Understanding the Japanese maritime law from key concepts (3)
— the “nationality" of a ship

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[Executive Summary]

*The nationality of a ship and issues related to a Flag-of-convenience (“**FOC**”) ship that cannot be avoided when talking about the nationality shall be discussed in the historical context.*

Under international law, the conditions for granting a ship her nationality have traditionally been to be determined by each state. The only restriction was that nationalities cannot be granted by two or more states. As FOC ships have increased after World War II, however, an idea to require “genuine link” between a ship and her flag state (nationality state) has been advocated and eventually incorporated into the UNCLOS in 1982. However, the United Nations Convention on Conditions for Registration of Ships 1986, an attempt to materialize the substance thereof, provides abstract conditions only. It has not yet come into effect.

Basic effects upon a ship by being granted her nationality by her flag state is that a ship is subject to controls by the jurisdiction of her flag state. But it was concerned that controlling power by the jurisdiction of the flag state over an FOC ship was not appropriately exercised. Since the 1970s, SOLAS, MAROL, STCW, MLC and other international treaties have gradually developed substantial controls over a ship by her flag state’s jurisdiction, and the scheme of controls over a ship by her calling port state (Port State Control) was increasingly adopted in addition to controls by her flag state jurisdiction so that both controls would make it possible to exclude a ship who did not satisfy regulation standards (a sub-standard ship), and thus the focus has been shifted from the restriction of an FOC ship to the exclusion of a sub-standard ship. Nevertheless, the nationality of a ship not only means she is subject to control of her flag state, but its significance is also found in other dimensions like criminal jurisdiction. Also there exist national interests or security issues

of a state in maintaining ships flying its flag. Therefore, some states have the offshore registration system, as an attempt to prevent ships belonging to their fleet from escaping to FOC states – Flagging Out – and ensure the number of ships flying their flags.

Conditions and status of a Japanese ship are mainly provided for in Ship Act. As a matter of conditions, all owners of a ship are required to be Japanese individuals or Japanese legal persons satisfying necessary conditions. The significant status of a Japanese ship includes exemption from Cabotage. There was a recent case in which the exceptional application of a special permission for coastal transport became an issue in the context of COVID-19 pandemic. As for the status of a foreign ship in Japan, she is entitled to enter into a Japanese port in principle as long as it is an open port. However, there is an exceptional legislation to prohibit a ship from entry into port. As to attempts to maintain ships flying its flag (Japanese ships), Japan does not have offshore registration system as such. Instead, there is the "Basic Policy to Secure Japanese Ships and Seafarers" under Marine Transportation Act and the recognition of a semi-Japanese ship linked to tonnage tax system.

Under private law, it is considered that the "nationality" of a ship becomes an issue in international private law (governing law). To which extent the law of the flag shall be the connecting point under the circumstances of prevailing FOC ships is an issue. This point typically arises in an issue of governing law of maritime lien, in respect of which we can yet find no express legislation, no well-established judicial precedents and academic views in Japan.

Many of the issues surrounding the nationality of a ship are related to an FOC ship. It seems we must understand their existence is rooted in the situation of competitions in a common worldwide market under the principle of freedom of shipping.

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1. Introduction

We would like to discuss the "nationality" of a ship in this paper.
As *Hayashi Shihei* in Japan in 18th century of Edo Era advocated the existence of "*direct water route with no boarder from Nihombashi Bridge in Edo* (former name of Tokyo) *to China and to the Netherlands* (then the sole the European country having diplomatic relations with the Tokugawa Tycoon Government)", the sea is connected to the world. A ship is physically capable of navigating to call at any ports around the world through the sea.
The traditional notion of "freedom of the high seas" since *Grotius* under international law (law of the sea) contains key concepts of the high seas and the "freedom of navigation" of a ship on the high seas. This was advocated in denying the concept of territorial sovereignty over oceans by the European ocean states in the preceding era of the Great Navigation. In addition, the concept of "freedom of navigation" contains the "flag state doctrine" regarding the exercise of state jurisdiction over ships navigating on such free high seas. That is the idea that a ship is to be granted her nationality by a state and is subject to its jurisdiction, and accordingly on the high seas, she is subject to the exclusive jurisdiction of her nationality state in principle. The conditions for granting a ship her nationality and its effects are thus a matter of international law as well as a matter of national law of each state. When we consider the right related to a ship in private law, the starting point is her ownership. If we think her ownership is the right to be recognized by

national law of a state, the issue of nationality can be said to be an issue even preceding.
This paper discusses the nationality of a ship both under international law and Japanese law. In the former we also refer to issues derived from the existence of an FOC ship, which are unavoidable when talking about the concept of the nationality of a ship. [1] Some discussions about an area where the "nationality" of a ship, inherently a concept in international law or public law, has impacts upon the relations in private law will follow.
As said, the main issues related to the concept of the "nationality" of a ship are found in the phase of international law (in particular the law of the sea) and public law of Japan and other states. The author is not a specialist of them. Since it is a historical concept, one must carefully trace back its evolutionary history to really explore its meanings. He cannot do that. In addition, the Russian invasion into Ukraine is a worldwide concern as of this paper. The nationality of a ship becomes a more critical problem at wartime than in peacetime. But he is not a specialist of international laws of armed conflict or Japanese national security law (peace and security legislation) either.[2] Therefore, this paper is merely a humble attempt to provide a general and superficial overview. That said, however, he will be more than happy if such a general and superficial overview helps readers realize the very characteristics of maritime law – it appears quite niche but is in fact the most vast and huge area, related to all legal fields in so far as any issues therein are related to the sea.

2. The nationality of a ship under international law

(1) What is the nationality of a ship?

[1] Main references on the subject of this paper includes, in addition to various literatures on international law and law of the sea, Kisaburo Enomoto, *Historical Studies on the Conditions for Registration of Ships under International Maritime Law: Focusing on "Genuine Link"* (3rd edn Supp, Research Institute for Maritime Economics 1988) ("**Enomoto (n 1-1)**"); Enomoto, *Essays on the Issues of "Flag-of-Convenience Ships"* (Kondo Marine Memorial Foundation 1993) ("**Enomoto (n 1-2)**"); Chiyuki Mizukami, *Ship's Nationality and Flag of Convenience* (Yushindo Kobunsha 1994); JMPCAA (Japan Marine Procedure Commission Agent Association), *Guide on Ship Act and Relevant Laws and Regulations (1997 Fiscal Year)*; Toshiaki Shimoyamada, *Open Registration and the International Transport Workers' Federation* (Japan Shipping Exchange 2003); Shin Henmi, *Studies on Flag-of-Convenience Ships* (Shinzansha 2006) ("**Henmi (n 1-1)**"); Shin Henmi, 'Legal Structure of a FOC Ship and its Problems' in JMPCAA, *Research Report in Fiscal Year 2011: Flag Back of a Foreign Ship to a Japanese Ship and its Procedure* at 129 (https://fields.canpan.info/report/detail/16637 (accessed 18 November 2022) "**Henmi (n 1-2)**"); Akiko Yoshida, *Transition of Jurisdictional Framework over Foreign Ships in International Maritime Conventions* (2007) 77 PRILIT (Policy Research Institute for Land, Infrastructure, Transport and Tourism) Research Reports; Tokuo Yamao, 'Flag-State of Ships and its Jurisdiction', (2007) 29 Bulletin of National Institute of Technology Yuge College 123; Mariko Kawano, 'A Study on Dilution of Relationship between a Ship and Her Flag State and the Role of the Flag State', (2010) 3 WIPPS (Waseda Institute of the Policy of Social Safety) Bulletin 155; Hiroyuki Goda, *Historical Developments of FOC Ships in Shipping in Postwar Japan* (Seizansha 2013); and Shingo Yoshino, *A Study of Japanese Marine Transportation in Armed Attack Situations* (2019) (http://id.nii.ac.jp/1342/00001739/ (accessed 18 November 2022)).

[2] Yoshino (n-1) comprehensively discusses the influences upon Japanese marine transportation in case the Armed Attack Situation under the current Japanese peace and security legislation arises and viable policies to maintain it in that situation, as well as options that can be taken by Japanese seafarers, after reviewing in great detail various experiences of and changes from the past to the present in naval war laws, requisition of ships and seafarers being the traditional shipping control policy at wartime, the realities of Japanese merchant fleet including FOC ships, and the practice of carriage by sea including war risk insurance.

A ship has her nationality. The nationality of a ship is generally understood to the relationship that such a ship belongs to a certain state, she is subject to control by such state, and she is under protection by such state.[3] The historical emergence and evolution of the concept of the nationality of a ship are interesting topics as such[4], but the basic law in the present is UNCLOS adopted in 1982. It provides under the title of "*nationality of ships*" *inter alia*:

- "*Every State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly.*" (Article 91, Paragraph 1, 1st and 2nd sentence);
- "*Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas*." (Article 92, Paragraph 1, 1st sentence); and
- "*Every State shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.*" (Article 94, Paragraph 1)

The expression of the "*flag state*" is often used to represent state of ship's nationality. In UNCLOS a ship granted the "*nationality*" by a state has "the right to fly its flag" of such state and it is provided, "Ships have the nationality of the State whose flag they are entitled to fly" (Article 91). On this basis the key word of the "flag state" is used and the obligation of the flag state is stated in various manners (Article 94). These read that the flag state is a state whose flag a ship is entitled to fly, and it is the nationality state of a ship. In addition, UNCLOS requires that each state shall not only fix "*the conditions for the registration of ships in its territory*" (Article 91) but also "*maintain a register of ships containing the names and particulars of ships flying its flag*" excluding small ships (Article 94, Paragraph 2, Sub-Paragraph (a)). That is the registration system of ships. It can thus be read as if the nationality state of a ship is her flag state, which is also her state of register.[5]

In practice, the "flag state" of a ship may differ from the "state of register" (more precisely, the "state of register" of ownership and other property rights). This is because there is a case where, if a ship owned by a State A company and registered in State A is leased (bareboat chartered) to a State B company, the lease (bareboat charter) of a ship can be registered in State B and the

[3] Mizukami (n 1) 16. But he also introduces at 17 *et seq* the view that the nationality of a ship is a kind of pseudo concept in contrast to the nationality of a natural person (who is a constituent member of a state, who is protected by the state, but who shall also have the loyalty duty to the state) which is the original scene in which this concept is used. Henmi (n 1-1) 14-16 also presents a view that is similar to the view mentioned above, also pointing out the difficulty in how to define the nationality.

[4] Mizukami (n 1) 22 introduces that although the term of the "nationality" of a ship began to be used in the early 19th century, a ship's obligation to fly a flag of a state whom she belongs to may be further traced back in as early as the 13th century European legislation.

[5] Enomoto (n 1-1) 11 explains that "*the nationality of a ship refers to the nationality (registry) granted to such ship by being recorded in the public book of such state maintained for that purpose.*" Henmi (n 1-1) 16 explains "*in practice, nationality of the flag state granted to a ship will be expressed by the fact that ship is entered – registered – in the public book of the flag state.*" The registration system records not only the "name and particulars of a ship" but also owner of the ship. As discussed later in this paper, some countries like Japan adopt dual registration systems, for registration of ownership and other property rights and for registration for administrative purposes, and other countries adopt unified registration, and these jurisdictions may be undertaken by either maritime authorities or legal affairs authorities (JMPCAA (n 1) Section 5.1.1).

ship is entitled to fly the flag of State B. [6] Although this was not clearly recognized in UNCLOS, it has become recognized in UNCCRS (not entry into force) as discussed later (Articles 11 and 12). If this happens, which state shall be considered as the nationality state is an issue. If we consider the nationality state is the state of register of ownership, it would mean the nationality state and the flag state are different. It is stipulated, however, that the flag state is the nationality state of a ship both in UNCLOS (Article 91, Paragraph 1) and in UNCCRS (Article 4, Paragraph 2). In addition to theoretical criticisms that such an idea will make it impossible to understand the concept of the nationality[7], there are also substantial criticisms that this idea has pushed forward the diluted relationship between a ship and her flag state even more than the use of FOC ships as discussed below.[8]
Bareboat charter registration system is not adopted in Japanese law so this paper will continue discussions having in mind the cases that be nationality state of a ship is her flag state, and her flag state is her state of register.

(2) Conditions for granting a ship her nationality and its effect

As is apparent from the aforementioned UNCLOS provisions, in international law, the conditions for granting a ship her nationality is a matter of domestic law of each state in principle. Traditionally, it was left to the discretion of each state, the only limitation being understood that it was not possible for a state to grant a ship her nationality if she has already been granted the nationality by another state. [9] The provision of UNCLOS that "Ships shall sail under the flag of one State only" (Article 92, Paragraph 1, 1st sentence) also expresses this.
Conditions under domestic laws can vary from strict ones to extremely loose ones in various states. Benchmarks for conditions considered by a state may include: (1) whether a ship shall be built in the state; (2) whether all or a part of owners of a ship shall be national(s) or legal person(s) of the state (and how to define a legal person of the state); and (3) whether all or a part of master and other crew shall be national(s) of the state. Some attempts have been made to classify conditions by various states. [10] An "FOC state" as discussed later can be described as a state with very loose conditions.

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[6] Mizukami (n 1) 131-138; and Henmi (n 1-1) 132-143

[7] Hisashi Tanikawa, 'Change of Basis of the Law of the Flag and Maritime International Private Law (2)' (1996) 43 Journal of Law, Political Science and Humanities (Seikei Univ) 23 at 26

[8] Henmi (n 1-1) 135; and Kawano (n 1) 171

[9] Mizukami (n 1) 59-60

[10] Seiji Tanaka, *Detailed Commentaries of Law of Maritime Commerce* (Supp 3rd edn, Keiso Shobo 1985) 162-165 introduces that Navigational Acts of England in 1651 once used three types of benchmarks for nationality: (1) origin (the place of manufacture of a ship or product of materials used thereto); (2) property (ownership of a ship); and (3) seamen (crew onboard a ship) and explains that the current legislations are generally putting focus on (2). He divides legislation types into five categories, from the one that all of ownership shall belong to its own nationals, to the one that does not have any requirements about ownership, and partly depending upon what conditions related to seamen are required. In addition, as to the cases of ownership by a legal person (as is rather usually the case), he says there can be four benchmarks in respect of a requirement of a legal person belonging to a state, *i.e.* the laws of incorporation, the location of headquarters, the nationality of officers, and the nationality of investors, and then divides legislation types into four categories by variously combining them. Shimoyamada (n 1) 8-47 broadly classifies national laws into three categories: strict, loosen, and open registrations, and successively introduces conditions in 23 nations, including Japan.

Generally speaking, the effect under international law of a ship being granted her nationality by a state is that her nationality is the trigger for exercise of various jurisdictions by the state over the ship (prescriptive, enforcement, and adjudicative jurisdictions). [11] For example UNCLOS provides that a ship shall be subject to exclusive jurisdiction of her flag state on the high seas save in exceptional cases expressly provided for in international treaties or in this Convention (Article 92, Paragraph 1, 1st sentence). In the territorial waters of a state, a foreign ship (a ship other than a ship of the state) has the right of innocent passage (Article 17) but does not naturally have any more rights. In addition, it is provided that, the flag state shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag (Article 94 Paragraph 1), it shall maintain a register of ships containing the names and particulars of ships flying its flag, and assume jurisdiction under its internal law over each ship flying its flag and its master, officers and crew in respect of administrative, technical and social matters concerning the ship (Paragraph graph 2), and it shall take such measures for ships flying its flag as are necessary to ensure safety at sea with regard, *inter alia,* to: (a) the construction, equipment and seaworthiness of ships; (b) the manning of ships, labour conditions and the training of crews; and (c) the use of signals, the maintenance of communications and the prevention of collisions (Paragraph 3). From the viewpoint of a ship, these mean that she is subject to these controls by her flag state.

At present, as to safety of life at sea, prevention of marine pollution, and certification, education and working conditions of seafarers, in addition to these abstract provisions for allocation of international jurisdiction among states under UNCLOS as aforementioned, International Convention for the Safety of Life at Sea ("**SOLAS**"), International Convention for the Prevention of Pollution from Ships ("**MARPOL**"), International Convention on Standards of Training, Certification and Watchkeeping for Seafarers ("**STCW**"), Maritime Labour Convention("**MLC**") (the former two have multiple versions adopted in different years and all four have experienced material amendments at multiple times) and other numerous multinational conventions plus resolutions and guidelines related to thereto since 1970s have progressively strengthened controls over ships and thereby very detailed controls internationally unified to a considerable extent are in place.[12] We can say the effectiveness of those controls is in the first place assured by causing

[11] Mizukami (n 1) 35.

Enomoto (n 1-1) 11 sets out various effects of a ship being granted her nationality by a state in the following manners without distinguishing national and international laws: (1) effects in the nationality state include: (i) she becomes a target for promotion and subsidy policies of shipbuilding and shipping industries of the state, (ii) she becomes subject to registration and other taxation of the state, and (iii) she will be able to be used as a maritime transportation means in the event of an emergency of the state; (2) effects upon the ship include: (iv) she is entitled (and obliged) to fly the flag of the state, (v) she is entitled to enter into open and closed ports and be engaged in coastal trade of the state, (vi) she is entitled to be engaged in mail transportation to receive subsidies, and (vii) she is entitled to receive other subsidies and privileges for ships of the state; and (3) other effects include; (viii) she is subject to the exclusive jurisdiction of the state (except adjudicative jurisdiction), and (ix) her nationality generally becomes a connecting point to decide the governing law in international private law.

Henmi (n 1-1) 29-35 classifies substantial functions and roles of the nationality into seven categories: (1) scope of application of national policies; (2) trigger for the jurisdiction; (3) foundation of national economies; (4) enhancement of national prestige; (5) national security; (6) judgment criteria for foreign policies; and (7) connecting point in international private law.

[12] They are conventions by International Maritime Organization, including its predecessor Inter-Governmental Maritime Consultative Organization (IMCO) ("**IMO**"), except MLC. An overview of the activities of IMO and the

each Contracting State to implement appropriate measures to make ships flying its flag be subject to these controls - inspections and issue/renewals of appropriate certificates. The very fact that a ship is subject to such controls by her flag state must be regarded as direct effect under international law of the ship having the nationality of such state.

Of course, the significance of a ship having a certain nationality (*i.e.* being subject to the "jurisdiction" of state in question) is not merely that she is subject to such – administrative in a word – controls. For example, the nationality of ship is quite relevant in the exercise of the state jurisdiction in the field of criminal law. A criminal offence committed on a ship flying a certain flag is in the first place left to the jurisdiction of her flag state.[13] Convention for the Suppression of Unlawful Act against Vessels at Sea ("**SUA**"), one of the international conventions on criminal jurisdiction which covers seajack and other acts of terrorism, provides that the fact that the offence covered by the Convention (Article 3) was committed against or on board a ship flying the flag of the Contracting State at the time the offence is committed is a trigger for the mandatory jurisdiction of her flag state, as well as the fact that such offense was committed in the territory of that State, including its territorial sea, or by a national of that State (Article 6, Paragraph 1).[14] Conversely, it is said that the exercise of criminal jurisdiction by a calling port state over a foreign ship staying in its inland waters is not unlimited: there are two doctrines – English/American doctrine (even a criminal offence related to internal affairs of a ship is subject to the jurisdiction of a calling port state but exercise of the jurisdiction may be entrusted to her flag state by operation of international comity) and French doctrine (a criminal offence related to internal affairs of a ship is not subject to the jurisdiction of a calling port state but to the jurisdiction of her flag state) and Japan has traditionally been considered as having adopted the latter, but both doctrines are gradually becoming closer in actual state implementations.[15]
In Japan, the first trigger to apply the Criminal Code is that a criminal offence was committed in Japan by any person (Article 1, Paragraph 1). The same principle applies in a Japanese ship outside Japan (Paragraph 2). In connection with this, a famous case in Japan in which the nationality of a ship became an issue in relation to criminal jurisdiction was the *Tajima* case that occurred in 2002. This was a case in which Filipino crewmembers allegedly killed a Japanese officer in a Panamanian ship navigating the high seas off Taiwan bound for Japan (she was a so-called FOC ship whose beneficial owner was a Japanese entity), and she subsequently called at a port in Japan with the suspects detained in the ship under her captain's power of police. In this case, the Criminal Code of Japan at that time did not have a provision to punish a foreign national who committed an offence outside Japan even if the victim of such offence is a Japanese national. Therefore, they could neither be arrested under the Code of Criminal Procedure of Japan nor punished under the Criminal Code of Japan. Finally, they were detained by the Japanese

major conventions created by them can be found at the "Outline of International Maritime Organization (IMO)" by the Ministry of Foreign Affairs of Japan (https://www.mofa.go.jp/mofaj/gaiko/imo/#section4 (accessed 18 November 2022)). MLC is a convention adopted by International Labour Organization("**ILO**") in 2006 to integrate and revise a number of conventions that had been in place before that.

[13] Soji Yamamoto, *Law of the Sea* (Sanseido 1992) 113-114

[14] However, UNCLOS provides for the definition of piracy, traditionally considered as "*hostis humani generis*" (why so considered is an interesting issue) (Articles 101 and 102), and requires all States to cooperate in the repression of piracy on the high seas and enables them to seize, arrest and punish regardless of her flag (Articles 100 and 105).

[15] Yamamoto (n 13) 114-119

authorities and handed over to Panama in response to a request for extradition from her flag state Panama to the calling port state Japan to be brought to trial (but ultimately found not guilty). [16] With this case being one of impetus, the relevant provision of the Criminal Code was subsequently amended (the insertion of Article 3-2 in the Criminal Code pursuant to Act No. 122 of 2003). This case is not just a crime on a foreign ship, but a crime that occurred on the high seas. Therefore, should the same case occur again at present, it will be subject to the exclusive jurisdiction of the flag state in so far as the ship is on the high seas in terms of the enforcement jurisdiction. As to the prescriptive and adjudicative jurisdictions, Japan at that time did not set jurisdiction even if its national had been the victim, but it will now be exercised as a result of the amendment of the law when a ship enters into Japan afterwards. Since the beneficial owner of the ship was a Japanese entity, this case is occasionally referred to as one of the problems deriving from the FOC ship issue to be discussed later, in that the suspects would have been arrested under the Code of Criminal Procedure of Japan and would have been punishable (if found guilty) under the Criminal Code of Japan even at that time (even before the amendment by the above Act) if she had been a Japanese ship but it was impossible to do so.[17] It is submitted, however, the same issue would have occurred in any event in so far as the ship had been a foreign ship navigating on the high seas to call to Japan whether she be an FOC ship or not.

Finally, but less importantly, it must be reminded that the nationality of a ship is more critical in emergency than in peacetime. Knowing inaccuracies, we may very roughly say it was formerly considered that a belligerent state at wartime may be entitled to capture a ship flying the flag of its enemy each other (though not always); as to a ship flying the neutral state, a belligerent state may be entitled to capture her and confiscate contraband of war thereon if she was transporting such contraband, and also entitled to capture her who tries to break through the blockade if the state has effectively set the blockade of a certain sea area.[18] In addition, a state in emergency may want under its national statute to compulsorily get the title of a ship or charter a ship (requisition of a ship) from private sector for state purposes. The targets will usually be, in the first place, ships flying its flag (who are subject to its exclusive jurisdiction under international law at least on the high seas).[19] As will be discussed later, it is understood that there exists no statute in Japan at present which squarely provides for requisition. But it is in our history to be never forgotten that a great many ships in private sector were requisitioned in wartime Japan and most of them, together with their crewmembers, passengers and others, were lost as sacrifices of

[16] More information on this case is found at JSA (Japanese Shipowners' Association), *JSA Shipping Yearbook 2003,* Section 1.5 (https://www.jsanet.or.jp/report/nenpo/nenpo2003.pdf) and *JSA Shipping Yearbook 2005*, Section 1.6 (https://www.jsanet.or.jp/report/nenpo/nenpo2005/text/nenpo2005_1_6.htm) (accessed 18 November 2022)). The former refers to further preceding cases. See also Akiyoshi Ikeyama, 'Crimes on Ships and the Criminal Jurisdiction of Calling Port Countries – Legal Implications of the *Tajima* Case in Japan, (2003) 47 Wavelength (JSE Bulletin) 10 (English).

[17] Ichiro Komatsu, *International Law in Practice* (2nd edn, Shinzansha 2015) 143

[18] This passage is not the accurate description of what was once called law of war. In addition, it is said that the former system of law of war is never applicable *per se* in the present (Komatsu (n 17) 464, 467). Readers are requested to understand the above is a mere common-sense description of what could be the general situation by the non-specialist author.

[19] But it is also pointed out by Yoshino (n 1) 73 and 141 that there exists no restriction in ships' nationalities for a state to set targeted ships for requisition and whether they will be limited to ships flying its flag or to be extended to cover foreign ships depends on domestic law of each state.

war.[20] In the early 1980s, when the British Government at Falklands War requisitioned even a luxurious passenger ship celebrated worldwide "*Queen Elizabeth II*" flying the Union Jack to pursue the war, it was quite an impressive news at that time.[21]

(3) Increase of FOC ships and a "genuine link" between a ship and her flag state

Whenever we discuss the nationality of a ship under international law, we cannot avoid discussing the issue of the so-called "*genuine link*" between a ship and her flag state, or the issue of an FOC ship (FOC state), which has long been controversial.

As discussed earlier, Article 91, Paragraph 1 of UNCLOS provides, "*Every State shall fix the conditions for the grant of its nationality to ships.*" Apparently, it reads as if a state can at its liberty decide what ships may be granted the nationality of that state. But it goes on to provide, "*There must exist a* genuine link *between the State and the ship.*" In other words, it requires a "*genuine link*" as a condition for a state to grant a ship its nationality. Debates have been made for many years about what kind of situation is required for the genuine link to be satisfied, and about what would happen if a state grants a ship its nationality despite the lack of a genuine link (whether other states can deny her nationality if such lack is found by them).

This issue has its origins in the emergence of the so-called "FOC ships" since before World War II, long before the adoption of UNCLOS and their postwar increase, and in the long-standing confrontations between the idea of endorsing them and the idea of opposing and restricting them. This UNCLOS provision also needs to be reviewed in this historical context. The concept of an FOC ship (or an FOC state to grant her), its source and historical or evolutionary processes are one of major themes not only in maritime law but also in marine economic history studies. The author is not at all capable to discuss them precisely here. For the purpose of this paper, he would ask readers to stop to be satisfied with a rough definition that an FOC ship is a ship beneficially[22] owned or managed by foreign persons but registered in a state who permits to register a ship

[20] Mitsuo Miyamoto, *Pacific War – Records of Lost Japanese Ships* (Seizando Shoten 2009) 3-5 includes explanations that the fleet of motorships at the time of commencement of Pacific War in 1941 was 6.337 million GT; the fleet already requisitioned at that time was 3.90 million GT (2.16 million GT by the Army and 1.74 million GT by the Navy); then fleet of 3.202 million GT was bult by March 1944; but the fleet lost at war was 9.047 million GT. He says they included some "available foreign ships" but most of them were perhaps Japanese ships. There may exist inconsistency in the scope of target ships or timing of statistics. But at any rate we must say most Japanese ships were lost.

[21] This news was quite widely reported then and afterwards. Here reference is made to National Institute for Defense Studies, Ministry of Defense of Japan, *History of International Conflict – Aspects of the Falklands War 1982* (2014) 334, 339-340.

[22] The meaning of beneficiary ownership may be an issue but it is intended to mean herein that if the whole share or other controlling rights of the legal owner of a ship is directly or indirectly held by another person, such person is the beneficial owner of the ship. The same shall apply hereinafter too.

with its nationality under convenient and loose conditions. [23/24] We may also say the pioneers of modern FOC ships were Panama-registered ships beneficially owned by the U.S. shipowners in 1920s and they are understood to be generally and widely adopted after World War II.[25]

What was adopted against the background idea that such FOC ships should not be allowed was the theory that a genuine link is required between a ship and her nationality state. The direct origin of the genuine link concept is said to be introduced in the draft law of the sea by the UN International Law Commission doing preparatory works for UN Conference on the Law of the Sea I in 1955, referring to the concept of "*genuine connection*" as adopted in *Nottebohm* Case Judgment by the International Court of Justice (the "**ICJ**") in the same year regarding the nationality of a natural person. [26] In *Nottebohm* Case, a German national *Friedrich Nottebohm* born in Germany in 1881 had migrated to Guatemala in Central America in 1905 and been doing business. But immediately after the start of World War II in 1939 he acquired the Liechtenstein's nationality. After Guatemala entered into war with Germany, he was arrested by Guatemala authorities, and was detained in the United States until the end of World War II. His property was confiscated as enemy German nationals' one by the postwar Guatemala. In response, Liechtenstein claimed Guatemala for the return of Nottebohm's property and for damages.

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[23] Mizukami (n 1) 142-145 is referred to in this definition. Mizukami introduces various stricter definitions by international law academics. The definition here is no more than a rough understanding of the author. For definitions, see also introductions in Enomoto (n 1-2) 2, 409-414; and Shimoyamada (n 1) 47-50. Recent explanations by academics of commercial law can also be found at Ujiharu Shizuta, 'Legal Analysis of Ships' in Kurume University Law and Politics Library No. 1: *Modern Law of Maritime Commerce* (Seibundo 1994) 136-141; Masumi Nakamura and Takashi Hakoi, *Droit Maritime* (2nd edn, Seibundo 2013) 55; and Noboru Kobayashi, *New Law of Maritime Commerce* (Shinzansha Shuppan 2021) 49, etc.

[24] In Japanese language, the term "*shikumisen*" (occasionally translated as a "tie-in ship" with an implication that she is tied in a certain arrangement, another possibly more literal translation being an "arranged ship") is also sometimes found as a similar term. Goda (n-1) 48-56 and Hiroyuki Goda, 'The Historical Change of the "Shikumisen" : Japanese "Tie-in" Vessels', (2011) 60 Maritime Transport Studies 33 point out interesting findings that although the meaning of the concept of "tie-in ship" was historically fluctuating in the context that who ties, what ship, with whom, in what manner, but it remains unchanged in the sense that it is a manner to use an FOC ship by Japanese companies; and that its origin is *not* likely to be found in Japanese shipping companies *but* in Japanese shipbuilders or shipping divisions of commercial traders around 1960 – There seemed to be some cases that they wanted ships constructed not in the scheme of planned shipbuilding with finance from Japan Development Bank but in the scheme for exportation of ships with finance from Japan Export-Import Bank at that time. Anyway the very existence of this term is related to the history of FOC ships in Japan.

On the other hand, the term "open registration" is also sometimes used instead of the term "FOC". This term puts focus on a case where a high degree of objective freedom is allowed as to conditions for the nationality. It may contain an argument that what is important for a state, whether it be a state called FOC state or not, is to implement the responsibilities of a state of ship's nationality with respect to safety of life, prevention of marine pollution, and certification and education of seafarers among others, and in so far as such responsibilities are implemented, a state shall be allowed to have a free (or loose) conditions for the nationality of a ship. Shimoyamada (n 1) is a Japanese work advocating this argument.

[25] Mizukami (n 1) 145-150; Enomoto (n 1-2) 4-5, etc. Goda (n 1) 35-47 verified there were also FOC in Japan prior to World War II in the form of FOC in then Kwantung Leased Territory in China or other manners.

[26] Nottebohm Case (second phase), Judgment of 6 April 1955: ICJ Reports 1955, p 4. https://www.icj-cij.org/en/case/18 (accessed 18 November 2022). Explanations of this case in Japanese are found at Mizukami (n 1) 199-202; Enomoto (n 1-1) 157-163; and Henmi (n 1-1) 59-61 in addition to general literatures for international law.

However, the ICJ did not acknowledge Liechtenstein's claim for his nationality, by holding that in which conditions a state may grant a person the nationality of the state is a matter of the state's own national law, but that international law requires "genuine connection" between the state and its nationals in order to exercise the right to protect them, and that Nottebohm's Liechtenstein nationality acquisition in this case is intended solely to obtain the position of a national of a neutral state for the protection of that state, and that genuine connection cannot be found there, and thus Guatemala is not obliged to approve his nationality of Liechtenstein.

Subsequently, after discussions in the UN Conference on the Law of the Sea I, this concept was formulated in Article 5 of Convention on the High Seas in 1958 ("**High Seas Convention**") as follows: "*Each State shall fix the conditions for the grant of its nationality to ships, ---. There must exist a genuine link between the State and the ship; ---.*" Apart from difference in detail, its substance is similar to the relevant provision in UNCLOS mentioned earlier. After further discussions in the UN Conferences on the Law of the Sea II and III, it became the said provision in UNCLOS in 1982.

Even supposing that a genuine link is required under international law in this way, however, how to think this concept has been controversial for many years and the situation remained unchanged after the adoption of UNCLOS too. [27] As a result, four years after the adoption of UNCLOS in 1986, the United Nations Convention on Conditions for Registration of Ships ("**UNCCRS**") which mainly intended to materialize the genuine link concept was further adopted. [28] It provides the flag state shall, *inter alia*:

(1) have a competent and adequate national maritime administration (Article 5) and maintain a register of the owner(s) of ship (including the operator[29], when the operator is not the owner) (Article 6);
(2) satisfy either (Article 7):
  (i) it shall include "appropriate provisions" in its laws and regulations for participation by its nationals as owners of ships flying its flag and for the level of such participation (such laws and regulations should be sufficient to permit the flag state to exercise effectively its jurisdiction and control over ships flying its flag) (Article 8); or
  (ii) it shall observe the principle that a satisfactory part of the complement consisting of officers and crew of ships flying its flag be its nationals or similar (which may be implemented on a ship, company or fleet basis) (Article 9); and

[27] It is said that there existed basically two positions: (i) that it shall mean a flag state shall ensure it concords with the nationality of a ship owner or the nationality of certain seafarers. International law imposes such requirement on the conditions for a flag state to grant a ship its nationality; and (ii) that it was an indication (or *prima facie* evidence) that a flag state is setting effective jurisdiction and making effective control over a ship flying its flag, and how to ensure them was left to each state. International law does not intervene in the conditions for a flag state to grant a ship its nationality. See Yamamoto (n 13) 108-109. As discussed later, the judgment in 1999 by the International Tribunal for the Law of the Sea in the M/V "Saiga" (No.2) case rejected that a state denies the nationality of a ship by reason of lack of a genuine link between the ship and her flag state.

[28] Mizukami (n 1) 237. For the Japanese translation and explanation of this convention, see Hisashi Tanikawa, 'United Nations Convention on Conditions for Registration of Ships (tentative translation)' (1986) 24 Journal of Law, Political Science and Humanities (Seikei Univ) 17; JMC (Japan Maritime Center) (ed), *Law of the Sea and Passage of Ships* (Rev, Seizando Shoten 2010) 230-236.

[29] The concept of an operator sometimes appears in other treaties. But its meaning is not necessarily clear. It is planned that this concept will be discussed in a different paper in this series.

(3) ensure that the shipowning company or a subsidiary shipowning company is established and/or has its principal place of business within its territory, or that there is a representative or management person who shall be its national or similar (Article 10).

However, it is said these contents were yet abstract and did not effectively restrict the freedom of a state in granting a ship its nationality. [30] Moreover, this Convention has not entered into force at any rate. In other words, the requirement of a genuine link certainly exists in Article 91 of UNCLOS as written law and it can be said that its contents (or elements on which it should be based) is stipulated in UNCCRS prepared with the intention of its materialization on the one hand, but in reality, even the latter is considered to have only abstract contents in that it only requires a flag state to include the above-mentioned elements in its laws and regulations. [31]

Recalling from today, the introduction of the provision of genuine link and subsequent controversies are a part of the long worldwide confrontation history between the side that approves FOC ships and the side that seeks to restrict FOC ships. It is an object of historical analyses in its own right. [32] In addition, it cannot be too much emphasized that written international law in the present (UNCLOS) does expressly provide this requirement. However, the subsequent judgment in 1999 by the International Tribunal for the Law of the Sea in the M/V "*Saiga*" (No.2) case held, "--- *the purpose of the provisions of the Convention (*UNLCOS*) on the need for a genuine link between a ship and its flag State is to secure more effective implementation of the duties of the flag State, and not to establish criteria by reference to which the validity of the registration of ships in a flag State may by challenged by other States*" and rejected that a state denies the nationality of a ship by reason of lack of a genuine link between the ship and her flag state. Supposing so even between states or under international law, [33] we

[30] Mizukami (n 1) 261-262. In contrast there is also an opinion to evaluate positively (Henmi (n 1) 198-199).
[31] In the drafting process of UNCCRS, the components of the genuine link was thought to be consisted of four elements: (1) ownership (necessity and degree of participation in the shares of ownership of the ship by its nationals); (2) manning (necessity and degree of manning of crewmembers by its nationals); (3) management (relationship of ship operation management system with her flag state); and (4) assurance of the identification and responsibility regime of ship owners and operators by the state of register (in particular, (1) (2) and (3) were called "economic three elements"). However, they eventually ended up with abstract requirements as described above. In particular (1) and (2) were made both abstract and selective requirements. See Mizukami (n 1) 255-261.
[32] Mizukami (n 1), Enomoto (n 1-1) and (n 1-2), and Henmi (n 1-1) are all great works doing that. Goda (n-1) is further different. This is a meticulous analytical study based on facts by a marine economist having experiences of working for a Japanese shipping company about historical developments of use of FOC ships by the Japanese shipping industry in distinguishing the respective stages of its emergence, expansion and maturation (though the title indicates "postwar" it also sheds light on prewar FOC in Japan as its pre-history), not only having comprehensive regard to relevant preceding academic achievements but also reviewing history books or materials of many companies edited by them, memoires of many persons concerned, various statistics, minutes of meetings of the Diet and other huge sources in history.
[33] The judgment in 1999 by the International Tribunal for the Law of the Sea in the M/V "*Saiga*" (No.2) case handled a case where a bunkering ship (oil tanker) flying the flag of Saint Vincent and the Grenadines (SVG) was arrested by Guinean authorities when she was supplying oil gas to fishing boats off Guinea, and her Master was detained, among others. SVG objected this. The Tribunal refused to accept one of preliminary defenses by Guinea, which argues that SVG's claim is not admissible on the ground that she was an FOC ship who lacks genuine link with SVG.
(https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_2/published/C2-J-1_Jul_99.pdf

perhaps have to say that the provision in question will not have a direct bearing on the claims that can be pursued by private persons in national courts; and, at least for the purpose of handling the daily business, in so far as a ship is granted the nationality of State A by State A (who considers that there exists a genuine link), she can only be said to have the nationality of State A (whether or not State A fall under the so-called FOC state category, and whether it be thought good or bad).

(4) From restriction of FOC ships to exclusion of sub-standard ships

Historical reasons why FOC ships have been criticized and tried to be restricted cannot be denied to include not only the oppositions in trade union movement aspect against the situations where ships in traditional shipping nations flew out to FOC states (the Flagging Out to be discussed later) to thereby diminish labor market of seafarers of such nations whilst seafarers working on board FOC ships may well be in poor working conditions but perhaps also the fears to the situations where the jurisdictional power over ships by the FOC state authorities as their flag state have not been adequately exercised and it resulted in serious problems in ensuring safety of ships and prevention of marine pollution. [34] We must also say, however, that it would be quite inaccurate (out of date if we dare say) to argue that the latter situation is still 100% ongoing today in this 21st century.

As discussed in (2) above, since the 1970s, controls have been progressively strengthened in the form of numerous treaties such as SOLAS, MARPOL, STCW, MLC and their affiliated resolutions and guidelines. At present, extremely detailed controls unified to a considerable extent internationally are in place. The effectiveness of these controls is in the first place designed to be achieved through appropriate measures by each state party to ensure that a ship flying its flag is subjected to such controls. Now, all of the so-called FOC states are State parties thereof. [35] In addition, as to control methods in conventions, not only the control over a ship by her flag state authorities but also the method of port state control ("**PSC**") – the method in which the state party authorities of a ship's calling port conduct inspections of her compliance with the relevant conventions separately from her flag state and, if necessary, take measures such as suspending

(accessed 18 November 2022). See paragraphs 75 to 86 – in particular 83 of the judgment. See Henmi (n 1-1) 199-202 and others for the outline of judgment. Mizukami (n 1) 215 refers to an older precedent in a national court – a case by the Dutch court in 1986 which denied the Dutch government's right to deny Panamanian nationality in a case where unauthorized broadcasting from a ship outside its territorial waters was an issue and the Dutch authorities opined that they would deny the genuine link between a Panamanian ship and Panama and thus she becomes a ship with no nationality (The *Magda Maria*).

[34] The *Torrey Canyon* (caused oil spill in 1967) was a Liberian registered ship, whose casualty is said to have triggered discussions leading to 1969 CLC/1971 FC and MARPOL 1973. There are more subsequent major oil spill accidents caused by FOC ships. Koresuke Yamauchi, *Studies of Maritime Private International Law – FOC Ships* – (Chuo Univ Press 1988) 5-7 (n 3) lists many marine casualties by FOC ships between 1966 and 1976.

[35] It is also rather critically pointed out that the problem may still lie in the following facts: the flag state's control is often carried out by accreditation bodies (the so-called classification societies), who are authorized by the flag state to conduct inspections and issue certificates. In particular, it is said that some FOC states do not have ship's inspection or examination capabilities, but delegate inspection services to foreign classification societies to fulfill their flag state responsibilities (Yoshida (n 1) 16 and Henmi (n 1-1) 396-397). Let alone the fact that delegation to classification societies in some areas is not at all limited FOC states, whether and/or how this is really problematic must be objectively reviewed against the evidence related to sub-standard ships to be discussed later.

her departure and notifying her flag state authorities of problems – have also been adopted to enhance the effectiveness of controls in a unified manner, in view of the possibility that the former control method alone may not be sufficient in effect. [36] Furthermore, since later 1970s, a Memorandum of Understanding (the "**MOU**") began to be executed between neighboring countries to carry out PSC in a unified manner in a certain area to resolve issues such as unfair competition among neighboring countries due to differences in PSC manners and obstacles to ship operations caused by overlapping PSC among countries, and further to take measures such as not conducting PSC in neighboring ports for a certain period of time if a ship is accredited to be a good ship at a certain port. The IMO adopted Resolution on Reginal Co-operation in the Control of Ships and Discharges in 1991 and the Memorandum of Understanding on Port State Control in the Asia-Pacific Region ("**Tokyo MOU**") was agreed upon and began to be implemented in 1993.[37]

Depending on the nature of control, a ship may also affect the coastal state where she navigates regardless of the port of call, and thus she may also be subject to the control by the coastal state authorities apart from the control by her flag state. [38]

As a result, it can be said that the present issue is how to exclude a ship who does not substantially comply with the rules under various conventions (the so-called sub-standard ship), regardless of whether she be an FOC ship or not.[39] An academic already wrote about 30 years ago,

> "*Under the circumstances that it is difficult to exclude or restrict FOC ships, …. efforts for safety of navigation of ships, prevention of marine pollution, and improvement of working conditions have been made through setting and strengthening international standards as to ship construction, equipment, manning, etc. and thereby excluding ships who do not meet the standards thereunder (sub-standard ships), rather than through … clarifying the existence of a genuine link between the state and its ships and thereby restricting FOC ships… This approach is not targeting FOC ships only, but is generally intended for strengthening jurisdiction and control by the state over ships flying its flag. It is not intended to exclude FOC ships. It has been pointed out that sub-standard ships are found in ships of not all but*

[36] SOLAS Annex Chapter 1 Regulation 19, STCW Article 10, MARPOL Article 5 etc.; provided, however, that whilst it is the obligation of the flag state to cause a ship flying its flag to comply with requirements under those conventions, control measures to be taken by the calling port state are considered not its obligations but its rights (the obligations for a calling foreign ship to accept them) (Yoshida (n 1) 14).

[37] For general explanations of the control method of PSC and the MOU as well as for the Tokyo MOU, see website of the Tokyo MOU Secretariat (https://koueki-tms.or.jp (accessed 18 November 2022)).

[38] Of particular concern is the prevention of marine pollution by a foreign ship passing through territorial waters or exclusive economic zones. In this regard, MARPOL is construed as not directly providing for the coastal state's jurisdiction, but subsequently adopted UNCLOS provides for the allocation of jurisdictions to allow a coastal state to have prescriptive and enforcement jurisdictions to prevent contamination from ships within the prescribed limits in exclusive economic zones (in addition to in the territorial waters where each coastal state was traditionally considered to have prescriptive jurisdiction unless undermining the right of innocent passage), although it does not yet have specific regulatory standards (Article 211, Paragraphs 5 and 6, and Article 220). See Yoshida (n 1) 14, 39-46 and Masashi Tomioka, *International Law for Control of Pollution from Ships*, (Shinzansha 2018) 139-148.

[39] Yoshida (n 1) is a thorough and comprehensive study of the process in which the calling port state and the coastal state have increased their roles of exercise of their jurisdictional powers, at the same time maintaining the priorities of control (exercise of its jurisdictional power) by the flag state under major maritime conventions.

most states, not limited to FOC ships…"[40]

And a business person at a Japanese ship company pointed out nearly 20 years ago,

"*Those who take the position for abolishing FOC ships often argue that FOC ships are dangerous as they are being poorly inspected. They often confuse FOC ships with sub-standard ships (ships in poor quality who do not meet the standards), but is is not necessarily correct. Neither a Russian ship* Nakhodka *who ran aground in the Sea of Japan nor a North Korean ship who went aground and was then abandoned on the coast in Sea of Japan are FOC ships.*"[41]

At present, the Tokyo MOU Secretariat announces every year the ranking of the ratio of sub-standard ships (ships to whom PSC measures were taken) in the last three years. [42] However, the rankings therein in 2019-2021 and the ranking of the nationalities of ships in Japanese merchant fleet surveyed and published by the MLIT as of 2021 (Ships therein other than Japanese ship must be *more or less* of FOC ship nature as they are ships classified in the Japanese merchant fleet) [43] do not match at all.

Reasons for such changes may be found on the sides of both beneficiary shipowners and the flag states.

In the first place, various explanations have traditionally been given as reasons why beneficiary shipowners use FOC ships. In short, they are based on economic rationality derived from the international nature of the shipping industry. [44] That is why it is impossible to forcibly restrict

[40] Mizukami (n 1) 282-283

[41] Masahiro Takahashi, 'Will FOC ship disappear?' (2004) 82 Ship & Ocean Newsletter (https://www.spf.org/opri/newsletter/82_1.html (accessed 18 November 2022))

[42] According to Tokyo MOU Secretariat, *ANNUAL REPORT ON PORT STATE CONTROL IN THE ASIA-PACIFIC REGION 2021* at Tables 8 and 9 (https://www.tokyo-mou.org/doc/ANN21-web.pdf via http://www.tokyo-mou.org/publications/annual_report.php (accessed 18 November 2022)), the blacklisted at the top are completely different from FOC states described in the next footnote.

[43] According to the MLIT, *Maritime Factbook in Statistics 2022*, Table 1-24: Breakdown of Japanese Merchant Fleet by the flag states (at 17) (https://www.mlit.go.jp/maritime/content/001514478.pdf (accessed 18 November 2022)), more than half of the Japanese merchant fleet is occupied by Panama registered ships and, over 90% are occupied by Liberia, the Marshall Islands, Singapore, Hong Kong and Bahama across Japan in the second. We need to treat the definition of "Japanese merchant fleet" with care in reviewing this and other similar sources. For example, the source at the same time, the MLIT, *Maritime Report 2022*, Table 3-3: Breakdown of Japanese Merchant Fleet (at 28) (https://www.mlit.go.jp/maritime/content/001514478.pdf (accessed 18 November 2022)) classifies the Japanese merchant fleet into (1) Japanese ships; and (2) (i) *shikumisen* (see (n 24) for this word) by operators; (ii) *shikumisen* by domestic owners; and (iii) chartered ships from overseas. Ships in (2)(i) and (2)(ii) are both FOC ships perhaps by definition, distinguished by whether their subsidiaries are operators themselves or owners located in Shikoku and other areas. As to (2)(iii), however, it is uncertain whether her foreign owners who charter her out to Japanese shipping companies beneficially own her in the manner of FOC.

[44] Henmi (n 1-1) 105-123 discusses factors in the choice of a ship's nationality by her beneficiary shipowners into 4 categories: legislative, economic, political and others. Goda (n-1) 5-7 analyses historical transitions of reasons for the Japanese shipping. But it is natural that the largest reason has been, as Goda (n-1) 3-5 and 231 explains, to maintain cost competitiveness in terms of crew costs. For example, Goda (n-1) 117-140 partly verified this in historical context for the relevant period too in reviewing the process of dramatic increases in seamen's costs and FOC ships of Japanese shipping companies since the late 1960s leading to

them. However, it does not necessarily mean that the beneficial owners of a ship are indifferent in securing safety of the ship, prevention of marine pollution and working conditions of seafarers. Even for the beneficiary shipowners (including their senior management), should such problems arise, at least in the present it will eventually rebound itself to them through severe criticisms and sanctions from the society, enormous liabilities for damages (in addition to money, huge loss of human resources spent for responses to litigations shall not be overlooked), [45] loss of excellent seafarers, and accountability to shareholders.

Secondly, from the flag state's perspective, at least in the present it is a big national business for an FOC state to be a major state of registry. It seems therefore that if a ship granted the nationality of a certain flag state (registered in that state) does not receive adequate controls under various conventions, and as a consequence if the possibility of her receiving detention and other measures by the PSC becomes high, let alone the possibility of her accidents that could lead to loss of life or marine pollution becomes also high, then the attractiveness of that state as a state of registry will also be materially lost in the end. The flag state must avoid that.[46]

(5) Remaining issues

It would go too far, however, if we said there remained no issue related to FOC ships any longer. The first reason is that the obligation of the flag state is so extensive that "*shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag*" (Article 94, Paragraph 1 of UNCLOS). Not all of them may be covered in the framework of existing international conventions. Typically, consider the criminal jurisdiction issue such as appearing in

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the advocation for recognition of *shikumisen* (see (n 24)) by then JSA president Shojiro Kikuchi in 1975. Takahashi (n 41) is an explanation by a business person of a Japanese shipping company, which talks about taxation (registration tax and assets tax), manning, and equipment and safety requirements, but it eventually turns out that a Japanese ship is not competitive in costs. The largest factor has perhaps been crew costs. Shipping companies are competing in the common worldwide market under the principle of freedom of shipping (see (n 82) for this word) and their ships may be manned with crew with the nationalities from all over the world in theory. One must of course assume assurance of their qualities. But that said, naturally it is quite difficult if not impossible to fill the gap in the levels of their wages reflecting the difference in prices levels deriving from economic situations of their respective home countries (put it another way, difference in the levels of wages does not represent the difference in the levels of their qualities). In contrast, tax advantages are, may still be existing, pointed out to be not decisive due to introduction of taxation for the use of tax haven countries (Goda (n-1) 11).

[45] An example in the earliest days is explained in Mizukami (n 1) 178-181 and Henmi (n 1-1) 228-230 with respect to many actions to pursue liabilities of not only registered owners but also other relevant parties litigated worldwide after the *Amoco Cadiz* oil spill in 1978.

[46] Mizukami (n 1) 183-186 and Henmi (n 1-1) 362-364 describes responses on the part of FOC states to ensure safety since 1970s. Further in the present, Liberia, the second FOC state after Panama, operates its registration business through LISCR, LLC, a US private company (LISCR, LLC is entrusted with the whole of the main agency service from the Liberian Republic) and LISCR JAPAN Corporation is its Japanese subsidiary (https://liscr-j.com/history.php (accessed 18 November 2022)). Ship registry business of the Marshall Islands is also operated by International Registries, Inc. in the US (https://www.register-iri.com/about-iri/ and https://iritokyo.co.jp (accessed 18 November 2022)). Advertisements by Panama and these states of registry boasting of the good quality of their inspections and the low PSC detention and accident rates of their fleet are often found in Japanese shipping gazettes and magazines too for many years. And may FOC states maintain their representative offices in major shipping nations including Japan to facilitate the convenience for beneficiary shipowners (Goda (n 1) 200-201).

Tajima case as discussed earlier. If a state which is both the state of the victim's nationality and the state of calling port immediately thereafter took the same legislation as Japan at that time, or even in Japan if the victim was not a Japanese national, a similar issue could again arise. It is unknown whether the state of offender's nationality will (be able to) exercise the jurisdictional power. Therefore, the last resort for the exercise of jurisdictional power still lies in the flag state. If the flag state had not (had been unable to) exercise(d) the jurisdictional power for some reasons, it would have become even more difficult to solve the problem properly.[47] From a different perspective it may be said, though possibly inaccurate, regard must also be had to the fact that a ship flying the flag of a certain state means she is under its diplomatic protection (A ship was occasionally illustrated as a floating territory. It may surely be inaccurate but is also getting some point).

Secondly, for a certain state, the presence of ships flying its flag constitutes a concern in the context of protection of the shipping industry and seafarers, national economic security, and other national interests of that state. [48] For the home state of the beneficiary shipowner (the state where the ship would have been registered if the FOC registration had not been done), if the substantial outflow of its ships to the FOC registration (the so-called Flagging Out) becomes serious, it means that a significant part of its foreign trade will be carried out by foreign ships. Assuming that a ship flying its flag is (*de jure* or *de facto*) obligated to have at least some seafarers with its nationality on board, such a situation will result in the loss of labor market of its own seafarers, which was squarely the main reason why labor unions once strongly opposed FOC ships. Depending on the degree, even the succession of maritime skills to next generations will be at risk. In addition, the general importance of retaining ships flying the flag of a state in case of national emergency of that state will be easily imagined if we consider the situation of political unrests of the FOC state to which the former's beneficiary merchant fleet are registered or tension between such FOC state and the third country, not to mention an extreme example of direct tension between that state and such FOC state (Thus far, though, under the realities that FOC registry had become national business of FOC states to get foreign monies, it cannot also be denied that some actual political unrests in FOC states in the past did not immediately change ship registry situations in such states).[49] These are issues in different dimension than the issue

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[47] It should also be noted that even supposing that the calling port state detains the suspect under its enforcement jurisdiction, if it wants to hand him/her over to the flag state, talks about the claim for extradition by the flag state must be the condition precedent (and mutual warranty between those two states would also be required). In *Tajima* case, a substantial period of time passed for the requests by the flag state Panama (about 1 month before the request for provisional detention; about another 1 months before the formal request for extradition by Panama within the framework of Act of Extradition of Japan). See (n 16) *JSA Shipping Yearbook 2003*.

[48] There is a critical comment that concrete substance and justification of the concept of "national economic security" remains unexplained (Goda (n 1) 200) but reference to this concept already existed at least when the scheme of semi-Japanese ships was introduced and is *inter alia* found in the Basic Policy to Secure Japanese Ships and Seafarers at 1 (1) at (n 70). It is presumed to intend to comprehensively refer to the combined situations discussed here.

[49] Henmi (n 1-1) 114-115 (n 389) points out that the unstable political situations in the past in Liberia (coup d'état in 1980 and civil wars in 1989-1996 and 2003) and Panama (coup d'état in 1968 and the U.S. invasion in 1989-1990) had little influences on the actual registrations with those states in the end, and in particular, the reliability of registration in Liberia has been supported by the fact that effective controlling place of the management is located in the U.S. In contrast, Goda (n 1) 221-222 (n 85) points out Liberian registered ship of Japanese shipping companies decreased during the two civil wars. At any rate the scenarios may have to

of how to ensure the safety of ships and prevent marine pollution (how to exclude sub-standard ships problematic from that perspective) through the framework of international conventions in the development of FOC ships as discussed in (4). They are issues that only each state shall consider individually.

Therefore, from more than 30 years ago around the adoption of the UNCCRS, several countries (in particular traditional shipping nations in Europe) have introduced another new ship registration system with variously relaxed conditions for registration and more advantageous treatments (dual or offshore registration system) in addition to the traditional ship registration system with conventional conditions. As their specific contents are matters of foreign laws of each state other than Japan, it is beyond the capability of the author to introduce them. It can be said to an attempt by each state to maintain their fleet flying its flag in the framework that "*Every State shall fix the conditions for the grant of its nationality to ships*" in UNCLOS (Article 91 Paragraph 1).[50] They are yet evaluated, however, that the FOC states have more advantageous elements in terms of manning and taxation and they have further responded with discounts in registration fees and others, and therefore it is yet difficult to compete with FOC ships on equal footings.[51]

As to national security, there is also a recent argument to point out policies for a state for the purpose of maintaining maritime trade and transportation in catastrophic disasters and other peacetime emergencies when the roles of ships flying flag of the state are to be expected, and policies for the same purpose in wartime emergencies when navigations of ships flying flag of the state may well be obstructed as they are targeted for attacks under international law, could be contradictory in their respective nature and go on to say it may be more likely that the merchant fleet including ships flying flags of neural states including FOC states will be able to maintain national lifelines of the state longer in the Armed Attack Situation – This is presented in the context of Japanese ships and Japanese merchant fleet.[52] And even as to FOC as a subject to be analyzed here, it is also said there are states that are moving to invite not only just registration of ships

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be simulated in the realities of international politics for the future.

[50] Mizukami (n 1) 268-281 introduces systems in France, the United Kingdom, and Norway (as of 1994). Henmi (n 1-1) 367-369 says they are also said to exist in Germany, Italy, Netherlands, Denmark, Finland, Spain, Portugal and Republic of Korea.

[51] Henmi (n 1-1) 370-372. Whilst positively evaluating the strengthened efforts of controls in the framework of international conventions to cover FOC ships and others, Henmi (n 1-1) 396-409 points out the limitations of PCS by calling port states in time and in quality and the limitations arising from the fact that the classification societies entrusted with control powers as the flag states by FOC states are profitable organizations, and argues the seaworthiness of a ship shall be, ultimately, maintained steadily under the responsibilities of her flag state who is to comply with the international conventions. Against these background understandings, he advocates there must exist "*substantial relationship*" between a ship and her flag state: Its substance should be based on the manning of seafarers with nationality of her flag state rather than on the ownership by nationals of her flag state or on the maintenance of office in her flag state; and that there is a possibility that those states who are currently considered as FOC states may establish this. This is perhaps considered as an attempt to rebuild the "*genuine link*" with putting focus on manning of seafarers rather than on the ownership of a ship. However, whether international incentives may be provided to FOC states to strive for this direction and/or FOC states on their part have political and social backgrounds to move for this direction may be questionable.

[52] Yoshino (n 1) 140-141. There also appears to be the idea to deploy more foreign ships than ships flying the flag of the state in wartime emergencies through international commitments from other states in advance and/or controls over the beneficiary shipowners.

but also substantial shipping companies and achieving the results.[53]
Factors to be analyzed and considered may be becoming more complicated.

3. Japanese ship and foreign ship under Japanese law

(1) Conditions and status of a Japanese ship

According to Article 91, Paragraph 1, 1st sentence of UNCLOS, the conditions for a Japanese ship shall be determined by Japanese law. What are they?
Ship Act of Japan provides:

> Article 1 The following ships shall be Japanese ships.
> 1 ships owned by the government or official organizations of Japan
> 2 ships owned by Japanese nationals
> 3 ships owned by corporations established under the laws of Japan, all of whose representatives and two-thirds or more of whose officers executing its business are Japanese nationals
> 4 ships owned by legal persons established under the laws of Japan other than provided for in the preceding item, all of whose representatives are Japanese nationals

In general cases, it is necessary for the owner to be a Japanese national or a Japanese company. To be a Japanese company here, it is necessary that it is incorporated under Japanese law, and all representatives and two-thirds or more of whose officers executing its business are Japanese nationals (Items 2 and 3). Conversely, as long as such entities own a ship, she naturally becomes a Japanese ship and shall be subject to various controls over a Japanese ship under Japanese law. If a Japanese company intends to own a ship, it is not possible to arbitrarily choose the nationality. As to officers executing the business of a company, it was formerly required that all of them were Japanese nationals. It was amended in 1999, triggered by the occurrence of a case in which a certain Japanese shipping company wanted to appoint a foreign national to the board. However, because of these requirements, whilst there is no requirements as to the nationalities of investors (shareholders) of a company as such, if a legal person intends to invite foreign nationals as officer(s) as per demands by foreign investors, these provisions may not allow it to continue to own a Japanese ship (it may lose conditions to own a Japanese ship if foreign officer(s) is(are) appointed). In addition, the Commercial Code provides that (1) in the case where a *membership company* under Japanese law[54] is the owner of a Japanese ship, if share of the company of a member executing its business is transferred and thereby the ship will lose Japanese nationality

[53] For example, see Goda (n 1) 203-205, 231

[54] There are three types of *membership company* [*mochibun kaisha;* 持分会社]: *general partnership company* [*gomei kaisha;* 合名会社] (whose all investors (members) have unlimited liability); *limited partnership company* [*goshi kaisha;* 合資会社] (whose investors (members) have either unlimited liability or limited liability); and *limited liability company* [*godo kaisha;* 合同会社] (whose all investors (members) have limited liability – The type was newly introduced in 2006, yet different form stock company, *i.e.* conventional limited company by *shares* [*kabushiki kaisha;* 株式会社]) (Articles 575 and 576, Paragraphs 2 to 4 of Companies Act). All investors (members) of these types of companies will become members executing its business unless otherwise provided for in its Articles of Incorporation (Article 590, Paragraph 1 of the Act), who will also be construed to be "officers executing it business" as referred to in Article 1, Paragraph 3 of Ship Act.

(resulting from dissatisfaction of conditions under Ship Act, Article 1, Item 3), then other members executing its business may demand the sale of the said share in exchange for a reasonable consideration (Article 691)[55]; and (2) in the case of a co-owned ship, if the share of a co-owner is transferred or a co-owner loses the nationality of Japan and thereby the ship will lose Japanese nationality, then other co-owners may demand the sale of the said share or put it on auction for a reasonable consideration (Article 700). The latter is a provision on the basis that in case of a co-owned ship it is necessary for all co-owners to satisfy above requirements.
According to Ship Act, the owner of a Japanese ship "*shall determine the port of registry in Japan and apply to the competent maritime authorities having jurisdiction over the port of registry for the measurement of the gross tonnage of the ship*" (Article 4, Paragraph 1) and "*shall "register* [toki; 登記]*" for property rights and then shall "register* [toroku; 登録]*" in Ships Register maintained by the maritime authorities which has jurisdiction over the port of registry*" (Article 5, Paragraph 1). Ship nationality certificate will be issued upon its registration in the latter (Article 5, Paragraph 2). This makes it possible for her to fly the Japanese flag and to be navigated for the first time (Article 6; except when a provisional certificate has been issued before the proper certificate). (1) Registration for property rights [*toki;* 登記] of a ship shall record and publicly disclose the ownership and other property rights of a ship under private law. In addition to ownership, mortgage and lease (Article 3, Paragraph 1 of the Ordinance on Ship Registration) and the manager[56] of a ship in case of a co-owned ship (Article 697 of the Commercial Code, Article 18 of the Ordinance on Ship Registration) are registered. It is under the jurisdiction of the Registry Office (the Legal Affairs Bureau, regional branch office of the Ministry of Justice). (2) Registration with Ships Register [*toroku;* 登録] records and publicly disclose a ship for public law purposes. As mentioned above, the nationality certificate of a Japanese ship will be issued on the basis of this registration. It is under the jurisdiction of the maritime authorities (Transport Bureau, regional branch office of the MLIT). In some countries, these two systems are unified. There are opinions for legislation that it is appropriate to unify two systems and manage them in the same government office. [57] In fact, the registration of a small ship is subject to a unified registration under Act on Registration of Small Ships, which is not only a prerequisite for navigation and for administrative purposes under public law but also for conditions to secure right under private law (Articles 3 and 4 of the Act).

As to the status of a Japanese ship, Ship Act itself prescribes that a Japanese ship shall have the following rights (privileges) and obligations:

[Rights] ⑴ Right to fly the flag of Japan (Article 2);

[55] This rule was formerly stipulated only for general partnership company and limited partnership company (Article 702, Paragraph 2 of the Commercial Code before amendment). However, by reason of introduction of limited liability company by Companies Act and inconsistencies between the Commercial Code and Companies Act arising therefrom, amendments to the Commercial Code in 2018 included necessary amendment and change of the place of the relevant provision in the Code (Nobukazu Matsui and Akihiro Oono (eds), *Q&A on 2018 Amendment of the Commercial Code* (Shoji Homu 2018) 59).
[56] The notion of management or manager (managing company) of a ship can exist in cases other than co-owned ships. It is rather more important and shall never be confused with the manager herein. It is planned that this notion will be discussed in a different paper in this series.
[57] See (n 5).

⑵ Right to call at closed port or place in Japan (main text of Article 3)[58]; and
⑶ Right to transport goods or passengers between ports in Japan (main text of Article 3)[59]

However, as a precondition, unless the owner of a ship first applies for her measurement (Article 4), registers ownership, registers ship nationality, and received the nationality certificate (Article 5), neither (1), nor navigation as a precondition of (2) and (3), is allowed in principle (Article 6).

[Obligation] ⑴ Obligation to fly the flag of Japan (Article 7);
⑵ Obligation to indicate her name, port of registry, and others (Article 7); and
⑶ Obligation to regularly receive inspection of her ship nationality certificate (Article 7-2)

Needless to say, the status of a Japanese ship includes not only as listed above but also being subjected to Ship Safety Act, Seafarers Act, Ships' Officers and Small Ships Navigators Act among others, as discussed in pages 13-14 of the paper in this series (the "sea" and a "ship") as those Acts shall be applied to a Japanese ship in most cases. And those Acts are also the national legislations of the international convention as discussed earlier in 2.[60]

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[58] An "open port," which is the counter notion of a "closed port or place", is "a port designated by Cabinet Order in consideration of the exportation and importation of cargo, entry and departure of ships engaged in foreign trades and other circumstances" (Article 2, Paragraph 1, Item 1 of Customs Act). In a word this is a port where a foreign ship is permitted to enter.

[59] This is the so-called cabotage. As there are some exceptions, it will be discussed later.

[60] It is not stated in the law that only Japanese nationals are allowed to be the crew on a Japanese ship. Since a Japanese ship is subject to Ships' Officers and Small Ships Navigators Act, it is required that a person who has a license under the Act shall be on board such ship in accordance with the prescribed standards for constitutions of the boarding crewmembers. But it includes the case where the person who has a certificate of qualification of the State Party of STCW is on board with the approval of the MLIT of Japan (Article 23). Any of crewmembers who are on board a Japanese ship (not limited to officers who have a license but including seamen who do not have a license) needs to have a mariner's pocket ledger (Article 50 of Seafarers Act). It is expected that a mariners' pocket ledger may be held by a foreign national (Article 29, Paragraph 2 and Article 35, Paragraph 2 of Enforcement Regulations of the Act).
However, this does not mean that foreign persons can be crewed on a Japanese ship without restriction. A Japanese ship is not surely the Japanese territory or territorial waters as such. But if she is in the Japanese territorial waters, it will also mean a foreign person works in the Japanese territorial waters. Even when she is abroad, you can also say that the place in a ship is somewhat similar to the place in Japan. Therefore, in reality, the crewing of a foreign national on a Japanese ship has been made only within a constrained framework. The MOT White Paper in or before 2000 (https://www.mlit.go.jp/hakusyo/transport/heisei12/3-6/3-6.htm (accessed 18 November 2022)) stated that "*From the past, as to a Japanese ship for whom a Japanese shipping company has the manning rights, the administrative guidance has been made not to allow her manned with foreign seafarers, following the Cabinet's Understanding on the Acceptance of Foreign Workers at the Land Workplaces in Japan (currently decided by the 9th Basic Plan in Employment Policy, the Cabinet's Decision in August 1999). On the other hand, as to a Japanese ship for whom a foreign shipping company has the manning rights (the so-called Maru-ship) due to bareboat charter to overseas, it is considered she is outside the scope of the said Cabinet's Understanding and thus she has been allowed partly manned with foreign seafarers.*" This statement disappeared from the MLIT White Paper 2001.
Later as of 2006, it was explained that there was no requirement for the nationality under the law but as far as the master and the chief engineer are concerned, they need to have Japanese license and *de facto* limited

As discussed earlier, it is understood that there is no statute squarely providing for requisition under the current Japanese law. However, there are some provisions which are of somewhat similar nature, though yet different from requisition.

In the first place, Act concerning the Measures for Protection of the People in Armed Attack Situations, etc. (Protection of People Act), one of peace and security legislations provides *inter alia*, where the government of Japan issues the "Basic Policy for how to respond to Armed Attack Situations or Survival Threatened Situation", then for the purpose of guiding evacuated people and transporting crucial materials the governor of a prefecture is empowered to "*request*" a designated public institution whose service is transportation to carry them; such institution is obliged to comply with such *request* unless there is justifiable reasons not to do so (Articles 71 and 79). If nevertheless carriage is not done, then the Prime Minister after implementing necessary procedure is empowered to "*instruct*" such institution to carry them (Article 73). These provisions are, for sea transportation, addressed not to a ship but to a designated public institution (company) whose service is transportation. At present only the domestic passenger carriers (ferry companies) and domestic shipping companies are designated as public institutions for sea transportation.[61]

Secondly, there can be a voyage order under Marine Transportation Act. It provides, "*The MLIT (Minister) may order a ship operator to perform a voyage by designating a route, a ship or persons or goods to be carried, only when the voyage is required for disaster rescue or other maintenance of public safety but there is no person or extreme shortage of person who voluntarily carries out the voyage*" (Article 26, Paragraph 1) .[62] It is not expressly stated the target ship shall be a Japanese ship even if it designates a ship concerned, and the text of the relevant ministerial ordinance can be read as if a foreign ship might possibly be included (there is a column to describe

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to Japanese nationals (as it then was), and abolishment of this requirement was being discussed, which realized as a matter of regulatory framework next year in 2007 (See *JSA Shipping Yearbook 2006,* Section 1.5 and *JSA Shipping Yearbook 2007,* Section 1.6 (https://www.jsanet.or.jp/report/nenpo/nenpo2006/text/nenpo2006_1_5.htm and https://www.jsanet.or.jp/report/nenpo/nenpo2007/text/nenpo2007_1_6.htm (both accessed 18 November 2022)).

Recently, an academic explains, in pointing out the need for discussions on the introduction of foreign seafarers in coastal shipping, the reason why manning of foreign seafarers are not allowed in coastal shipping in Japan is yet "*based on the Cabinet's Decision on the acceptance of foreign workers in 1966*" (Japan Maritime Daily, 19 August 2020 https://www.jmd.co.jp/article.php?no=259992 (accessed 18 November 2022)). Hiroyuki Goda, 'Vessel Charter/Shipping Company Nationality', Commentary in JFIR (Japan Forum for International Relations) Research Program, *Japan and the World in the Age of 'Multilayer Globalism' 2020 to 2023* (2021) (https://www.jfir.or.jp/en/studygroup_article/3525/ (English) (accessed 18 November 2022)) says, "*The issue of whether to allow foreign crews on board a Japanese ship is not a matter of law but merely a matter of labor-management agreement.*" (See also Goda (n 1) at 175-176 (n 142).) Differences in explanations may be attributable to differences in whether one has in mind domestic shipping within Japan's territorial waters that will inevitably involve immigration control or oceangoing shipping that will not.

[61] See https://www.mlit.go.jp/kikikanri/seisakutokatsu_terro_tk_000004.html (accessed 18 November 2022).

[62] The order was previously possible only to "a voyage between ports in Japan" and thus limited to order for coastal shipping. However, the amendment in 2008 eliminated them and it is possible to order a voyage to/from overseas. The MLIT explains that situations where "*the voyage is required for disaster rescue or other maintenance of public safety*" therein only means peacetime emergency situations and does not include contingencies under peace and security legislations. This is also stated in "Basic Policy to Secure Japanese Ships and Seafarers" at 2. (6) in (n 70).

the nationality in the form of the voyage order certificate in Article 24-2 and Appendix 5 of the Enforcement Regulations of the Act). Considering that a foreign entity is not included in a 'ship operator' subjected to the order (Article 42, Paragraph 1) and its enforceability may be questionable in case the Japanese Government issued such order to a foreign ship, however, the target ship of the order is probably expected to be a Japanese ship.

(2) Foreign ship in Japanese law

Conversely, what status does a foreign ship have under Japanese law?
Typically, it means that she does not have any rights (privileges) that a Japanese ship has as discussed in (1): Namely, she does not have the (1) right to fly the flag of Japan; (2) right to call to a closed port and place in Japan; and (3) to transport goods or passengers between ports in Japan. However, as to (2) and (3), there is an exception that *"this shall not apply if there is a different provision in laws or treaties, if a ship needs to avoid a marine casualty or capture, or if she obtained a special permission by the MLIT (Minister)*" (the proviso of Article 3).
With regard to (2), conversely speaking, it is a general rule that even a foreign ship can enter an open port in principle. Rather an open port is a port of this kind, and instead, it is the discretion of each state to determine where to designate an open port. However, there is a further exception to this rule: the prohibition of a specified ship of a specified foreign state from entering a port under the Act on Special Measures Concerning the Prohibition of Entries of Specified Ships into Ports. This Act was enacted in 2004 to "*maintain Japan's peace and security in light of the international situation surrounding Japan in recent years*" (Article 1). Specific decisions are made through the Cabinet Decisions (Article 3) and announced in the Official Gazette (Article 4) and approved *ex post facto* by the Diet (Article 5). Specifically, it is now applied in relation to sanctions against North Korea. Other statutes concerning the prohibition of a ship entering ports in Japanese law includes the Act on Assurance of Security of International Ships and Port Facility (Article 45), enacted as domestic legislation of the ISPS Code of SOLAS Treaty in the wake of terrorist events in the U.S. in 2001, and Quarantine Act, application of which was at issue in connection with the call of a British ship *Diamond Princess* at the wake of COVID-19 pandemic in Japan in February 2020 (Article 4, but applicable only before free pratique) [63]. These statutes can be formally applied to both a Japanese ship and a foreign ship, but in many cases in reality they will become problematic in case of a foreign ship.[64]
Next (3) is the rule that a foreign ship cannot be engaged in domestic transport, called Cabotage. [65] However, as stated in Article 3 of Ship Act, the exception applies *inter alia* when a ship received

[63] See https://www.jsanet.or.jp/sanctions/pdf/nk-01.pdf (accessed 18 November 2022) for the list.

[64] Following *Diamond Princess*, "refusal of entry into port" of a Dutch-registered passenger ship *Westerdam* was widely reported in Japan too. But what actually took place was the refusal of landing of all foreign persons for reasons under Immigration Control and Refugee Recognition Act (the legitimacy of which may be a separate issue) and the "request" for cancelling an entry into port subsequent thereto (The MLIT press conference 7 February 2020) (https://www.mlit.go.jp/report/interview/daijin200207.html (accessed 18 November 2022)).

[65] See Tomoharu Hase, 'Regulatory Framework for Coastal Shipping and Ferry as an Environment-Friendly Transportation – Focusing on Cabotage and Environmental Issues', (2010) 59 Maritime Transport Studies 1, Nobuhiro Ishida, 'The Cabotage and the Coastal Shipping Industries' (2013) 114-3 Journal of Economics (Osaka City Univ) 148. According to the former and Goda (n-1) 23 (n 13), the origin of the term *Cabotage* may have come from a Spanish *cabo* that refers to a cape and indicated navigation along the coast between

a special permission (special permission for coastal transport) from the MLIT. According to the MLIT press release in 2010, the criteria for granting a special permission are: (a) that such coastal transportation does not interfere with the securing of stable transportation in Japan; and (b) that it does not interfere with the transportation of goods or passengers by Japanese marine transport companies. Generally speaking, a special permission may be granted in the following cases: (i) those that are considered to be a part of overseas transportation undertaken by a foreign ship operated by a Japanese company; (ii) those that are also considered to be a part of overseas transportation based on mutual state promise under the bilateral treaty for commerce and navigation; and (iii) those that are not considered to be commercial activities such as the transportation of empty containers. At that time, although it did not fall under any of (i)(ii) and (iii), some foreign ships were granted special permissions for the transportation between "Special Free Trade Area" and "Free Trade Area" of Okinawa (as they then were) and the mainland Japan. [66] Another special case in more recent time includes a case of *Queen Beetle* who arrived at Hakata Port in Kyushu in October 2020 to be employed by JR (Japan Railway) Kyushu's subsidiary to be engaged in international transportation between Japan and Korea. But since it became virtually impossible to be engaged in such transportation due to the boarder control measures against COVID-19 pandemic, a special permission for coastal transport was temporarily granted in March 2021 for domestic tour transportation business. [67]

Finally, Japan has enacted the statute called Act on Navigation of Foreign Ships through the Territorial Sea and Internal Waters, in respect of a foreign ship's right of innocent passage under international law in Japan.

(3) Measures to secure Japanese ships and the notion of semi-Japanese ships

At the end of the discussion on nationality, we would like to discuss the policy for how to secure Japanese ships and the notion of semi-Japanese ships forming part of the policy. The latter indicates "semi" but it is not a system for ship's nationality *per se*.

The offshore registration system was once discussed in Japan too. [68] However, it has not been introduced until present (conditions of a Japanese ship is nothing but as included in Article 3 of Ship Act). Instead, the system introduced in 2012 as a supplementary system to secure Japanese ships and continued to date with amendments is a system to recognize a prescribed foreign ship as a semi-Japanese ship.

According to the explanation in the MLIT White Paper in 2012 when the system was introduced,

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capes in a manner not to miss the shore; or from a French *cabot* that refers to a small boat or from a French *caboter* that refers to voyage along the coast between capes.

[66] https://www.mlit.go.jp/common/000111596.pdf (accessed 18 November 2022)

[67] However, the oppositions to this special permission were strong, and the company announced in December 2021 that she would be changed to a Japanese ship, which was in effect in March 2022. As to chronologies, see press release of JR Kyushu Jet Ferry (JR Kyushu subsidiary) https://www.jrkyushu.co.jp/news/__icsFiles/afieldfile/2021/12/16/211216_QUEENBEETLE_nihonseki.pdf (accessed 18 November 2022); as to the oppositions of the parties concerned, see articles in Japan Maritime Daily, 11 December 2020 and 15 March 2021.

[68] JSA (n 16) Section 1.5; and Takahashi (n 41). Attempts to rebuild competitiveness of Japanese ships prior to the current semi-Japanese ship scheme included the schemes of new Maru-ships, Modernized ships and international ships. They also have not been the schemes to change the conditions for granting a ship Japanese nationality as such and therefore are not discussed in this paper.

"*We recently experienced the situation that foreign ships tried to avoid calling to Japanese ports following the Great East Japan Earthquake and the nuclear accident thereafter. As a result, the importance to establish economic national security by Japanese merchant fleet has become clearer. In response to this situation, this system is introduced as a system that allows foreign ships held by subsidiaries located in FOC states of Japanese international shipping companies who can be transferred to Japanese ships for navigation in a secure and prompt manner when needed to recognize as 'semi-Japanese ships' to complement Japanese ships.*" (Part II, Chapter 5, Section 3-3). [69] A semi-Japanese ship specifically means a ship who satisfies: [A] she is either (1) a ship applied by a Japanese international ship operator (the so-called operator) to the MLIT, being a foreign ship owned by its foreign subsidiary and operated by itself or (2) a ship jointly applied by a Japanese international ship operator and a Japanese shipowner (the so-called owner located in Shikoku and others) being a foreign ship owned by a foreign subsidiary of the latter and operated by the former; [B] there exists a contract in respect of her to the effect that, if a voyage order as provided in Article 26 of Marine Transportation Act is issued to the said operator, such ship shall be either in case of (1) transferred to such operator (in which case she will become a Japanese ship) or in case of (2) transferred to such Japanese owner and then further transferred or chartered to such operator (*ditto*); and [C] she is a ship recognized by the MLIT as satisfying the prescribed conditions to ensure that the said voyage order can be carried out securely and promptly (Article 39-5 of the Act). In short, a semi-Japanese ship is a foreign ship beneficiary owned by a Japanese operator or a Japanese owner, who has been recognized as capable of promptly being transferred to a Japanese ship to be engaged in the voyage order in case of emergency (in case a voyage order is issued by the Japanese authorities to a Japanese operator). Marine Transportation Act text itself does not give a straight indication of the implications for a Japanese international operators and owners if they get recognitions for ships owned by their foreign subsidiary companies. Marine Transportation Act merely provides that that ship operators can alone or jointly prepare the "Plan for Securing Japanese Ships and Seafarers" to apply for the approval by the MLIT (Article 35, Regulations for Approvals of Plans for Securing Japanese Ships and Seafarers and Other Matters in accordance with Article 35 of Marine Transportation Act) and that when they receive the approval, special measures for taxation (application of the so-called tonnage tax system) will become enjoyable (Article 38) among others. But it apparently reads a plan to secure "*Japanese* Ships" and it is not concerned with semi-Japanese ships. However, according to "Basic Policy to Secure Japanese Ships and Seafarers" issued by the MLIT under Article 34 of the Act, as a matter of tax law, "*semi-Japanese ships who are subject to measures to secure semi-Japanese ships to be implemented in relation to securing oceangoing Japanese ships and others*", in addition to Japanese ships, "*will also be subjected to tonnage tax system to promote to steadily secure semi-Japanese ships and thereby increase oceangoing Japanese ships.*"[70] Put it another way, it can be said to be a measure to cause Japanese shipping companies to secure semi-Japanese ships for the application of tonnage tax system [71] and thereby to

[69] https://www.mlit.go.jp/hakusyo/mlit/h23/hakusho/h24/index.html (accessed 18 November 2022)

[70] "*Basic Policy for Comprehensive and Systematic Promotion of Measures to Secure Japanese Ships and Seafarers Required to Ensure Stable Maritime Transportation*" ("**Basic Policy to Secure Japanese Ships and Seafarers**") at 2. (3) (adopted in 2008 and last amended in 2018; https://www.jsanet.or.jp/seisaku/pdf/ton_std/u/01.pdf (accessed 18 November 2022))

[71] Strictly speaking, semi-Japanese ships covered by tonnage tax system are conceptually not all semi-Japanese ships but only the "semi-Japanese ships who are subject to measures to be implemented in relation to securing oceangoing Japanese ships and others". The applicable semi-Japanese ships are expressed as the

indirectly achieve the final objective to secure Japanese ships in case of need.

4. When the nationality of a ship becomes an issue in private law – Private international law

The nationality of a ship is essentially a concept under international law and public law. However, it does not mean that there is no situation where the nationality of a ship becomes an issue in private law. It is mainly in international private law.[72]

Generally speaking, in a case of international nature, even if it is a matter of private law, the set of national law that should be applied to the matter in question (governing law) becomes an issue. Governing law is determined for each legal relationship unit related to a case. The benchmark for determining governing law for a legal relationship unit is called a connecting point under international private law. Traditionally, it has been considered that the flag state of ship is the connecting point in cases involving ships in principle and thus governing law in those cases is the law of the flag (the law of the flag doctrine in maritime international private law). It is because a ship moves across countries, and we cannot conceive of the state in which she is located when she navigates on the high seas.[73]

However, it has already passed many years since it began to be argued unreasonable to dispose of all cases with the flag state doctrine, as the development of FOC discussed in 2. has caused the relationship between a ship and her flag state to be diluted and even the situation has arisen where the flag state and state of register may have become different. Nonetheless, yet there are cases in which the law of the flag may have to be relied on in practice (at least, the concept of the law of the place of business headquarters of the beneficiary shipowner, instead of the law of the flag, is difficult to be applied to multinational companies and to co-owned ships, and there is

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specified semi-Japanese ships under the Act on Special Measures Concerning Taxation (Article 59-2, Paragraph 1, Item 1). The number of such ships are decided having regard to the increase ratio of Japanese ships by each shipping company and the total target number to secure Japanese ships and semi-Japanese ships set as a policy target (Basic Policy to Secure Japanese Ships and Seafarers at 2 (3) in the preceding footnote).

[72] In the substantive law after international private law determines the governing law (the Civil Code, the Commercial Code and other Japanese laws, if Japanese law is to be the governing law), it seems that the nationality of a ship should not directly affect the matter. Articles 691 and 700 of the Commercial Code concerning the transfer of the share to maintain the Japanese nationality referred to in 3. (1) are few exceptions. Rarely we encounter with an opinion that relates the issue of tort liability of a time charterer under Japanese law to the fact that a ship is an FOC ship. But it is submitted that there is a leap forward in logic to relate the issue of tort liability of a time charterer who is not a shipowner to the fact that a ship is an FOC ship, because FOC is in essence a matter about how to own a ship. It is planned that this issue will be discussed later in this series again.

[73] References since 2000 on maritime international private law includes Tadashi Kanzaki, 'Applicability of the General Choice-of-Law Rules to Maritime Affaires', (2000) 2 Japanese Yearbook of International Private Law 152; Tomotaka Fujita, 'Conflict of Laws and Maritime Law: Its Present Status and Future', (2000) 2 Japanese Yearbook of International Private Law 169; Masato Dogauchi, 'Maritime International Private Law' in Seiichi Ochiai and Kenjiro Egashira (eds), *Encyclopedia of Maritime Law in Commemoration of Centennial Anniversary of Japan Maritime Law Association* (Shoji Homu 2003) 669; Henmi (n 1-1) 245-264; Fumiko Masuda, 'Maritime Matters' in Yoshiaki Sakurada and Masato Dogauchi (eds), *Commentary of International Private Law Vol. 1: Act on General Rules of Application of Laws §§1-23* (Yuhikaku 2011) 598; Akiyoshi Ikeyama, 'Legal Issues of Jurisdiction and Governing Law in Maritime Cases in Japan', (2011) East Asia Maritime Law Forum 80 at 92 (English); and Kobayashi (n 23) 482.

no common support for that). When and how the law of the flag doctrine should be maintained is a major issue in general theory of maritime international private law. In 2006, the entire statute for international private law in Japan was revised for the first time in a century (Act on General Rules of Applicable Laws was enacted in replacement of previous one [*Horei*; 法例]). However, the Act does not expressly stipulate ship matters in the end.[74]

This issue typically emerges as a governing law issue concerning *recognition* of maritime lien (whether maritime lien shall be recognized) and *effect* thereof (priorities with other security rights), one of the most popular individual issues in maritime international private law theory. [75] There are so many academic views and we cannot say case law has been established either. In the past the prevailing view seemed to be the double application of (i) the governing law of the claim in question as it is the matter of effect of such claim and (ii) governing law of the flag in replace of *lex rei sitae* as it is a matter of property rights. [76] In the 1990s, 2 rulings by Tokyo District Court denied the previous cases and applied *lex fori* for both recognition and effect of maritime lien (without having regard to the law of the flag and others). [77] They have been criticized.[78] And thereafter, rulings that differ from them are continuing. They do not necessarily return to the conventionally prevailing view to apply the law of the flag. In recent cases as to recognition, there are cases to adopt double application of the governing law of the claim and actual *lex rei sitae* of the ship when the claim arose (in replace of the law of the flag). [79] On the other hand, unlike the recognition, the effect is a matter of determining the priority of a number of claims related to an attached ship (some of which are naturally subject to different governing laws; apart from maritime lien, of particular importance will normally be a claim secured by a mortgage registered in accordance with the law of the flag). Therefore, the benchmark for such

[74] Kunio Koide (ed), *Q&A on New International Private Law – Commentary on Act on General Rules of Application of Laws* (Shoji Homu 2006) 161

[75] The *recognition* and *effect* are translations of original Japanese words *seiritsu* [成立] and koryoku [効力]. The former may more often be translated as *formation*. The followings are what are meant thereby: It may not be a logically necessary result to divide the issues in *recognition* and *effect* of maritime lien. But as maritime lien is a kind of security interests, and because if it is *recognized* it results that a ship can be attached without the title document of obligation [*saimu meigi;* 債務名義] (plus without requirement of counter security)(Article 189 and Article 181, Paragraph 1, Item 4 of Civil Execution Act), the issue of *recognition* is asked in terms of whether or not such result is legitimate. If the owner of a ship does not do anything after the attachment, she will proceed to be auctioned and proceeds will be distributed, and in that case its superiority or inferiority with the mortgage in the ship becomes an issue. The issue of *effect* arises as a matter of benchmarks for its determination.

[76] Decision of Hiroshima High Court on 9 March 1987, Hanrei Jiho 1233-83, etc. Regarding the status of precedents and academic views, refer to references (n 73) as well as Mika Takahashi, 'Maritime Lien and Arrest' in Seiichi Ochiai and Kenjiro Egashira (eds), *Encyclopedia of Maritime Law in Commemoration of Centennial Anniversary of Japan Maritime Law Association* (Shoji Homu 2003) 109 at 121-123, Takayuki Matsui and Kenichiro Kurosawa, 'Recent Views and Judicial Precedents on Governing Law of Maritime Lien After Entry into Force of Act on General Rules of Applicable Laws – Introduction of Recent Cases of Time Charterers' Insolvency, (2009) 899 NBL 28.

[77] Decision of Tokyo District Court on 19 August 1991, Hanrei Times 764-286; and Decision of Tokyo District Court on 15 December 1992, Hanrei Times 811-229

[78] They include Dogauchi (n 73) 675-677.

[79] Judgment of Mito District Court 20 March 2014, Hanrei Jiho 2236-135; Decision of Fukuoka District Court Kokura Branch on 4 December 2015, Kaijiho 232-70; and Decision of Kobe District Court on 21 January 2016, Kaijiho 232-75. All of them are cases of fuel oil supply claims, and the actual location of the ship when the claims arose as *lex rei sitae* was the law of the place where the fuel oil was supplied.

determination must be common to all the claims concerned. It is felt that governing law of each claim and/or the actual *lex rei sitae* of the ship when each claim arose cannot be chosen and thus there still remains a question of inevitable choice among *lex fori* where the auction takes place (it means Japanese law because we are discussing the governing law in Japan) or the law of the flag, being another candidate set of law that may be commonly applicable.[80]

In addition, if there is no other appropriate connecting point, for example in the dispute of ownership or the collision between ships flying different flags on the high seas, the law(s) of the flag(s) may still have to be relied on. In the latter case, there may be variations as to whether the both laws of the flags of colliding ships shall be applied at all times, or whether it should be considered that which ship's law of the flag shall be applied when a damaging ship (defendant) and a damaged ship (plaintiff) are clear. There is also a view from the past that *lex fori* must be applied because the law of the flag has become obscure due to the development of FOC ships.[81]

5. Conclusion

As we have seen, many of the issues surrounding the nationality of ships at present are certainly related to how to address FOC ships or how to deal with FOC ship related issues.

However, we must repeat that the use of an FOC ship is based on economic rationality derived from the international nature of shipping industry. Additionally, it should be noted that it is rooted in the situation of competitions in a common worldwide market under the principle of "freedom of shipping" rather than just of international nature. The principle of "*freedom of shipping*" is the principal political policy for shipping industry of a state to the effect that the freedom to enter into or exit from shipping industry shall be guaranteed; transport of cargoes from the country shall not be required to be preferentially undertaken by its merchant fleet or ships flying its flag through governmental interference; and choice of shipping companies and ships shall be left to the free and fair competitions among private companies. It is surely not a principle *per se* under international law (law of the sea). It has therefore been not impossible to conversely adopt a policy for a state to promote or compel to transport export/import cargoes by ships flying its flag for the purposes of national security or protection of shipping industry of the state (discrimination by the flag). In fact, it seems to have once adopted in Central/South American countries in history. It is perhaps impossible to deny, however, that the principle of freedom of shipping is in the end the controlling principle for the shipping order in the present world.[82] It is thus common in the

[80] Since none of the decisions in the previous footnote did not eventually recognize maritime lien, no substantial ruling was made about effect. However, the relevant passage of Decision of Kobe District Court discussed the issue of recognition, and in the concluding part it suddenly said that both recognition and effect shall be disposed of by double application. It seems that this is a confusing ruling.

[81] For the latter case, Judgment of Sendai High Court on 19 September 1994, Hanrei Jiho 1551-86 held the laws of the flags of both damaging ship and damaged ship are in double application. Refer to Tanikawa (n 7) 34 as a supporting view for *lex fori.*

[82] See this term in JSA, *Glossary of Maritime Terms* (https://www.jsanet.or.jp/glossary/wording_txt_ka.html (accessed 18 November 2022); Mizukami (n 1) 55-56; Henmi (n 1-1) 184-188; and Goda (n 1) 31-32 (n 56). This principle is occasionally referred to as the basis of shipping policy of the Japanese Government. See MLIT, *Maritime Report 2018* at 109 (https://www.mlit.go.jp/common/001249547.pdf (accessed 18 November 2022) for example. Japan also have legislation called Act on Special Measures against Unfavorable Treatment of Japanese Overseas Vessel Operators by Foreign States, etc.

Henmi (n 1-1) 187 in critical nuances argues, "*It is perhaps undeniable that this very principle has led to the situation that the nationality of ships has become a mere formality, as represented by prevailing FOC ships,*

present international shipping for a shipping company in State A to be engaged in marine transportation totally unrelated to State A. In other words, it is not a principle for such company to be only engaged in transport to/from State A, but in international transports around the world too. Therefore, it seems difficult if not impossible to think that a shipping company in State A shall only own a ship of State A and it is improper to own other ships. [83] In State A, the presence of a considerable number of ships flying the flag of State A and seafarers with the nationality of A may well be crucial for the purpose of economic national security and transmission of marine skills to next generation of State A (or of securing State A's own means transport to/from State A). And we must think how to give what incentives to shipping companies in State A who shall contribute to such purposes (as owners or employers). But it is quite different from thinking that it is always inappropriate for shipping companies in State A to own other ships than ships flying the flag of State A.

At least from the beginning of this century, we may say how to answer the issues as referred to in 2. (5) having due regard to this has been considered for decades.

[Opinions herein are personal opinions of the author in the present and not opinions of corporations or organizations he belongs to. This paper shall not be construed to give legal advices to any specific cases.]

and further given rise to the threat to the order of oceans. There may be rooms to presume that, had traditional shipping nations strengthened controls over shipping even at the sacrifice of development of shipping industry of their nations to a certain extent, the problems in the present might not have taken place, or even if it had taken, it might have been possible for mainly traditional shipping nations to treat FOC ships." What he means by "*at the sacrifice of development of shipping industry of their nations"* may be a mistake of "*at the sacrifice of development of national economy of their nations*", as international shipping is a companion for trade (export/import). At any rate, however, he also explains slightly later, "*In the background there were severe competitions in international shipping. There exists no boarder in international shipping. Shipowners located in various countries must pursue profits to be produced by ships within a common ring called the oceans.*" The latter is the reality.

[83] In the casualty of *Wakashio* (registered in Panama) in 2021, the beneficiary owner (*Nagashiki Kisen*) and the time charterer (*Mitsui OSK Lines*) were Japanese companies and thus it was widely reported. Reportedly she was in the middle of a voyage from China to Brazil via Singapore. She was probably engaged in the transportation of ore produced in Brazil (ballast voyage at the time of the casualty).