

ACCIDENTS ON THE HIGH SEAS AND FLAGS OF  
CONVENIENCE: WHETHER THE BBNJ DRAFT TREATY  
WILL ADDRESS INSUFFICIENT REGULATORY COMPLIANCE  
BY OPEN REGISTRY STATES

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## I. INTRODUCTION

The high seas experienced many catastrophic events in the past year. Starting in March 2020, the COVID-19 pandemic ravaged nations across the globe while leaving cruise ships and their stranded employees, who were forbidden to access ports, abandoned at sea for months.<sup>1</sup> On August 4, 2020, a massive explosion rocked Beirut, Lebanon, leaving hundreds dead and thousands injured, and causing approximately \$15 billion of damage.<sup>2</sup> Two days after the explosion, Mauritius declared a national emergency over a cargo ship that initially ran aground in late July that leaked over one thousand tons of fuel oil into the reefs of Mauritius, one of the world's most precious and protected areas of biodiversity.<sup>3</sup>

These apparently random tragedies piled upon an already calamitous year are more closely related than they initially seem. A common thread unites these events, a global governance failure that allows actors to exploit and abuse the high seas with devastating consequences not only to the environment, but to the lives, property, and basic human rights of uncountable individuals. The failure is a practice commonly referred to as “flags of convenience,” a term relating to the registration and nationality of ships that allows some shipowners to avoid adhering to international standards for ship operations.<sup>4</sup>

The ocean, like space, is an international common resource.<sup>5</sup> As humanity globalizes, our oceans are a classic tale of the “tragedy of the commons, whereby collective resources are more easily exploited than

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<sup>1</sup> See David Millar, *Flags of Convenience and the Cruise Ship Debacle*, STRATEGIST (Apr. 17, 2020), [https://www.aspistrategist.org.au/flags-of-convenience-and-the-coronavirus-cruise-ship-debacle/\(discussing the impact of the COVID-19 pandemic, “flags of convenience,” and the cruise industry\).](https://www.aspistrategist.org.au/flags-of-convenience-and-the-coronavirus-cruise-ship-debacle/(discussing%20the%20impact%20of%20the%20COVID-19%20pandemic,%20%22flags%20of%20convenience,%22%20and%20the%20cruise%20industry).)

<sup>2</sup> See Ian Urbina, *The Disturbing Story Behind the Beirut Port Explosion*, NATIONAL (Sept. 2, 2020), <https://www.thenation.com/article/world/lebanon-explosion-environment-shipping/> (reviewing the problem of abandonment of ships and “flags of convenience” in the context of the Beirut port explosion); Sarah Al-Arshani, *The \$15 Billion Hit from the Devastating Beirut Explosion will be a Gut-Punch to Lebanon’s Hobbled Economy*, INSIDER (Aug. 21, 2020, 11:49 PM), <https://www.insider.com/beirut-explosion-could-cost-lebanons-struggling-economy-15-billion-2020-8> (estimating the damage from the Beirut explosion to cost Lebanon around \$15 billion).

<sup>3</sup> See Navin Singh Khadka, *Why the Mauritius Oil Spill is so Serious*, BBC NEWS (Aug. 13, 2020), <https://www.bbc.com/news/world-africa-53754751> (discussing the impact of the Mauritius oil spill and the broader impact on biodiversity).

<sup>4</sup> See *Flags of Convenience*, INT’L TRANSP. WORKER’S FED’N, <https://www.itfglobal.org/en/sector/seafarers/flags-of-convenience> (last visited Feb. 11, 2022) (defining “flags of convenience” and the affect this practice has on the industry).

<sup>5</sup> Elizabeth Mrema, *Introduction: Protecting the Global Commons*, 18 GEO. J. INT’L. AFR. 3, 3 (2017).

conserved, ignored than managed, and depleted than replenished.”<sup>6</sup>The ocean “supplies more than half of the oxygen we breath and provides food and livelihoods for billions of people worldwide.”<sup>7</sup> But now, “[c]enturies of overuse and neglect threaten to leave us with a vast blue wasteland.”<sup>8</sup> Our oceans and those who depend on them for food, transportation, or employment face unprecedented threat.<sup>9</sup> Unsustainable fishing, inadequate protection of marine areas, the shipping industry, pollution from oil and gas, climate change, and other problems threaten to destroy this valuable resource.<sup>10</sup> Beyond the environmental consequences, these problems pose an enormous threat to the safety and security of people around the world, illustrated by both the Beirut explosion and the COVID-19 cruise ship debacle.<sup>11</sup>

Many countries assisted in gradually depleting the ocean’s health and resources, but no individual country has the capacity to singlehandedly remedy the damage.<sup>12</sup> International cooperation is the sole solution to this collective action problem, but current international agreements and regulatory schemes fall short.<sup>13</sup> An example is the failure of the international community to remedy the Great Pacific Garbage Patch, an accidental aquatic landfill floating in the Pacific Ocean that contains immeasurable quantities of plastic waste from around the world.<sup>14</sup>

The UN previously implemented international agreements to protect and conserve the world’s deteriorating oceans.<sup>15</sup> However, these international agreements yield slow results because they often “either lack or have inadequate [measures for] monitoring or enforcement.”<sup>16</sup>

Flags of convenience are a prime example of the “lowest common denominator” taking advantage of regulatory gaps in international agreements to exploit the high seas.<sup>17</sup> Under international law, vessels must sail under the

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<sup>6</sup> *Id.*

<sup>7</sup> *The Ocean*, WWF, <https://explore.panda.org/oceans> (last visited Feb. 11, 2022).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> See Millar, *supra* note 1 (discussing the COVID-19 pandemic and its impact on halting the cruise industry); Urbina, *supra* note 2 (examining the catastrophic effects of the August 2020 Beirut explosion).

<sup>12</sup> Mrema, *supra* note 5, at 3.

<sup>13</sup> *Id.* at 3-4.

<sup>14</sup> *Great Pacific Garbage Patch*, NAT’L. GEOGRAPHIC, <https://www.nationalgeographic.org/encyclopedia/great-pacific-garbage-patch/> (last visited Feb. 12, 2022).

<sup>15</sup> See Mrema, *supra* note 5, at 4 (discussing different UN agreements including “the United Nations Convention on the Law of the Sea, the Antarctic Treaty Systems, and the UN Environment’s Regional Seas Conventions and Protocols, but fundamental gaps and inconsistencies remain that require immediate attention.”).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

flag of a particular nation, and that nation inspects the vessels and their seaworthiness, ensures safety and pollution prevention, and certifies the crews.<sup>18</sup> Flag nations are primarily responsible for enforcing international standards for the ship and crew.<sup>19</sup> However, some states fall short on the compliance and enforcement aspects of regulation, often intentionally, to attract shipowners looking to reduce operating costs and increase profit margins, as countries earn revenue from their fleet.<sup>20</sup> Non-complying states employ open registry systems that allow ship owners in other countries to register their ships in a foreign state.<sup>21</sup> A ship registered on the open registry would sail under a “flag of convenience,” a term describing a ship sailing under a flag state with lax enforcement of international regulations, lower taxes, and easy, low-cost vessel registration procedures.<sup>22</sup>

Flags of convenience epitomize the common resource problem of the ocean, and though the practice is widely criticized, it remains a common method by which shipowners avoid taxes, regulations, and liability.<sup>23</sup> Flags of convenience undercut the myriad of aspirational and environmentally responsible regulations set forth by international governing bodies.<sup>24</sup>

The UN, in drafting a new treaty designed to protect and conserve “marine biodiversity of areas beyond national jurisdiction,” signals to the world that the international community recognizes the need to finally address the common resource problem of the high seas.<sup>25</sup> The treaty, abbreviated as the BBNJ Treaty, will cover a large portion of the ocean (“50 percent of the planet’s surface and all the water below”) and intends to encourage the “conservation and sustainable use of marine resources.”<sup>26</sup>

To effectively promote such conservation and sustainability, the treaty must address flags of convenience. The international community must

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<sup>18</sup>*Flags of Convenience*, NGO SHIPBREAKING PLATFORM (last visited Feb. 12, 2022), <https://www.shipbreakingplatform.org/issues-of-interest/focs/>.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*; Nivedita M. Hosanee, *A Critical Analysis of Flag State Duties as Laid Down Under Article 94 Of the 1982 United Nations Convention on the Law of The Sea*, U.N. DIV. FOR OCEAN AFFAIRS AND LAWS OF THE SEA 71 (2009), [https://www.un.org/Depts/los/nippon/unff\\_programme\\_home/fellows\\_pages/fellows\\_papers/hosanee\\_0910\\_mauritius.pdf](https://www.un.org/Depts/los/nippon/unff_programme_home/fellows_pages/fellows_papers/hosanee_0910_mauritius.pdf).

<sup>21</sup> Judith Swan, *Fishing Vessels Operating Under Open Registers and the Exercise of Flag State Responsibilities – Information and Options*, FOOD AND AGRIC. ORG. OF THE U.N. (2002), <https://www.fao.org/3/y3824e/y3824e00.htm#Contents>.

<sup>22</sup> *Flags of Convenience*, *supra* note 18.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> Stewart M. Patrick, *Why the U.N. Pact on the High Seas Biodiversity is too Important to Fail*, WORLD POL. REV. (July 8, 2020), <https://www.worldpoliticsreview.com/articles/28011/why-the-u-n-pact-on-high-seas-biodiversity-is-too-important-to-fail>.

<sup>26</sup> *Id.*

hold accountable countries that fail to meet international standards. Otherwise, countries will continue the same practices to achieve a competitive edge in exploiting the ocean's resources, at the ever-increasing expense of everyone else.

This Note will analyze the probability that the BBNJ Treaty will eliminate or regulate flags of convenience, the effects the agreement might have on flags of convenience, and thus whether the treaty will successfully achieve its goals. Without directly mentioning and addressing open registries and enforcement of regulations, it appears unlikely that the treaty will fully achieve its intended results of environmental protection and conservation. Part II of this Note will describe accidents at sea that occurred because of flags of convenience, discuss past treaty iterations, and propose the incorporation of a more extensive and robust regulatory scheme for enforcement and accountability in the language of the treaty. Part III of this Note will recommend that the drafters of the treaty directly include language regarding open registry states and call for increased oversight of those countries' fleets by the flag state.

## II. BACKGROUND

As markets continue to globalize, the use of international shipping grows and shifts.<sup>27</sup> As ships become larger and more numerous, the need for effective regulation and oversight becomes even more pressing. More ships result in more trafficked shipping routes and a greater potential for accidents. With more ships than ever sailing around the world, safety and environmental responsibility matters more than ever, drawing greater attention to countries with open ship registries.<sup>28</sup>

Open registries allow vessels to register under a country's flag despite a lack of real connections between the ship and the country.<sup>29</sup> Vessels choose to operate under flags of convenience primarily for economic and regulatory reasons—flags of convenience states offer lower taxes, fewer regulations, lower registration fees, and cheap labor.<sup>30</sup> With almost seventy-three percent of the world's vessels registered in a country different than that of its

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<sup>27</sup> See U.N. Conference on Trade and Development, *50 Years of Review of Maritime Transport, 1968-2018*, UNCTAD/DTL/2018/1, at 8 (2018) (stating that “[t]he trend towards globalization of production and markets has posed enormous challenges and influenced production and transportation patterns and requirements,” which raised “new challenges for national governments, particularly of developing countries, in the management of their economic and social development.”).

<sup>28</sup> See *Flags of Convenience*, *supra* note 4 (describing flags of convenience and open registries as a problematic “rush to the bottom” scenario).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

ownership,<sup>31</sup> many ships likely fail to meet the minimum ship regulation standards implemented by the UN.<sup>32</sup> This raises significant concerns in terms of safety, pollution, and human rights, as vessels may be inherently unsafe or owners choose to cut corners to maximize profit.<sup>33</sup> Additionally, flags of convenience allow companies to avoid liability for their unscrupulous practices by increasing owner anonymity, and avoid oversight by registering in states without the resources or incentive to actively monitor their fleet's operations.<sup>34</sup> Ultimately, flags of convenience are a primary culprit behind many maritime incidents and environmental disasters, and must either be fully eliminated or greatly reformed to protect the oceans and establish a safe, well-regulated shipping industry.

#### A. *Accidents at Sea*

Flags of convenience lie at the heart of many accidents at sea.<sup>35</sup> These accidents manifest in both expected and surprising ways, as illustrated by the following oil-related incidents. In 1978, a 228,513-ton supertanker named the Amoco Cadiz, operated by a subsidiary of the American-owned Standard Oil Company and sailed under the Liberian flag, ran aground off the coast of France, leaked 220,000 tons of crude oil and raised questions about “the lack of effective regulation of tankers sailing under ‘flags of convenience.’”<sup>36</sup> The Amoco Cadiz spill surpassed the Torrey Canyon spill, which happened eleven years prior, as the largest oil spill in history.<sup>37</sup> The Amoco Cadiz example is a direct consequence of a ship sailing under a flag of convenience, but the

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<sup>31</sup> *Flags of Convenience*, *supra* note 18.

<sup>32</sup> See generally United Nations Conference on Trade and Development, Convention on Conditions for Registration of Ships, U.N. Doc. TD/RS/CONF./23, adopted by the United Nations Conference on Conditions for the Registration of Ships, art. 10-11, Feb. 7, 1986, 12 U.N.T.S. 7 [hereinafter UNCTAD].

<sup>33</sup> See Jessica Battle, *Justice for the Ocean*, WWF (Aug. 27, 2020), <https://medium.com/@WWF/justice-for-the-ocean-ce5c915501df> (discussing the failure of states to govern ship crews and its devastating effects).

<sup>34</sup> *Id.* (examining flags of convenience in light of recent ecological disasters as a major threat to the future wellbeing of the oceans and the Earth; “[v]arious international rules and regulations for the operations of ships and fishing already exist, but the shirking of flag state responsibility and the heavy lift to make those responsible pay for damage stand in the way and, thus, the ocean and dependent coastal states lose out.”).

<sup>35</sup> See Millar, *supra* note 1 (discussing how the COVID-19 pandemic stalled the cruise industry); Urbina, *supra* note 2 (discussing the August 2020 Beirut explosion).

<sup>36</sup> John Kifner, *Wreck of the Amoco Cadiz Revives Issue of Safety in Transporting Oil*, N.Y. TIMES (Mar. 23, 1978), <https://www.nytimes.com/1978/03/23/archives/wreck-of-the-amoco-cadiz-revives-issue-of-safety-in-transporting.html>.

<sup>37</sup> *Id.*

infamous BP Oil Spill reveals the true scope of the problem.<sup>38</sup> In 2010, the Deepwater Horizon oil rig exploded, killing eleven workers and releasing over 130 million gallons of crude oil into the Gulf of Mexico.<sup>39</sup> Oil rigs technically fall under the “vessel” category and are thus required to register with a state and fly its flag.<sup>40</sup> Deepwater Horizon was registered under the Marshall Islands, a flag of convenience state with a gross domestic product “700 times less than BP’s market capitalization.”<sup>41</sup>

Beyond oil spills, the aforementioned cruise ship example and the Beirut explosion highlight the scope of the types of accident that result from flags of convenience.<sup>42</sup> Early into the COVID-19 pandemic, cruise ships garnered international attention as outbreaks caused countries to block the ships from entering port, stranding crews at sea for long periods of time with insufficient living conditions.<sup>43</sup> Cruise lines often register under flags of convenience for reasons stated above (cheap labor, fewer regulations and taxes, etc.), “[b]ut the pandemic has shown that cruise shipping is essentially an unregulated industry that has thrived in an environment lacking rules.”<sup>44</sup>

The second recent international incident resulting from flags of convenience is the Beirut explosion. It killed at least 190 people, injured over 6,500, and destroyed buildings across the city.<sup>45</sup> The story began in 2013, when a “barely seaworthy” ship, owned by a Russian man living in Cyprus and flagged under the Marshall Islands, was abandoned with a deadly cargo

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<sup>38</sup> *Deepwater Horizon- BP Gulf of Mexico Oil Spill*, ENV’T PROTECTION AGENCY, <https://www.epa.gov/enforcement/deepwater-horizon-bp-gulf-mexico-oil-spill> (last visited Feb. 13, 2022).

<sup>39</sup> Joan Meiners, *Ten Years Later, BP Oil Spill Continues to Harm Wildlife—Especially Dolphins*, NAT’L GEOGRAPHIC (Apr. 17, 2020), <https://www.nationalgeographic.com/animals/2020/04/how-is-wildlife-doing-now--ten-years-after-the-deepwater-horizon/#close>.

<sup>40</sup> See Brian Baker, *Flags of Convenience and the Gulf Oil Spill: Problems and Proposed Solutions*, 34 HOUS. J. INT’L L. 687, 690 (2012) (explaining how the Marshall Islands possessed responsibility for overseeing and ensuring regulatory compliance of Deepwater Horizon).

<sup>41</sup> Andrew Clark, *BP Oil Rig Registration Raised in Congress Over Safety Concerns*, GUARDIAN (May 30, 2010), <https://www.theguardian.com/environment/2010/may/30/oil-spill-deepwater-horizon-marshall-islands>.

<sup>42</sup> See Millar, *supra* note 1 (Discussing the impact of the COVID-19 pandemic on the cruise industry); Urbina, *supra* note 2 (Examining underlying issues surrounding the August 2020 Beirut explosion).

<sup>43</sup> See Millar, *supra* note 1 (“[a]s we’ve seen during the Covid-19 crisis, if a port won’t allow the crew ashore, and the owners won’t pay for them to return home, the ship and crew are stranded at sea like some 21st century *Flying Dutchman*.”).

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

<sup>45</sup> See Urbina, *supra* note 2 (highlighting that “[a]bandonment of ships, ‘flags of convenience,’ and lax law enforcement are common at sea, often with tragic consequences.”).

of ammonium nitrate outside the Port of Beirut—after the abandonment, Lebanese authorities had no choice but to deal with the cargo themselves.<sup>46</sup> They placed the ammonium nitrate in a hangar, where it stayed until stray fireworks ignited the blast.<sup>47</sup> Without ending the practice of flags of convenience, no treaty will sufficiently prevent these largescale, devastating accidents.

*B. Registration of Ships and Flags of Convenience*

Flags of convenience allow small shipowners and companies to operate when they otherwise could not afford to meet the monetary costs of regulatory compliance, but the harm of the practice far outweighs the benefits. Each of the vessels from the above examples operated under the flag of a state labeled by the International Transport Worker's Federation (ITF) as a flag of convenience country.<sup>48</sup> The ITF defines a flag of convenience ship as “one that flies the flag of a country other than the country of ownership.”<sup>49</sup>

Ships usually possess nationality, meaning that they must register to a specific state and be subject to that nation's laws and regulations.<sup>50</sup> When ships are permitted to register with countries other than that of the owner of the vessel, a greater amount of ships sail under flags with less regulations and oversight.<sup>51</sup> States are permitted to determine the requirements for registration of ships, and other states must recognize those vessels' nationality.<sup>52</sup> Often, states with open registries are smaller countries with smaller economies.<sup>53</sup> These states oversee the fleet of ships registered under its name, but those countries often do not have the resources to fulfill that obligation fully, allowing shipowners to cut corners and cause accidents.<sup>54</sup> Additionally, flags

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<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> See *Flags of Convenience*, *supra* note 4 (the ITF's Fair Practice Committee designates thirty-five countries as flag of convenience states).

<sup>49</sup> *Id.*

<sup>50</sup> See H. Edwin Anderson, *The Nationality of Ships and Flags of Convenience: Economics, Politics, and Alternatives*, 21 TUL. MAR. L.J. 139, 141 (1997) (stating that “[t]he concept of vessel nationality has evolved concurrently with the political sovereignty of nation-states. In the status quo, all vessels must have nationality.”).

<sup>51</sup> L. F.E. Goldie, *Environmental Catastrophes and Flags of Convenience - Does the Present Law Pose Special Liability Issues?*, 3 PACE Y.B. INT'L L. 63, 63(1991).

<sup>52</sup> *Id.* at 66.

<sup>53</sup> See Anthony Van Fossen, *Flags of Convenience and Global Capitalism*, 6 INT'L CRITICAL THOUGHT 359, 360 (2016), <https://research-repository.griffith.edu.au/bitstream/handle/10072/99637/FossenPUB1582.pdf?sequence=1> (finding that many major flags of convenience states are small islands in the Caribbean).

<sup>54</sup> *Flag States' Responsibilities and Seafarer's Rights*, SEAFARERS' RTS. INT'L (Sept. 29, 2014), <https://seafarersrights.org/flag-state-responsibilities-and-seafarersrights/>.



of convenience make determining liability more difficult because shipowners can layer the true ownership of vessels through corporate identities and multiple jurisdictions.<sup>55</sup>

### C. Current Treaty Iterations

The international body of law regarding the registration and nationality of ships developed over the course of centuries, but the UN codified these rules in the 1958 Convention on the High Seas.<sup>56</sup> Specifically, Article Five of the Convention describes the United Nation's framework for ship registration and recognition, designating the power to "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" to individual states.<sup>57</sup> The Convention states that "[s]hips 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," and that "the State must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag."<sup>58</sup> The "genuine link" concept requires a ship and a flag state to share some connection.<sup>59</sup>

Article 94, sections one through five of the United Nations Convention on the Laws of the Sea (UNCLOS) stipulate the duties and responsibilities of flag states.<sup>60</sup> In summary, states are required under UNCLOS to maintain a register containing names and details about its ships, "assume jurisdiction under its internal law" in matters concerning the ship or its crew, and take necessary measures for ensuring safety at sea.<sup>61</sup> These necessary measures pertain to the construction and seaworthiness of the ships, the labor conditions and the crews, and the use and maintenance of communication mechanisms.<sup>62</sup> States are required "to conform to generally accepted international regulations, procedures and practices and to take any steps which may be necessary to secure their observance."<sup>63</sup>

These treaty provisions promote safety and responsibility of vessels and flag states, and the genuine link concept in article 94 of UNCLOS should

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<sup>55</sup> See Battle, *supra* note 33 (discussing the failure of states to police their ships and crews).

<sup>56</sup> Convention on the High Seas, Apr. 29, 1958, 450 U.N.T.S.11.

<sup>57</sup> *Id.* at art. 5.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> United Nations Convention on the Laws on the Sea art. 94, Dec. 10, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

theoretically address flags of convenience by forcing vessels to be connected to the flag under which they register. However, the genuine link term is so ambiguous that this requirement lacks any teeth in its practical application.

Overall, international law fails to adequately address flags of convenience. The “genuine link” requirement, though intended to ensure connections between the vessel and the flag state, falls short because (1) the treaty requires the genuine link while also granting flag states wide discretion in their policies and (2) the term “genuine link” was never adequately defined in international law.<sup>64</sup> In allowing states such broad discretion and regulatory power, the international community gives individual states a great deal of autonomy in the management of their fleets.

The International Maritime Organization (IMO), an organ of the U.N., is the “global standard-setting authority for the safety, security and environmental performance of international shipping” and “[i]ts main role is to create a regulatory framework for the shipping industry that is fair and effective, universally adopted and universally implemented.”<sup>65</sup> However, the mere existence of a regulatory framework and the aspirational statement that the international community would universally adopt and implement such framework does not reflect in practice, because flag states are economically incentivized to minimize taxes, costs, and regulations.<sup>66</sup>

### III. SOLUTIONS

With the increase in global commerce and a greater concern regarding climate change and conservation, the UN turned its attention to protecting biodiversity and marine life by forming the Intergovernmental Conference on an “[i]nternational legally binding instrument under the United

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<sup>64</sup> See Eric Powell, *Taming the Beast: How the International Legal Regime Creates and Contains Flags of Convenience*, 19 ANNUAL SURVEY OF INT’L & COMP. L. 266, 295-96 (2013),

<https://digitalcommons.law.ggu.edu/cgi/viewcontent.cgi?article=1174&context=annlsurvey> (discussing how “[t]his approach epitomizes the tension between traditional maritime principles and challenges of the new order: the international community has struggled to define ‘genuine link’ in light of the understanding that State sovereignty includes the right to set registry terms.”).

<sup>65</sup> See International Maritime Organization, *Introduction to IMO*, INT’L MAR. ORG., <http://www.imo.org/en/About/Pages/Default.aspx> (last visited Feb. 24, 2022) (“In other words, its role is to create a level playing-field so that ship operators cannot address their financial issues by simply cutting corners and compromising on safety, security and environmental performance. This approach also encourages innovation and efficiency.”).

<sup>66</sup>FOCs, INT’L TRANS. WORKERS FED’N, <https://www.itfseafarers.org/en/focs> (last visited Feb. 24, 2022) (“In an increasingly fierce competitive shipping market, each new FOC is forced to promote itself by offering the lowest possible fees and the minimum of regulation.”).

Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction.”<sup>67</sup> Known as the draft BBNJ Treaty (short for “biological diversity of marine areas beyond national jurisdiction”), the text encourages “[e]nhancing international cooperation and encouraging the adoption of complementary measures within existing frameworks,” though it remains unclear whether this international cooperation will create greater unity in IMO standards compliance.<sup>68</sup>

#### *A. Treaty Content and Applicable Language*

However, as stated in the Ocean Yearbook’s research article comparing UNCLOS to the new BBNJ treaty, “[t]he UN negotiations for a new agreement on BBNJ ... provide an opportunity to create a platform for international cooperation and more coherent action to redress these gaps and weaknesses in an increasingly crowded, degraded, depleted ocean.”<sup>69</sup> Perhaps most promising is Article Six of the draft treaty:

#### **Article 6**

##### **International cooperation**

1. States Parties shall cooperate under this Agreement for the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, including through strengthening and enhancing cooperation with and among relevant legal instruments and frameworks and relevant global, regional, subregional and sectoral bodies and members thereof in the achievement of the objective of this Agreement.

2. States Parties shall promote international cooperation in marine scientific research and in the development and transfer of marine technology consistent with the Convention in support of the objective of this Agreement.

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<sup>67</sup> G.A. Res. 72/249 (Dec. 24, 2017).

<sup>68</sup> KLAUDIJA CREMERS ET AL., A PRELIMINARY ANALYSIS OF THE DRAFT HIGH SEAS BIODIVERSITY TREATY, INST. FOR SUSTAINABLE DEV. AND INT’L RELATIONS 1 (Jan. 2020), <https://www.iddri.org/sites/default/files/PDF/Publications/Catalogue%20iddri/Etude/202001-ST0120-high%20seas.pdf>.

<sup>69</sup> Kristina M. Gjerde et al., *Building a Platform for the Future: The Relationship of the Expected New Agreement for Marine Biodiversity in Areas beyond National Jurisdiction and the UN Convention on the Law of the Sea*, 33 OCEAN Y.B. ONLINE 3, 15 (May 7, 2019).

[3. States Parties shall cooperate to establish new global, regional and sectoral bodies, where necessary.]<sup>70</sup>

Allowing for the possibility to create new bodies where necessary could facilitate the implementation of a governing body that provides more oversight into the enforcement of regulations. Additionally, if various states are cooperating and communicating regarding marine biodiversity and conservation, then states without sufficient regulatory regimes might fall under greater degrees of scrutiny by the international community. Incentivizing flag states to follow regulations based on this ecological and cooperative framework could provide a countervailing incentive to flag of convenience states, providing them with a new reason to tighten up their systems. Beyond the states themselves, businesses and shipping vessels might experience greater scrutiny and increased pressure to operate more transparently and with better practices.

Delegates to the UN expressed hope that “that the new treaty — slated to be completed in 2020 — will be both robust in its scope and practical in its application.”<sup>71</sup> The effect of such a robust and practical treaty would encourage sustainability, accountability, and transparency under which shady vessels and flag of convenience states would find it more difficult to sail under the radar of IMO regulators.<sup>72</sup>

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<sup>70</sup> Intergovernmental Conference on An International Legally Binding Instrument Under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction, *Revised Draft Text of an Agreement Under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction*, A/CONF.232/2020/3 (Nov. 18, 2019), <https://undocs.org/en/a/conf.232/2020/3> [hereinafter Draft BBNJ Agreement].

<sup>71</sup> Press Release, Intergovernmental Conference on Marine Biodiversity Third Session, Am & PM Meetings, New Oceans Treaty Must Be Robust, Practical in Application, Delegates Stress, Closing Third Round of Marine Biodiversity Negotiations, U.N. Press Release SEA/2118 (Aug. 30, 2019).

<sup>72</sup> KLAUDIJA CREMERS ET AL., STRENGTHENING, MONITORING, CONTROL AND SURVEILLANCE IN AREAS BEYOND NATIONAL JURISDICTION, STRONG HIGH SEAS PROJECT 35 (2020), <https://www.prog-ocean.org/wp-content/uploads/2020/01/Cremers-Wright-and-Rochette-2019.-Strengthening-Monitoring-Control-and-Surveillance-in-Areas-Beyond-National-Jurisdiction-1.pdf>.

### B. *The Genuine Link*

The genuine link concept is well established in international law.<sup>73</sup> “Article 5 of the 1958 Convention on the High Seas and Article 91 of the 1982 UN Convention on the Law of the Sea both provide that there must exist a ‘genuine link’ between a State and a ship to which it has granted its nationality.”<sup>74</sup> However, the concept has never been defined, either by treaty or by tribunal,<sup>75</sup> effectively removing any teeth this requirement might have in policing flag states with open registries. Defining the genuine link in international law could have far reaching implications in addressing flags of convenience. Currently, each state sets its own requirements for the genuine link standard, which allows open registry states to circumvent the genuine link requirement altogether.<sup>76</sup>

The BBNJ Agreement contains no language defining or otherwise elucidating the genuine link concept.<sup>77</sup> If the drafters were to include an article defining the requirements of a genuine link in the treaty, then fewer vessels could register in flag of convenience, open registry states.<sup>78</sup> However, the international community will not include such language because it still adheres to the principle that every nation has the right to create laws for ships that fly its flag.<sup>79</sup> The Treaty’s more general language on increasing international cooperation and coordination of conservation efforts is more palatable to a greater number of countries, while simultaneously turning the spotlight to flag of convenience states. Those flag of convenience states are often at the epicenter of the most flagrant violations by vessels in international waters, like the Beirut explosion.<sup>80</sup>

### C. *Port State Control*

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<sup>73</sup> Robin R. Churchill & Christopher Hedley, *The Meaning of the “Genuine Link” Requirement in Relation to the Nationality of Ships*, INT’L TRANS. WORKER’S FED’N 4, 68 (2000).

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 68-70 (“An authoritative ruling as to what is meant by the genuine link requirement in the 1958 and 1982 Conventions could only be provided by an international court, such as the International Court of Justice or the International Tribunal for the Law of the Sea, or by means of the conclusion of a supplementary agreement to the 1982 Convention.”).

<sup>76</sup> Baker, *supra* note 40, at 705-706.

<sup>77</sup> See generally Draft BBNJ Agreement, *supra* note 67 (failing to include the genuine link concept, and any substantive definitions of genuine link in the draft text of the treaty).

<sup>78</sup> Baker, *supra* note 40, at 706.

<sup>79</sup> Baker, *supra* note 40, at 708.

<sup>80</sup> Draft BBNJ Agreement, *supra* note 70, at art. 6. See also Urbina, *supra* note 2 (linking the Beirut explosion and ship abandonment to flags of convenience).

Port state control refers to port states inspecting and detaining vessels that fail to meet minimum regulations of vessel seaworthiness, safety, and human rights standards.<sup>81</sup> Before the widespread use of flags of convenience, the international community could depend on the reliability of port states in enforcing the regulations set out by the IMO and controlling their ships.<sup>82</sup> However, “[t]his approach became impracticable with the advent of flags of convenience.”<sup>83</sup> States recognized that it was necessary to ensure that ships entering their ports were soundly made, so in 1982 fourteen European countries gathered together to form the Paris Memorandum of Understanding (MOU), a regional system for port state control.<sup>84</sup> Other regions of the world used the Paris MOU as a guideline for establishing their own port regulations, and “under many IMO Conventions, ships are required to carry certificates onboard to provide proof of inspection and to demonstrate compliance with international standards.”<sup>85</sup> Many states accept onboarding documents for entry into their ports, but if a state performs an inspection on a vessel and finds it fails to meet safety and labor standards, the state may delay the vessel’s departure or detain it.<sup>86</sup> Additionally, that state may report the substandard vessel to a database that records such information to increase transparency in the industry.<sup>87</sup>

Allowing port states regulatory power over ships flagged by other countries provides a last resort safeguard against blatant enforcement violations by flag of convenience countries. However, port regulation falls short because many vessels either slip through the cracks or experience jurisdictional issues relating to their respective flag states.<sup>88</sup> While port state

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<sup>81</sup> See Dr. Z. O. Özçayır, *The Use of Port State Control in Maritime Industry and the Application of the Paris MOU*, 14 OCEAN & COASTAL L.J. 201, 201-202 (2009). Available at <https://digitalcommons.maine.gov/oclj/vol14/iss2/4> (emphasizing that “[p]ort state control is not, and can never be, a substitute for the proper exercise of flag state responsibility. Flag states have the primary responsibility of safeguarding against substandard ships. When flag states fail to meet their commitments, port states must act as the last safety net in the control system.”).

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 206.

<sup>84</sup> *Id.* at 209-210.

<sup>85</sup> *Id.* at 212.

<sup>86</sup> *Id.* at 212-213.

<sup>87</sup> See *Port State Control: Ship Compliance with International Conventions*, LLOYD’S REGISTER, <https://www.lr.org/en-us/port-state-control/> (last visited Feb. 25, 2022).

<sup>88</sup> Özçayır, *supra* note 81, at 207. See also Millar, *supra* note 1 (highlighting the jurisdictional complexities of vessel nationality; when the COVID-19 pandemic hit, many cruise ships were denied access to ports); Stuart Slade, *Could COVID-19 End Flags of Convenience?*, DEFENSE & SECURITY MONITOR (Apr. 9, 2020) (“When the COVID-19 pandemic struck, [cruise ships] received messages from the ports they were about to visit that they were being denied entry, and advising them to seek assistance from their national

control provides some measure of enforcement of international regulations, it essentially forces the port state to assume some flag state duties.<sup>89</sup> Port state control cannot substitute for flag state regulation; ideally port state control would add transparency in the shipping industry while supplementing the regulatory efforts of the flag state.

#### *D. Potential Likelihood of Passage*

The BBNJ treaty aims to fill the gaps left by the UN's prior attempts to protect the oceans.<sup>90</sup> Specifically, the BBNJ addresses the pressing need to preserve high seas biodiversity.<sup>91</sup> The BBNJ Agreement has been in development for sixteen years; initially added to the agenda in 2004, the first session convened in 2017.<sup>92</sup> The final session, scheduled for March 2020, was postponed indefinitely because of the COVID-19 pandemic, with the new date still undetermined as of July 22, 2021.<sup>93</sup> Negotiating the agreement has been anything but smooth sailing.<sup>94</sup> The Agreement, both geographically and substantively expansive, attempts to balance freedom on the high seas with protecting the "common heritage of mankind."<sup>95</sup> This difficult ideological balance, additionally complicated by the significance of the subject matter, has proven controversial in the international arena.<sup>96</sup> Negotiations could continue for some time and "many experienced delegates anticipate a fifth or

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flag authorities. Since many flags of convenience are held by small countries with very limited resources, this advice was not helpful.").

<sup>89</sup> Özçayır, *supra* note 81.

<sup>90</sup> Elizabeth M. DeSanto et al., *The Once and Future Treaty: Towards a New Regime for Biodiversity in Areas Beyond National Jurisdiction*, 99 J. MAR. POL. 239, 240 (2018), available at <https://www.sciencedirect.com/science/article/pii/S0308597X18307048> ("These gaps were either because provisions and definitions were not specific enough for states to be certain of the treaty's meaning at the time of UNCLOS, such as the application of the common heritage of mankind; or did not address problems that have either arisen since its ratification, such as exploitation of Marine Genetic Resources (MGRs), or worsened since the treaty's completion in 1982, such as marine pollution.").

<sup>91</sup> Cymie R. Payne, Article, *New Law for the High Seas*, 36 BERKLEY J. INT'L L. 345, 346 (2019).

<sup>92</sup> Efthymios Papastavridis, *The Negotiations for a New Implementing Agreement Under the UN Convention on the Law of the Sea Concerning Marine Biodiversity*, 69 INT'L & COMP. L. QUARTERLY 585-86 (2020).

<sup>93</sup> G.A. Res. 75/L.96 (Jun. 25, 2021).

<sup>94</sup> Papastavridis, *supra* note 92, at 586 ("[R]egardless of when the fourth session takes place, the omens are not in favour of the 'BBNJ-canoe' reaching its destination any time soon.").

<sup>95</sup> Draft BBNJ Agreement, *supra* note 67.

<sup>96</sup> Papastavridis, *supra* note 92, at 586.

even a sixth session in 2021.”<sup>97</sup> Even if the BBNJ were to become binding international law in the future, it is unlikely that the agreement will effect real change in current ocean governance, as the degree of disagreement between state parties remains so polarizing.

#### *E. Suggested Changes and Critiques*

Even if the draft is finalized and agreed upon, becoming binding international law, there is currently no provision addressing flags of convenience.<sup>98</sup> For a treaty that intends to fill gaps in ocean governance and protection, failing to mention one of the primary underlying causes of many maritime disasters appears to be a crippling shortcoming of the current treaty iteration. Allowing this regulatory loophole to continue to exist undermines any attempt at increased regulation, since flags of convenience allow shipowners to avoid international regulatory compliance. If the BBNJ Treaty becomes binding international law, the practice of registering ships under open registries will only increase, as the cost of full compliance increases.

One solution would be to eliminate flags of convenience entirely, though this option poses issues to small shipowners who may not be able to afford the tax and compliance costs of registering in their respective home countries. The elimination of flags of convenience would also face severe pushback from the extremely powerful shipping industry. The best solution is to define and enforce the genuine link requirement, thereby decreasing the ease and accessibility of flags of convenience, while increasing port state control and transparency of practices within the industry. Ultimately, the pushback from open registry states and the shipping industry, coupled with the structures and processes of international law, severely inhibits the likelihood of passage of a treaty robust enough to ensure real compliance with international regulations.

#### IV. CONCLUSION

The UN faces the challenge of drafting a treaty weak enough to be palatable to enough countries for it to pass, but robust enough to carry out its goals. The Draft BBNJ Treaty has the potential to make significant strides in the conservation and protection of our oceans, especially if the final iteration includes language that addresses flags of convenience and increases regulation and enforcement of international standards.

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<sup>97</sup> *Id.*

<sup>98</sup> Draft BBNJ Agreement, *supra* note 67.