

For Sale: Flags of Convenience and the Commodification of Sovereignty in the European Union

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Submitted to
Central European University
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In partial fulfillment for the degree of Master of Arts in Public Policy

Budapest,
Hungary

2015

Author's Declaration

I, the undersigned **Randolph DeArmond Dilday** hereby declare that I am the sole author of this thesis. To the best of my knowledge this thesis contains no material previously published by any other person except where due acknowledgement has been made. This thesis contains no material which has been accepted as part of the requirements of any other academic degree or non-degree program, in English or in any other language.

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Abstract

Within the European Union (E.U.) an industrial deregulatory mechanism, Flags of Convenience (F.O.C.), have been tolerated, perpetuated, and legitimized. F.O.C. are oft hypothesized as a fundamental and negative force in regulatory competition. A neoliberal instrument, they capitalize primarily on the E.U.'s institutionally enshrined freedoms of movement — for goods, capital, and labor — and freedom of establishment, legitimacy and market access. Further F.O.C. are generally criticized for poor safety records, and minimal responsibility and compliance toward international conventions on security, labor, environmental, and safety requirements. While conceived a *bête noire*, in the E.U. F.O.C. represent a dynamic instrument which has induced a convergence in member States' ship registers. Member States have successfully commodified a coupled sovereignty — E.U. and nation-state — through F.O.C., in a profitable pursuit. In this thesis I will explore how F.O.C. have been tolerated, perpetuated, and legitimized by the E.U., and how this commodification of sovereignty operates within the E.U.'s policy framework. The ascent of F.O.C. as a principal instrument in maritime industries has catalyzed a curious convergence worthy of further study.

Acknowledgements

To my mother, my stay, who kept me under *weigh*. To my father who taught when to have and have *knot*. To my sister who laughed at each nautical *gaff*. My family and friends, my taut *bitter end*. And most important, for the completion of this thesis, my Academic Writing instructor Sanjay Kumar who showed me how to chart my course, and my supervisor and friend Vera Scepanovic who helped weigh my anchor, and whose support never flagged.

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Abbreviations

E.C. European Council
E.C.J. European Court of Justice
E.E.C. European Economic Commission
E.E.Z. Exclusive Economic Zone
E.U. European Union
F.O.C. Flag of Convenience
I.C.S. International Chamber of Shipping
I.L.O. International Labor Organization
I.M.O. International Maritime Organization
I.S.F. International Shipping Federation
I.T.F. International Transport Workers Federation
M.A.R.P.O.L International Convention for the Prevention of Pollution from Ships
P.S.C. Port State Control
Paris M.o.U. Paris Memorandum of Understanding
S.O.L.A.S. International Convention for the Safety of Life at Sea
S.T.C.W. International Convention on Standards of Training, Certification, and Watchkeeping for Seafarers
Tokyo M.o.U. Tokyo Memorandum of Understanding
U.N.C.L.O.S. United Nations Convention on the Law of the Sea
U.N.C.T.A.D. United Nations Convention on Trade and Development

Chapter 1: Introduction

A modern Atticism of antediluvian enterprise, Flags of Convenience (F.O.C.) embody the neoliberal race to the bottom¹ (Harlaftis 1996; Rodriguez 2011). Predecessors to today's F.O.C. were christened in the 19th century as a tool for European merchants to profit on the domestically outlawed slave trade (Shaughnessy and Ellen 2007). By the 1920s F.O.C. were likewise hoisted by U.S. merchant vessels to satiate Americans' Prohibition Era pleasures (Shaughnessy and Ellen 2007). Untrammelled by restrictive domestic policies, provisions, and regulations, F.O.C. granted these spirits legal passage between ports of call.

In the wake of World War II F.O.C. use and availability underwent rapid expansion (Christodoulou-Varotsi 2012). These flags — “[...] generally defined as a registry operated by a flag State which allows non-national or foreign vessels to register to fly its flag [...]” — unfurled to the four-winds (Gianni 2008, 4). European and U.S. ship owners and operators, anxious to avoid high taxes and operational costs in their respective nations began the wholesale out-flagging of their merchant vessels (Shaughnessy and Ellen 2007; “Why So Many Ships Fly Panama's Flag” 2014). Soon, so-called flag-states emerged. A contemporary to the tax haven, these safe harbors sprang from the Marshall Islands, to Mongolia and Malta (Brooke 2004; Shaughnessy and Ellen 2007; Gianni 2008). Their radicle often nurtured with logistic and financial support from third states, in an attempt to cultivate regulatory competition between F.O.C. (Shaughnessy and Ellen 2007). The Liberian F.O.C. was, for example, abetted and encouraged by the U.S. to create a competitor to the dominant Panamanian F.O.C. (“Brassed

¹ Described by Sassen (2000) as “[...] downward pressure on regulations across all jurisdictions [...]” to increase competitiveness and entice transnational industries and footloose capital (380).

Off” 2002; Shaughnessy and Ellen 2007). Costs are continually sunk deeper in this race to the bottom.

Related literatures have tacked toward F.O.C. antagonism (Working 1999; Griffiths and Jenks 2012). They pay little heed to the support and legitimacy F.O.C. receive internationally as the manifestation of a sovereign’s conferred right to register vessels (United Nations Convention on the Law of the Sea 1982). Their treatment is principally as security risk, environmental, safety and labor hazard. F.O.C. are erroneously connoted as risky and flagitious, treated as unfit and unsafe for safe passage (Working 1999; Griffiths and Jenks 2012). They are statically presumed to act as the agent and means which sustains illicit commodity flows. They are but an *extra*-legal mechanism which must be curtailed (Griffiths and Jenks 2012). Current literature oversimplifies this commodification of national sovereignty (see, Gianni 2008; Griffiths and Jenks 2012). The relatively uniform field is void of finesse or fimbriation, consideration of F.O.C.’s finer qualities and the international conventions and criteria within which they are framed.

International conventions governing maritime industries have implicitly supported F.O.C. (“European Maritime Transportation Strategy until 2018” 2009; United Nations Convention on the Law of the Sea 1982). They have not adequately accounted externalities and impacts beyond minimum security, safety, labor, and environmental provisions (Rodriguez 2011; Christodoulou-Varotsi 2012). F.O.C., as a commodifiable sovereign asset and as a marketable neoliberal tool, have been placed under only loose international regulation which do not regulate their financial potential. It is remarkable as provisions exist to govern financial aspects of other commodifiable sovereign assets, like tax havens (Wagstyl 2014; Drezner 2009). Prevalence and preeminence —

of maritime transport industries and F.O.C. in the global economy — may serve motive for the slack policy framework that stays the current *corpus ordinationes*.

The maritime shipping and transport industries have proved *conditio sine qua non* to international trade (“European Maritime Transport Strategy until 2018”; 2009). These industries have long shored international trade, and their import continues to rise (Gianni 2008; “European Maritime Transport Policy until 2018” 2009). The open-market nature of F.O.C. have long been employed to enhance the profitability of maritime industries. Suprisingly, F.O.C. face few regulatory restraints, outside the international conventions that enforce environmental, labor, safety, and security standards. A gulf exists between the extant *corpus ordinationes* which focuses on social interests, and the purpose of F.O.C.: revenue through the sale of sovereignty.

Within the E.U. an unparalleled regulatory institution has been assembled. It reinforces a *re-contextualized* member State sovereignty (Anastasiou 2007). The sinuous E.U. *corpus ordinationes* is tasked to manage the largest single market in the world, an envisioned polestar to evolved and harmonized social policies (Martinsen and Vollaard 2014; Gabriel 2015). One would logically expect meticulous E.U. imprimatur to enforce ship register policy that ensure social interest are met, through evolved and harmonized social policy balanced with similarly regulated economic interest. That a *social Europe* would prevail.

Transnational capital preeminence and maritime industries’ importance have, however, checked this development (Van Apeldoorn 2009). With over 80% of global trade carried by maritime shipping and transport channels, and an over EUR 24 billion contribution to the E.U.’s balance of payments, the E.U. ghosts, implicitly endorsing F.O.C. through maritime regulations that fail to restrict – as one would expect – their deregulatory nature (Shaughnessy and Ellen 2007; Christodoulou-Varotsi 2012). The principal cost reduction instrument and impetus

employed to encourage transnational capital and maritime industries, F.O.C., have been supported in international conventions and criteria, including the E.U. policy framework. They are legitimated internationally as a tool for ship owners and operators to increase marginal revenues through reduced operational costs, taxes, and fees (Yannopolous 1988). F.O.C. represent a commodification of sovereignty, a subjugation of social interests apparently at odds with the E.U.'s envisioned *raison d'être* (Working 1999; Martinsen and Vollaard 2014).

Social interests and integrations elemental to the E.U. have been subverted to transnational and footloose capital² demands (Martinsen and Vollaard 2014). Perpetuation of F.O.C. have been justified by the E.U. as a necessity to retain global attractiveness and compete against ship registers in flag states like Panama and Liberia ("European Maritime Transport Strategy until 2018" 2009; "Why so Many Flags Fly Panama's Flag" 2014). Loose and laissez faire policies — supported in Articles 45 and 49 of the Treaty on the Functioning of the E.U. — have flourished inter-member State competition for vessel registration revenue (Christodoulou-Varotsi 2012). The "[...] freedom of capital and the primacy of markets [...]" within the E.U. has been bolstered alongside member State and E.U. sovereignty's commodification (Van Apeldoorn 2009, 22). Small E.U. member States like Malta and Cyprus, conferred with the sovereign right to register vessels, prepared their F.O.C.; they have successfully commodified their sovereignty and attracted foreign owned and operate vessels onto their registers (Rodriguez

² "[...] the capacity to withdraw and shift both productive and financial capital with greater ease" (Rurda 2002).

2011). As a result they have become two of the largest ship registers³ in the world (Gianni 2008; Rodriguez 2011).

Legitimization and perpetuation of F.O.C. emerges two problems to be explored in this research. Firstly, how are F.O.C. — as operated by E.U. member States — an embodiment of commodified sovereignty? How does this commodification of sovereignty function within the member States, and between the member States and the E.U.? And secondly, how does the E.U.'s policy framework support the commodification of sovereignty?

In this thesis I will explore how the sale and commodification of sovereignty — through F.O.C — has been tolerated, perpetuated, and legitimized within the E.U. and her member States. My analysis will specifically F.O.C.us on the Maltese case. Malta is a microcosm with a long maritime history (Lewis 2013). After independence in 1964, Malta has established herself as a maritime industrial center *par excellence* (“Making Malta a Center of Maritime Excellence” n.d.). In 2004, after accession to the E.U. Malta successfully reigned her full-O.S.R. and shifted it to the legitimated *quasi*-open ship register. (Lou et al. 2011; Rodriguez 2011). In the decade since, Malta has expressed how the E.U.'s policy framework has supported the commodification of sovereignty through weak provisions to govern member States' immaterial sovereign assets, like F.O.C.

Limited by resources — time, access, and facilities — my research is principally made with qualitative methods, specifically archival research. I have analyzed policy documents and relevant literatures on F.O.C., the E.U.'s regulatory structure, international maritime conventions and criteria, and the commodification of nation-state sovereignty. Too, I capitalized on an

³ Determined by number of vessels over 1,000 gross tons, Malta has the fourth and Cyprus the twelfth largest ship registers worldwide (Gianni 2008).

opportunity to travel to Malta and conduct field research on the topic at hand. Here, I have synthesized these subjects in my exploration.

In part, the E.U. has progressively provisioned a principal for profit in the toleration, perpetuation, and legitimation of F.O.C.. By no means a novel or phenomenal instrument, F.O.C. represent an important tool employed by principal actors in the global economy. It presents the commodification of state sovereignty through the sale of an immaterial asset bestowed to nation-states. The E.U., through a *laissez faire* policy-framework aimed firstly at safety, security, and the environment, and secondly on increased competitiveness in the global market for footloose capital and *footloose tonnage*⁴ has induced F.O.C. and their commodification of sovereignty to converge on her shores.

⁴ Like the aforementioned *footloose capital*, but specifically referentially to maritime vessels.

Chapter 2: Literature Review

Current F.O.C. literature remains diffuse, especially concerning the E.U.; a synthesis of two discrete literatures is necessitated and applied. Firstly, I will review the E.U. policy-framework, its embedded neoliberalism, and social-economic asymmetry. This literature is basal to a discussion of ship registers and F.O.C. within the E.U. as their toleration, perpetuation, and legitimation are manifested in the conflation of these factors. Secondly, an overview of relevant F.O.C. literature will be undertaken. The majority F.O.C. literature F.o.C.uses on negative labor, security, environmental, and safety impacts and externalities, limiting the breadth of available information for analysis. A preference will be made to the scant Eurocentric F.O.C. literature.

2.1 E.U. Literature

“The course of European integration from the 1950s onward has created a fundamental asymmetry between policies promoting market efficiencies and those promoting social protection and equity” (Scharpf 2002, 665).

The E.U. emerged from the industry-driven European Coal and Steel Commission (Anastasiou 2007). This post-World War II integration experiment conflated steel and coal industries — those industries of war — in France, Italy, West Germany, Belgium, the Netherlands, and Luxembourg, in an embryonic attempt to protect the continent from another ravaging war (Anastasiou 2007). It initiated the “[...] first transnational, democratic decision making institution for the purpose of jointly governing and prudently integrating vital national interests around common industries” (Anastasiou 2007, 34). From this experiment in European integration, through the Treaties of Rome, Maastricht, Lisbon, and on the Functioning of the E.U., a fundamental economic-social asymmetry has emerged (Martinsen and Vollaard 2014).

Freedom of movement, for capital, labor, goods, and services, and the freedom of establishment enshrined in Articles 45 and 49 of the Treaty on the Functioning of the E.U. have been key in contemporary integrations and institutionalizations (2012). Too, they sustain the E.U.'s embedded neoliberalism, and asymmetric economic-social capital endowments (Martinsen and Vollaard 2014). The now near neap state of the E.U.'s professed and envisioned end, that *social Europe*⁵ was shorn as the economic developments and modernization were provisioned with various political capitals⁶. According to Martinsen and Vollaard (2014), although social policies have expanded since the 1990s, they have been serially subjugated to the E.U.'s capitalist arrangements, and used to support transnational and footloose capital acquisition (2014).

Enhanced capitalist arrangements and attractiveness are consistently upheld by institutional and political will, hard law and binding provisions in the E.U. (Van Apeldoorn 2009). These — the political will, hard law, and binding provisions — are rooted in the fundamental rights enshrined in the Treaty on the Functioning of the E.U. and the Treaty on E.U. (Van Apeldoorn 2009; Martinsen and Vollaard 2014). Social policies and provisions “[...] have remained mostly regulatory in nature [with] non-binding soft-law or framework legislation, such as directives, allowing [member States] to select the policy instruments themselves for the policy goals set” (Martinsen and Vollaard 2014, 683). Member States are required to meet regulatory

⁵ According to Martinsen and Vollaard (2014) the E.U.'s capacity to promote a socially oriented Europe continues to be hampered by E.U. and member State policy which consist “[...] of different constitutive components that [...] have a contradictory impact on the implementation of social policies” (689).

⁶ This includes institutional developments like the European Economic Area, E.U. Cohesion Funds, the Stability and Growth Pact and the E.U. Monetary Union.

minimums; with their accordance they have the opportunity to subvert social policies to support neoliberal ends, such as footloose capital acquisition (Rodriguez 2011; 2014).

Van Apeldoorn (2009) described this subjugation as embedded neoliberalism. It is a machination where “[...] the freedom of capital and the primacy of the markets is ideologically articulated with the subordinate interest of productive capital as well as of organized labor” (22). Social interests are employed to enhance transnational capital acquisition and neoliberal interests. Extant in the E.U. and the European Coal and Steel Commission — that industry driven foundry which cast the E.U. — embedded neoliberalism is supported through political will and institutional manifestations (2009). The drive for economic growth imbued with embedded neoliberalism has opened opportunities for instruments like F.O.C. to develop. It is supported by member States’ adoption of supply “[...] national competitiveness strategies, which [...] promote a thorough neoliberal socio-economic reconstructing” (27). The social-economic asymmetry described by Scharpf (2002) and Martinsen and Vollaard (2014) is furthered as social integration becomes a sunk cost to regulatory revenue competition. This phenomenon will be later engaged apropos of F.O.C. and commodified sovereignty in the E.U. (Diacono 2010; Rodriguez 2011).

Although social interests have not been wholly reigned by economic interest, they are provided markedly less support (Martinsen and Vollaard 2014). Ingrained and embedded, a neoliberal strategy has distilled social interests to a degree “[...] that supports and facilitates what is euphemistically called the ‘adaptation of societies’ to the so-called exigencies of European and global competition [...]” (Van Apeldoorn 2009, 30). Maxims once decried in support of that social Europe — namely the freedoms of movement and establishment — have

culled policy and provisions to strengthen the E.U.'s capitalist capacities, neoliberal arrangements, and regulatory competition.

In effect, regulatory competition for footloose capital, and more specifically *footloose tonnage*, has flourished in this clime (Rodriguez 2011; Christodoulou-Varotsi 2012).

Fundamental freedoms – of movement for goods, services, and labor, and of establishment – have serially been employed to perpetuate and legitimize F.O.C. both as an instrument for ship owners and operators, and E.U. member States (Rodriguez 2011). The E.U. implicitly supports these enterprising deregulatory industries; it appears to have shorn responsibility to E.U. integrations' social aspects and interests (Martinsen and Vollaard 2014). This conundrum, to be explored further, is that F.O.C. have catalyzed a convergence around compliance with socially oriented conventions, effectively improving those qualities embedded neoliberalism and regulatory competition appears to have hamper (Christodoulou-Varotsi 2012).

2.2 F.O.C. Literature

“Flying the flag of countries like Belize or Liberia allows them to avoid heavy taxes and hire crews from low-wage countries [...] such vessels have poor safety records, frequently do not pay employees, and sometimes abandon sailors in distant ports when aging ships get too expensive to run.” (Working 1999)

Objective F.O.C. literature is a *rara avis*; it tends to objectify the phenomenon as a lucrative and nefarious tool. Griffiths and Jenks (2012) outline the F.O.C.'s capacity to destabilize global capital markets and commodity flows (2012). They invoke the readers' imagination: the vessels are involved in narcotics, dual-use materials, and small arms and light weapons transport. These vessels “[...] sail under so-called flags of convenience and are registered in flag states with limited regulation and control of their merchant fleets” (vi). F.O.C.

are a problem — Griffiths and Jenks posits — because “[...] criminal networks take advantage of the many gaps in governance and surveillance of the maritime domain to smuggle [...]” (1). Maritime transportation moves nearly 80% of illicit trade, the majority by F.O.C. vessels (2012).

The F.O.C. Griffiths and Jenks conceive is a corrupted caricature, and is unduly characteristic of the F.O.C. oeuvre (“Brassed Off” 2002; Gianni 2008; 2012). Invoked are countless eponymous examples, from small arms and light weapons smugglers in South Asia to New World narcotics. However, while F.O.C. may carry a majority of illicit goods, one must keep perspective. For instance, F.O.C. vessels account too for 79.2% of fish carriers and cargo vessels – as a percentage of the global total gross tonnage shipped (Gianni 2008). Further, while 80% of illicit goods may be transported by maritime transport, an equal percentage of total global is weighed over maritime routes (Griffiths and Jenks 2012; “European Maritime Transport Strategy until 2018” 2009).

Taking a more nonpartisan position, Lou et al. delineate an important intra-F.O.C. distinction in their catalogue of F.O.C. diversity and flag choice behavior (2011). For the authors, there exist two distinct types of F.O.C., or open ship register⁷: the *full*-open ship register, and the *quasi*-open ship register. Both *full*- and *quasi*-open ship register benefit ship owners and operators; each has characteristics which serve to drive flag choice behavior for a specific clientele (Yannopoulos 1988; 2011). According to Lou et al., from a financial perspective, “[...] the selection of a flag is a primary step for a successful shipping operation. Competition in international shipping markets mandates that the ship owner/operator has to cut costs in all ways possible, and [an] open register is imply the magic wand that has made such dreams come true”

⁷ O.S.R. are constituent to F.O.C.; a ship register is called a F.O.C. when it meets the criteria described in the Rochdale Criteria or the I.T.F. Criteria.

(2011, 1). They are *the* apparatus for ship owners and operators, they are an accelerator and instrument in the neoliberal race to the bottom (Yannapoulos 1988).

Distinction between the *full*- and *quasi*-open ship register is as follows. The *full*- open ship register provides ship owners and operators with the “[...] maximum cost saving possibilities, will accept all vessels regardless of their current vessel classification, and will provide total flexibility with regard to the enforcement of safety, environmental and labour regulations [...]” (2011, 5). Alternatively, the *quasi*- open ship register maintains a body of labor, safety, security, and environmental regulations which meets basic international conventions and criteria (2011, 5). Ship owners and operators elect to register to quasi-O.S.R. because they allow “[...] a certain cost savings offered by [an] open register while at the same time avoiding the poor safety reputation associated with [full] open registers” (2011, 5). Relatively legitimate, the *quasi*-open ship registers’ benefits may be furthered reaped. Within the E.U., registration to a *quasi*-open ship registers like Malta, Cyprus, the French International Registry, and the Cayman Islands, yields access to the largest single market⁸.

Rodriguez (2011) provides perhaps the most well rounded account of E.U. F.O.C., their foundations, regulations, history, and perpetuation. Rodriguez departs from the orthodox literature to describe legal provisions enacted and enabled by the E.U., and her antecedent E.C. In his review of relevant legislations, jurisprudence, and historical accounts, Rodriguez sought to analyze “[...] how will F.O.C. vessels be regulated in the future”, within the E.U. (Rodriguez 2011, 16)?

⁸ Member States Cyprus and Malta each operate a *quasi*-open ship registers., other member States create less conspicuous F.O.C. (Alexander 2015). These *quasi*-open ship registers include so-called secondary or international registers employed by France; and such off-shore registries with former colonies, as is the case with the United Kingdom and the Cayman Islands (Christodoulou-Varotsi 2012, 2).

From the 1958 Geneva Convention of the High Sea's Article 5, Rodriguez describes the historic institutions and provisions which have revealed today's F.O.C. field. Article 5 explicates the genuine link's role in a nation-state's registration procedures, stating "[...] there must be a genuine link between the State and the ship; in particular the State must effectively exercise its jurisdiction and control in administrative, technical and social matters" (Rodriguez 2011, 17). This concept was upheld in the United Nations Law of the Sea in 1982 (2011). However, enforcement became unfeasible as the U.N.C.T.A.D. reported in 1995 that only 11 countries had become signatories (Rodriguez 2011, 18). The genuine link concept was also rejected in large part within the E.U. as it failed to pass the acid test of Article 50 of the Treaty on the Functioning of the E.U.'s freedom of establishment principle (Rodriguez 2011; 2012).

The rub between the E.U. and F.O.C., the friction that frightens the flame, is the capitalization on social policy and integrations for financial benefit (Christodoulou-Varotsi 2012; Martinsen and Vollaard 2014). The force that endorses and enhances E.U. F.O.C. is that freedom of movements enshrined in the E.U. – and its antecedents' – founding documents (Rodriguez 2011). As compliance with these freedoms are legally necessitated, the E.U. field is fertile for F.O.C. to take root, for *footloose tonnage* to sail between member States ship registers. The E.U. and member States are further incentivized to not restrict or strictly-regulate F.O.C., principally because it would affront the open market and freedom of movement principals fundamental to the E.U., and implicitly because it could trammel economic growth and global competitiveness for maritime industries (Rodriguez 2011; "European Maritime Transport Strategy until 2018" 2009). With this framework in place the commodification of sovereignty, through F.O.C. and their constituent open ship registers, has ensued.

Chapter 3: The Commodification of Sovereignty

“Today, many small countries voluntarily auction off their sovereignty to the highest bidder, reaping great rewards in the process. In some respects, it has never been so profitable to be a nation-state in this non-nation-state world.” — (Drezner 2009)

Deepened and broadened globalization has induced the erosion of nation-state sovereignty through marketization and commodification (Van Apleldoorn 2009; Drezner 2015). Nation-states continue to promote and employ this “[...] in the attempt to adapt state action to cope more effectively with what they see as global ‘reality’” (Evans 2010, 161). Complex interactions between transnational capitals and state agencies have restructured state sovereignty; supply-side tactics and commodification have stayed the sale of sovereignty (Van Apleldoorn 2009; Drezner 2009).

As material and immaterial sovereign assets — a sovereign nation-states capital, goods, rights and services — have acquired exchange-value. Nation-states have been induced to commence their commercialization (Marx 1887; Drezner 2015). Certain formerly *un-*commodified assets have become marketable to actors without necessarily a link to the state (Van Apleldoorn 2009; Drezner 2009). First provisioned *not* as commodities or capital depositories, but rather as necessities to operate as a sovereign nation-state in a new ‘global reality’, nation-states have since created effective and efficient means to aid their marketization and sale (Yannopoulos 1988; Evans 2010; Drezner 2009).

Sovereign assets include those both material and immaterial, endowed to the sovereign nation-state. For the purpose of this paper, the sovereign nation-state will be systematized based on the descriptions by Hall (1948) and Giddens (1985). To Hall, sovereignty represents that supreme power of the state as employed in a legitimate, recognized, and exclusive territory.

Sovereignty's legitimation requires, what Giddens (1985) describes as, a "[...] reflexibly monitored set of relations between states [...]" (263). A sovereign nation-state will thus operate within this paper as: a supreme authority and jurisdiction granted over a territoriality which abides international rules and norms; and a nation-state recognized as such by the international community (Hall 1948; Giddens 1985).

This sovereign nation-state is endowed with material and immaterial assets. Material assets include natural capitals⁹ present in a nation-state's territoriality (Drezner 2009). Immaterial assets include various rights and capacities provisioned to sovereign nation-states and enshrined in international law. These include: ship registration, citizenship, E.E.Z., internet country codes, nation-state membership in the United Nations, and market access¹⁰ (Drezner 2009; "Why so Many Flags Fly Panama's Flag" 2014).

Sovereignty, as administration and authority over rendered assets, has proved especially divisive and contentious in maritime contexts (United Nations Convention on the Law of the Sea 1982). Though periphery to this thesis' *raison d'être*, disputes over a specific material maritime asset, those mid-oceanic shoals and atolls, and their intrinsic and immaterial asset, a 200 nautical mile E.E.Z., have swelled of late (National Oceanic and Atmospheric Administration n.d.). Nation-states' protracted rivalries over these slight, sea-swept sands is not a rivalry over land, but rather the immaterial assets it is endowed (National Oceanic and Atmospheric Administration n.d.). The real, driving interest is these islands' immaterial asset, their sole right to the E.E.Z. that endow their shores (National Oceanic and Atmospheric Administration n.d.).

⁹ Including, but not limited to, mineral resources, maritime access, deep-water harbors, and fertile lands.

¹⁰ Within the E.U., market access endowed through vessel registration or citizenship may be concluded to be such a supranational immaterial sovereignty.

F.O.C., likewise, present a vessel for capitalization on nation-state sovereignty (“Why so Many Ships Fly Panama’s Flag” 2014; Drezner 2009). Insofar as vessel *flagging* and registration “[...] confers nationality on a ship and brings it within the jurisdiction of the law of the flag state [...]”, the vessel — whether within or without the flag-state’s territorial waters — ferries a flag-state’s investment, jurisdiction, and sovereignty (*A Guide to Ship Registration* 1992; United Nations Convention on the Law of the Sea 1982). Vessels registered to a flag-states’ ship register remain cleated to their flag-states’ sovereignty. They expand the flag-states’ economic potential into new regions, as they shore their flag-states’ legislations, jurisdiction, assets, and authority across the four oceans (*A Guide to Ship Registration* 1992; United Nations Convention on the Law of the Sea 1982).

For the nation-state — and particularly the E.U. member State — sovereignty is embodied in authority and jurisdiction over a territoriality, control of its material and immaterial assets, and recognition (Hall 1948; Giddens 1985; Van Apeldoorn 2009). These assets are bestowed by the international community through treaties, agreements, and conventions. Firstly, in that supreme authority over a territoriality, and its natural material assets. And secondly, in those rights conferred to the nation-state by international regulations, conventions, and provisions. Again, these include the right to register ships, to grant citizenship, to be provided an international internet code, and the like (Gianni 2008; Drezner 2009). Commercialization of immaterial assets represents a liberal application and actualization of state sovereignty. The nation-state shrewdly capitalizes on its conferred capacities; it facilitates commodification as sovereignty is marketed by the state and representative state agencies to clientele beyond the states’ jurisdiction. Sovereign, immaterial assets are peddled for a depository of equate exchange value (Marx 1887; Drezner 2009).

According to Marx and Engels (1948) and Marx (1887), commodification is similar to exploitation. Within this paper however, commodification is to be disengaged from exploitation's myriad negative connotations. The process of commodification must firstly be understood with a keen grasp of the constituent commodity.

To Marx (1887) a commodity is a good or service, provided one does not produce it for personal consumption. They represent exchange value depositories (1887). Once a commodity is created or acquired, the owner "[...] wish[es] to part with it in exchange only for those commodities whose use-value satisfies some want [...] to realize the value of his commodity, [or] to convert it into any other commodity of equal value [..]" (Marx 1887). A commodity has a literal value. Not all commodities have, however, so apparent a value (Marx 1887; Polanyi 1944)

Similar to Marx, Polanyi (1944) envisions a commodity as a *something* produced not for consumption, but rather for sale at market (1944). Polanyi further delineates a distinction important to this thesis, the difference between the discrete *real* and *fictitious* commodities. Polanyi's real commodities are those things which are produced for sale at market. So-called fictitious commodities, alternatively, encompass those things bereft of the *produced for sale at market* quality (1944). Polanyi includes land, labor, and currency as fictitious commodities (1944, 41). These do not have rational nor logical connection to a literal value. Their valuation and commodification serve a "[...] means to subordinate the substance of society itself to the laws of the market" (Polanyi 1944, 71). A nation-states' sovereign immaterial rights — and especially within the context of this paper, the right to register vessels— may similarly be conceived as such fictitious commodities.

Assets sharing the aforementioned fictitious commodity qualities are subsequently commercialized. They are converted and they are coveted. Nation-states, as the owner or the proprietor, try to realize a figurative exchange value for these fictitious commodities¹¹. Money is the primary medium employed to engage the commodity's use-value (Marx 1887; "Commodification" n.d.). The process whereby a sovereign right is commodified is complete with the "[...] transformation of relationships, formerly untainted by commerce, into commercial relationships, relationships of exchange, of buying and selling" (1887; "Commodification" n.d.). The seller of like immaterial assets has successfully commodified a nation-states' sovereignty (1887; Drezner 2009).

Applied to ship registers, the F.O.C. embodies the successful commodification of sovereignty. The perhaps hyperbolic Mongolian Ship Register provides a diaphanous depiction (Alexander 2015). A non-littoral state, Mongolia invoked an immaterial asset — the nation-state's sovereign right enshrined in the United Nations Convention on the Law of the Seas — to christen a ship register in 2003 (Brooke 2004). Managed in Singapore by the private firm 'Sovereign Ventures', the Mongolian Ship Register has experienced impressive growth in the past decade (Brooke 2004; Alexander 2015).

Much of the Mongolian Ship Register's growth is thought to be tied to increased P.S.C. for North Korean flagged vessels¹². Formerly North Korean flagged vessels are speculated to have re-flagged under the Mongolian flag (Brooke 2004). The I.C.S. has described the *full*-open ship register operated in Mongolia as sub-standard due to its employment "[...] as an

¹¹ The exchange-value invoked by F.O.C., specifically by member States, is primarily based on their international legitimacy and the access to the European Economic Area. Exchange value refers to the quantity of another commodity one's commodity may be exchanged for at market (Marx 1887; "Commodification n.d.). An E.U. F.O.C. *valuable* principally because the economic benefits and competitive advantages it entails.

¹² This includes port closures to North Korean flagged vessels as part of U.N. mandated sanctions (Brooke 2004).

international service that offers quite competitive fees and no restrictions on the ownership of any ship [...]” (Brooke 2004; Alexander 2015). In the first operational year the Mongolian Ship Register flagged approximately 300 vessels and earned USD 200,000 (Brooke 2004; Alexander 2015). Sovereignty is commodified as the Mongolian Ship Register has profitably acquired a figurative exchange-value; the services it supplies being highly desired by a particular international clientele (“Why so Many Flags Fly Panama’s Flag” 2014).

Internationally provisioned immaterial assets so hoisted represent the F.O.C.; their sovereignty possess a value, stitched and sewn, and flown aloft (United Nations Convention on the Law of the Sea 1982). F.O.C., and their constituent ship registers, present a piecemeal commodification of the nation-state’s granted rights, authority, and assets. They represent Polyani’s fictitious commodity, saddled with value far beyond their stars and bars. Within the international community, criteria and conventions which govern maritime industries, ship registers and their F.O.C. have failed to adequately account this commodified asset in their regulations (United Nations Convention on the Law of the Seas 1982). Instead they elect to focus on the maintenance of minimal safety, security, environmental, and labor standards. A diffuse international policy-framework, apropos to a ship registers neoliberal qualities, has effectively legitimized and perpetuated commodification of sovereignty through F.O.C. (Drezner 2009; Christodoulou-Varotsi 2012).

Chapter 4: Flags of Convenience and International Criteria, Community-collaborators, and Conventions

Globalization's expansion since its early embodiments has been driven in large part by market forces and the maritime shipping and transport industries (Harlaftis 1996; Mansell 2009)). F.O.C. represent the conflation of these drivers. It is an industrial instrument that allows ship owners and operators opportunity to maximize cost savings, and better capitalize on market forces, commerce, and commodity flows (Lou et al. 2011). That it can perpetuate a race to the bottom characterized by commodified sovereignty is hardly accounted in international criteria and conventions.

Historically, the phenomenon now considered as F.O.C. was a tool utilized to most efficiently reap globalization generous potential (Shaughnessy 2007; Griffiths and Jenks 2012). Not until the 20th century did the international community — represented here by the U.N., I.M.O., I.L.O., and the I.T.F. — construct criteria to categorize ship registers as F.O.C., or to modernize and augment conventions to better govern maritime shipping and transportation industries. The internationally implemented conventions additionally serve as foundation to the E.U.'s maritime strategy. They enforce signatories' — including the E.U. and her member States — general acceptance of F.O.C. as a neoliberal tool. This is reflected in the juxtaposition between the primary, economic criteria for F.O.C. categorization, that it is utilized to reduce costs, and the primary, social purpose of international conventions, to regulate safety, security, and environmental protocol in maritime industries. The E.U. embodies this juxtaposition. To grasp its implications on E.U. F.O.C. let us first examine those international conventions which confer them with credence and legitimacy.

Described below are the criteria, community, and conventions which manage and mandate modern maritime shipping and transport industries. One may identify great concern for seafarer safety, international security, and environmental protection, coupled with ineffective or absent regulation for the externalities and sunk costs inherent to F.O.C. as neoliberal mechanism. Principal criteria include: the Rochdale Criteria, and the I.T.F. Criteria; principal international community-collaborators, primarily the I.M.O.; principal international conventions include: U.N.C.L.O.S., S.O.L.A.S., M.A.R.P.O.L., and S.T.C.W.

4.1 The Rochdale Criteria

The British Rochdale Committee of Inquiry conceived the Rochdale Criteria in an attempt to describe generally acceptable criteria for F.O.C. vessel categorization (Febin 2007; Christodoulou-Varotsi 2012). F.O.C.'s growing preeminence in post-World War II trade had emerged the need for a definitive classification schema (Shaughnessy 2007; Christodoulou-Varotsi 2012). Drafted in 1970, the Rochdale Criteria provided a foundation for F.O.C. categorization; invocation of one criteria would earn the F.O.C. denomination (Christodoulou-Varotsi 2012). Criteria described by the Rochdale Committee of Inquiry include (Febin 2007; Christodoulou-Varotsi and Pentsov 2008; Christodoulou-Varotsi 2012):

- The flag-state allows for foreign ownership, control, and operation of marine vessels;
- The registration process is quick, simple, discrete, and possible for a ship owner to complete *in absentia* of the flag-state;
- Income taxes are not or are minimally collected by the flag-state. Tonnage-based annual registration fees are the main costs incurred by ship owners and operators paid to their flag-state;

- The flag-state does not require additional shipping tonnage for its own import and export purposes;
- Foreign labor is allowed aboard ships;
- The flag-state lacks the administrative capacity or facility to properly enforce national and international provisions and conventions, “[...] nor has the country even the willingness [...]” (Christodoulou-Varotsi 2012, 4).

While still employed in F.O.C. categorizations, the Rochdale’s criterion have been outmoded by supranational governance structures like the E.U., and augmented by additional criteria like the I.T.F. Criteria. Regarding the E.U., the Rochdale Criteria are unable to adequately categorize an F.O.C. (Christodoulou-Varotsi and Pentsov 2008). As an F.O.C. is operationally “[...] a flag with lower costs, more relaxed crewing requirements and less vigorous regulation [...]”, certain Rochdale criteria would inaccurately deem every E.U. member States’ ship register an F.O.C. (Gianni 2008). This is due to Articles 45 and 49 of the Treaty on the Functioning of the E.U., the freedom of movement and the freedom of establishment (2012). These require by law every member State to allow E.U. nationals to find gainful employment and establish business ventures in other member States (2012). Though it remains an important guide to F.O.C. categorization the Rochdale Criteria were necessarily expanded through a subsequent F.O.C. categorization framework, the I.T.F. Criteria.

4.2 I.T.F. Criteria

The I.T.F. perceives the F.O.C. as a problem grossly exaggerated by increased interdependencies induced by globalization (Febin 2007). F.O.C. provides ship owners and operators a quick descent in this race to the bottom. Their principal concern is for the safety, security, and treatment of transport workers involved in maritime industries. As delineated by

the I.T.F. in 1974, an F.O.C. ship is “[...] one that flies the flag of a country other than the country of ownership” (“Flags of Convenience” n.d.). To the affected transport worker, this often results in poor safety procedures and conditions aboard vessels, low wages, and minimal to non-existent pensions or healthcare (“Flags of Convenience” n.d.). Alternatively, it provides ships owners and operators great cost savings through low taxes and registration, and most importantly “[...] the opportunity to employ cheap labor from the global labor market” (“Flags of Convenience” n.d.).

These persistent qualities are induced by F.O.C.; the I.T.F. criteria is founded on the genuine link theory, enshrined in the U.N.C.L.O.S. (“Flags of Convenience” n.d.; Febin 2007).

For a ship register to not be considered an F.O.C., a ship owner and operator must have a genuine link to the flag state, such as citizenship or legal residence (“Flags of Convenience” n.d.; Febin 2007).

4.3 United Nations Convention on the Law of the Sea

Written between 1973 and 1982 and entering into force in 1994, the keystone United Nations Convention on the Law of the Sea charted the international community’s course to tackle the dynamism and potential conflict contained in the worlds’ seas and oceans. The Convention was initiated by the extensive changes occurred since the antecedent 1958 and 1960 United Nations Convention on the High Seas (Christodoulou-Varotsi and Pentsov 2008). New problems of governance and regulation had emerged. Novel and collaborative approaches were necessitated to ensure sustainable management of maritime resources, and resolutions to settle

conflict related to maritime claims and sovereignty (United Nations Convention on the Law of the Sea 1982).

In 1967 Arvid Pardo, U.N. Ambassador from Malta, catalyzed changes to the United Nations Convention on the High Seas and the birth of U.N.C.L.O.S. (Pardo 1967). In a speech to the U.N. General Assembly, Ambassador Pardo described the need for “[...] an effective international regime over the seabed and ocean floor beyond a clearly defined national jurisdiction [...]” as a means to “[...] avoid the escalating tension that will be inevitable if the present situation is allowed to continue” (Pardo 1967). He further described rivalrous maritime claims’ conflict potential, the pollution born by vessels and industry and sunk in the seas, and the need for orderly and systematic ocean governance.

U.N.C.L.O.S. burgeoned from those concerns described by Ambassador Pardo. Today the convention has 167 signatories, including E.U. member States dually represented by the E.U. and their national governments (“Chronological Lists of Ratifications of, Accessions and Successions to the Convention and Related Agreements” 2015). It provides the groundwork to determine maritime sovereignty claims, regulated marine borne and deposited pollutions, and mitigate marine territorially disputes. Too, it provides operational definitions of novel, now conventional, concepts like the E.E.Z, differentiated littoral zones¹³, and the conferred degree of authority and jurisdiction a nation-state enjoys over these various zones (United Nations Convention on the Law of the Sea 1982). U.N.C.L.O.S. provides the legal framework for modern maritime governance, and legitimacy to its signatories.

¹³ The U.N.C.L.O.S. includes detailed descriptions of a nation-states’ rights in various littoral zones, including internal waters, territorial waters, contiguous zone, and the E.E.Z. (National Oceanic and Atmospheric Administration n.d.)

4.4 International Maritime Organization

Today the primary architect and defender of maritime conventions is the I.M.O. (“What Exactly is IMO?” n.d.). A U.N. organization, the I.M.O. is endowed with the responsibility to impose “measures to improve the safety and security of international shipping and prevent pollution from ships [and oversee] legal matters, including liability and compensation issues and the facilitation of international maritime traffic” (“What Exactly is IMO?” n.d.).

4.5 International Convention for the Safety of Life at Sea

An international convention aimed at coordinating the safety of maritime labor began development in 1914, as a response to World War I (International Convention for the Safety of Life at Sea 1988). Finally come to fruition in 1988¹⁴, S.O.L.A.S. progressively grew in breadth and regulatory power. It now provides minimum baselines and standards for the construction and operation of vessels in international and national waters. Signatory states take primary responsibility for the enforcement of S.O.L.A.S.; recently however, P.S.C. has emerged as a possible effective means to ensure flag-state enforcement (1988). Port states inspect vessels entered into their ports. P.S.C. is employed in cases where “[...] there are clear grounds for believing that the ship and its equipment do not comply with [the Convention]” (1988). Signatory states must enforce compliance to the Convention in their maritime procedures and provisions, ports, facilities, and flagged vessels (1988). S.O.L.A.S. accounts for vessels’ electrical, technical, and mechanical installations and systems; safety features; communication

¹⁴ Earlier versions of the International Convention for the Safety of Life at Sea were passed in 1960 and 1974 (International Convention for the Safety of Life at Sea 1988). Too, it has been amended since the 1988 versions’ implementation.

technology and procedures; navigation services; cargo types allowed and safety precautions; dangerous goods transport; nuclear powered vessels; operations management and special security and safety measures (1988).

4.6 International Convention for the Prevention of Pollution From Ships

The first draft of M.A.R.P.O.L was adopted in 1978. Today, it is the primary framework for the management and prevention of accidental and operational marine pollution. The Convention aims to reduce pollution from vessels and littoral industries through flag state enforcement (International Convention for the Prevention of Pollution from Ships 1978).

M.A.R.P.O.L. specifically provides guidelines and a framework for signatory states to regulate pollution by oil, by harmful and dangerous cargoes, by noxious liquid cargoes, by vessel sewage and garbage, and by air pollution (1978). Like S.O.L.A.S. the primary enforcement agent is the flag-state, however P.S.C. has become a more common and effective check against rogue states.

4.7 International Convention on Standards of Training, Certification, and Watchkeeping for Seafarers

Upon implementation in 1984, S.T.C.W. established universal, minimal requirements for seafarer watchkeeping, certification, and training International Convention for the Safety of Life at Sea 1974. Procedures outlined in S.T.C.W. impressively extend beyond signatory states through P.S.C. (1974). Signatory port states are required to board and search, or deny port access to vessels with “[...] deficiencies deemed to pose a danger to persons, property, or the environment” (1974)

International maritime criteria, conventions, and collaborations have conceived a broad policy framework to regulate maritime shipping and transportation industries. Their focus on

safety, labor, security, and the environment is echoed by the E.U.. F.O.C. are not specially regulated with regard to their objectification as an embodiment of commodified sovereignty. This, as we shall see, has not proven detrimental to the maritime industries. Rather, and especially within the E.U., this toleration, perpetuation, and legitimization of F.O.C. has catalyzing convergence toward the *quasi*-open ship register.

Chapter 5: E.U., Flags of Convenience and the Commodification of Sovereignty

“European flags must face ever-fiercer competition from foreign competitors who are favored by more flexible regulations, cheaper labor or government support. This [...] could result in maritime transport activities being relocated from Europe to third countries.” – (“European Maritime Transport Policy until 2018” 2009).

Curiously the E.U. implicitly avers F.O.C. as a requisite tool to remain competitive in global trade and maritime industries (“European Maritime Transport Policy until 2018” 2009). Their logic justifies that neoliberal strategy steeped in sovereignty’s commodification (Polyani 1944; Drezner 2009). Diffuse international conventions and criteria outlined above fostered this race to the bottom. The E.U., and her member States are left a Hobbesian Hobson’s choice: induce capital flight to F.O.C. states, or implement policies which capitalize on that immaterial sovereign asset — the right to register vessels — to entice capital to remain (United Nations Convention on the Law of the Sea 1982).

E.U. and member States’ logic have shifted responsibility for many F.O.C. externalities to external actors (“European Maritime Transport Strategy until 2018” 2009). Social interests are

bound to the foremost pursuit of economic interests. Seafarers' *mal de mer* appears best treated with a *remède industrielle*, so to speak (Rodriguez 2011). Now, lest we devolve into an inquiry about the oological qualities invoked in their logic, let us explore how the E.U.'s current policy framework has developed, how it has tolerated, legitimized, and perpetuated the commodification of sovereignty through F.O.C. (Rodriguez 2011).

Current E.U. maritime industry policy and regulation is directed by the E.U. Maritime Shipping and Transport Strategy 2018 ("European Maritime Shipping and Transport until 2018" 2009). Composed in 2009 by the Commission, the broad strategy builds on previous international conventions — especially U.N.C.L.O.S. and M.A.R.P.O.L. — and attempts to deepen collaborative working relationships with non-state stakeholders — especially the I.M.O., I.L.O., I.C.S., and I.S.F. — in the E.U. and member States ("European Maritime Transport Policy until 2018" 2009).

The E.U. Maritime Shipping and Transport Strategy 2018 appears affected by the guidance of shipping professionals represented the I.C.S. and the I.S.F. (2009). They, according to the Commission's press release on the Strategy, presented "[...] an industry opinion on the more urgent issues to be addressed and on the way the EU could intervene" (European Commission 2009); that, by 2018, E.U. maritime industries need be at least as efficient, competitive, sustainable, and reliable as they are today, and that capacity match cargo-volume needs (European Commission 2009; "European Maritime Shipping and Transport until 2018" 2009). Motivated by these opinions, the E.U. Maritime Transport Strategy 2018 has tripartite primary foci: to increase environmental standards, maritime industry capitals, and maritime industries' resilience to financial crises' (2009). That member State ship registers are only mentioned with regard to their "[...] ever-fiercer competition from foreign competitors [...]" is

unsurprising (2009). Now, let us endeavor to explore the legal and regulatory beginnings to the E.U.'s F.O.C. strategy, and their impact on member States' commodified sovereignty.

In 1973 the E.C. made a first foray into maritime policy and regulation catalyzed by the E.C.J. case *the Commission versus France* — the French Seaman's Case (Rodriguez 2011; *Commission v. France* 1973). The case set the stage for the E.U.'s current F.O.C. orientation. The Commission of the European Communities filed suit against the Republic of France on the grounds it had not “[...] complied with its obligations under the provisions of the EEC Treaty as regards freedom of movement [...] for workers within the Community”¹⁵ (*Commission v France* 1973; Rodriguez 2011). France was subsequently ordered to comply with E.E.C. provisions and open their ship register to foreign owned and operated vessels (Rodriguez 2011).

The Court determined E.C. member States' nationals must be allowed equal opportunities to work on vessels flagged by other member States (*Commission v. France*). The E.C.J.'s decision grafted current maritime shipping and transportation provisions to the freedom of movement of labor and capital fundamental to the future E.U.'s Lisbon Treaty and the *Acquis Communautaire* (Anastasiou 2007; Rodriguez 2011; Consolidated Treaty on the Functioning of the EU 2012). Further, F.O.C. provisions and regulations in the E.C., and subsequently in the E.U., would follow these legitimated employment and registration freedoms to their logical, neoliberal conclusions (Rodriguez 2011; Christodoulou-Varotsi 2012).

In the decades between the French Seaman's Case and the Lisbon Treaty's implementation, the E.C. embarked on a subtle shift. Global competition for footloose capital and footloose tonnage induced the E.C. to tack from the social orientation prescribed and

¹⁵ Article 1, 4, 7 of Regulation 1612/68/E.E.C. of the European Economic Community lays out the freedom and mobility of workers within the European Community (Council Regulation 1612/68/EEC on the Community Trade Mark, 1968 O.J. L 257)

promoted by Mollet toward a “[...] free-market, competition-driven European integration process” (Gheler 2009; Hoerber 2014, 203). Economically liberalized, a regulatory competition and race to the bottom ensued (Yannopoulos 1988; “Brassed Off” 2002). Member States pursued competitive policies to retain and attract footloose tonnage. Social policies became secondary, minimal, and sunk costs to economic development in the new global reality (Christodoulou-Varotsi 2012; Martinsen and Vollaard 2014). Regulatory competition for footloose tonnage, became increasingly tolerated and legitimized with the E.U.’s policy framework so long as minimal safety, security, and environmental regulations were met (Rodriguez 2011; Christodoulou-Varotsi 2012).

By the 1990s a revival of ship register legislation began (Rodriguez 2011). The social-economic asymmetry supported by the Maastricht Treaty was further leavened with the E.U.’s flourished capitalist and embedded neoliberal arrangements (Van Apeldoorn 2009; Rodriguez 2011). The E.U. strategy congealed around a two suits: the 1996 case *the Commission versus France*, and the 2004 case *the Commission versus the Netherlands (Commission v. France 1996; Commission v. Netherlands 2004)*.

The first suit, levied against the Republic of France by the Commission of the European Communities, was a continuation of the earlier 1973 French Seaman’s Case. The E.C.J. compelled France to abide their decision in the prior case (*Commission v. France 1996*). They declared France, while “[...] restricting the right to register a vessel in the national register and to fly the national flag to [...] natural persons of French nationality [...]” failed to follow numerous Articles within the E.C. Treaty (*Commission v. France 1996*).

The Commission versus the Netherlands, challenged another contentious criteria to ship registration: the genuine link. In the proceedings the Netherlands cited the U.N.C.L.O.S. article

91, that “There must exist a genuine link between the State and the ship” (1982; *Commission v. Netherlands* 2004). The E.C.J. decided, rather, that “[...] it is not necessary to establish a genuine link between the state and the actual owner; it is sufficient to provide that the management of the ship be carried out [...]” from the flag state (*Commission v. Netherlands* 2004). Ship owners and operators cheered this decisions that a genuine link need not exist between the ship owner and flag state, but only ship operations and management must be carried out in the flag state. This second caveat finding further support in in the Treaty on the Functioning of the E.U.’s Article 49, the freedom of establishment (2012).

From anchors to bankers E.U. industries subsequently capitalized on intra-E.U. regulatory competition codified in the E.U.’s freedoms of movement and establishment (Consolidated Treaty on the Functioning of the EU 2012; Wagstyl 2014). Corporations made remarkable gains as member States sought to entice footloose capital and footloose tonnage to their shores with favorable tax regimes, low operational costs, and minimal and beneficial vessel registration processes (Christodoulou-Varotsi 2012). While the E.U. continues to envision itself polestar to social integration and benefits, it in fact became pallbearer. The E.U.’s social *raison d’être*, its fruit ripened, consumed to sustain member States’ sale of immaterial, sovereign assets (Van Apeldoorn 2009).

Further cases, conventions, criteria, and strategies enforced the E.U.’s minimal ability and intention to regulate F.O.C. and their commodification of sovereignty (Rodriguez 2011; “European Maritime Shipping Policy until 2018” 2009). Immaterial sovereign assets have presently become as important as material sovereign assets with regard to maritime shipping and transportation industries (Rodriguez 2011). No longer does a states’ deep water facilities

determine their ability to entice these industries. Their attractiveness now lay in regulatory and registration regimes vessel registers' international legitimacy, and market access.

Within the E.U., F.O.C. continue to be tolerated so long as they meet the basic safety, security, environmental, and labor requirements¹⁶; a regulatory convergence is occurring. Since 1996 additional regulations and provisions have been implemented by the E.C. and E.U. to increase member States' maritime industry capacity and competitiveness. Material assets, include funding for deep water port expansion in littoral states. And immaterial assets including tax relief for maritime industries, and exemption from or reimbursement of social contribution to member States (Rodriguez 2011). A fickle and fictitious commodity, F.O.C. are tolerated and perpetuated in E.U. and member State policy frameworks. A convergence toward *quasi*-open ship registers which comply with international conventions and safety, security, labor, and environmental standards has been induced. Member States are brandished with the capacity to legitimately market and commodify their sovereignty through *quasi*-open ship registers. This arcade is sheltered by the E.U. (Diacono 2010).

¹⁶ Where they meet requirements described in U.N.C.L.O.S., M.A.R.P.O.L, and S.O.L.A.S., and have 'White List' status on the Paris M.o.U and the Tokyo M.o.U.

Chapter 6: Case Study: Maltese Flags of Convenience and Member State Sovereignty Commodification

Harken back to Polyani's (1944) definition of a commodity. A commodity is a good or service produced for sale at market. Vessel registration, and F.O.C., represent an immaterial sovereign asset, one conferred to recognized nation-states by the United Nations Convention on the Law of the Sea as a necessary tool to operate in a then new 'global reality'. It is not produced for sale at market. Contemporarily, a nation-states' right to register vessels requires *re-*conceptualization as it is no longer a necessity to operate in a new 'global reality'. Vessel registration has become commodity fictitious, not produced but marketed for sale, its value figurative and acquired through shifted circumstances, and added value.

Malta has proven an adept marketer of such commodified sovereign assets. Since independence in 1964, the Maltese government sought new sources of revenue to support their newly sovereign state ("Making Malta a Centre of Maritime Excellence" n.d.). Through a combination of several related factors Malta proves an outstanding case of the commodification of sovereignty through F.O.C. ("A Guide to Ship Registration" n.d.). The Maltese case proves divergent from most F.O.C. as Malta has not simply commodified a sovereign asset, but has too burgeoned a dynamic industry. Their ship register is but one component in a larger national industry ("Making Malta a Centre of Maritime Excellence" n.d.).

In 1973 Malta enshrined its aspirations in the fundamental Merchant Shipping Act (Maltese Merchant Shipping Act 1973). The Act delineates a detailed system of governance and regulation for Malta's maritime industries; it includes detailed procedures and requirements for ship registration. Amended throughout the proceeding decades, the Merchant Maritime Act guided maritime industrial growth in Malta.

Part II of the Merchant Maritime Act enforced Malta's F.O.C. status. It sets forth a detailed delineation of ship registry processes, requirements, certifications, and fees (1973). According to the Act, vessels eligible for registry must be owned by “ [...] (a) citizens of Malta; (b) bodies corporate established under and subject to the laws of Malta having their principal place of business in Malta [...]” (1973, 11). Foreigners, able to establish a body corporate in Malta, were thus enabled to register vessels in the Maltese Ship Register. Malta too improved the establishment process through the application of an efficient approach to body corporate establishment for foreigners (“Malta: A Guide to Ship Registration” 2014). They hastened and streamlined the requisite requirements for vessel registration.

The Maltese Ship Register was never a *full*-open ship register to the extent of the Marshall Islands, Cambodia or Liberia (Gianni 2008). Malta always operated a *quasi*-open ship register. Even in the original 1973 Merchant Shipping Act, transport of undisclosed dangerous goods — ranging from benzine to gun-powder, nitro-glycerine, small arms and light weapons — was banned. Transport of these goods required special disclosure and certification. Vessels under the Maltese F.O.C. never knew the nefarious cargo F.O.C. are constantly coupled (1973).

Through subsequent decades Malta capitalized on its fictitious commodity, embodied in the Maltese Ship Register (“A Guide to Ship Registry” n.d.; Diacono 2010; Lewis 2013). Their sovereign right to register ships was employed at greater and greater scales. The Maltese Ship Register's ranks swelled, not because it offered a highly covert or surreptitious register, nor because labor, safety, or environmental provisions were nil (Diacono 2010; Rodriguez 2011).

Malta cultivated a dynamic maritime industry center, the Maltese Ship Register but one constituent element (“Making Malta a Centre of Maritime Excellence” n.d.; Diacono 2010). Maritime industries were cultivated and new management techniques employed to increase the

effectiveness and efficiency of vessel registration and related state services. These were the added value that attracted an international clientele to the Maltese Ship Register.

In 1999, in the midst of maritime industry and ship register expansion, disaster struck. *The Erika* remains an eponymous even in Europe's F.O.C. experience. It served as a warning and reinforced negative general perceptions of F.O.C. (Gianni 2008; Mansell 2009). A Maltese flagged oil tanker with a 37,000 ton capacity, *The Erika* sank in French waters in the Bay of Biscay (Gianni 2008). Estimates account over 30,000 tons of oil were spilled in this avoidable environmental calamity. Prior to *the Erika's* sinking, inspectors in two separate conditions drew attention to her poor operational condition (Gianni 2008). Their ship register then 'black-listed' on the Paris M.o.U., Maltese regulations did not require repair prior to her voyage.

The Erika catastrophe, coupled with Malta's accession to eventual E.U. membership, catalyzed the Maltese Ship Registers upward convergence toward a legitimate, *quasi*-open ship register. Through the accession process Malta was under pressure to improve its low performing ship registry — to meet the various international conventions detailed above (Mansell 2009). Malta was “[...] encouraged to improve the performance of ships on their registry by the European Union as a condition for membership” (Mansell 2009, 186). By 2004 Malta had shifted from 'black list' to 'grey list' status on the Paris M.o.U. (Mansell 2009). Finally a full-member to the Paris M.o.U., Malta was 'white-listed' in 2006 (Mansell 2009).

Effectively legitimized by 'white list' and E.U. member state status, Malta began the even more lucrative commodification of sovereignty through a *quasi*-open ship register, an E.U. F.O.C. (Mansell 2009; Diacono 2010). 2004-2006 represent a transition for the Maltese Ship Register; from a *full*- to *quasi*- open ship register, and from marred to reliable in the international community's perspective (Mansell 2009). After 2006 their sovereign assets acquired increased

legitimacy, coupled with the access to the European Economic Area E.U. membership entailed. These facets created a great added value for certain ship owners and operators to fly the Maltese flag. As explained above, these facets in-fact serve as the primary component to E.U. F.O.C. exchange value. Vast profits from opened access to the vast E.U. single market could be reaped; international legitimacy and ‘white list’ status simplified shipping logistics, opened foreign ports, and reduced applied P.S.C. measures (Mansell 2009; Rodriguez 2011). Malta successfully capitalized on these features to create the fourth largest ship register in the world (Gianni 2008).

Malta’s approach to commodification is a case divergent in its dynamism, though its utilization of market access, legitimacy, and the Treaty on the Functioning of the E.U.’s freedoms is comparable to other member States (Diacono 2010; Christodoulou-Varotsi 2012). F.O.C. as a commodified sovereignty are most frequently contextualized apropos of the Mongolian or Liberian examples. These treat the right to register a ship as akin to a windfall. Malta instead strives to develop a broad and capable maritime industry cluster (“Making Malta a Centre of Maritime Excellence” n.d.). Thus far they have been successful. Over 20,000 people are employed in maritime industries which contribute over 11% of Malta’s G.D.P. (“Making Malta a Centre of Maritime Excellence” n.d., 11). As an F.O.C. Malta is a *bilander*¹⁷; a unique mainsail rigged aloft to better catch the winds.

Transport Malta, the public agency task with ship register management, has proved adept at the commodification of Malta’s flag. Flag commodification and marketization highlights Malta’s maritime history, ‘white list’ status, absent nationality requirements for vessel crews, easy establishment of a body corporate for foreign nationals to register vessels under, and no restrictions, inspection fees, nor hidden costs (“Malta: A Guide to Ship Registration” 2014).

¹⁷ A *bilander* is a unique style of sailing rig. They are a small ship frequently used by European merchants in the Mediterranean]

Further, Transport Malta has applied a customer centric approach to ship register management. According to their brochure, they employ a “[c]ustomer service oriented approach that values long term customer relationship” (“Malta: A Guide to Ship Registration” 2014). A distinct strategy — of customer-centrism, the development of a maritime industry cluster, market access and enhanced international legitimacy – emboldened the Maltese Ship Registry to heel, to more effectively, efficiently, and proficiently deliver services. In the commodification of sovereignty through F.O.C., states must add value to entice clients to hire their service in the crowded market yet to flag.

Chapter 7: Concluding Remarks

Malta — unlike most European F.O.C. — has broadly cultivated its maritime industries and has emerged a center of excellence in these fields. Material and immaterial assets related to the maritime industries have been augmented. Supported by European Union Cohesion Funds, Malta has constructed, outfitted, and refurbished deep water port facilities, and vessel terminals in Valletta. Transport Malta, the public agency tasked with vessel registration and the Maltese Ship Registry management, has incorporated a customer-centric approach to vessel registration. Hierarchies in state agencies to streamline the ship registration process for foreign nationals (“Malta: A Guide to Ship Registration” 2014).

To flag a vessel, and weigh her anchor under the Maltese flag has never been easier. A fact highlighted by Transport Malta — the government agency charged with the Maltese Ship Registry’s management — in their brochures. These changes, along with the benefits bound to Malta’s E.U. membership, have induced impressive growth in the Maltese Ship Registry. Between 2013 and 2014 the ship register grew over 13% (“Making Malta a Centre of Maritime Excellence” n.d.). While register growth and expansion is quite acute in Malta, owing to its integrated policy to develop an advanced, broad, creative, and dynamic maritime industrial center, growth too has occurred in ship registers across E.U. member States.

Vessels under weigh under E.U. F.O.C. currently constitute 56% of total vessel tonnage owned and operated by member State nationals (Rodriguez 2011). Certain member States’ competitive advantages, ranging from absent crew nationality requirements, minimal taxation, low operational costs, quick establishment procedures for a body corporate establishment, and local fee exemptions, have flourished E.U. F.O.C. and retained their competitiveness in the global market. Attempts to ascend and negate this race to the bottom were elaborated and

attempted by the European Union in the late 1990s. The results were etiolated at best. Their premier goal, to reduce F.O.C. use 25%¹⁸ by European Union nationals by 2005 was unsuccessful. F.O.C. utilization continues to increase in the E.U. (Rodriguez 2011).

Should economic benefits still exist for member States, F.O.C. will continue to be tolerated, and legitimized (Yannopoulos 1988). Pressure from member States and the I.S.C. will continue to impact policy strategy and implementation. Additionally, from the E.U.'s early incarnations it is apparent the value institutions place on economic interests and development. And it is this attention, and its embodiment in the European Economic Area, European Union Cohesion Fund provision, and the accession processes necessitated compliance with international conventions, which augment member States' flags value. In addition to the value an immaterial sovereign asset like a F.O.C. has, those of the member States contain an added value. They grant access to the European Economic Community, access to facilities funded by the European Union Cohesion Funds, legitimacy and access to foreign ports without embargoes or strict port state control due to member States' compliance with international conventions. F.O.C. successfully commodify sovereignty — not only that of the flag state, but of that binding and supranational E.U. (Luo et al. 2011; Rodriguez 2011).

European lawmakers have not seriously tackled F.O.C. with regard to its neoliberal tendencies and commodification of sovereignty. They tack to and fro, at once calling for ascendance from this race to the bottom, harmonized registration procedures and fee schedules across member States, all the while elaborating the necessity to remain competitive against “[...] ever-fiercer competition from foreign competitors [...]” (“European Maritime Transport Strategy until 2018” 2009). The current *corpus ordinatones*, was composed piecemeal by “[...] EU

¹⁸ This when in 1985 only approximately 22% of tonnage was carried on F.O.C. vessels in the then ten member E.C. (Yannopoulos 1985, 199)

regulators to pretend to penalise F.O.C. vessels. The most import concern is that the vessels are in optimum conditions to sail” (Rodriguez 2011, 25). A conflation of industry interest, member State interests and international conventions, the E.U.’s established regulations have served to best “[...] maximize the quality of EU ship registers” (Rodriguez 2011, 25). This quality enhances their competitive advantages on the global market.

International and E.U. policy-frameworks are inutile to F.O.C. prevention or reduction. In operation, they have served to tolerate, perpetuate, and legitimize F.O.C., especially in the E.U.. Nearly all member States now operate an F.O.C., be it conspicuous or inconspicuous (West 2009; Christodoulou-Varotsi 2012). This, much to the chagrin of organizations like the I.T.F., the I.L.O, and environmental organizations which attach negative and nefarious connotations from extreme and eponymous experiences on the F.O.C. epithet. This static perception of F.O.C. needs to be *re*-conceptualized and better contextualized.

While E.U. and international policy-frameworks have not successfully challenged F.O.C. as an instrument in the neoliberal race to the bottom, they have mitigated some its severest consequences. Here we may refer back to the Maltese case. In 2006, after acceding to the E.U., Malta finally achieved ‘White List’ status on the Paris M.o.U.. Their ship register induced to implements higher, safety, security, and environmental standards.

Too recall Lou et al. and their distinction between the *full* and *quasi* open ship registers. We can observe convergence in the E.U. toward *quasi*-open ship registers, as in the Maltese case. This constitutes compliance with international and European conventions and legislations. These registers’ convenience rest *not* in their acceptance of “[...] all vessels regardless of their current vessel classification, and [provision of] total flexibility with regard to the enforcement of safety, environmental and labour regulations [...]” (5), but plainly in lower registration and

tonnage fees, more attractive tax regimes, European Economic Area market access, and international legitimacy. Confident with the *quasi*-open ship registers qualities and attributes, and certain of their perpetuation, toleration, and legitimization with the E.U.'s loose and laissez faire maritime policy framework, perhaps now we can *re*-contextualize F.O.C.'s and their requisite commodification of sovereignty.

Instead of continuing to ask *how to mitigate the consequence of F.O.C. and reduce their use?* may we begin to explore more beguiling questions. *Why would any ship owner or operator select not to fly an F.O.C.? How would harmonization of ship registration fees and processes within E.U. member States impact trade? And are E.U. member States actually in ship register competition with states like Liberia, Mongolia, and the Marshall Islands?*

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