregate FoCs, international organizations and the commercial maritime community through their interactions produce a regulatory system that entrenches distinct forms of private power in multilateral policing governance on the high seas (Gould, 2021).

There can be a series of legal measures implemented to strengthen a genuine link and to make FoC less attractive for shipowners, including:

- a unification of conventions and regulations, because disparity of the requirements is exploited by open registry states providing more relaxed laws;
- enhancing cooperation between states and maritime organizations to make registration of ships more logical and safety standards more obvious;
- more strict measures from the side of port states, such as enforcing sanctions against ships if any are imposed, black-listing, and more thorough inspecting (Aladwan, 2020).

For example, one of the control mechanisms aimed at ensuring the safety of navigation, including its ecological component, was first the regional and then the global initiative – the Port State Control. Just it was, which showed the most remarkable effectiveness in combating substandard shipping. Of course, it cannot be considered a replacement for the control of a flag state of a ship, but tangible help is quite reasonable (Plachkova & Avdieiev, 2020, p. 43-50). Today, it is much better for shipowners to have a respected flag on their ship and, with a high degree of probability, do not get into the statistics of ships entering ports checked for compliance with applicable instruments.

In addition, the audit initiative contributes to strengthening the genuine link in the frames of the IMO. In January 2016, the IMO Member States Audit Scheme (IMSAS) became a contractual obligation. Audits under the Scheme became mandatory on January 1,

2016, when the majority of amendments to the IMO instruments, adopted for the institutionalization of the Scheme, entered into force (Member State Audit Scheme). Through such an initiative, states monitor on a reciprocal basis implementation of international instruments with the involvement of the IMO specialists.

3. The genuine link and the pollution control

Depending on the location, the sources of marine pollution subdivide into two major categories: land-based and sea-based. Moreover, mainly marine pollution comes from the sources of the first category, and the struggle against it concerns the competence of each state. For pollution from ships, liability and applicable mechanisms cover different response levels. Two regional agreements lay down the legal basis for combating pollution from sources on land-based: the Convention on the Protection of the Marine Environment of the Baltic Sea Region 1974 (The Helsinki Convention, 1974) and the Convention on the Prevention of Marine Pollution from Land-based Sources 1974. The Helsinki Convention was updated in 1992. And there are newer tools: The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal 1989 and The Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships 2009 (not yet in force). In addition, pollution control is in focus of global and regional arrangements such as US SDG or European Green Deal (Shevchenko et al., 2021).

The marine sources of pollution are primarily ships, mainly tankers, and installations for the exploration and exploitation of the resources of the seabed and its subsoil, supplemented by the issue of large passenger liners. Seabed activities are currently of industrial importance, mainly within the continental shelf. Therefore, measures taken by coastal states to combat marine pollution and resulting from such activities should be regarded as a duty of the proper states (formulated, *inter alia*, in the Conventions on the High Seas, on the

Continental Shelf 1958 and in the UNCLOS'82) rather than as their special rights. Even more so, this remark refers to the first category of the sources. This is not the case with sea-going ships, which are, although far from the main, but one of the most apparent sources of marine pollution. Naturally, coastal states near the shores of which foreign ships go to or call at the ports seek to protect their coasts and the coastal waters as much as possible from the pollution (Kiselev & Makovskij, 1976, p. 79). The basis for combating such pollution is the International Convention for the Prevention of Pollution from Ships (MARPOL 1973/78), which specifies the obligations of a flag state of a ship to counter pollution. For example, the modern vessel-source oil pollution governance includes four aspects: beforehand prevention, in-process response, ex-post handling, and comprehensive governance. The latter is based on convention implementation facilitation, coastal state anti-pollution jurisdiction, crew management, and port state control (Zhang et al., 2021). This returns us to the issue of proper interpreting and performing of international obligations both by flag and port states.

In order to suitable combination the international shipping with the activities of the coastal states to protect and preserve the marine environment, the UNCLOS'82 includes norms delimiting the jurisdiction of a flag state, a coastal state, and a port state to enforce the international norms and the standards or the national laws and the regulations to prevent marine pollution from ships. Meanwhile, according to UNCLOS'82, the advantage in ensuring their implementation remains for the jurisdiction of a flag state. They ensure the observance of the applicable international norms and standards, their laws, and regulations under the Convention by the ships sailing under their flags, and take measures to ensure their effective implementation, regardless of where the violation was committed. Suppose a ship violates the stated international norms and standards or national laws and regulations. In that case, a flag state shall take measures to investigate without delay and,

where it is appropriate, initiate proceedings against the alleged violation, regardless of where the violation was committed or where contamination was occurred or was detected as a result of such violation (p. 1 and p. 4 the art. 217). In addition, the UNCLOS'82 establishes the universal jurisdiction of a port state to enforce the international norms and the standards for the prevention of marine pollution from ships (the art. 218). Such a triple jurisdiction system regarding pollution (a state of the flag, a coastal state, and a port state) is designed to maximize the protection of the sea from pollution from ships. The general standards for combating marine pollution are enshrined in article 194 of the UNCLOS'82.

The choice of a flag under which a ship will be registered is crucial for a creditor, which considers a flag of registration, deciding on the financing of shipping companies. Creditors concerned about the potential liability of pollution of the environment attach great importance to the ship inspection program by providing the following safety and operational standards. From the economic point of view, the consequences of registration in a country are significant for the shipping company, in particular, it concerns the following aspects such as taxes, legislation (the need to comply with specific legislation regarding tax payment, possible state regulation of certain spheres of the company's activities, audit, and accounting, recruitment of personnel, other issues that may affect economic results of activity); safety standards (in case of registration under a flag implying accession to the SOLAS Convention and compliance with its requirements, a shipowner is obliged to maintain a constant high standard of the technical condition of a ship, and in case of registration under a flag not allowing accession to the SOLAS, he can save on the costs associated with the maintenance and the repair of a ship); conditions of employment of a crew (some jurisdictions regulate in their way the nationality (citizenship) of crew members). This strengthens and maintains the genuine link.

While many shipowners register their ships in the “convenient” jurisdictions, nobody takes care of the technical condition of their ships themselves. The consciousness of such shipowners can be an example for very, very many.

Another big problem of pollution and ensuring the genuine link – is the change of registration of ships due to the approaching end of service. It has recently been described by Wan et al. (2021). We support the proposed reforms to make the shipping industry more sustainable by strengthening, in particular, the genuine link, the introduction of a “second citizenship” for ships that are approaching the end-of-life, and open electronic databases of hazardous materials found on and inside ships. In addition, in order to strengthen the genuine link, it is proposed: a) to call flag states to accede to the international treaties containing rules on their liability for ships sailing under their flag; b) to strengthen control of ships sailing under the “convenient” flags, in ports; c) to transfer confiscated ships with the “convenient” flags to revenue of a state with a subsequent sale through auctions or utilization; d) to create measures to regulate the chartering of ships under the “convenient” flags, including on conditions of a bareboat charter (Bekyashev, 2021, p. 15-16).

More than ten years ago, in his dissertation, R. Rhea (2010) noted that the successful registers of the future would be the hybrid registries, those that draw on the most desirable traits from both open and national registers to create the best of both worlds (p. 61). The convergence of registries, when the interests of all participants in these necessary formalities are taken into account, is still relevant. However, the tendency to increase income due to complex repairable and sometimes irreparable environmental damage does not leave modern shipowners. The consequence of a predatory attitude to the natural environment may soon be its much more active “revenge” when it will become more difficult for humanity to earn money and elementally to survive.

Conclusions

The analysis of the norms of the UNCLOS'82 and the practice of registering ships in the alternative registries showed that despite the primary purpose of registering ships – ensuring, through the discharge of a flag state's duties, the genuine link between a flag state and a ship – the main goal of creating the modern international and “convenient” registers of ships is nevertheless to increase revenues to state budgets. Such practice cannot be recognized as appropriate to the norms of UNCLOS'82. The modern mechanisms of counteracting the adverse effects of various types of “alternative” registrations show their weakness. The possibilities of strengthening the genuine link are mainly based on the consciousness of states of the “convenient” jurisdictions and shipowners, who do not have to count on them. A possible alternative might be to strengthen the procedures of the PSC by involving more ships under inspection and more thorough controls.

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Кузнєцов С. Концепція “реального зв’язку”: чи є можливим підсилення? – Стаття.

У статті розглядаються шляхи та засоби посилення реального зв’язку між судном та державою його реєстрації. Автор підкреслює причини, умови та наслідки реєстрації морських суден в альтернативних реєстрах. Він наголошує на комплексному характері реального зв’язку і критикує розгляд реєстрації суден у державах як діяльності, спрямованої виключно на отримання доходів. Автор розглядає публічно- та приватноправові аспекти реєстрації суден, її функції та деякі механізми запобігання порушенням у зв’язку між судном та державою його реєстрації. Негативний вплив відкритих реєстрів та “зручних” прапорів на реальний зв’язок є наслідком бізнес-під-

ходу до вибору юрисдикції, прийнятого як судновласниками, так і “зручними” реєстрами. Таким чином, “зручні реєстри” розглядають послаблення вимог як особливу послугу, що надається ними, та як конкурентну перевагу у порівнянні з іншими реєстрами. Проблема може бути пом’якшена шляхом координації кроків міжнародними морськими організаціями та державами порту. Автор зазначає про слабкість здійснюваних кроків зі зміцнення реального зв’язку, неефективність норм міжнародних договорів у цій сфері, оцінює запропоновані механізми її посилення та наголошує на необхідності посилення контролю у рамках інспектування відповідно до процедур Port State Control.

Ключові слова: реальний зв’язок, держава прапора, “зручні” прапори, юрисдикція, забруднення, запобігання, відкритий реєстр, держава порту, прибережна держава, Port State Control.

Кузнецов С. Концепція “реальной связи”: возможно ли усиление? – Стаття.

В статье рассматриваются пути и средства усиления реальной связи между судном и государством его регистрации. Автор подчеркивает предпосылки, условия и последствия регистрации морских судов в альтернативных реестрах. Он отмечает комплексный характер реальной связи и критикует рассмотрение регистрации судов в государствах как деятельности, направленной исключительно на получение доходов. Автор рассматривает публично- и частноправовые аспекты регистрации судов, ее функции и некоторые механизмы предотвращения нарушений в связи между судном и государством его регистрации. Негативное влияние открытых реестров и “удобных” флагов на реальную связь является следствием бизнес-подхода к выбору юрисдикции, принятого как судовладельцами, так и “удобными” реестрами. Таким образом, “удобные реестры” рассматривают ослабление требований как особую предоставляемую ими услугу и как конкурентное преимущество по сравнению с другими реестрами. Проблема может быть смягчена путем координации шагов, предпринимаемых международными морскими организациями и государствами порта. Автор отмечает слабость предпринимаемых шагов по укреплению реальной связи, неэффективность норм международных договоров в этой сфере, оценивает предложенные механизмы ее усиления и отмечает необходимость ужесточения контроля в рамках инспектирования в соответствии с процедурами Port State Control.

Ключевые слова: реальная связь, государство флага, “удобные” флаги, юрисдикция, загрязнение, предотвращение, открытый реєстр, государство порта, прибережное государство, Port State Control.