

# RAISING THE SPECTOR OF DISCRIMINATION: THE CASE FOR DISREGARDING “FLAGS OF CONVENIENCE” IN THE APPLICATION OF U.S. ANTI-DISCRIMINATION LAWS TO CRUISE SHIPS

By Paul T. Hinckley \*

In June 2005, the United States Supreme Court resolved a conflict between two lower courts and ruled that Title III of the Americans with Disabilities Act applies to foreign-flagged cruise ship, in the case of *Spector v. Norwegian Cruise Lines*.<sup>1</sup> Though enlightening and constructive, many issues regarding the application of U.S. laws to entities located outside U.S. territorial boundaries were unresolved by the Supreme Court decision, especially with regard to cruise vessels operating in the United States.<sup>2</sup> Many of these problematic legal questions arise from the pervasive practice in the maritime industry of flying “flags of convenience” (“FOC”s).<sup>3</sup> Flags of convenience can be defined as “the flag of any country allowing the registration of foreign-owned and foreign-controlled vessels under conditions which, for whatever the reasons, are convenient and opportune for the persons who are registering the vessels.”<sup>4</sup>

A cruise vessel’s internal operations and management are presumed to be under the jurisdiction of the host state whose flag the vessel flies. Therefore it is out of the jurisdiction of U.S. courts (absent expressed congressional intent to the contrary). As a result, courts have found that many U.S. regulations, most notably labor and employment protections, do not apply to cruise ships and other maritime vessels flying foreign flags. This article explores the current situation and argues for extra-territorial availability of additional protections to workers aboard ships ultimately owned and controlled by U.S. interests.

## FLAGS OF CONVENIENCE AND OPEN REGISTRIES - HISTORY AND PRACTICE

A ship flying under the flag of a sovereign state, under most circumstances, is operating under the laws and jurisdiction of that host state.<sup>5</sup> That state is also responsible for the enforcement of both domestic and international laws against the ships that sail its flag.<sup>6</sup> However, when there is little to no actual relationship between the ship (its crew and its owner) and the host state, the ship is often referred to as flying a “flag of convenience.”<sup>7</sup> Among the reasons for “flagging out” are: fewer to no taxes imposed on earnings, lower safety standards, and reduced operating costs.<sup>8</sup> In response to the adverse effects on the American maritime workforce caused by U.S. ships’ “flagging

out” and hiring cheap foreign labor, U.S. maritime trade unions have long sought international support against open-registry countries. They hope to further restrict the registration of ships by requiring a “genuine link” between the vessel and the country registering the vessel.<sup>9</sup>

Since the 1920s, the percentage of the world’s maritime vessels FOCs increased.<sup>10</sup> A recent United Nations Conference on Trade and Development (UNCTAD), entitled *Review of Maritime Transport*, declared that over half of the gross ship tonnage owned by the three biggest shipping nations (Greece, Japan, and the United States) were flying FOCs.<sup>11</sup> Similarly, in 2001, a study by the International Transport Workers’ Federation concluded that FOC ships accounted

for 53% of the world’s gross tonnage.<sup>12</sup>

The United States has played an integral part in both the development of the open-registry concept and in the increasing popularity of FOCs.<sup>13</sup> Indeed, “the creation of open-registries was largely masterminded by the entrepreneurs of developed countries.”<sup>14</sup> However, union pressure on the legislature in the United States in the early and middle twentieth century resulted in strict crew mandates and registry requirements for ships seeking to fly the U.S. flag, in addition to increased safety requirements and wage protections for U.S. laborers.<sup>15</sup> Because the costs of maintaining a crew can account for half of operating expenses,<sup>16</sup> economic concerns drove the maritime industry in the United States to seek alternatives to the high-priced U.S. labor force.

In the 1920s, the United States became involved in the creation of the Panamanian registry.<sup>17</sup> During that period, U.S. Consulars actually represented Panamanian interests abroad in countries without a Panamanian Consulate.<sup>18</sup> Panama currently has approximately 1700 registered vessels and is considered the oldest open-registry.<sup>19</sup> Further illustrating U.S. involvement, Panama’s registry is administered from an office in New York.<sup>20</sup> The registry fees it receives account for five percent of Panama’s annual budget.<sup>21</sup> The country advertises that “any person or company, irrespective of nationality and corporation,” with any sized ship, can register in a ‘straightforward’ and ‘expedient’ manner.<sup>22</sup> The Panamanian Registry also claims to be “one of the most responsible in the world in reference to the concern of the Administration for the safety of life at sea of its vessels and the people embarked and for the economic well-being of the

owners/operators of these vessels [sic].<sup>23</sup> However, the Panamanian Registry's simplified requirement system has proven to encourage substandard practice. In fact, in 1999, the affluent British owners of a Panamanian registered vessel kept twenty percent of the wages meant for the crew.<sup>24</sup> Furthermore, in 2001, the average vessel flying the Panamanian flag was built in 1985. In that year alone, 15 Panama-registered vessels were lost, a number far greater than any other nation.<sup>25</sup>

Not satisfied with just the open registry of Panama, former Secretary of State Edward Stettinius and a group of leading U.S. entrepreneurs and multinationals spearheaded the creation of the Liberian registry.<sup>26</sup> Liberia now has the world's largest ship registry with approximately 1800 registered vessels.<sup>27</sup> The Liberian registry is administered through International Registries, Inc., of Reston, Virginia, and is headquartered in New York.<sup>28</sup> The biggest obstacle to registering a vessel in Liberia is a requirement that vessels over 1600 tons may be registered only by Liberian nationals.<sup>29</sup> Under Liberian law, however, a corporation or partnership qualifies as a Liberian national.<sup>30</sup>

In 1993, the U.S. Coast Guard caught the Royal Caribbean ship Nordic Empress dumping oil in waters off the coast of the Bahamas as it made its way to Miami.<sup>31</sup> The ship was flagged out of Liberia.<sup>32</sup> During the course of the Coast Guard's investigation, Royal Caribbean Cruise Lines ("RCCL") denied charges that it had illegally dumped pollutants.<sup>33</sup> The cruise line also claimed that it was immune from criminal prosecution in the United States because its ships fly foreign flags.<sup>34</sup> RCCL argued that under international law, only Liberia had jurisdiction to prosecute because Nordic Empress flew the Liberian flag.<sup>35</sup> The United States was forced to amend the charges to making false statements to the Coast Guard.<sup>36</sup> The ship had omitted the discharge from its record books before submitting them to the Coast Guard, and it was this act which brought the cruise ship under U.S. jurisdiction.<sup>37</sup>

The business of maintaining ship registries is lucrative and provides substantial income for host states that are able to attract vessels to that country.<sup>38</sup> Many countries, in order to lure and keep registry business in their states, fail either to adopt or to enforce laws against ships that may cause them financial difficulty. The fear of losing the registry income provided by a fleet of fee-paying ships to another country with less rigorous regulations (or enforcement regulations) creates a virtual race to the bottom where states fail to enforce, among other things, labor and employment regulations and anti-discrimination laws.

#### DISCRIMINATION IN THE CRUISE INDUSTRY

Cruise ship operations are the fastest growing segment of the global maritime industry.<sup>39</sup> Since 1980, cabin occupancy has increased almost 600 percent, from 1.5 million to more than 10

million passengers worldwide.<sup>40</sup> The number of North Americans taking cruises has doubled in the past ten years. Employment in the cruise industry has increased to meet the demands. Royal Caribbean International, one of the largest cruise operators, estimated that it would need 12,000 new "hotel" employees for housekeeping and the dining room each year for the next five years to keep pace with expansion.<sup>41</sup>

The majority of these workers are recruited from countries in Eastern Europe, Asia, the Caribbean, and Central America.<sup>42</sup> Workers must often pay recruiters and placement companies hundreds of dollars for their positions, gradually paying these fees from their paychecks.<sup>43</sup> This arrangement creates a situation where the worker is an indentured servant by the time she or he steps onto the ship, greatly increasing the consequences of job loss.<sup>44</sup> Ship operators exploit this situation by using the threat of termination (and often abandonment at foreign ports) to quell complaints and disputes.<sup>45</sup>

Cruise ship crew-members generally work ten to twelve hours a day, seven days a week, for ten-month contracts.<sup>46</sup> A shipboard waiter may work as many as 16 hours a day and often gets less than six hours of uninterrupted rest per night.<sup>47</sup> Collective agreements on cruise ships frequently require shipboard employees to work 80 hours per week. "In a survey of shipboard employees conducted by the ITF in 2001, 95% of those surveyed reported working seven days a week."<sup>48</sup> They are not paid overtime and often work their entire contract without any break.<sup>49</sup> Even working under an

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ITF collective bargaining agreement, the lowest compensated employee may earn as low as \$730 a month.<sup>50</sup> Poor or unsafe living conditions, unpaid wages, long working hours, abusive employers, the fear of crew-members being abandoned in foreign ports, little or no job security, and the suppression of union activities frequently occur on FOC ships.<sup>51</sup> This has resulted in an ever-increasing staff turnover rate in which the average term of hotel crew employment decreased from three years in 1970, to a year and a half in 1990, to nine months in 2000.<sup>52</sup>

Despite the fact that they maintain internal operations outside the jurisdiction of the United States, the cruising industry frequently lobbies Congress to pass favorable laws.<sup>53</sup> By total spending, it is the fourth-largest lobbying industry in Florida.<sup>54</sup> In fact, as an organization created to advance the interests of the cruising industry, the International Council of Cruise Lines spends about a million dollars annually on its lobbying efforts.<sup>55</sup>

In addition to the aforementioned employment difficulties, gender and race-based discrimination aboard cruise vessels continues to be a serious problem.<sup>56</sup> "The operation of the cruise ship is segregated by gender. All the captains are men and few if

any women are found in the deck and engine departments. Women concentrate in hotel, catering, and other 'non-technical' sectors of the vessel."<sup>57</sup>

National origin discrimination also occurs.<sup>58</sup> Women from industrial countries are far more likely to be found in a small number of management or administrative positions, and are also more likely to be employed as receptionists, nurses, entertainers, and beauticians; while, Asians and women from less developed countries are almost entirely employed in the "hotel" functions of the ship, which include catering, waiting, and cabin staff positions.<sup>59</sup> Reports also suggest that women from industrial countries are paid more than those from less developed countries employed in the same job.<sup>60</sup>

### THE INADEQUACY OF THE SPECTOR DECISION AND OTHER CASELAW

The decision in *Spector v. Norwegian Cruise Lines* dealt a blow to the longstanding practice of deferring to a host country in matters concerning the functioning of a ship.<sup>61</sup> That decision declared that foreign-flagged cruise ships, which pick up American citizens at U.S. ports, must comply with Title III of the ADA because the cruise ships qualify as "public accommodations" under the Act.<sup>62</sup> The Court was unclear, however, about the extent to which the ADA would apply or what modifications would need to be made to accommodate handicapped individuals.<sup>63</sup> In situations where compliance would not be "readily achievable" or would be a violation of an inter-national obligation, the Court declared the Act would not apply.<sup>64</sup> Relying on precedent,<sup>65</sup> the Court held that if compliance affected the "internal order of the ship" the Act would not apply, since the internal operation of the ship is subject to the jurisdiction of the host state.<sup>66</sup> However, the Court's decision in *Spector* did nothing to change the status quo as it relates to the jurisdictional situation which allows U.S. owned and operated cruise lines to discriminate on the basis of gender and nationality without fear of discrimination lawsuits, to blacklist employees for union activity, and to escape liability for dumping waste in inter-national waters.

Under the *Spector* decision, the Americans with Disabilities Act may now apply to cruise ships, ending the practice of discriminating against U.S. passengers who are disabled. However, because crews are considered part of the "internal order of the ship" and thus subject to the laws of the host state, crews remain unprotected by U.S. employment laws. Thus, a cruise ship company may be required to make reasonable accommodations for a handicapped passenger, such as braille in an elevator or a handrail in a bathroom, but may not be required to make the same modification to an employee service elevator or to a crew member's bathroom. Furthermore, under *Spector*, the cruise

company may not be able to charge more when selling a boarding ticket to a disabled person, yet may pay a disabled employee less.

### LIMITATIONS ON EXTRATERRITORIAL APPLICATION OF U.S. LAW

Historically, U.S. laws did not apply extraterritorially. This was due to the principle set forth by the Supreme Court in *Foley Brothers Inc. v. Filardo*,<sup>67</sup> which states that federal laws are presumed not to apply extra-territorially absent specific congressional intent. The Supreme Court affirmed its approval of this rule in two consolidated cases, *Equal Employment Opportunity Commission v. Arabian American Oil Co.*,<sup>68</sup> and *Bourlesan v. Arabian American Oil Co. (Aramco)*.<sup>69</sup> In those cases, the Court held that Title VII of the Civil Rights Act of 1964 did not apply to employment outside the U.S. despite the fact that Aramco was an American corporation and its employees (the plaintiffs) were American citizens. In its holding, the Court declared that the rule against extraterritorial application "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord."<sup>70</sup>

Subsequently, in 1991, Congress declared its intent to apply the ADA and Title VII of the Civil Rights Act to U.S. citizens working abroad for U.S. companies.<sup>71</sup> As a result, claims of discriminatory employment practices abroad against U.S. companies brought by American citizens no longer run the risk of dismissal on those grounds. These changes are limited, however. For example, Title VII of the Civil Rights Act applies only when the employee is a United States citizen, and the employee's company is controlled by an American employer.<sup>72</sup>

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The language of the statute specifies that overseas citizens are to be covered under the revised legislation, but neglects to mention whether or not foreign nationals working for U.S. corporations overseas fall are included.<sup>73</sup> This exclusion of foreign nationals by the congressional revision has been the subject of at least two cases, *Shekoyan v. Sibley Int'l Corp.*, and *Torrico v. IBM*.<sup>74</sup>

In *Shekoyan* (2002), a foreign national sued his former employer claiming Title VII violations.<sup>75</sup> Though born in Armenia, the plaintiff was a permanent resident of the United States.<sup>76</sup> He was hired in the District of Columbia, but his job required him to work in the Republic of Georgia.<sup>77</sup> Shekoyan claimed that his immediate supervisor, Jack Reynolds, discriminated against Shekoyan's on the basis of his national origin.<sup>78</sup> Shekoyan claimed that his boss made statements that he was not a "real American," mocked his accented English, and made racist comments about people from former Soviet states.<sup>79</sup> The District Court for the District of Columbia held that, because Shekoyan was not a U.S. citizen and because of his employment was in the Republic of Georgia, he was outside of the protections

afforded by Title VII. The court further found that it lacked subject-matter jurisdiction over his claim.<sup>80</sup> Title VII did not apply to permanent U.S. residents or to U.S. “nationals” – only to citizens of the United States who may be working abroad.<sup>81</sup>

In *Torrico v. International Business Machines*,<sup>82</sup> the United States District Court for the Southern District of New York took a different approach. *Torrico* dealt with an employee who, though not a U.S. citizen, was a U.S. resident prior to agreeing to take a three-year temporary rotational assignment in Chile.<sup>83</sup> He was discharged while on medical leave<sup>84</sup> and sued pursuant to the Title I of the Americans with Disabilities Act (ADA).<sup>85</sup> In deciding whether or not ADA protections should apply in *Torrico*, the court borrowed a “center of gravity test” which New York courts normally used for employment contract disputes when choice of law was at issue.<sup>86</sup> Here, however, they looked to see whether or not it could reasonably be argued that *Torrico*’s employment occurred in the United States, and whether the ADA should therefore apply.<sup>87</sup> After a bench trial, the court found in favor of the defendants, but the case set a precedent for allowing claims to survive summary judgment despite the plaintiff not being a U.S. citizen and being out of the country at the time the discrimination occurred. “A non-resident employed in the United States who travels abroad on a business trip is not stripped of the protections of the ADA the moment he or she leaves U.S. territory.”<sup>88</sup>

In *EEOC v. Bermuda Star Line, Inc.*,<sup>89</sup> the United States District Court for the Middle District of Florida was presented with the opportunity to consider application of Title VII<sup>90</sup> to a cruise ship flying a foreign flag. In that case, Susan Harman inquired into an entry-level position as a wiper or ordinary seaman in the deck or engine department of Bermuda Cruise line vessel *S.S. Veracruz*.<sup>91</sup> The employment inquiry was made over the telephone to Captain Glidden, Bermuda Star’s port captain, whose office was in Miami.<sup>92</sup> Harmon was told that, because she was a female, her application for employment would be denied.<sup>93</sup> She was told that the ordinary seaman position required that the applicant be male.<sup>94</sup> Despite the fact that the *S.S. Veracruz* was registered in Panama and flew the Panamanian flag, and that the corporation itself was organized under the laws of the Cayman Islands, the court held that the Title VII violations occurred within U.S. territorial boundaries and accordingly denied the defendant’s motion for summary judgment.

U.S. courts were presented with a second opportunity to visit the issue of Title VII application to cruise ships when the District Court for the Southern District of Florida considered *EEOC v. Kloster Cruise Ltd.* (d/b/a Norwegian Cruise Lines).<sup>95</sup> That case began when two charges of employment discrimination against Kloster were filed with the Equal Employment Opportunity Commission (“EEOC”).<sup>96</sup> Judy Corbeille, an assistant cruise director, alleged that she was fired as a result of her pregnancy.<sup>97</sup> Fernando Watson, a bar manager, claimed that he had been forced to resign because he was discriminated against on the basis of his race and national origin.<sup>98</sup> Pursuant to its statutory duty, the EEOC began its

investigation by issuing two administrative subpoenas.<sup>99</sup> It sought to discover evidence relating to Kloster’s corporate structure and employment practices.<sup>100</sup> Kloster refused to comply with the subpoenas. The EEOC requested judicial enforcement.<sup>101</sup>

The District Court denied the EEOC’s request. It held that “the application of Title VII to foreign flagged vessels owned by a foreign corporation, without clear congressional authorization, would “undermine the sovereignty of another country” and “violate principles of international law.”<sup>102</sup> The Court of Appeals for the Eleventh Circuit reversed the decision.<sup>103</sup> In its decision, the court stated, “[a]lthough we do not decide the jurisdictional reach of Title VII with respect to owners of foreign flagged cruise ships, we reverse the district court’s ruling because it was prematurely made in this subpoena enforcement action.”<sup>104</sup> The Eleventh Circuit’s reasoning is worth noting:

In the instant case, many of the EEOC’s requests for documents are attempts to discover information that would be relevant to jurisdiction. For example, although Kloster argues that the discharged employees were actually employed by Ivanhoe Catering International, Ltd. (“Ivanhoe”), a wholly owned Bahamian subsidiary of Kloster, the EEOC makes a colorable assertion that Ivanhoe is really a mere alter ego of Kloster. The EEOC subpoenae request information on the relationship between Kloster and Ivanhoe. The EEOC also seeks information relating to the nature and extent of Kloster’s business operations in Miami, the extent to which the employment activities occurred in Miami, and whether the acts of alleged discrimination occurred in Miami. These and other facts may lead to information that will allow the EEOC to make an informed decision regarding its jurisdiction. The EEOC cannot be expected to ask only questions to which it already knows the answers.<sup>105</sup>

Because Title VII only applies extraterritorially to American citizens employed by U.S. companies, the EEOC sought information regarding not only whether or not the employees filing the complaint were American citizens, but whether or not a case could be made that Kloster (Norwegian Cruise Lines) was a U.S. company.<sup>106</sup> Such a determination would not have been the end of the inquiry since NCL had attempted to protect itself from liability by hiring its crew through a third-party employment company, a common strategy among cruise operators.<sup>107</sup>

The Eleventh Circuit, in its decision, also alluded to the conclusion that was reached in *Lauritzen v. Larsen*,<sup>108</sup> which dealt with the application of the Jones Act to a foreign owned ship. In that case, the Court considered seven factors,<sup>109</sup> only one of which was the “law of the flag,” to guide its resolution of the issue regarding whether the Jones Act applied to a maritime tort action brought by a Danish seaman against a Danish owner of a Danish vessel.<sup>110</sup> The *Kloster* court held that it could not “conclude at this early stage that the EEOC clearly lacks jurisdiction.”<sup>111</sup>

The result of the decision in *Kloster* remains nonetheless unclear when combined with the Court's ruling in *Spector*.<sup>112</sup> The courts appear to be more willing to look past the supposed sovereignty of ships flying FOCs to analyze other factors which may affect choice-of-law issue.

### CONCLUSION

Most cruise lines operating in the United States have significant ties to the United States.<sup>113</sup> While most are incorporated abroad, and register their ships under foreign flags, they are often headquartered in the United States. Additionally, most passengers are U.S. citizens, and often the cruise lines are owned and largely controlled by U.S. interests.<sup>114</sup> A rule which accounts for the beneficial ownership of the vessel and the owner's nationality, as well as the relative protections to be expected from the host state, should guide courts toward determining whether extension of anti-employment discrimination laws should be available, to both U.S. citizens and to aliens working aboard U.S. cruise ships.<sup>115</sup>

Thus far, legislative efforts by Congress have failed to bring

about real change in the industry.<sup>116</sup> To date, international efforts have also had limited success.<sup>117</sup> Meanwhile, the current situation allows for the absurd result of protecting passengers from discrimination, but not workers. Unlike the National Labor Relations Act and the Fair Labor Standards Act, both ruled to be inapplicable to foreign crews aboard foreign flagged ships due to their potential for conflict with other legal obligations, U.S. anti-discrimination statutes are unlikely to provoke international discord of the kind discussed in *Benz* and *McCulloch*, the respective cases deciding those matters.<sup>118</sup>

American corporations should not be permitted to shirk the laws of the United States by transferring non-citizen employees to foreign offices or by simply hiring foreign workers. Title VII must be re-written in order to conform to its original purpose - the deterrence of discriminatory behavior by employers.<sup>119</sup> If a protected U.S. trademark were being used improperly aboard a cruise ship and compensation denied, the U.S. would undoubtedly assert jurisdiction. Therefore, courts should consider showing the same courtesy to the people employed aboard the same ships.

## ENDNOTES

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<sup>1</sup> *Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119 (2005).

<sup>2</sup> Anne Gray Miller, 10-VI BENEDICT ON ADMIRALTY § 6.04 (2007) (noting the uncertainty regarding the application of Title VII of the Civil Rights Act to cruise vessels).

<sup>3</sup> Rochdale Report, COMMITTEE OF INQUIRY INTO SHIPPING, REPORT 51 CMND 4337 (London: HMSO, 1970). According to the Rochdale Report, there are six criteria for determining the status of a "flag of convenience":

[1] The country of registry allows ownership and/or control of its merchant vessels by non-citizens;

[2] Access to the registry is easy; ship may usually be registered at a consulate abroad. Equally important, transfer from the registry at the owner's option is not restricted;

[3] Taxes on the income from the ships are not levied locally, or are very low. A registry fee and an annual fee, based on tonnage, are normally the only charges made. A guarantee of acceptable understanding regarding future freedom from taxation may also be given;

[4] The country of registry is a small power with no national requirement under any foreseeable circumstances for all the shipping registered, but receipts from very small charges on a large tonnage may produce a substantial effect on its national income and balance of payments;

[5] Manning of ships by non-nationals is freely permitted; and

[6] The country of registry has neither the power nor the administrative machinery effectively impose any governmental or international regulations; nor has the country even the wish or the power to control the companies themselves.

<sup>4</sup> R. Tali Epstein, Comment, *Should the Fair Labor Standards Act Enjoy Extraterritorial Application?: A Look at the Unique Case of Flags of Convenience*, 13 U. PA. J. INT'L BUS. L. 653, 665 (1993) (quoting BOLESŁAW A. BOCZEK *FLAGS OF CONVENIENCE* 6-12 (1962))(describing the widespread practice of registering merchant vessels under flags of convenience).

<sup>5</sup> See H. Edwin Anderson, III, *The Nationality of Ships and Flags of Convenience: Economics, Politics, and Alternatives*, 21 TUL. MAR. L.J. 139, 140 (1996).

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

<sup>7</sup> For a good discussion of the history of the "genuine link" requirement, see *Id.* at 148-152.

<sup>8</sup> Epstein, *supra* note 4, at 666

<sup>9</sup> International Transport Workers' Federation, *Flags of Convenience Campaign*, ITF Handbook, available at <http://www.itfglobal.org/flags-convenience/index.cfm> (last visited Oct. 6, 2007).

For example, the ITF declares its two main objectives in its flags of convenience campaign to be:

"(1) to establish by international governmental agreement a genuine link between the flag a ship flies and the nationality or residence of its owners, managers and seafarers, and so eliminate the flag of convenience system entirely, [and] 2) to ensure that seafarers who serve on flag of convenience ships, whatever their nationality, are protected from exploitation by shipowners."

<sup>10</sup> Anderson, *supra* note 5, at 156.

<sup>11</sup> Anderson, *supra* note 5, at 156-157.

## ENDNOTES CONTINUED

- <sup>12</sup> Shayna Frawley, *The Great Compromise: Labor Unions, Flags of Convenience, and the Rights of Seafarers*, 19 W.R.L.S.I. 85, 89 (2005).
- <sup>13</sup> Anderson, *supra* note 5, at 158-161 (discussing the mutual dependency that arises between open registry states and the industrially developed nations whose ships fly FOCs).
- <sup>14</sup> Anderson, *supra* note 5, at 158-161.
- <sup>15</sup> Anderson, *supra* note 5, at 158-161.
- <sup>16</sup> Anderson, *supra* note 5, at 159.
- <sup>17</sup> Rodney Carlisle, *Sovereignty for Sale: The Origins and Evolution of the Panamanian and Liberian Flags of Convenience*, (Naval Institute Press, 1981) (1981) (a thorough discussion of the development of the Liberian and Panamanian registries).
- <sup>18</sup> Anderson, *supra* note 5, at 159.
- <sup>19</sup> Anderson, *supra* note 5, at 155.
- <sup>20</sup> Anderson, *supra* note 5, at 155.
- <sup>21</sup> Ross A. Klein, *High Seas, Low Pay: Working Conditions on Cruise Ships*, Our Times: Canada's Independent Labour Magazine (Dec. 2001/Jan. 2002), available at <http://www.cruisejunkie.com/ot.html>. (last visited Oct. 16, 2007).
- <sup>22</sup> Frawley, *supra* note 12, at 91 (quoting "The Advantages of the Panamanian Registry" Consulates of Panama, available at <http://www.embassy-avenue.jp/panama/adva.htm> (last visited Oct. 16, 2007)).
- <sup>23</sup> Frawley, *supra* note 12, at 91.
- <sup>24</sup> Frawley, *supra* note 12, at 91 (quoting the International Transport Workers Federation *Flags of Convenience Campaign Report 1998 & 1999*).
- <sup>25</sup> Frawley, *supra* note 12, at 91 (citing *Flags of Convenience Campaign Report 2001/02*, "Casualties for 2001" *Lloyds Register, World Casualty Statistics 2001*, International Transport Workers Federation, available at <http://www.itf.org.uk/iftweb/seafarers/foc/report2001/pages/s15-07.html> (last visited Oct. 16, 2007)); see also Anderson, *supra* note 5, at 167-68 (pointing out that when, in accordance with the Paris Memorandum of Understanding (MOU) signed by seventeen European countries and Canada, port states were to inspect for safety infractions every fourth vessel porting, by 1991 those countries had detained 6.15% of Panamanian flagged vessels, 4.59% of Liberian flagged vessels, and 16.67% of vessels flagged in the Marshall Islands. By contrast, only 1.8% of U.K. vessels were detained).
- <sup>26</sup> Anderson, *supra* note 5, at 155.
- <sup>27</sup> Anderson, *supra* note 5, at 155.
- <sup>28</sup> Anderson, *supra* note 5, at 155.
- <sup>29</sup> Anderson, *supra* note 5, at 155.
- <sup>30</sup> Anderson, *supra* note 5, at 155.
- <sup>31</sup> William A. Goldberg, *Cruise Ships, Pollution, and International Law: The United States Takes on Royal Caribbean Cruise Lines*, 19 WIS. INT'L L.J. 71, 71 (2000).
- <sup>32</sup> Goldberg, *supra* note 34, at 71.
- <sup>33</sup> Goldberg, *supra* note 34, at 71.
- <sup>34</sup> Goldberg, *supra* note 34, at 71.
- <sup>35</sup> Goldberg, *supra* note 34, at 71.
- <sup>36</sup> Goldberg, *supra* note 34, at 71.
- <sup>37</sup> William A. Goldberg, *Cruise Ships, Pollution, and International Law: The United States Takes on Royal Caribbean Cruise Lines*, 19 WIS. INT'L L.J. 71, 73 (2000).
- <sup>38</sup> Klein, *supra* note 21 (noting that in 1995, Panama earned \$47.5 million in ship-registration fees and annual taxes (five per cent of its federal budget)).
- <sup>39</sup> Transport International Online, *Cruise Shipping: Behind the Fantasy*, Issue 1 (June 2000) available at <http://www.itfglobal.org/transport-international/cruiseshipping.cfm> (last visited Oct. 16, 2007) (noting that since the mid- 1980s, cruise shipping has outstripped all other maritime sectors with an average growth rate of 9.6 per cent a year, compared with the average of all types of vessels of 2.76 per cent)[hereafter "Transport International Online"]
- <sup>40</sup> Klein, *supra* note 21.
- <sup>41</sup> Klein, *supra* note 21.
- <sup>42</sup> Klein, *supra* note 21.
- <sup>43</sup> Klein, *supra* note 21.
- <sup>44</sup> Klein, *supra* note 21.
- <sup>45</sup> Ross A. Klein, *High Seas, Low Pay: Working Conditions on Cruise Ships*, Our Times: Canada's Independent Labour Magazine (Dec. 2001/Jan. 2002), available at <http://www.cruisejunkie.com/ot.html>. (last visited Oct. 16, 2007).
- <sup>46</sup> Klein, *supra* note 21.
- <sup>47</sup> Klein, *supra* note 21.
- <sup>48</sup> Klein, *supra* note 21.
- <sup>49</sup> Ross A. Klein, *High Seas, Low Pay: Working Conditions on Cruise Ships*, Our Times: Canada's Independent Labour Magazine (Dec. 2001/Jan. 2002), available at <http://www.cruisejunkie.com/ot.html>.
- <sup>50</sup> International Transport Workers' Federation, Sample "Standard Collective Bargaining Agreement 2006," available at <http://www.itfglobal.org/files/seealsodocs/1467/ITF%20Standard%20CBA%202006.pdf>. (last visited Oct. 16, 2007).
- <sup>51</sup> Frawley, *supra* note 14, at 95 (summarizing information from the International Transport Workers' Federation, available at <http://www.itfglobal.org/flags-convenience/flags-convenience-184.cfm> (last visited Oct. 16, 2007)).
- <sup>52</sup> Transport International Online, *supra* note 39.
- <sup>53</sup> Center for Public Integrity, *International Council of Cruise Lines*, (1998 – 2004), available at <http://www.publicintegrity.org/lobby/profile.aspx?act=clients&year=2003&cl=L001929&sub=3> (last visited Oct. 16, 2007). The Center for Public Integrity lists the number of lobby filings by the International Council of Cruise Lines, an organization comprised of cruise companies and other special interest groups, as 87 between 1998-2004. Among the listed issues which the organization lobbies for (or against) are the Environment, Immigration, Civil Rights & Civil Liberties, and Taxation & Internal Revenue Code. The Center pegs the spending on lobbying efforts by the Council at \$6,134,702 between 1998-2004. Norwegian Cruise Lines, also heavily involved in lobbying, spent \$2,760,000 on its efforts during the same time period.
- <sup>54</sup> *Id.* "Sea Transportation" ranks fourth, behind "State, Local, Tribal Governments and related organizations", "Railroads & Related Organizations", and "Electric Utilities". The Sea Transportation industry spent more on lobbying between 1998-2004 than the Automotive Industry, the Defense Aerospace Industry, the Food & Beverage Industry, and Health Services & HMOs combined.
- <sup>55</sup> Klein, *supra* note 21.

## ENDNOTES CONTINUED

<sup>56</sup> See generally Transport International Online, *For Women, More Jobs – But a Culture of Discrimination*, Issue 1 (June 2000), available at <http://www.itfglobal.org/transport-international/discrimination.cfm> (last visited Oct. 16, 2007).

<sup>57</sup> *Id.*

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

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

<sup>60</sup> *Id.*

<sup>61</sup> Duncan B. Hollis, *International Decision: Spector v. Norwegian Cruise Line Ltd. United States Supreme Court, June 6, 2005*, 99 A.J.I.L. 881, 881 (2005) (noting that the decision in *Spector* may presage the further erosion of primacy of flag state jurisdiction).

<sup>62</sup> *Id.* at 882.

<sup>63</sup> See *supra* note 50.

<sup>64</sup> *Spector*, 545 U.S. at 136

<sup>65</sup> *Id.* at 130 (2005) (noting that the first of the modern cases to address the application of a domestic statute to a foreign-flag ship in U.S. waters was *Benz v. Compania Naviera Hildalgo, S.A.*, 353 U.S. 138 (1957)) (holding that the Labor Management Relations Act did not reach relations between “a foreign crew operating under an agreement made abroad under the laws of another nation”). The Court did not stray from the rule laid down in this case that laws apply only within the territorial boundaries of the United States absent specific congressional intent to the contrary.

<sup>66</sup> *Id.* at 136-141.

<sup>67</sup> *Foley Brothers Inc. v. Filardo*, 336 U.S. 281, 285 (1949) (holding that the federal Eight Hour Law did not apply to U.S. citizen working abroad in Iran).

<sup>68</sup> *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991).

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> Civil Rights Act of 1991, Pub. L. No. 102-166, §109, 105 Stat. 1071 (1991) (“PROTECTION OF EXTRATERRITORIAL EMPLOYMENT”).

<sup>72</sup> See *infra* Note 66.

<sup>73</sup> See *infra* Note 66.

<sup>74</sup> *Shekoyan v. Sibley Int'l Corp.*, 217 F. Supp. 2d 59 (2002);

<sup>75</sup> *Shekoyan.*, 217 F. Supp. 2d at 62; *claim dismissed by* 2004 U.S. Dist. LEXIS 4845 (D.D.C., Mar. 19, 2004); *affirmed by* 366 U.S. App. D.C. 144, 409 F.3d 414; *US Supreme Court certiorari denied by* *Shekoyan v. Sibley Int'l, Inc.*, 2006 U.S. LEXIS 1187 (U.S. Feb. 21, 2006).

<sup>76</sup> *Shekoyan.*, 217 F. Supp. 2d at 62.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 61.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Torrico v. IBM*, 213 F. Supp.2d 390, 393 (S.D.N.Y. 2002).

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

<sup>84</sup> *Id.* at 397 (“Torrico became very ill in January 1999 as a result of an autoimmune disease that caused, among other symptoms, severe chronic fatigue, reactive arthritis and peripheral neuropathy, and severe muscular pain throughout his body. At one point on January 23, 1999, Torrico collapsed and required medical attention. Torrico's physician advised him that on account of this condition, he would require rest and would not be

able to work for approximately six months. Accordingly, Torrico informed his employer of his illness and went on a medical leave of absence on January 24, 1999.” IBM stated that Torrico's employment contract ended while he was on leave).

<sup>85</sup> See 42 U.S.C. §12101 (1990).

<sup>86</sup> *Torrico*, 213 F. Supp. 2d at 403.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 402-03.

<sup>89</sup> *EEOC v. Bermuda Star Line, Inc.*, 744 F. Supp. 1109 (1990).

<sup>90</sup> See 42 U.S.C. § 2000e-2 (1991), Unlawful Employment Practices.

<sup>91</sup> *Bermuda Star Line, Inc.*, 744 F. Supp. at 1110.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *EEOC v. Kloster Cruise Ltd.*, 743 F. Supp. 856 (S.D.Fla. 1990).

<sup>96</sup> *Id.* at 856.

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

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*, 857 (S.D.Fla. 1990).

<sup>100</sup> See 42 U.S.C. §2009e-9 (1964). Section 2000e-9 gives the EEOC the same authority to enforce subpoena as the National Labor Relations Board has under 29 U.S.C. § 161.

<sup>101</sup> *EEOC v. Kloster Cruise Ltd.*, 743 F. Supp. at 857.

<sup>102</sup> *EEOC v. Kloster Cruise, Ltd.*, 939 F.2d 920, 922 (11th Cir. 1991).

<sup>103</sup> *Id.* at 924.

<sup>104</sup> *Id.* at 923.

<sup>105</sup> *Id.* at 922-23.

<sup>106</sup> *Id.*

<sup>107</sup> This may have been due to an increasing realization that a court may find any one of the cruise lines operating out of the U.S. to be U.S. companies. In that situation, a court would likely find a U.S. citizen to be protected by U.S. anti-discrimination laws. However, even if the cruise line in question is found to be an American enterprise, aliens working aboard the ship would still have the burden of proving that the situs of the discriminatory action occurred within the territorial boundaries of the United States. This would create another strange situation where the ship operator could pay a foreign national less just because he is from Nigeria, while a U.S. citizen on the same ship would be protected from that action. Also, because U.S. citizens would have more protections, they may be undesirable employees. This would also then raise the question of whether or not a U.S. citizen could sue for Title VII (Civil Rights Act) violations discrimination based on U.S. citizenship. Title VII prohibits discrimination based on nationality, but does not protect against discrimination based on citizenship.

<sup>108</sup> *Lauritzen v. Larsen*, 345 U.S. 571 (1953).

<sup>109</sup> *Lauritzen*, 345 U.S. at 583-91 (noting the seven *Lauritzen* factors are: (1) the place of the wrongful act; (2) the “law of the flag;” (3) the allegiance or domicile of the injured party; (4) the allegiance of the defendant shipowner; (5) the place of the contract; (6) the accessibility of the foreign forum; and (7) the law of the forum.)

<sup>110</sup> *Id.*

<sup>111</sup> *EEOC v. Kloster Cruise, Ltd.*, 939 F.2d at 924.

## ENDNOTES CONTINUED

<sup>112</sup> *Spector v. Norwegian Cruise Lines, Ltd.*, 2005 WL 578842 (U.S.) Oral Argument noting the issue of whether or not Title VII applies to cruise ships came up in oral argument during the Spector case. Below is an excerpt of the exchange between Mr. Frederick (counsel for Norwegian Cruise Lines) and two Justices:

JUSTICE O'CONNOR: Well, but this is a good question, and what is your position? That the ship could engage in racial discrimination while in U.S. port and within the 3--

MR. FREDERICK: Justice O'Connor, our position is that Congress has not spoken to the question, and so there is no congressional statute that is on point.

JUSTICE SOUTER: Then your answer, I take it, is yes, it can discriminate and it can discriminate because Congress has not told it not to. Is that it?

MR. FREDERICK: No. No. Our position is that it can't discriminate because a different law proscribes that—

JUSTICE SOUTER: So far as United States law is concerned, it could.

MR. FREDERICK: Yes.

<sup>113</sup> See *infra* Note 110.

<sup>114</sup> John Pain, *For Carnival CEO, It's Full Speed Ahead*, SEATTLE TIMES, May 7, 2004, available at [http://seattletimes.nwsourc.com/html/travel/2001920579\\_carnivalchief09.html](http://seattletimes.nwsourc.com/html/travel/2001920579_carnivalchief09.html) (last visited Oct. 16, 2007).

Carnival Corporation is a widely held public company, a member of the S&P 500, traded on the NYSE, but incorporated in Panama. Carnival Corp.'s chairman and chief executive, Micky Arison, is Florida's second-richest person and the 33rd wealthiest in America, with an estimated net worth of \$5.9 billion, according to Forbes magazine. Royal Caribbean Cruises, which operates both the Royal Caribbean Lines and Celebrity Lines, is based in Miami, FL and incorporated in Liberia. While almost 40% of the company is owned by insiders and much of it controlled by Norwegian founder Arne Wilhelmsen, over 60% is owned by U.S. institutional investors and mutual funds, available at <http://finance.yahoo.com/q/mh?s=RCL> (last visited Oct. 16, 2007).

<sup>115</sup> See generally Olivia P. Dirig and Mahra Sarofsky *The Argument for Making American Judicial Remedies Under Title VII Available to Foreign Nationals Employed by U.S. Companies on Foreign Soil*, 22 HOFSTRA LAB. & EMP. L.J. 709 (2005); Epstein, *supra* note 4.

<sup>116</sup> See generally Key U.S. Lawmakers Seek Reform of Open Registries, Am. Mar. Officer (Oct. 2000), available at <http://www.amo-union.org/newspaper/morgue/10-2000/Sections/>

News/itf-lawmakers.htm (last visited Oct. 16, 2007). Excerpt as follows:

Rep. Bonior characterized FOC cargo and cruise vessels as "floating plantations." Pointing to documented abuses aboard such vessels, the Congressman said FOC ship owners and operators "thumb their noses" at U.S. laws and standards, even while thriving on U.S. trade. "No more of this," he said. "No more of these seagoing plantations coming into our ports."

Rep. Bonior had a particularly pointed message for the U.S.-based flag-of-convenience luxury cruise fleets: "Change your act," he cautioned, "or your cruising for a bruising." Rep. Clay, a 32-year House veteran who will retire at the close of the current Congressional session, recalled his multiple, frustrating attempts to apply U.S. labor laws to foreign-flag cargo and cruise ships making frequent port calls in the U.S. His bills to accomplish that were heard in House testimony, but there never was a Senate version of the legislation.

FOC labor and living conditions remain "intolerable," said Rep. Clay, who characterized the FOC regime as "a not-too-sophisticated scheme to deny workers their rights."

Countries that provide "open" vessel registries often "don't even pretend to have laws to protect mariners," Rep. Clay said. As a result, FOC ships are "snake pits of human suffering," with long hours at little pay, substandard quarters, rancid food, and payoffs to manning agents in crew recruitment countries in exchange for desperately needed jobs.

"This nation not only has the right, but the moral duty to end these abuses," Rep. Clay said. "Now is the time to strike back, to bring justice to these workers at sea." Rep. Engel said FOC shipping represents an "assault against working men and women" and "something we should not stand for."

It is, he added, an issue of "basic fairness."

<sup>117</sup> Olivia P. Dirig and Mahra Sarofsky, *supra* note 115 (outlining that The International Labor Organization Convention No. 111 addresses international discrimination in employment and calls for all ratifying nations to pursue policies that will work toward eliminating discrimination in employment).

<sup>118</sup> *Benz v. Compania Naviera Hildalgo, S.A.*, 353 U.S. 138 (1957); *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963).

<sup>119</sup> Olivia P. Dirig and Mahra Sarofsky, *supra* note 115, at 710.