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Introduction: International Standards at Sea

On November 11, 2002, the oil tanker *Prestige*, flying the flag of the Bahamas, under the command of a Greek captain with a crew of Filipinos and Romanians, chartered by a Liberian-registered company based in Switzerland, and probably owned by Russian nationals, ran into a storm as it carried its load of 77,000 tons of heavy fuel oil from Latvia to Singapore. Two days later the captain sent out a distress call, indicating that the hull had been breached and the ship was leaking oil, and asking to be towed into a Spanish port to offload its oil and avoid catastrophic environmental damage. Spanish authorities, fearing damage to local waters, refused (as did those from Portugal), and when the ship drifted shoreward anyway, towed it out to sea where it eventually broke in two and sank in 2 miles of water 150 miles off the coast of Spain, discharging much of its oil into the water.[1] It caused precisely the catastrophic environmental damage the captain had hoped to avoid.

The tanker was operating legally, but only just. At twenty-six years old, it was older than most currently operating oil tankers.[2] It had only a single hull, making an oil spill more likely if an accident occurred. But international laws requiring double hulled tankers initially applied only to newly built tankers,[3] and the provisions of a 2001 amendment to the

1. "The Politics of an Oil Spill," *The Economist*, November 21, 2002, 46–47; David Ljunggren, "Ban Ships with Flags of Convenience—Canada," *Reuters News Service*, November 21, 2002; Melissa Rossi and Christian Caryl, "Just Missing the Boat," *Newsweek*, December 2, 2002, 7.

2. Miguel Vida, "Stricken Tanker Towed Away from Spanish Coast," *Reuters News Service*, November 18, 2002; Lloyd's Register Fairplay, *World Fleet Statistics 2002* (London: Lloyd's Register, 2002), 13.

3. 1992 Amendments to the International Convention for the Prevention of Pollution from ships (1973/1978).

International Convention for the Prevention of Pollution from Ships requiring double hulls on all tankers were not due to take effect until 2015.[4] In fact, under the earlier law, a tanker that did not otherwise meet the new regulations would have to be retired before age thirty, which would have taken the *Prestige* out of commission in a mere three years.[5] European Union law, passed in the wake of a similar oil spill three years prior, added provisions for banning ships from EU ports if they had been repeatedly detained for environmental or safety violations or if they flew the flag of a state whose vessels are known to be at high risk for causing environmental damage.[6] But though it might have, this particular vessel did not appear on that list. For a variety of reasons—including the age and condition of the vessel and the international nature of the crew—the ship could not have been legally registered in the United States or most European states. Its owners would not have wanted to register it there anyway; the environmental, safety, and labor laws they would have had to follow would have been too strict, and the fees and taxes too high.

The *Prestige* serves as an excellent example of the globalized state of maritime shipping and the consequences thereof. In addition to its polyglot crew and tangled web of ownership and registration, it was classified by a U.S. classification society, the American Bureau of Shipping, which certified that the ship had at least the minimally required equipment. Its protection and indemnity insurance was provided by British-based London Steamship Owners Mutual Insurance. It had been inspected, though not since 1999, under the European port-state inspection system, which required that 25 percent of all ships that enter Euro-

4. 2001 Amendments to the International Convention for the Prevention of Pollution from Ships (1973/1978).

5. 1992 Amendments to the International Convention for the Prevention of Pollution from ships (1973/1978). EU Law in 2001 had also adopted the 2015 deadline for ships, whether flagged in MARPOL signatory states or not, to have double hulls in order to traverse European waters, and with the earlier U.S. Oil Pollution Act (1990) the U.S. banned the use of single-hulled tankers but included a variety of grandfathering provisions until 2015. U.S. Congress, 101st Session, "Oil Pollution Act of 1990," 101 P.L. 380; 104 Stat. 484, Title IV, Subtitle A, Section 4115.

6. European Parliament and European Council, Directive 95/21/EC, December 19, 2001.

pean ports be inspected for safety and environmental problems. It had been registered in five different states since it was built.

And its journey was international as well. As such it is representative of much of the way global commerce is conducted. Ninety-five percent of goods traded internationally as measured by weight, and two-thirds as measured by value, are transported on the oceans by ships.[7] Most of these ships fly flags of convenience. An estimated 64 percent of the world's merchant-fleet tonnage is registered in flag-of-convenience states, including 68.7 percent of bulk carrier and 64.3 percent of container-ship tonnage.[8] States compete for ship registrations by intentionally keeping taxes and fees low and by having lax, or poorly enforced, environmental, safety, and labor standards; shipowners respond by flying these convenient flags in an effort to compete internationally through lower operating costs.

This ability to choose a level of international regulation by choosing where to register a ship introduces considerable difficulties for those trying to protect the marine environment and ensure the well-being of those who work or travel on ships. It also engages important theoretical questions about the role of international regulation in a globalized economy, the role of the state and the impact on sovereignty under these conditions, and the extent to which international competition increases the incentive for keeping regulatory standards low. What does the extent and pattern of foreign flag registry (and degree of regulation adopted by individual ships) tell us about when we should expect regulatory races to the bottom or upward harmonization? What does the process of responding to lowered standards on ocean vessels suggest about the role of the state—or of nonstate actors—in responding to the regulatory problems created by a system that allows states, or individual businesses, to opt out of global regulatory structures? The *Prestige*, whether simply the unlucky victim of a bad storm or a ship ill-equipped to avoid environmental disaster, is representative of the collision between globalization and international regulatory standards. Examining efforts to respond to this collision may help it have a more buoyant future than did this particular ship.

7. Philip E. Steinberg, *The Social Construction of the Ocean* (Cambridge: Cambridge University Press, 2001), 14.

8. Institute of Shipping Economics and Logistics, *ISL Shipping Statistics Yearbook 2004* (Bremen: ISL, 2004), v.

Flagging Standards?

This book examines the relationship between globalization and environmental, safety, and labor standards in the context of the shipping industry. There are nearly as many definitions of globalization as there are scholars who write about it, but the most important aspect of globalization for the purposes of this study is the reduction of barriers (be they political or technical) to international economic activity. Goods move long distances, are assembled in one location from parts made in other locations, and may be used somewhere else altogether. Freer international trade, the reduced relative cost of transportation, and increasing economic integration make possible this global movement of goods, much of which happens on the oceans on ships.

The shipping industry is among the most globalized of industries. By its very nature international shipping necessarily involves crossing between jurisdictions and traveling long distances in nonterritorial spaces. Shipowners can choose where to register their vessels and thereby choose the international and domestic regulations within which they operate. The labor market for ship workers is as global as any; shipowners can hire workers from anywhere in the world and there is often little connection between the nationality of a shipowner, the country of origin of those who work on the ship, and where the ship travels.

The underlying mechanism for the potential lowering of standards in the shipping industry is the system of open registration, a phenomenon that began in the first half of the twentieth century but gained popularity after World War II and increased in importance beginning in the 1960s. Open registries, also known as flags of convenience (FOCs), are generally characterized as ship registries that do not require citizenship of shipowners or operators, levy no or minimal taxes, allow ships to be worked by nonnationals, and have neither the will nor the capability to impose domestic or international regulations on registered ships.[9] Because these registries do not have nationality requirements for shipowners, they have created a globalized system in which shipowners have the ability to

9. Frank L. Wiswall, Jr., "Flags of Convenience," in William A. Lovett, ed., *United States Shipping Policies and the World Market* (Westport: Quorum Books, 1996), 116; Jim Morris, "Lost at Sea: 'Flags of Convenience' Give Owners a Paper Refuge," *Houston Chronicle*, August 22, 1996, 15.

choose where to register their vessels based on cost and convenience. The possibility of a race to the regulatory bottom, or the existence of regulatory havens, is realistic in a circumstance such as this when individual economic actors are not required (legally or practically) to undertake their activity in their home states. When they have the ability to choose where to operate, the locations in which they might operate (and that can thus earn revenue from their operations) may choose to compete to attract them. This process sets the stage for competition in regulatory laxity.

This system does allow low-quality ships to choose a ship registry in order to avoid internationally accepted regulation, and does allow for a collective level of regulation on ships lower than would be required in the home states of most shipowners. But it is balanced by a set of processes put into place by self-interested actors (including states and nonstate entities) that attempt to hold ships and states to higher standards. This ongoing opposition underlies the efforts of economic actors to traverse the tensions inherent in globalization. The processes that succeed or fail in lowering costs or raising standards in this issue are instructive for addressing these conflicts in other areas of the globalized economy.

Book Overview

The book as a whole seeks to evaluate and explain decisions by states and shipowners about what environmental, safety, and labor standards to adopt as they attempt to balance the economic advantages of low standards and the increasing international political advantages of raising those standards. It examines the strategies used by those who seek to raise standards on ships in the context of determining the broader implications of these decisions for efforts responding to potential downward pressure on international regulation under conditions of globalization.

Chapter 2 examines the relationship between globalization and standards generally in order to frame the broader debate into which the experience of shipping fits. It concludes that rather than leading to either upward harmonization or a regulatory race to the bottom, globalization of ship registration has lead to what might be termed a "race to the middle." Truly open registries start with low standards that then are pushed upward through pressure from a variety of sources. At the same time, the

creation by traditional maritime states of international or second registries lowers to some extent the standards on ships that register in these locations, leading to a set of middle-range standards in most major ship registries. In addition to adopting moderate levels of international regulation, open registries specialize in the types of standards they adopt, creating regulatory niches that shipowners make use of when deciding where to register their vessels.

The incentive structure provided by international economic competition underlies the development of successful strategies to raise the standards upheld by open registry states and the ships that fly their flags. Chapter 3 examines the challenges faced in international cooperation and the advantages of free riding made possible in an era of global competition and cooperation. The difficulties facing collective action come from the inability to exclude those who do not participate in cooperation from the benefits of that cooperation, giving them little incentive to cooperate in its provision. Additionally, many international problems, especially pertaining to the environment, are rival (also referred to as subtractable), meaning that those who continue to access a resource outside of a cooperative agreement can diminish the ability of the cooperating group to protect it. One important way around these problems is to attempt to change the issue structure: to create cooperation on issues that are both nonrival and excludable. While the nature of a problem itself may not be amenable to change, it may be possible to set up the cooperative process by which it is addressed so that those who do not cooperate are excluded from the benefits of cooperation. This process involves cooperation as a club good, and has led to great success in the area of shipping standards. If those who adopt low standards as a strategy of competition under globalization are excluded from the benefits of globalization itself, they lose the incentive to avoid at least some international regulation.

Chapter 4 begins the empirical consideration of shipping registration and standards, by laying out the history of the globalized shipping industry and the growth of flags of convenience. The rest of the book examines the specific strategies followed by states, nongovernmental actors, and international organizations that have brought about the level of environmental, safety, and labor standards eventually adopted by flag states or by individual vessels. First is the attempt to improve the physi-

cal condition of ships as they enter port, and to require improvement in substandard ships before they are allowed to leave. Second, once in port, ships face the possibility that dockworkers or others will refuse to unload or service them if labor standards are not sufficiently protected on board. Finally, goods from ships, once unloaded, may not be allowed to enter the market of states to which they have been shipped, if the shipowners cannot demonstrate that they have been obtained within the required regulatory standards. In addition, once all these strategies of exclusion are in place, industry organizations create their own collective processes in efforts to help members better compete within these port, ship-worker, and market strategies designed to exclude substandard ships.

Chapter 5 examines this first stage: the state-based port state control, a system of international agreements under which states agree to inspect a certain percentage of ships that enter their ports and detain those in egregiously poor condition until they are no longer a threat to safety or environment at sea. This system induces flag states to increase their standards, and ships to flag in states that meet a certain level of quality, by focusing inspections on ships from those flags that have had the greatest percentage of detentions in previous years. Shipowners do not want their ships to be singled out for inspection, and flag states, eager to attract ship registrations, seek to reassure potential registrants that they will not be negatively impacted by the reputation of the flag state. As a result, a number of ship registries have persuaded the states in which they operate to ratify international agreements and to create their own inspection systems and rules to increase the standards to which ships are held.

Chapter 6 examines the second stage: the work of the International Transport Workers Federation (ITF), an international labor union that attempts to prevent ships from registering in open registries by conducting labor actions against flag-of-convenience vessels. The ITF offers individual flag-of-convenience registered ships the opportunity to agree to a set of international labor standards and thereby gain ITF certification; if these vessels refuse, the organizers can call for a dockworker boycott of the ship in a given port. A large percentage of open registry ships have negotiated these agreements with the union in order to avoid such a labor action, and some businesses that hire ships to transport goods have begun to use only ships that have ITF agreements. Labor standards on ships worldwide have increased as a result of these efforts.

The final stage is even more intrusive: it involves efforts to prevent the goods on the ships themselves from finding a market inside the state to which they have been brought. International fisheries are one resource that suffers when open registry states choose to remain apart from regional fisheries management agreements in order to attract ship registrations. Chapter 7 looks at the actions undertaken by international organizations and states in an effort to respond to open registry vessels that fish outside of such international agreements. International organizations have begun to require member states to restrict trade in regulated fish to ships from states that have accepted, or otherwise agreed to abide by, the relevant fishery conservation measures. While many of these measures are fairly recent, they have encouraged some flag states to join international agreements or to cease registering fishing vessels.

Chapter 8 examines industry-based organizations that have taken on clublike characteristics in response to state, international organization, and labor union strategies of exclusion. For centuries ships have been inspected by classification societies that determined whether they were built to the correct specifications, and have obtained protection and indemnity insurance for assistance in case of disaster. These services, obtained by shipowners themselves, have now come to be used in the process of ship registration and port state control. The port state control inspections process discriminates based on the detention record of a ship's classification society, which has given societies an incentive to choose the ships they will classify in order to improve their records and become competitive to shipowners choosing a society. Protection and Indemnity clubs self-insure, and therefore gain from limiting their membership to ships unlikely to experience disasters. Other industry organizations for those who own, operate, or hire the services of ships have also begun to discriminate in membership to form clubs of higher-standard ships, used to help those ships avoid exclusion from ports, services, or markets.

The most successful efforts to raise the standards upheld by open registry states and the ships registered there collectively point to the advantages of exclusion as a strategy for regulatory cooperation. Ships register in open registries because of the cost advantages such registries provide, and registries compete to offer low-cost (and low-standard) options for

registration. When ships can no longer sell the fish caught outside of fisheries agreements, find that the goods they transport rot on the docks because workers at port refuse to unload them, or are subject to increased scrutiny from port state control because of the policies of their flag states, the advantages of registering in these states decreases. What these strategies have in common is that they create a "club" of ships that can gain access to a set of advantages (markets for fish, labor services at ports, preferential treatment in port-state inspections), based on their willingness to adopt a set of standards. Ships that do not adopt such standards, or that register in flag states that do not adopt them, are excluded from the benefit. This processes makes registering a ship in a truly low-standard registry (or operating a substandard ship) less cost-effective than it would otherwise have been.

The strategies that have successfully worked to raise environmental, safety, and labor standards on ships also suggest that in a number of instances it is not only states that play the centrally important role in raising international standards. International organizations can be instrumental in providing the context in which states operate such clubs. Additionally, nonstate actors like labor unions can raise standards without the cooperation of states. And others affected by ships that operate outside the international regulatory framework, like the fishers who lose when flag-of-convenience fishing vessels undermine fishery conservation, can play important roles in persuading states or international organizations to take action.

Finally, chapter 9 explores the connection between state sovereignty and globalization in the consideration of how states respond to increasing economic integration and trade. Contrary to what many argue, globalization—and the use of offshore locations for economic activity—does not inherently signal a fundamental shift in sovereignty and diminution of state control. To some extent the presence of flags of convenience and other forms of offshore activity can be seen as a voluntary abdication by states of responsibilities in exchange for the systemic advantages these opportunities present. It is because of these competing advantages of high standards and low costs that such offshore opportunities are created. But the acquiescence of states in "offshore" economic activity suggests that states have the ability to diminish its importance if

they so choose; the nonstate actors involved in pushing for increased standards may therefore tip the balance in persuading states to race to the regulatory middle.

There are impacts on the environmental conditions affecting the ocean, on the safety of those who work or travel on ships, and on labor conditions in the shipping industry, from the globalized nature of shipping. Globalization *has* led to a downward trend in standards. But globalization has created many opportunities to raise these standards as well. Ultimately the conditions on ships and in the oceans result from a constant interaction between those who benefit from lower standards and those who prefer higher ones.