



ISSN 2278 – 0211 (Online)

Flag Vessel Protection Law in Bangladesh: A Critical Analysis

Md. Asraful Alam

Faculty Member, Department of Department of Maritime Law,
Bangabandhu Sheikh Mujibur Rahman Maritime University, Bangladesh

Md. Golam Zakaria

Student, LLM Maritime Law, Department of Maritime Law and Policy,
Bangabandhu Sheikh Mujibur Rahman Maritime University, Bangladesh

Abstract:

Bangladesh is a party to the Convention on the Code of Conduct for liner Conference, 1974 and has its municipal legislation, the Bangladesh Flag Vessel Protection Ordinance, 1982, in pursuance of the Convention to protect Bangladeshi Flag vessel. The Ordinance confirms that at least 40 % of the sea-borne cargoes relating to the country's foreign trade have to be carried by Bangladesh flag vessels. This protection was given with a view to protecting newly born Bangladesh Shipping Corporation to sustain at first and then to compete among the global competitors gradually. But the corporation has shown a degradation rather than gradual rising under the legal protection. Moreover, the legal protection has vitiated the concept of equal treatment principle as well as has an adverse impact on country's foreign trade. This paper finds the legal lacuna and suggests for modification of the legislations.

Keywords: Flag state, flag vessel, Cabotage, foreign trade, inefficiency, maritime transport, foreign trade and seaworthiness

1. Introduction

The maritime transport sector has traditionally been one of the most liberal of all service sectors (1). Nonetheless, a great number of impediments to free and open access to maritime transport services persist in developing as well as in developed countries. These impediments are often generally referred to as flag discrimination and consist of various forms of preferential treatment of shipping under the national flag over all other shipping (2). Bangladesh is a maritime nation with a large area in the Bay of Bengal; especially after two legal victories with the neighboring countries India and Myanmar. The victories have widened the scope of economic development for Bangladesh through natural resources and services; more particularly by maritime transportation. Maritime transport plays the vital role in the national economy by accelerating foreign trade. The prime object of the Maritime transportation is to accelerate foreign trade rather than earning from the port authority or shipping enterprisers. Shipping entrepreneurs can be a mean of earning revenue but it cannot be the sole basis of earning from maritime transportation. Bangladeshi flag vessels should be protected and promoted but not at the cost of foreign trade (3). The Bangladesh Flag Vessel (Protection) Ordinance, 1982 provides that at least 40 % of the sea-borne cargoes relating to the country's foreign trade have to be carried by Bangladesh flag vessels which seem to be an impediment to the foreign trade (4). The ordinance was promulgated in 1982 to protect the interest of Bangladesh Shipping Corporation (BSC) when foreign trade in Bangladesh was much smaller than what it is today (5). Moreover, the flag vessel protection has not played any positive role in increasing local flag vessel business in the last 35 years rather the number of vessels has declined.

2. Objective of the Study

The main object of the study is to show that the existing legal stand of flag vessel protection in Bangladesh is inconsistent with the international legal framework. However, the additional objectives are to show that-

1. the flag vessel protection is hampering foreign trade in Bangladesh;
2. the flag vessel protection has vitiated efficiency shipping in Bangladesh; and
3. Finally, to recommend some suggestions to overcome those legal blocked.

3. Methodology

This is a qualitative legal research based on both primary and secondary sources. International conventions and national legislations have been used as the primary sources of the study. However, the study is based on literary review of books, journals, Articles, Website, official desk report and online available information as the secondary source.

3.1. Sources of Study

The international legal framework of the study includes-

1. The United Nations Convention on Law of the Sea, 1982 (UNCLOS, III).
2. The Convention on the Code of Conduct for liner Conference, 1974.

The national legal framework of the study includes-

1. Bangladesh Flag Vessel Protection Ordinance, 1982,
2. Bangladesh Merchant Shipping Ordinance, 1983&
3. Inland Shipping Ordinance, 1976.

3.2. Analysis of the International Conventions

3.2.1. The United Nation Convention on Law of the Sea, 1982

The maritime transport sector has traditionally been one of the most liberal of all service sectors (6). The international law of the sea and particularly the regime of the 1982 United Nations Convention on the Law of the Sea ensure that merchant vessels are generally free to navigate through the majority of maritime zones and the majority of coastal states commonly open their maritime ports and waterways to foreign ships and international commercial intercourse (7). Article 90 of the convention guarantees the right of navigation for all states irrespective of coastal and land locked. The article provides that every State whether coastal or land-locked has the right to sail ships flying its flag on the high seas. The Article guarantees the right with a condition to fly its national flag. Article 91 of the Convention adds another supplementary condition of having nationality of the carrier at sea.

Article 92 of the convention mentions the status of ship. The article says that Ships shall sail under the flag of one State only and shall be subject to its exclusive jurisdiction on the high seas. A ship may not change its flag during a voyage or while in a port of call save in the case of a real transfer of ownership or change of registry.

Article 94 of the Convention prescribes the duties of the flag state. The Article mentions that every State shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.

Bangladesh is a state party to UNCLOS, III and adopted the Merchant Shipping Ordinance, 1983 in pursuance the convention. The Ordinance requires for registration of all Bangladesh ships along with the process and conditions for registration. Moreover, the Ordinance provides the effect of the registration and non-registration of Bangladesh ship. It says that a Bangladesh ship which is registered under the Ordinance shall entitled to get all the rights, protection and privileges declared by the government while a non-registered ship is not to get them.

3.2.2. The Convention on a Code of Conduct for Liner Conference, 1974

The United Nations (UN) Convention on a Code of Conduct for liner conferences came into force on the 6th October, 1983. The object of the convention is to improve liner conference system with a view to adopt universally acceptable code of conduct for liner conference taking into account the special needs and problems of the developing countries as to expanding foreign trade. The preamble of the conventions states that -

The Contracting Parties to the present Convention desiring to improve the liner conference system *recognizing* the need for a universally acceptable code of conduct for liner conferences *taking* into account the special needs and problems of the developing countries with respect to the activities of liner conferences serving their foreign trade.

The objectives of the convention are-

- a. to facilitate the orderly expansion of world sea-borne trade;
- b. to stimulate the development of regular and efficient liner services adequate to the requirements of the trade concerned;
- c. to ensure a balance of interests between suppliers and users of liner shipping services;
- d. to ensure no discrimination against the ship-owners, shippers or the foreign trade of any country;
- e. to hold meaningful consultations with shippers' organizations, shippers' representatives and shippers on matters of common interest, with, upon request, the participation of appropriate authorities;
- f. to make available to interested parties' pertinent information about their activities which are relevant to those parties and should publish meaningful information on their activities.

The convention recognizes the special needs of the developing countries. However, the first and foremost objective of the convention is to facilitate the orderly expansion of world sea- borne trade. Any legal provision which creates an impediment to expand world sea-borne trade is inconsistent to the object of the convention.

The second objective of the convention is to simultaneous development for efficient liner service adequate to the requirements of the trade concerned. Therefore, any legal provision as to liner service which make the liner inefficient is also against the object of the Convention.

The third objective of the convention says about the balance of interest between the trade partners. As a result, any provision as to provide advantage to one party and disadvantage to other party is also violates the spirit of the Convention.

Moreover, Article 2 of the convention guarantees the rights of the shipping line to participate in sailing and loading in the trades covered by this convention. The Article says that any shipping line admitted to membership of a conference shall have sailing and loading rights in the trades covered by that conference.

Article 2(4)(a) declares for equal stand for trading parties. It says that the group of national shipping lines of each of two countries the foreign trade between which is carried by the conference shall have equal rights to participate in the freight and volume of traffic generated by their mutual foreign trade and carried by the conference. However, the convention also looks at the interest of third country shipping line. Article 2(4)(b) provides that third-country shipping lines shall have the right to acquire a significant part such as 20% in the freight and volume of traffic generated by that trade. If, for anyone of the countries whose trade is carried by a conference, there are no national shipping lines participating in the carriage of that trade, the share of the trade to which national shipping lines of that country would be entitled under article 2, paragraph 4 shall be distributed among the individual member lines participating in the trade in proportion to their respective share.

Article 2(6) mentions that if the national shipping lines of one country decide not to carry their full share of the trade, that portion of their share of the trade which they do not carry shall be distributed among the individual member lines participating in the trade in proportion to their respective shares.

Furthermore, Article 2(7) provides that If the national shipping lines of the countries concerned do not participate in the trade between those countries covered by a conference, the shares of trade carried by the conference between those countries shall be allocated between the participating member lines of third countries by commercial negotiations between those lines.

3.2.3. The Bangladesh Flag Vessel Protection Ordinance, 1982

Bangladesh lives by the sea and off the sea, and therefore has a responsibility towards the sea (8). Therefore, Bangladesh had acceded to the Liner convention on the 24th July, 1975 and enacted the Bangladesh Flag Vessels (Protection) Ordinance, 1982. The preamble of the Ordinance says about the sole objective of the Ordinance as to give protection to the Bangladesh flag ship. The Ordinance contains 9 sections. Detail analysis of the Ordinance is noted in below.

3.2.4. Limitation on Carriage of Cargoes of sea-borne Trade

Section 3 of the Ordinance is the cornerstone provision as to reserve at least 40 % of the sea-borne cargoes relating to the country's foreign trade has to be carried by Bangladesh flag vessels. The section states that notwithstanding anything contained in any other law for the time being in force, at least forty per cent of the sea-borne cargoes relating to foreign trade of Bangladesh shall be carried by Bangladesh flag vessels. However, the section has a proviso which relaxes the limitation in three cases. This are-

1. When there is any reciprocal agreement between the trading partners.
2. if the prescribed authority has issued any waiver certificate. &
3. where the prescribed authority declares any general waiver.

The first exception to the general restriction is reciprocal agreement between the trading parties. Bangladesh may enter into any agreement with other state bilaterally relaxing the restriction. Very interestingly, this proviso does not mention any optimal limit of relaxation through the mutual agreement.

The second exception is specific waiver through certificate of waiver. The provision requires liner ship to pursue for a waiver certificate from the prescribed authority of Bangladesh. The certificate is issued case by case or voyage by voyage.

The third exception is through general waiver. The authorities concerned may grant a general waiver in respect of certain trade or sea-route after consultation with the Bangladesh Shipping Corporation (BSC) and the Shippers Council of Bangladesh.

3.2.5. Carriage by Third Party Flag Vessel at Sea

Section 4 of the Ordinance says that where there is no Bangladesh flag vessel or flag vessel of the trading country concerned available for carriage of any cargo from or to Bangladesh, the prescribed Authority may liberate the cargo for carriage by a third country flag vessel.

The section implies for liberating the cargo for carriage by a third country flag vessel only when there has no national flag vessel and flag vessel of the trading country.

3.2.6. Non-Bangladesh Flag Vessels Not to Carry Coastal Trade Cargoes

The Ordinance is very strict about coastal trade carriage. Section 5 of the Ordinance says that no flag vessel of any foreign country shall carry coastal trade cargoes of Bangladesh. Moreover, this restriction is also subject to contingency. The proviso of the section provides

that the restriction shall not apply to a vessel in respect of which a certificate of waiver is issued by the Prescribed Authority (9). The section provides the concept of 'Cabotage'. Cabotage is the transport of goods or passengers between two places in the same country by a transport operator from another country (10). The Ordinance allows Cabotage on condition of a certificate of waiver which is very complex and creates a scope of corruption.

3.2.7. Sanction and Punishment under the Ordinance

Section 8 of the Ordinance states that if any vessel carries any cargo in contravention of any provision of this Ordinance; the owner of the vessel shall be punishable with fine not exceeding the value of the freight of such cargo. Section 9 of the Ordinance specifies the punishment for a company violating the provisions of the Ordinance, every person who was in charge of and was responsible, shall be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly. However, the Ordinance omits to say about the jurisdiction of any court to penalize or adjudicate the issue.

4. Analysis and Findings

Bangladesh adopted the Bangladesh Flag Vessel Protection Ordinance, 1982 in pursuance of the Liner Convention, 1974. However, the Ordinance is inconsistent in many aspects with the Convention as well as acts like an impediment to the foreign trade of Bangladesh. The inconsistency and impediments can be brought under the following heads:

4.1. Inconsistent Objectives

The objective of the Ordinance is inconsistent with the Liner Convention. The primary objective of the Liner convention is to facilitate the orderly expansion of world sea-borne trade whereas the sole objective of the Ordinance is to protect national flag ship. The act promulgated in 1982 was too vague in recognizing the UN Convention, could not even correctly mention the name of the convention, and remains ambiguous to a large extent as to the flag waiver in the container traffic (11). The Ordinance does not contain any holistic approach to bring Bangladesh Shipping industry in forward rather confined to museum.

4.2. One Eyed Reservation for National Flag Vessel

The Ordinance provides for guarantee 40% reservation for Bangladesh Flag Vessel in sea borne trade. The reservation in itself is partial and vague. The Ordinance provides for only 40% reservation for Bangladesh flag vessel but it does not say anything about 40% reservation for foreign trade partner which is permitted under the Liner Convention as 40% for national flag vessel, 40% for foreign trade partner and 20% for third country liner. Article 4 of the Ordinance mentions that the trading partner is entitled to get preference just after non-availability of the national flag vessel. However, there has neither express provision of this issue nor any reservation quota for the trading partner under the Ordinance.

The omission as to reservation for the foreign trade partner plays as an impediment to get any prevalence by foreign trade partner to engage in trade with Bangladesh.

4.3. Ignoring Foreign Trade Interest

States around the world have applied cargo reservation schemes, i.e. legislation attributing a certain (often significant) fraction of the maritime trade of a state to that state's national fleet, for many decades as a means of promoting and developing their national merchant marines through guaranteed supply and demand, for reasons of economy, security or national prestige (12). But the Bangladesh Flag Vessel Protection Ordinance, 1982 applies reservation only for protecting national flag vessel rather than any other economical consideration. The great interest of foreign trade was totally ignored in the Ordinance.

4.4. Inefficiency and Degradation of National Flag Vessel

Due to a lack of transport capacity in many developing countries, reserved cargoes are not actually transported by the national lines of that country where the transportation rights are simply sold to the highest bidder which is just as disruptive and incurs inefficiencies and substantial costs. Although in many cases such arrangements exist but are not actually applied, their mere existence creates legal uncertainty and economic inefficiency and bears the risk of a backtracking of governments to restrictive regimes by reviving these schemes to support their national fleets in times of economic or political problems (13). The Ordinance granted cargo reservation for national flag vessel to protect it and to make the industry competent to fight with global partners. But the protection through reservation has shown a negative impact on Bangladesh Shipping Industry. As a result, the number of vessel of Bangladesh Shipping Corporation which started its journey with 34 vessels has declined to only 5 vessels now (14). Moreover, almost all of the Bangladesh flag vessels are incapable of launching in the international liner trade of Bangladesh. They show poor performance which also adds new additional coast for carrying. National interest should get protection, not the inefficient shipping companies. Furthermore, Bangladesh local ships operate up to Singapore but most of Bangladeshi cargoes go to the European Union, USA and middle-eastern countries. So, waiver should not be required.

It is found from international perspectives that all of these different forms of protectionism in favor of national (shipping) interests have a direct negative impact on efficiency, transport and product costs, and thus on trade in general, or in other words: a lower degree of restrictions on trade in maritime transport services leads to lower shipping charges, which again lead to increased trade (15).

4.5. High Carrying Cost and Barrier to Foreign Trade

Poor export and general trade performance of many developing countries often stems from high transport costs as a result of restrictive, protectionist national (maritime) transport policies in these countries, which ultimately result in negative economic effects on freight rates, international trade, employment, national income, balance of payments, etc. (16). It is established that maritime transport costs profoundly influence international trade and may function as a significant barrier to trade (17). In spite of degradation in national flag vessel private shipping industry has shown improvement to some extent in Bangladesh. But it has created another problem of high cost in carriage of goods by sea as it always goes to the highest bidder. This highly carrying cost creates a negative impact on foreign trade of Bangladesh. As a result, foreign trade is hampered day by day and step by step. Some local private flag vessel owners took advantage of the ordinance and presently they do not have any vessel to secure even one per cent cargo under liner service. Transport costs have an impact that is similar to tariffs insofar as they also mean costs that influence the ability of firms to compete in foreign markets (18).

4.6. Protection without Prevention

The Ordinance is based on theory of protection without imposing any obligation to prevent the threats to the national flag vessels. As a result, the industry is becoming more vulnerable day by day. No state action shows expected improvement and protection. Most countries in the world exercise their right to protect their own flag carriers under its own preferential policy or under the UN Regime. China emphasizes on self-reliance in shipping its international trade, Egypt reserves 30 per cent for its flag carriers, France requires two-thirds of its oil imports to be carried by its flag carriers, India insists for 90 per cent of oil in its flag carriers despite the fact that its ships can only meet about 30 per cent of total import, Indonesia reserves 45 per cent for its flag carriers, Japan and many developed world countries offer incentives to their flag operators (19). But their reservation is subject to efficient shipping and plan to face the threat these may attack their national fleets.

4.7. Procedural Complexity

States have traditionally tried and today still tend to regulate and protect certain service industries that are critical to economic, social, and national security goals, particularly banking, insurance, telecommunications and transportation (20). In the shipping sector, cargo sharing agreements administered by the UN Code of Conduct for Liner Conferences another cargo reservation schemes exemplify such quantitative restriction policy (21). But the Ordinance creates not only quantitative restriction but also procedural restriction. The Ordinance says for waiver certificate from the prescribed authority. However, it is silent about the procedure of obtaining the certificate. Moreover, the certificate is provided on case by case and voyage by voyage which creates another hassle for the foreign flag vessels. As a result, they do not become interested to carry goods from and to engage in foreign trade with Bangladesh.

4.8. Close-Door Policy

The developing countries' maritime transport policies have largely been motivated by economic objectives and have been regarded as a tool to develop the national economy; in this context, developing countries have often turned to "closed-door policies", especially with regard to international shipping and have applied various forms of cargo reservation schemes and other "hard-line measures (22). But the closed door policy cannot be an effective policy in the era of globalization and free trade. Bangladesh cannot stay within a closed door in fare of outer threat. Bangladesh shipping industry has to face the newly borne challenges with new determination, confidence and skill rather to be protective. It is reported that of the nearly 95% imports and exports carried out by sea, only 5.45% is being carried out by Bangladesh flag carrier ships. In turn, exporters and importers are relying mainly on foreign ships to ferry goods (23). Is it necessary to protect national flag vessel carrying only 5.45% of sea borne foreign trade?

4.9. Recommendation

The study highly recommends for remission of cargo reservation system under the Ordinance to prevent adverse impact on the foreign trade of Bangladesh. Foreign trade is the prime mover economical force of a country. Liberal cargo sharing will accelerate the line for all to carry goods from or to Bangladesh which will accelerate foreign trade of Bangladesh. Maritime transport can be a mean of foreign trade but cannot be the sole basis of national economy.

There should have a holistic approach from Bangladesh government to make the national fleet more qualitative and efficient. In this case, government may be given soft term-loan financing at very low interest rates for ship purchasing, income tax relief and reduced port tariff. Government may enrich national fleet in two ways; by direct aid to the local shipping industry, and by attracting foreign investment in the local shipping industry. Government may adopt a holistic approach to ensure foreign direct investment in Bangladesh.

The last and not the least recommendation of the study is to simplify the institutional process. The policy should be based on an individualistic approach or on the basis of UN Convention on a Code of Conduct for Liner Conferences. In the latter case, it should be correctly explained and incorporated in the law and not leave for novices to mislead and create chaos.

4.10. Conclusion

Bangladesh can neither afford to jeopardize its international trade nor its shipping industry. After all shipping happens to be a derived demand and there cannot be any demand for shipping in the absence of and demand for trade. Bangladesh needs to protect its fleet without jeopardizing the trade. Protection to the national flag vessel is not the only way to protect them. There a number of ways to protect them through innovative approach and pragmatic way. The ordinance should be reviewed and amended on priority basis to tune it to requirements of sea-borne foreign trade. The Ordinance should be modified in such a way as to bring the Bangladesh fleet in more competent, efficient and seaworthy for launching across the Europe and America.

5. References

- i. Parameswaran, Benjamin. (2004). The Liberalization of Maritime Transport Services: with special reference to the WTO/GATS Framework. Hamburg studies of Maritime Affairs 1, International Max Planck Research School for Maritime Affairs at the University of Hamburg (IMPRS), at page-47
- ii. Ibid,
- iii. Gregory, William R. (2012). FLAGS OF CONVENIENCE: THE DEVELOPMENT OF OPEN REGIS TRIES IN THE GLOBAL MARITIME BUSINESS AND IMPLICATIONS FOR MODERN SEAFARERS. PhD thesis, Georgetown

- University Washington, D.C. November 1, 2012 , at page-7, available at - https://www.oceanfdn.org/sites/default/files/Gregory_georgetown.pdf, last accessed- 11.06.2016
- iv. Article 3 of the Bangladesh Flag vessel Protection Ordinance, 1982, Ordinance no XIV of 1982.
 - v. Businesses for scrapping flag vessel ordinance. The Daily Star,2003,Star Business Report,13th April,2003, Available at- <http://www.sdnbd.org/sdi/news/general-news/April-2003/13-04-2003/Business.htm> Last accessed- 11.06.2016
 - vi. Parameswaran, Benjamin.2004. 'The Liberalization of Maritime Transport Services: with special reference to the WTO/GATS Framework', Humburg studies of Maritime Affairs 1, International Max Planck Research School for Maritime Affairs at the University of Hamburg (IMPRS), at page-51
 - vii. Ibid at page 48
 - viii. Shafiqullah, Captain A.K.M. (2016). Maritime Governance: Challenges for Maritime Community. Published Seminar paper, Bangabandhu Sheikh Mujibur Rahman Maritime University Bangladesh, Chittagong, 30th May, 2016, at page-05
 - ix. The Prescribed authority in Bangladesh under the Ordinance is the Department of Shipping.
 - x. Wikipedia, available at- <https://en.wikipedia.org/wiki/Cabotage> Last accessed-09.06.2016
 - xi. Supra at 5.
 - xii. Hearn,George H. (1970). Cargo Preference and Control. Journal of Maritime Law and Commerce (1970), pp. 481-498, at-481.
 - xiii. OECD Doc. No. DSTIIDOTIMTC(2001)13 (31 October 2001), at 13.
 - xiv. Khan, Anisur Rahman. (2015). National flag carrier ships declining. The Independent, 24th November, 2015
 - xv. Parameswaran, Benjamin. (2004). The Liberalization of Maritime Transport Services: with special reference to the WTO/GATS Framework.Humburg studies of Maritime Affairs 1, International Max Planck Research School for Maritime Affairs at the University of Hamburg (IMPRS), at page-55
 - xvi. White, Lawrence J. (1988). International Trade in Ocean Shipping Services: The United States and the World. (Cambridge (MA): American Enterprise Inst./Ballinger Publ.,1988) at p-44.
 - xvii. Clark, Ximena Dollar, DavidMicco, Alejandro, (2001). Maritime Transport Costs and Port Efficiency. Washington, D.C.: The World Bank, 2001 , at page-4
 - xviii. Amjadi, Azita/Yeats, Alexander J.(1995). Have Transport Costs Contributed to the Relative Decline of Sub-Saharan African Exports? Some Preliminary Empirical Evidence. Washington, D.C.: The World Bank, 1995, at 98.
 - xix. Khandaker, R Zaman. (2003). Bangladesh Flag Vessels (Protection) Ordinance, 1982;Time to chart a new course. The Daily Star,10th June 2003. Available at ; <http://archive.thedailystar.net/2003/06/10/d30610150176.htm>
 - xx. Mafucci, Marianna. (1982). Liberalization of International Trade in the Services Sector: Threshold Problems and a Proposed Framework under the GATT. Fordham International Law Journal (1982), pp. 371-409, at 384.
 - xxi. Hoekrnan, Bernard M.ISauvi. (1994). Liberalizing Trade in Services. Washington D.C.: The World Bank, 1994, at 6.
 - xxii. Harper. (1950). aEeDDoc. No. CENM/CHINNMTC (99)3 (7 January 2000), at p-4.
 - xxiii. Mostofa, CaptainFiroz. (2016). Holistic Approach towards Overcoming Maritime Challenges of Bangladesh. Published Seminar paper, Bangabandhu Sheikh Mujibur Rahman Maritime University Bangladesh, Chittagong, 30th May, 2016, at page-42