

FLAGS OF CONVENIENCE AND THE GULF OIL SPILL: PROBLEMS AND PROPOSED SOLUTIONS

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I. INTRODUCTION

The practice of international registration of maritime

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vessels¹ has long been a point of contention in developed countries.² Developed countries fear that by allowing internationally registered maritime vessels to navigate their waters, and make use of their ports, they will be exposed to serious domestic safety concerns.³ This fear stems from the fact that internationally registered maritime vessels operating within a state's jurisdiction are not subject to the same regulatory standards as domestically registered maritime vessels.⁴ Developed countries fear that because they cannot regulate all maritime vessels operating within their jurisdiction that they could then be exposed to weak regulatory standards found in outside jurisdictions.⁵ Countries are forced to merely hope that ships operating near or within their economic zone have been inspected and are in keeping with all proper safety regulations.

With the recent events in the Gulf of Mexico, these long-standing fears have been brought to the surface once again.⁶ On April 20, 2010, the Deepwater Horizon oil rig, owned by Transocean Ltd. (hereinafter "Transocean"), and under contract with British Petroleum P.L.C. (hereinafter "BP"), exploded.⁷ The explosion killed eleven workers and injured another seventeen.⁸ What followed was a catastrophic, three month long oil spill.⁹

1. Throughout this paper, "maritime vessels" and "ships" are referred to with the understanding that traditionally people have spoken about the international registering of maritime vessels in the terms of registering just "ships"; however, this is misleading because other kinds of maritime vessels, such as oil rigs, must be registered as well. *Maritime Law: Defined*, ATTORNEY PAGES, <http://attorneypages.com/hot/maritime-law-defined.htm> (last visited Feb. 2, 2012).

2. See Richard J. Payne, *Flags of Convenience and Oil Pollution: A Threat to National Security*, 3 HOUS. J. INT'L L. 67, 67 (1980).

3. See generally *id.* at 89–92 (discussing pollution liability).

4. See *id.* at 72.

5. See *id.* at 97–99.

6. Tom Hamburger & Kim Geiger, *Foreign Flagging of Offshore Rigs Skirts U.S. Safety Rules*, L.A. TIMES, June 14, 2010, <http://articles.latimes.com/2010/jun/14/nation/la-na-oil-inspection-20100615>.

7. *Eleven Workers Missing After La. Oil Rig Explosion*, USA TODAY, Apr. 21, 2010, http://www.usatoday.com/news/nation/2010-04-21-louisiana-oil-rig_N.htm.

8. *Id.*

9. *No Oil Leaking as BP Conducts Critical Pressure Tests in Gulf Oil Well*, CNN, July 16, 2010, <http://www.cnn.com/2010/US/07/15/gulf.oil.disaster/index.html?hpt=T2>.

During the spill an estimated five million barrels of oil, some fifty-eight thousand barrels of oil per day, escaped unimpeded into the Gulf of Mexico.¹⁰ The oil spill finally ceased on July 15, 2010,¹¹ after disaster response crews placed a large cap onto the well, cutting off flow into the Gulf of Mexico.¹² On September 8, 2010, BP released a 192 page accident investigation report detailing what it found to be the causes of the explosion.¹³ The report alleges that BP and Transocean employees failed to correctly interpret a pressure test, and neglected to recognize the ominous signs of the impending disaster, such as a specific pipe, called a riser, losing fluid.¹⁴ The report also alleges that while BP did not listen to recommendations by Halliburton for more centralizers,¹⁵ the lack of centralizers probably was not a cause of the explosion.¹⁶ The blowout preventer, removed on September 4, 2010, had not reached a NASA facility in time for it to be part of the report.¹⁷ In response, Transocean called the report “self-serving” and blamed BP’s “fatally flawed well design” as the proximate cause of the disaster.¹⁸

So, how is this tragic incident related to flags of convenience? The Deepwater Horizon oil rig, manufactured in South Korea, was operated by a Swiss company under contract

10. Dan Shapley, *How Big Was the BP Oil Spill?*, THE DAILY GREEN, Sept. 21, 2010, <http://www.thedailygreen.com/environmental-news/latest/bp-oil-spill-size-0528>.

11. *No Oil Leaking as BP Conducts Critical Pressure Tests in Gulf Oil Well*, *supra* note 9.

12. Bradley Blackburn & David Muir, *Gulf of Mexico Oil Spill: Well Integrity Test Shows Oil Stopped*, ABC NEWS (July 15, 2010), <http://abcnews.go.com/WN/gulf-oil-spill-bps-cap-success-oil-stops/story?id=11173330>.

13. *Deepwater Horizon Accident Investigation Report*, BRITISH PETROLEUM (Sept. 8, 2010), http://www.bp.com/liveassets/bp_internet/globalbp/globalbp_uk_english/incident_response/STAGING/local_assets/downloads_pdfs/Deepwater_Horizon_Accident_Investigation_Report.pdf [hereinafter *BP Accident Report*].

14. *Id.* at 10.

15. The possible involvement of any “centralizers” is outside the scope of this paper.

16. *BP Accident Report*, *supra* note 13, at 35.

17. Keith Cowing, *BP’s Failed Blowout Preventer Heads for NASA*, NASA WATCH (Sept. 5, 2010), <http://nasawatch.com/archives/2010/09/bps-failed-blow.html>.

18. *Transocean: BP’s Probe ‘Self-Serving’ and Misleading*, MSNBC (Sept. 8, 2010), http://www.msnbc.msn.com/id/39046088/ns/us_news-environment.

with a British oil company.¹⁹ Safety and security of the oil rig was not the responsibility of the United States government, but that of the Marshall Islands—a small, underdeveloped island nation located in the South Pacific Ocean.²⁰ The Marshall Islands are designated by the International Transportation Workers' Federation (hereinafter "ITF") as a flag of convenience (hereinafter "FOC") country.²¹ The Marshall Islands and thirty-one other countries were identified as flag of convenience states by the ITF's Fair Practices Committee, a joint committee of ITF seafarers' and dockers' unions, which runs the ITF campaign against flag of convenience states.²² Now, as the government tries to figure out what went wrong in the worst environmental catastrophe in U.S. history, this international patchwork of divided authority and sometimes conflicting priorities is emerging as a crucial underlying factor in the explosion of the rig.²³

The Marshall Islands, as the registered flag of Deepwater Horizon, was responsible for inspecting Deepwater Horizon and ensuring that the rig was in compliance with all required safety rules and regulations.²⁴ Nonetheless, the Marshall Islands failed to directly handle this burden.²⁵ The Marshall Islands outsourced its obligations to inspect ships registered under its flag to an outside contractor.²⁶ The company responsible for this inspection allowed Deepwater Horizon to maintain low staffing levels and allowed a drilling expert to override the captain on crucial decisions made on the day of the explosion.²⁷ Some survivors credit these allowances as contributing to the confusion and helping cause the disaster.²⁸

19. *Id.*

20. *Id.*

21. *FOC Countries*, INTERNATIONAL TRANSPORT WORKERS FEDERATION, <http://www.itfglobal.org/flags-convenience/flags-convenien-183.cfm> (last visited Feb. 2, 2012).

22. *Id.*

23. Hamburger & Geiger, *supra* note 6.

24. *See id.*

25. *See id.*

26. *See id.*

27. *See id.*

28. *See id.*

On June 17, 2010, BP, Transocean, and Halliburton representatives appeared at a hearing before the United States House Committee on Energy and Commerce.²⁹ At the hearing members of the House were noticeably angry with Transocean for registering the Deepwater Horizon vessel overseas.³⁰ Members of the House insinuated that Transocean did so in order to avoid United States tax liability.³¹

Mississippi Democratic Representative Gene Taylor asked, “I’m just curious, how long did it take the Marshall Islands Coast Guard to show up when that rig caught on fire, and how long did it take the Korean Coast Guard to show up?”³² Further, Minnesota Democratic Representative James Oberstar, chairman of the House Transportation Committee noted, “[m]y view after this tragedy is that we need to Americanize the vessels operating in the [United States] economic zone.”³³

The congressmen’s comments speak directly to the heart of the problem with flags of convenience. The fact of the matter is, due to Deepwater Horizon being flagged under the Marshall Islands, the Deepwater Horizon oil rig was largely outside the jurisdictional regulatory oversight of the United States.³⁴ Nonetheless, the United States bore the burden of responding to and addressing the disaster; meanwhile, Transocean saved some 1.8 billion dollars in United States tax liability by moving its legal domicile from the Houston area to the Cayman Islands and later to Switzerland.³⁵ When confronted with this information, Florida Republican Representative John Mica concluded: “I think most of us would like to see every ship that operates [in

29. *Timeline: Gulf of Mexico Oil Spill*, LONDON SOUTH EAST (Oct. 29, 2010), http://www.lse.co.uk/FinanceNews.asp?ArticleCode=xvv11q6i92hey6w&ArticleHeadline=TIME LINEGulf_of_Mexico_oil_spill.

30. Dan Froomkin, *Gulf Oil Spill: Rig Owner’s Avoidance of U.S. Jurisdiction Angers House Panel*, HUFFINGTON POST (June 17, 2010), http://www.huffingtonpost.com/2010/06/17/gulf-oil-spill-rig-owners_n_616390.html.

31. *Id.*

32. *Id.*

33. *Id.*

34. *See generally id.* (discussing the fact that the U.S. could not verify if the Deepwater Horizon oil rig met U.S. standards because it was under another country’s flag and outside the jurisdiction of the U.S.).

35. *Id.*

the Gulf of Mexico] is American flagged, American staffed and American built.”³⁶ Is the congressman’s proposal the solution to the problem of flags of convenience?

II. BACKGROUND INFORMATION

In 1958, a group of nations desiring to codify the rules of international law as related to the high seas, adopted a set of provisions that would thereafter be accepted as generally established principles of international law.³⁷ A main premise of these provisions was that any country should have access to the sea and should be able to have jurisdictional control over its own ships.³⁸ However, it was also said that a nation should carry the burden of regulating the ships over which it has jurisdictional control.³⁹ Thus, the process of registering and flagging ships was born.⁴⁰ However, it soon became apparent that this process of registering and flagging ships was ripe for exploitation.⁴¹ Unfortunately, global entrepreneurs looking to capitalize on this process sought registries that gave them a competitive advantage over their peers by offering a lower cost: a more attractive alternative than registering with a developed nation.⁴²

A. *Registering of Ships*

The United Nations Conference on the Laws of the Sea (“UNCLOS”) sets forth the rules governing the ship registration process.⁴³ This document adopted and absorbed the rules set forth in the 1958 Geneva Convention on the High Seas.⁴⁴ The

36. *Id.*

37. Convention on the High Seas, Apr. 29, 1958, 450 U.N.T.S. 11.

38. *See, e.g., id.* arts. 2, 3, 6.

39. *See, e.g., id.* arts. 4, 5.

40. *Id.* art. 5. The system of registration only applies to commercial ships, other ships, such as warships, are subject to a different registration system. N.P. READY, SHIP REGISTRATION 8–9 (1991).

41. *See* Payne, *supra* note 2, at 67.

42. *Id.* at 69.

43. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

44. *Id.* pmb1.

document came into force in 1994 when the sixtieth state, Guyana, signed the treaty.⁴⁵ Article 90 of UNCLOS provides that, “[e]very State, whether coastal or land-locked, has the right to sail ships flying its flag on the high seas.”⁴⁶ Further, Article 91 of UNCLOS provides for how ships shall be registered:

Every State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. There must exist a *genuine link* between the State and the ship.⁴⁷

Article 94 of UNCLOS establishes what the duties of the flag state once a ship is registered under their jurisdiction:

1. Every State shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag
3. Every State shall take such measures for ships flying its flag as are necessary to ensure safety at sea with regard, *inter alia*, to:
 - a. the construction, equipment and seaworthiness of ships;
 - b. the manning of ships, labour conditions and the training of crews, taking into account the applicable international instruments;
4. Such measures shall include those necessary to ensure:
 - a. that each ship, before registration and thereafter at appropriate intervals, is surveyed by a qualified surveyor of ships . . .
 - b. that each ship is in the charge of a master and officers who possess appropriate qualifications, in particular in seamanship, navigation, communications and marine engineering, and

45. *The United Nations Convention on the Law of the Sea (A Historical Perspective)* (1998), http://www.un.org/Depts/los/convention_agreements/convention_historical_perspective.htm [hereinafter *UNCLOS: A Historical Perspective*].

46. UNCLOS, *supra* note 43, art. 90.

47. *Id.* art. 91 (emphasis added).

that the crew is appropriate in qualification and numbers for the type, size, machinery and equipment of the ship;

c.that the master, officers and to the extent appropriate, the crew are fully conversant with and required to observe the applicable international regulations concerning safety of life at sea, . . . the prevention, reduction and control of marine pollution . . .⁴⁸

As shown, the flag state generally has the responsibility to ensure that everything on the registered ship is in accordance with generally accepted international standards.⁴⁹ However, every flag state does not equally adhere to the requirements of Article 94, even though part 6 states that:

A State which has clear grounds to believe that proper jurisdiction and control with respect to a ship have not been exercised may report the facts to the flag State. Upon receiving such a report, the flag State shall investigate the matter and, if appropriate, take any action necessary to remedy the situation.⁵⁰

B. What Are “Flags of Convenience”?

Generally, flags of convenience may be defined as “the flags of certain countries whose laws allow . . . and indeed, make it easy for . . . ships owned by foreign nationals or companies to fly these flags.”⁵¹ The ITF⁵² maintains a list of countries’ registries it deems to be flag of convenience style registries.⁵³ The ITF has identified thirty-two registries as flag of convenience style registries,⁵⁴ including the Republic of the Marshall Islands, the

48. *Id.* art. 94 (emphasis in original).

49. *Id.*

50. *Id.*

51. Enrico Argiroffo, *Flags of Convenience and Substandard Vessels: A Review of the ILO’s Approach to the Problem*, 110 INT’L LAB. REV. 437, 438 (1974).

52. The International Transport Workers Federation is an international trade union federation of transport workers’ unions. *About the ITF*, INTERNATIONAL TRANSPORT WORKERS FEDERATION, <http://www.itfglobal.org/about-us/moreabout.cfm> (last visited Feb. 1, 2012).

53. *FOC Countries*, *supra* note 21.

54. *Id.*

country where Deepwater Horizon was registered.⁵⁵ The ITF believes that, in accordance with UNCLOS, there should be a *genuine link* between the real owner of a vessel and the flag the vessel flies.⁵⁶ Arguably, “there is no ‘*genuine link*’ in the case of flags of convenience registries.”⁵⁷ Thirty-two countries are FOCs.⁵⁸

C. *Why Flags of Convenience?*

The creation and utilization of flags of convenience can be traced to entrepreneurs of developed countries seeking to avoid the strict regulations of those developed countries.⁵⁹ Of these regulations, some of the primary concerns for those seeking shelter under flags of convenience are “(1) easy registration of maritime vessels, (2) lower taxes, (3) reduced operating expenses, and (4) freedom of control by the country of registry.”⁶⁰

1. *Ease of Registration*

Shockingly, and in complete contrast with the UNCLOS requirement that there be a *genuine link* between a ship and its place of registry,⁶¹ many ships registered under flags of convenience have never even been to the country where they are registered.⁶² This relaxed institutional control exerted by flag of

55. *Id.*; Hamburger & Geiger, *supra* note 6.

56. *What Are Flags of Convenience?*, INTERNATIONAL TRANSPORT WORKERS FEDERATION, <http://www.itfglobal.org/flags-convenience/sub-page.cfm> (last visited Feb. 1, 2012).

57. *Id.*

58. The FOC countries are Antigua and Barbuda, Bahamas, Barbados, Belize, Bermuda (UK), Bolivia, Burma, Cambodia, Cayman Islands, Comoros, Cyprus, Equatorial Guinea, French International Ship Register (FIS), German International Ship Register (GIS), Georgia, Gibraltar (UK), Honduras, Jamaica, Lebanon, Liberia, Malta, Marshall Islands (USA), Mauritius, Mongolia, Netherlands, Antilles, N. Korea, Panama, Sao Tome and Principe, St Vincent, Sri Lanka, Tonga, and Vanuatu. *FOC Countries*, *supra* note 21.

59. H. Edwin Anderson, III, *The Nationality of Ships and Flags of Convenience: Economics, Politics, and Alternatives*, 21 TUL. MAR. L.J. 139, 158 (1996).

60. Payne, *supra* note 2, at 69.

61. UNCLOS, *supra* note 43, art. 91 (emphasis added).

62. Payne, *supra* note 2, at 69.

convenience registries over the ships registered under their jurisdictional oversight exemplifies exactly what it means to be a flag of convenience registry.⁶³

Despite the UNCLOS requirement that there be a *genuine link* between a flag state and a ship registered under its flag, international law allows ships that have never even been to the country where they are registered to legitimately fly that country's flag.⁶⁴ This loophole opens the door for entrepreneurs around the globe, looking to capitalize on this process, to seek registries that could give them a competitive advantage over their peers by offering a lower cost and more attractive alternative to registering with a developed nation.⁶⁵ It is the ability to seek out the most advantageous registry that makes flags of convenience registries so attractive.⁶⁶

2. *Lower Taxes*

Relief from United States income tax can be a motivating factor in choosing to fly a flag of convenience. However, due to accelerated depreciation, investment tax credits, and deductible interest payments under the United States federal income tax, tax avoidance has become a less influential factor in a ship-owner's decision to use a flag of convenience.⁶⁷ Nevertheless, a corporate ship registering in the United States might be subject to an income tax rate as high as 48%, whereas a ship registered outside the United States may pay nothing in United States federal income tax.⁶⁸ Ships registered outside of the United States usually only pay taxes in an annual fee measured per tonnage carried over that year.⁶⁹ This charge is usually very low when compared to United States federal income tax.⁷⁰

63. *See id.* at 69–70.

64. Payne, *supra* note 2, at 69–70.

65. *Id.* at 69.

66. *See id.*

67. *Id.*

68. *Id.*

69. Argiroffo, *supra* note 51, at 437.

70. *Id.*

3. *Reducing Operating Cost*

Reductions in operating costs are a huge motivating factor in making the decision to register under a flag of convenience.⁷¹ This motivation is even more prevalent in the United States where, generally, a ship must be built within the jurisdiction of the United States for it to be registered as a United States vessel.⁷² For the most part, a ship is cheaper to build outside rather than inside the United States.⁷³ Using a flag of convenience may also reduce the labor costs involved in ship operation.⁷⁴ The ITF is responsible for much of the labor restrictions that drove entrepreneurs to seek shelter under flags of convenience.⁷⁵ The ITF hoped that by issuing crewing mandates they could increase maritime employment among developed countries.⁷⁶ The mandates, however, actually had the opposite effect.⁷⁷ As a result of the mandates, entrepreneurs began to seek crews from less developed countries where labor was cheaper and registering a ship was less burdensome.⁷⁸ Furthermore, those seeking to register in a flag of convenience registry are also able to take advantage of the lack of unionization in many flag of convenience countries when looking to further reduce labor costs.⁷⁹

4. *Freedom from Control*

Given that the vast majority of flag of convenience countries are classified as either developing or third-world states,⁸⁰ the

71. Payne, *supra* note 2, at 70–72.

72. 46 U.S.C.A § 12118(e)(2) (West Supp. 1981).

73. John Kifner, *Liberia: A Phantom Maritime Power Whose Fleet is Steered by Big Business*, N.Y. TIMES, Feb. 14, 1977, at 14.

74. *Id.*

75. See generally HERBERT R. NORTHRUP & RICHARD L. ROWAN, THE INTERNATIONAL TRANSPORT WORKERS' FEDERATION AND FLAG OF CONVENIENCE SHIPPING 31–41(1983).

76. *Id.*

77. David Matlin, *Note, Re-evaluating the Status of Flags of Convenience Under International Law*, 23 VAND. J. TRANSNAT'L L. 1017, 1050–51 (1991).

78. *Id.*

79. *Our Ship, Their Flag*, THE ECONOMIST, Mar. 12, 1977, at 81.

80. Payne, *supra* note 2, at 72.

relative freedom of control when compared with developed countries is a huge motivating factor in choosing to register in a flag of convenience registry.⁸¹ Flag of convenience registries rarely have the economic means and motivation to police and regulate ships under their jurisdictional control.⁸² Many times, because these countries lack the economic means to adequately regulate their fleets, flag of convenience countries contract out regulatory responsibilities to private contractors.⁸³ In fact, UNCLOS specifically allows this practice⁸⁴, although it seems to be in stark contrast with the UNCLOS requirement that ships maintain a *genuine link*⁸⁵ to their countries of registry.⁸⁶

The prevalence of this practice raises the question of whether these private firms are doing an adequate job of regulating flag of convenience fleets or whether they are regulating these fleets at all.⁸⁷ Representative Gene Taylor posed this question to Coast Guard Admiral Kevin Cook: “I’m just curious, given the amount of corruption around the world . . . what guarantee do you have that they actually performed those safety inspections before the Coast Guard signed off on them?”⁸⁸

This concern is twofold given the size and power of some multinational corporations compared to the countries where they register their ships.⁸⁹ For example, the money Liberia collects in ship registration fees alone amounts to 8% of its gross national product.⁹⁰ For context, Exxon’s Marshall Islands flagged oil tanker, Exxon-Valdez, infamously ran aground in Prince William Sound, triggering one of the largest oil spills in history.⁹¹ In 2009, Exxon reported over one hundred billion

81. Payne, *supra* note 2, at 72; Argiroffo, *supra* note 51, at 438.

82. Argiroffo, *supra* note 51, at 438.

83. Froomkin, *supra* note 30.

84. UNCLOS, *supra* note 43, art. 153 (emphasis added).

85. *Id.* art. 91.

86. Froomkin, *supra* note 30.

87. *Id.*

88. *Id.*

89. Payne, *supra* note 2, at 72.

90. *Id.*

91. Elizabeth Bluemink, *Size of Exxon Spill Remains Disputed: Bigger than the*

dollars in revenue.⁹² This figure would make Exxon larger than all but thirty-eight of the world's economies.⁹³ By contrast, Liberia had a GDP of just 986 million dollars in 2010,⁹⁴ less than one-tenth of Exxon's reported revenue in 2005.⁹⁵

Given the disparate wealth between some of the largest multinational corporations and the countries where those corporations often register their ships, those wishing to register their ships in flag of convenience registries face an environment in which regulation is structurally discouraged and intentionally favorable.⁹⁶

III. WHAT IS THE SOLUTION?

As the United States begins to deal with the terrible tragedy of the Deepwater Horizon explosion and the resulting oil spill⁹⁷, questions are being asked about how to avoid similar future disasters.⁹⁸ While the role that Transocean's use of a flag of convenience had in this disaster remains unclear, the fact still remains that there was a lack of regulation on a ship that potentially posed such a serious risk to the United States economy and to the global environment.⁹⁹

Gulf? Accuracy of Estimate for 1989 Slick is Questioned, ANCHORAGE DAILY NEWS, June 10, 2010, <http://www.adn.com/2010/06/05/1309722/size-of-exxon-spill-remains-disputed.html>

92. Matt Krantz, *Big Oil Tanks Up: Exxon's Profit Nears \$10B*, USA TODAY, Oct. 27, 2005, http://www.usatoday.com/money/companies/earnings/2005-10-27-xom_x.htm.

93. *Id.*

94. *World Development Indicators*, WORLD BANK (2010), available at http://data.worldbank.org/data-catalog/world-development-indicators?cid=GPD_WDI.

95. Krantz, *supra* 92. (This figure was arrived at by comparing the GDP of Liberia in 2010 with the gross revenue of Exxon in 2005).

96. See Anderson, *supra* note 59, at 158–60 (discussing the economic reasons behind the creation of open registries and flags of convenience due to large multinational corporations seeking less regulation by turning to less wealthy countries for ship registration).

97. See Campbell Robertson, *Beyond the Oil Spill, the Tragedy of an Ailing Gulf*, N.Y. TIMES, Apr. 20, 2011, <http://www.nytimes.com/2011/04/21/us/21spill.html> (discussing the United States and the oil industry's reactions to the gulf coast oil spill and addressing questions about what, if anything, should be done next).

98. See Froomkin, *supra* note 30.

99. See Hamburger & Geiger, *supra* note 6.

This paper aims to help answer some of the questions about how to deal with such situations and what can be done to insulate ourselves from further tragedy.

In the succeeding pages, the following issues are elaborated: (1) the removal of oil rigs from the definition of “ships,” (2) the CLEAR Act, and (3) the strengthening and restoring the requirement of a *genuine link*,¹⁰⁰ as well as how all three issues can be used together to help ensure that flags of convenience do not pose serious risk to the international community in the future. Through new, innovative requirements for ship registration, similar future disasters may be avoided.

A. *Remove Oil Rigs from the Definition of “Ships”*

The first possible solution to the problem of flags of convenience could be to separate oil rigs, like the Deepwater Horizon rig, from the generally accepted definition of “ships” within international law.¹⁰¹ The reason that oil rigs are included in the discussion of flags of convenience is because under current international law the term “ships” includes oil rigs.¹⁰² However, should oil rigs be treated differently than ships under international law?

The Deepwater Horizon oil rig exploded on April 20, 2010 and consequently triggered a massive oil spill that could not be stopped until July 15, 2010, three months later.¹⁰³ What resulted was an oil spill at least four times larger, and according to some estimates as much as six times larger, than the worst oil tanker spill in United States history, the Exxon-Valdez spill.¹⁰⁴ Coupled with the increase in the amount of spilt oil was an

100. UNCLOS, *supra* note 43, art. 91.

101. *See supra* text accompanying note 1.

102. *See* RENE JEAN DUPUY & DANIEL VIGNES, A HANDBOOK ON THE NEW LAW OF THE SEA 841–42 (1991) (referring to floating platforms).

103. *See No Oil Leaking as BP Conducts Critical Pressure Tests in Gulf Oil Well*, *supra* note 9.

104. Dan Shapley, *So How Big Was the BP Oil Spill?*, THE DAILY GREEN (Sept. 21, 2010), <http://www.thedailygreen.com/environmental-news/latest/bp-oil-spill-size-0528> (stating that independent estimates indicate the BP spill released 185 million gallons of oil not including 33.8 million gallons that BP captured compared to 30 to 35 million gallons spilled in the Exxon Valdez accident).

increase in the economic cost of the disaster.¹⁰⁵ Exxon spent over 3.8 billion dollars to clean up the spill site, compensated over eleven thousand affected residents, and paid fines assessed against the company.¹⁰⁶ While a completely accurate comparison of total liabilities between the Exxon-Valdez oil spill and the Deepwater Horizon oil spill will not be possible until many years after the publication of this paper, at least one scientist projects BP's potential liability will be upwards of 100 billion dollars.¹⁰⁷ Some analysts are so astounded by the potential liability that they fear BP might collapse under the burden of such a large liability.¹⁰⁸ If this happens, United States taxpayers could be stuck footing the bill of one of the most catastrophic environmental disasters in history.¹⁰⁹

Part of the difference in total liability between the Exxon-Valdez oil spill and the Deepwater Horizon oil spill could be explained by the fact that Deepwater Horizon was an oil rig while Exxon-Valdez was an oil tanker.¹¹⁰ Oil rigs, when

105. This was found by comparing the total liabilities of the Exxon-Valdez oil spill and comparing it with the projected liabilities of the Deepwater Horizon oil spill. Susan Lyon & Daniel J. Weiss, *Oil Spills by the Numbers—The Devastating Consequences of Exxon Valdez and BP Gulf*, CENTER FOR AMERICAN PROGRESS (Apr. 30, 2010), http://www.americanprogress.org/issues/2010/04/oil_numbers.html; Rowena Mason, *BP's Gulf of Mexico Oil Spill Bill Could Hit \$60bn, Moody's Warns*, TELEGRAPH, Apr. 20, 2011, <http://www.telegraph.co.uk/finance/newsbysector/energy/oilandgas/8462057/BPs-Gulf-of-Mexico-oil-spill-bill-could-hit-60bn-Moodys-warns.html>; Alex Spillius, *BP Oil Spill Could Cost \$100bn*, TELEGRAPH, June 18, 2010, <http://www.telegraph.co.uk/finance/newsbysector/energy/oilandgas/7836982/BP-oil-spill-could-cost-100bn.html>.

106. Lyon & Weiss, *supra* note 105.

107. Spillius, *supra* note 105.

108. *See id.*

109. *See generally* Edmund L. Andrews, *BP Oil Spill: Taxpayers Could Pay Billions in Damages*, THE FISCAL TIMES (May 14, 2010), <http://www.thefiscaltimes.com/Articles/2010/05/14/BP-Oil-Spill-Taxpayers-Could-Pay-Billions-in-Damages.aspx#page1> ("Taxpayers could be on the hook for billions of dollars from BP's still-gushing spill in the Gulf of Mexico.")

110. *See generally* Steven F. Hayward & Kenneth P. Green, *The Dangers of Overreacting to the Deepwater Horizon Disaster*, in 1 American Enterprise Institute Energy and Environment Outlook 2 (2010), available at <http://www.aei.org/files/2010/06/14/01-2010-EEO-g.pdf> (noting how perceptions between tanker and rig spills are different because of the finite amount of oil on board a tanker compared to the indeterminate amount associated with a rig).

compared to oil tankers, pose exponentially greater risks.¹¹¹ Thus the question, why are oil rigs considered to be “ships” under international law when they can pose such wildly different risks?

A definition of “ship” is neither given by the 1982 Convention nor the Geneva Conventions.¹¹² These definitions are to be found in several different multilateral conventions.¹¹³ Yet, these definitions only give a rough or approximate indication of what a “ship” is according to international law.¹¹⁴ The 1954 London Convention on the Prevention of Pollution of the Sea and the 1973 London Convention on Oil and Prevention of Pollution from Ships include in their definition of “ship” both fixed and floating platforms.¹¹⁵ Furthermore, the 1972 London Convention on the International Regulations Preventing Collisions at Sea uses the word “vessel” as a replacement for “ship” and defines vessel as “. . . every description of water craft, including non-displacement craft and seaplanes used or capable of being used as a means of transportation on water.”¹¹⁶ Thus, these definitions, when taken together, would seem to say that any occupied object found on the open sea would qualify as a “ship.”¹¹⁷

111. Myles Spicer, *Gulf Oil Drilling Has High Risk, Too Little Reward*, MINNPOST (May 7, 2010), <http://www.minnpost.com/community-voices/2010/05/gulf-oil-drilling-has-high-risk-too-little-reward>.

112. DUPUY & VIGNES, *supra* note 102, at 841.

113. *Id.*

114. *Id.*

115. *Id.*; International Convention for the Prevention of Pollution of the Sea by Oil art. III, May 12, 1954, 327 U.N.T.S. 3 (including floating platforms by not listing them under excluded ships); International Convention on the Prevention of Marine Pollution by Dumping Wastes and Other Matter, art. IIIIII, Dec. 29, 1972, 26 U.S.T. 2403, 1045 U.N.T.S. 140.

116. *See* International Convention for the Prevention of Pollution of the Sea by Oil, May 12, 1954, 327 U.N.T.S. 3 (including floating platforms in the definition of ships by not listing them under excluded ships); International Maritime Organization, Convention on the International Regulations for Preventing Collisions at Sea, Oct. 20, 1972, 28 U.S.T. 3459, 1050 U.N.T.S. 16.

117. DUPUY & VIGNES, *supra* note 102, at 842 (stating that both the word “ship” and the word “vessel” may be understood to mean “any object or device found in the seas and connected to a State by a link such that that State can claim to exclude interference by other States . . . [and that such] a link [may be created] by the flying of a flag . . . [or]

This definition is complicated by the fact that in the economic zone and on the continental shelf, the coastal state is recognized as having exclusive jurisdiction.¹¹⁸ Given this fact, the area occupied by the ship, whether it is on the high seas, in an economic zone, or on the continental shelf, is crucial.¹¹⁹ Coastal nations are protected from oil rigs on their continental shelf or in their economic zones from flying flags of convenience.¹²⁰

As shown above, the difference between ships and oil rigs can be huge in terms of potential liability and potential for economic damages in the event of a disaster.¹²¹ Thus, this paper proposes that instead of relying upon a loose definition of “ship,” the term “ship” should be defined in an international agreement. A definition for the term “ship” should be limited to what has traditionally been referred to as a ship and thus, exclude oil rigs. In another definition, the agreement should define oil rig, further differentiating oil rig from a “ship.” In doing this, the international community would be able to set different rules regarding the regulation of oil rigs. This division would then allow the international community to place higher safety restrictions on oil rigs, keeping the safety restrictions in line with the difference in potential liability and economic damages between ships, like oil tankers, and oil rigs, like the Deepwater Horizon.

Should the definition of an “oil rig” ever be separated from the definition of “ship,” the new safety regulations that would go along with the new definition should reflect the unique liability and safety concerns that go along with oil rigs. The international community should move to require those who register oil rigs under their flag to have the ability to regulate and assume responsibility for coordinating rescue and cleanup operations in large scales should any accident occur.

by the fact of registration . . . and even situations of actual control”).

118. *See id.*

119. *See generally id.* (noting that the concept of ships and their connection to states may be affected by the zone the ships occupy).

120. *See id.*

121. *See supra* text accompanying note 115–17.

B. Eliminate Open Registries Altogether or Make Countries Have to Apply to Get Approval to Register Ships

While separating oil rigs from the definition of “ships” under international law would provide a useful solution to the problem of flags of convenience, another possible solution to the flags of convenience problem is eliminating registries known as “open registries,” i.e. those registries whose laws permit and make it easy for ships owned by foreign nationals or companies to fly their flags.¹²² More often than not, the title “flag of convenience registry” is synonymous with that of “open registry.”¹²³

Open registry states tend to not require that the entity seeking to fly its flag have any real connection to the flag state; other registries require demonstration that the ship owner demonstrate a percentage of equity in the entity owned by a citizen of the flag state, national managers (director, chair of board), national office (locations), and percentage of national crew.¹²⁴ Shockingly, this practice of flag states having little to no relation to the ships in its registry runs counter to generally accepted international standards.¹²⁵ Specifically, UNCLOS states that “[t]here must exist a *genuine link* between the state and the ship.”¹²⁶

Compare this practice with the practice of what are known as “closed registries,”—i.e., those registries that place great emphasis on the ship and the flag state maintaining a *genuine link*—and the difference is astounding.¹²⁷ For example, the United States, as a closed registry, subjects those wishing to

122. See generally K.X. Li & J. Wonham, *Registration of Vessels—New Developments in Ship Registration*, 14 INT’L J. MARINE & COASTAL L. 137, 139–46 (1999) (describing, defining, and providing examples of the terms “flags of convenience” and “open registry”).

123. See, e.g., Anderson, *supra* note 59, at 156–57 (indicating that flags of convenience are in fact an element of open registries).

124. See *id.* at 151–56 (comparing the differences between open and closed registry by examining the ship requirements in several major registries including the United States and the United Kingdom).

125. See *Lowering the Flag*, ENVIRONMENTAL JUSTICE FOUNDATION, <http://www.ejfoundation.org/page164.html> (last visited Apr. 6, 2012).

126. UNCLOS, *supra* note 43, art. 91 (emphasis added).

127. See Li & Wonham, *supra* note 122, at 146–49.

register their vessels under the United States flag to standards that greatly exceed open registry requirements.¹²⁸

For a ship to qualify for registration in the United States ship registry and fly the flag of the United States, that ship must adhere to much stricter guidelines for maintaining a *genuine link* than if the ship had been registered in an open registry state like the Marshall Islands.¹²⁹ To be a U.S. flagged ship, the United States requires that the ship: be owned by an entity which is greater than fifty percent owned by United States citizens; be owned by an entity in which a majority of the national directors (i.e. board members, directors, chairs, etc.) are citizens of the United States; be owned by an entity in which its principal place of business is in the United States; and be manned by officers from the United States and be crewed by a crew in which at least seventy-five percent of the members are United States citizens.¹³⁰

Despite the vast differences in what flag states require of the ship registered under their flag,¹³¹ as it stands now, under international law each nation is allowed to independently determine the requirements to which ships must adhere to before being allowed to register.¹³² This generally accepted principal of international law was first recognized in the *Muscat Dhows Case*.¹³³ In *Muscat Dhows*, the foreign court held that “generally speaking it belongs to every foreign sovereign to decide whom he will accord the right to fly his flag and to prescribe the rules governing such grants.”¹³⁴ This principle was then adopted by the United States Supreme Court in the case of *Lauritzen v. Larsen*, in which the Court stated:

128. *Id.* at 147–49 (comparing the very minimal links between flag country and ownership of the vessel in open registry systems and the detailed links required by the U.S. registry).

129. *Id.* at 139–49 (listing the Marshall Islands as an open registry nation while listing the United States as a closed registry system).

130. *Id.* at 148–49.

131. *See generally id.* at 139–49 (describing the different registry systems used throughout the world).

132. *Id.* at 137.

133. *Muscat Dhows (Fr. v. Gr. Brit.)*, Hague Ct. Rep. (Scott) 93, 96 (Perm. Ct. Arb. 1916).

134. *Id.*

Each State under international law may determine for itself the conditions on which it will grant its nationality to a merchant ship, thereby accepting responsibility for it and acquiring authority over it. Nationality is evidenced to the world by the ship's papers and its flag. The United States of America has firmly and successfully maintained that the regularity and validity of a registration can be questioned only by the registering state.¹³⁵

The principle that only the flag state may dispute the validity of the registration, however, was modified when it was incorporated into the 1958 Geneva Conventions on the High Seas.¹³⁶ According to the 1958 Geneva Convention on the High Seas, there must be a *genuine link* between the ship and the flag state.¹³⁷ This *genuine link* language was then further incorporated into UNCLOS:

Every State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. There must exist a *genuine link* between the State and the ship.¹³⁸

The language that there must be a *genuine link* between the flag state and the ship was included by the international community in an effort to police so-called open registries that were registering ships with virtually no relation to the flag state other than the documentation of the registration and the physical presence of the flag flying on the ship.¹³⁹ However, regardless of the aims of the various conventions, the ability of each state to set its own requirements for ship registration

135. *Lauritzen v. Larsen*, 345 U.S. 571, 584 (1953).

136. See Li & Wonham, *supra* note 122, at 137–38 (discussing how the Geneva Convention moved away from the absolute principle in *Lauritzen* and established the principle that there must be a genuine link between ship and state).

137. *Id.* at 139–40.

138. UNCLOS, *supra* note 43, art. 91 (emphasis added).

139. See Li & Wonham, *supra*, note 122, at 137–38 (describing the goals of several conventions to increase the link between ships and their flag states, which would effectively eliminate open registries and flags of convenience).

remains unchallenged.¹⁴⁰ In an advisory opinion of the International Court of Justice (ICJ) on the Constitution of the Maritime Safety Committee of the International Maritime Consultative (now referred to as the International Maritime Organization) further affirmed the legal standing of an open registry.¹⁴¹ The legality of open registries, as they stand now, cannot be challenged.¹⁴²

However, when taking into account the catastrophic consequences, both monetarily and environmentally, of the recent developments in the Gulf of Mexico¹⁴³ and the ensuing lack of response by the Marshall Islands, there is good reason to consider strengthening the requirement of a *genuine link* between the flag state and the flagged ship.¹⁴⁴

The Marshall Islands, as the flag state for the Deepwater Horizon oil rig, were the ones benefiting from the operation of the rig, yet the Marshall Islands had no involvement when disaster struck.¹⁴⁵ If the United States had been the flag state of Deepwater Horizon, the United States could have benefited from the labor and the tax dollars that Deepwater Horizon would have provided.¹⁴⁶ Furthermore, the United States was the country most well equipped, at least within the area, to deal with the disaster and respond to any problems.¹⁴⁷ Also, had the

140. Li & Wonham, *supra* note 122, at 138.

141. *Id.*; See also Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization, Advisory Opinion, 1960 I.C.J. 150 (June 8) (noting that registration with a specific state was enough to qualify a ship under its flag state).

142. *Maritime Transport 1992*, OECD (1993).

143. Spillius, *supra* note 105 (monetary damage); David Biello, *Lasting Menace: The Deepwater Horizon Spill's Unwelcome Legacy*, SCIENTIFIC AMERICAN, June 1, 2009, <http://www.scientificamerican.com/article.cfm?id=lasting-menace> (environmental damage).

144. Froomkin, *supra* note 30; see generally Hamburger & Geiger, *supra* note 6 (noting how the U.S. inspection regulations may have prevented the disaster while the Marshall Islands regulations failed).

145. Froomkin, *supra* note 30, at 1.

146. See Payne, *supra* note 2, at 69–74 (explaining the benefits of FOCs to both ships and their flag nations).

147. See generally NAT'L COMM'N ON THE BP DEEPWATER HORIZON OIL SPILL AND OFFSHORE DRILLING, REPORT TO THE PRESIDENT 129–70 (describing the response from myriad federal and state agencies).

United States been the flag state for Deepwater Horizon, the more stringent requirements that would have been placed on the rig by the United States might have prevented the disaster in the first place.¹⁴⁸

The Geneva Conventions and UNCLOS were aimed at strengthening the bond between flag state and ship, yet their aims were never met.¹⁴⁹ The international community is still holding onto the principle set forth in the *Muscat Dhows Case*, decided back in 1916, that every nation can decide the requirements for ships that will fly its flag.¹⁵⁰

This antiquated notion should not remain today. The potential consequences stemming from a lack of regulation in 1916 pale in comparison to the consequences that face the world today.¹⁵¹ No longer can international law advocate a country's right to have open access to the seas regardless of the country's ability to take responsibility for any potential liability it may face; the risks are too great.¹⁵² The Deepwater Horizon disaster resulted in roughly 200 million gallons of unadulterated crude oil being spilled into the Gulf of Mexico.¹⁵³ The drafters of the decision in 1916 could not have foreseen the consequences that could result from a disaster of this magnitude.¹⁵⁴

148. Hamburger & Geiger, *supra* note 6 (explaining that the command structure that led to the disaster would not have been permitted if the ship were under a U.S. flag).

149. See generally Li & Wonham, *supra* note 122, at 138 (noting that the attempt to require a *genuine link* between ship and flag state has not been successful).

150. *Muscat Dhows (Fr. v. Gr. Brit.)*, Hague Ct. Rep. (Scott) 93, 96 (Perm. Ct. Arb. 1916); see also Lee & Wonham, *supra* note 122, at 148.

151. See Barney T. Levantino, *Protection of the High Seas from Operational Oil Pollution: A Proposal*, 6 *FORDHAM INT'L L.J.* 72, 72-73 (1982); Rose George, *Flying the Flag, Fleeing the State*, *N.Y. TIMES* (Apr. 24, 2011), http://www.nytimes.com/2011/04/25/opinion/25george.html?_r=1&pagewanted=print; see Timo Koivurova & Kamrul Hossain, *Offshore Hydrocarbon: Current Policy in the Marine Arctic* 13-20 (2008), available at <http://artic-transform.org/download/OffHydBP.pdf>.

152. See *id.* at 3-4, 20-28 (discussing the current state of international law with regards to sovereign rights over offshore hydrocarbon resources).

153. Joel Achenbach & David Fahrenthold, *Oil Spill Dumped 4.9 Million Barrels into Gulf of Mexico, Latest Report Shows*, *WASH. POST*, Aug. 3, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/08/02/AR2010080204695_pf.html.

154. See generally History of Offshore Oil and Gas Development in Louisiana, *BUREAU OF OCEAN ENERGY MANAGEMENT*, Feb. 2, 2012, <http://www.gomr.boemre>.

Thus, the time is now to move past the notion that a state may only question the validity of its own registry,¹⁵⁵ and move towards a system that holds countries accountable for the regulation of ships that have the capability of bringing entire ecosystems to their knees if not correctly operated.¹⁵⁶

C. *The CLEAR Act*

Lastly, and perhaps the best and most realistic of the potential solutions to the problem of flags of convenience, is the Consolidated Land, Energy, and Aquatic Resources Act of 2009, otherwise known as the CLEAR Act.¹⁵⁷ The CLEAR Act, sponsored by Representative Nick Rahall (D-WV),¹⁵⁸ was billed as the House of Representatives legislative response to the gulf oil spill.¹⁵⁹ The CLEAR Act passed the House by a vote of 209 for, 193 against, and 31 not reporting.¹⁶⁰ The CLEAR Act requires that all ships involved in exploration, development, and production activities in the United States' exclusive economic zone (hereinafter "EEZ"),¹⁶¹ be United States flagged ships.¹⁶²

gov.homepg/regulate/envIRON/louisiana_coast.html.

155. *Muscat Dhows (Fr. v. Gr. Brit.)*, Hague Ct. Rep. (Scott) 93, 96 (Perm. Ct. Arb. 1916).

156. *See generally id.* (stating that "[e]very sovereign may decide whom it will accord the right to fly its flag and to prescribe the rules governing its use . . ."); Spillius, *supra* note 105 (explaining that while BP's chief executive Tony Hayward could take "golden parachute back to England, we in America are left to recover for years from the disaster").

157. *See* Consolidated Land, Energy, and Aquatic Resources Act, H.R. Res. 3534, 111th Cong., 2d Sess. (2010), <http://www.govtrack.us/congress/bill.xpd?bill=h111-3534>.

158. *Id.*

159. *See id.* § 501; David Karas, *Holt Reintroduces Big Oil Bailout Prevention Act*, NJ.COM, Jan. 28, 2011, <http://www.nj.com/news/times/regional/index.ssf?base/news-22/1296197167310560.xml&coll=5>.

160. *See* House Vote On Passage: H.R. 3534 [111th]: Consolidated Land, Energy, and Aquatic Resources Act, <http://www.govtrack.us/congress/vote.xpd?vote=h2010-513>.

161. "The exclusive economic zone is an area beyond and adjacent to the territorial sea, subject to the specific legal regime established in this Part under which the rights and jurisdiction of the coastal State and the rights and freedoms of other States are governed by the relevant provisions of this Convention." UNCLOS, *supra* note 43, art. 55. "The exclusive economic zone shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured." *Id.* art. 57.

162. *See* Consolidated Land, Energy, and Aquatic Resources Act, H.R. Res. 3534, 111th Cong., 2d Sess. § 709(a)(1) (2010), <http://www.govtrack.us/congress/bill.xpd?bill=>

This act would include Mobile Offshore Drilling Units (MODUs), like the Deepwater Horizon rig.¹⁶³ This requirement would require all ships involved in exploration, development, and production within the United States' EEZ be: owned by an entity which is greater than fifty percent owned by United States citizens; owned by an entity in which a majority of the national directors (i.e. board members, directors, chairs, etc.) are citizens of the United States; owned by an entity in which its principal place of business is in the United States; and be manned by officers from the United States and crewed by a crew in which at least seventy-five percent of the members are United States citizens.¹⁶⁴

1. *Current Regulatory Structure of the Exclusive Economic Zone Without the CLEAR Act*

Under UNCLOS Article 56, a country has special powers over waters considered to be within its EEZ.¹⁶⁵ These powers go above and beyond those provided under international law for ships traveling on the high seas.¹⁶⁶ Currently, Article 56 of UNCLOS provides for the rights, jurisdiction, and duties of the coastal State in the EEZ:

1. In the exclusive economic zone, the coastal State has:
 - a. sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds;
 - b. jurisdiction as provided for in the relevant

h111-3534.

163. *See id.* § 710(2).

164. *See id.* § 709(a)(1); Li & Wonham, *supra* note 122, at 148.

165. *See* UNCLOS, *supra* note 43, art. 56.

166. *Compare id.* (defining the rights of States to explore, exploit, conserve and manage natural resources), *with* Convention on the High Seas, Apr. 29, 1958, 450 U.N.T.S. 11 (describing the freedom of States to navigate, fish, lay submarine cables and pipelines and fly over the high seas).

provisions of this Convention with regard to:

- i.the establishment and use of artificial islands, installations and structures;
 - ii.marine scientific research;
 - iii.the protection and preservation of the marine environment;
- c.other rights and duties provided for in this Convention.

2.In exercising its rights and performing its duties under this Convention in the exclusive economic zone, the coastal State shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of this Convention.¹⁶⁷

Further, Article 57 of UNCLOS provides the EEZ to “. . . not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.”¹⁶⁸

Under current international law the United States can use its powers under UNCLOS to, for the most part, exclude others from operating within its EEZ.¹⁶⁹ However, the United States has increased approvals for drilling permits in its EEZ, rather than exercising its right to exclude others from operating within its EEZ.¹⁷⁰ Before the Deepwater Horizon disaster, the United States routinely issued permits to both domestic and foreign companies seeking to operate with the United States' EEZ.¹⁷¹ Included in this permitting process was the requirement that those having a permit to operate must adhere to United States safety regulations, as well as acquiesce to any inspections of said safety equipment.¹⁷²

167. UNCLOS, *supra* note 43, art. 56.

168. *Id.* art. 57.

169. *See id.* art. 58 (outlining special exceptions to allow for other states to engage in overflight, navigate, lay submarine cables, and to lay pipelines in another state's exclusive economic zone).

170. *See Offshore Drilling Poised to Expand, but Transparency Still Lags*, 12 OMB WATCH 6, Mar. 8, 2011, available at <http://www.ombwatch.org/files/Watcher/march82011.pdf>.

171. *See id.*

172. *Id.*

Nonetheless, as a response to the Deepwater Horizon disaster, Secretary of the Interior Ken Salazar issued a blanket moratorium on deep-water drilling in the Gulf of Mexico.¹⁷³ Even though this moratorium has since been overturned by U.S. District Judge Martin L.C. Feldman,¹⁷⁴ this move by Salazar represents the power the United States has over operations within its EEZ. Under current law, there is no requirement that those applying to drill within the United States' EEZ use United States flagged vessels in their operation.¹⁷⁵ However, with the proposal of the CLEAR Act, that could change.¹⁷⁶

2. *Arguments For and Against the CLEAR Act*

The CLEAR Act would essentially put the entire development and production process occurring in the United States' EEZ solely into United States regulatory control.¹⁷⁷ Thus, all ships involved in development and production processes occurring within the United States EEZ would be subject to United States oversight and safety regulations.¹⁷⁸ This control would greatly increase the likelihood that ships moving in the vicinity of the United States were operating under the United States' standards for safety regulation. Furthermore, in addition to putting control back into the relatively capable (when compared with that of flags of convenience states) hands of the United States government, this move would increase the United States labor involvement and divert more taxes into the hands of the United States government, which would both work

173. See Charlie Savage, *Drilling Ban Blocked; U.S. Will Issue New Order*, N.Y. TIMES, June 23, 2010, at A1.

174. See *id.*

175. See generally Capt. Kelly Sweeney, *Mobile Offshore Drilling Units in Gulf Should be U.S.-Flagged*, PROFESSIONAL MARINER (Sept. 2010), <http://professionalmariner.com/ME2/dirmod.asp?sid=&nm=&type=Publishing&mod=Publications%3A%3AArticle&mid=8F3A7027421841978F18BE895F87F791&tier=4&id=E541FCAFC2DF437A8F62782E274D9428> (discussing the fact that the Deepwater Horizon rig was foreign-flagged and within regulations).

176. See CLEAR Act, H.R. Res. 3534, 111th Cong., 2d Sess. § 709(e) (2010), <http://www.govtrack.us/congress/bill.xpd?bill=h111-3534>.

177. See *id.*

178. See *id.*; UNCLOS, *supra* note 43, art. 58.

to benefit the United States economy.¹⁷⁹

However, the CLEAR Act is not without its detractors.¹⁸⁰ Detractors of the CLEAR Act believe that, *inter alia*, the requirement that all ships involved in exploration, production, and development activities be United States flagged vessels would result in a shortage of ships.¹⁸¹ Detractors believe that this shortage of ships could lead to an increase in prices and a decrease in global involvement.¹⁸² However, this would only be a short-term problem.¹⁸³ Initially, there would be a shortage; ships would be forced to reflag, or the United States would be forced to build more ships.¹⁸⁴ But, once ships were either reflagged or built from scratch, there would no longer be a shortage and the fleet of foreign flag vessels would be replaced with a fleet of United States flag vessels, further contributing to the economy of the United States as well as increasing safety in the seas adjacent to the United States.¹⁸⁵

179. See Argiroffo, *supra* note 51, at 439–40; HERBERT R. NORTHRUP & RICHARD L. ROWAN, THE INTERNATIONAL TRANSPORT WORKERS' FEDERATION AND FLAG OF CONVENIENCE SHIPPING (1983).

180. See IMPACTS OF PROPOSED LEGISLATION THAT WOULD CURTAIL THE USE OF FOREIGN FLAGGED VESSELS AND FOREIGN BUILT FACILITIES IN OFFSHORE ENERGY ACTIVITIES, http://www.iadc.org/offshore_GOM_reform/documents/Americanization-white-paper-July-28-Final-with-logos.pdf [hereinafter IMPACTS OF PROPOSED LEGISLATION](opposing the CLEAR Act by Energy API, the International Association of Drilling Contractors, the International Association of Geophysical Contractors, U.S. Oil & Gas Association, the Offshore Operators Committee, and IPAA).

181. See *id.* at 1–2.

182. See *id.* at 3.

183. See generally *Maersk Line Limited Completes Heavy-Lift Vessel Reflagging*, MARINELOG.COM, http://www.marinelog.com/index.php?option=com_content&view=article&id=1771:2012jan00103&catid=1:latest-news&Itemid=107 (noting that “[e]xpansion of the U.S. flag multipurpose fleet benefits project businesses); Andrew Swiger, Senior Vice President, Exxon Mobil Corporation, Speech in Philadelphia for the Newbuild Contract Commitment (Sept. 29, 2011) (celebrating the Newbuild Contract for new U.S. flag ships that will fuel the economy), available at http://www.exxonmobil.com.qa/Corporate/news_speeches_20110929_aps.aspx.

184. See generally IMPACTS OF PROPOSED LEGISLATION, *supra* note 180, at 1–3 (stating that the vast majority of ships currently working in the Gulf of Mexico are foreign-flagged).

185. See Swiger, *supra* note 183 (celebrating the Newbuild Contract for new U.S. flag ships that will fuel the economy); Sweeney, *supra* note 175 (stating that it would be safer if every mobile offshore drilling unit was U.S.-flagged and under the command of a

Additionally, CLEAR Act critics also argue that requiring all ships within the United States' EEZ involved in exploration, production, and development activities to be United States flagged would not increase safety because the United States Coast Guard already has jurisdiction to inspect all ships operating within the United States' EEZ.¹⁸⁶ However, this is untrue; the CLEAR Act goes much further than just requiring inspections to be conducted by the United States.¹⁸⁷ The CLEAR Act would make it possible for the United States to be primarily responsible in the regulation of ships involved in exploration, productions, and development from the very beginning, prior to operation.¹⁸⁸

The United States would not only have the ability to inspect the ships, but the United States would also have the ability to regulate the safety requirements of the equipment manufacturing process because the ships would have to be built within the United States absent a granting of waiver by the Department of Interior.¹⁸⁹ This enhanced control would serve to increase safety not only within the United State's' EEZ, but to the world as ships manufactured within the United States sail abroad.¹⁹⁰ Further, the United States could regulate the working conditions of those aboard the ships because the requirements of United States flagging would require the crew to be made up of at least 75% United States citizens.¹⁹¹

If the CLEAR Act were to be implemented, the requirement that ships operating within the United States EEZ be one-hundred percent officered by United States citizens and be seventy-five percent crewed by United States citizens would probably draw a significant amount of backlash from foreign companies.¹⁹² This requirement would essentially force foreign

licensed captain).

186. UNCLOS, *supra* note 43, art. 73.

187. CLEAR Act, H.R. Res. 3534, 111th Cong. (2010), *available at* <http://www.govtrack.us/congress/bill.xpd?bill=h111-3534>.

188. *Id.* §§ 203, 208.

189. *Id.* § 220.

190. *Id.* § 221(c)(2).

191. Li & Wonham, *supra* note 122, at 148.

192. Impacts of Proposed Legislation, *supra* note 180, at 1.

companies to operate with effectively all American crews.¹⁹³ Having an entirely American crew would be especially burdensome to those foreign countries who might maintain a cheaper labor force if they were allowed to crew their vessels with nationals from their own country.¹⁹⁴ Further, this might make maintaining operations within the United States' EEZ very difficult for foreign companies as they would have to communicate and do business with an essentially all American crew.¹⁹⁵ Detractors believe that such a requirement might effectively block off the portion of the Gulf of Mexico lying within the United States' EEZ to all foreign companies.¹⁹⁶

Nonetheless, requiring that all ships within the United States' EEZ involved in exploration, production, and development activities to be United States flagged ships would allow the United States to have greater control over regulation, would divert more jobs to the United States, and would divert more tax dollars into the United States economy. The CLEAR Act is an option that should be attractive not only to those interested in the protection of the United States economy, but also those interested in growing the United States economy.

3. *Status of the CLEAR Act*

Since the U.S. House of Representatives approved the measure on July 30, 2010,¹⁹⁷ the CLEAR Act has stalled in the United States Senate¹⁹⁸ and no further action was taken on the bill before the legislative session ended.¹⁹⁹ However, it is entirely possible that the CLEAR Act will be revitalized once the Senate returns from break and will eventually be passed.²⁰⁰ The

193. *Id.*

194. *Id.* at 2

195. *See id.*

196. *Id.* at 1–2.

197. CLEAR Act, H.R. Res. 3534, 111th Cong. (2010), available at <http://www.govtrack.us/congress/bill.xpd?bill=h111-3534>.

198. *Id.*

199. *Id.*

200. The Senate did not vote on the CLEAR Act during the 2010 session. At the end of a Session, proposed Bills are cleared from the calendar and must be reintroduced during the next Session. The CLEAR Act failed to become a law during both the 2010

CLEAR Act stops short of calling for a major modification to some international agreement and represents a favorable solution to the problems that flags of convenience pose to the United States economy and environment.

IV. CONCLUSION

As shown above, the prevalence of flags of convenience poses a difficult problem in regulating and ensuring the safety and preservation of international waters. It is clear that in its present form, the system of registering ships does not work as intended, and in order to avoid a future crisis, a solution must be implemented. While the aforementioned changes in law will not alone remedy the problem of flags of convenience, they may provide a starting point for discussion about better protecting international waters. The goal remains: we will be able to formulate a plan that will both allow for equal access to international waters, while simultaneously providing an adequate level of safety and preservation commensurate with the risks involved in conducting and encouraging business in international waters.