

**THE MEANING OF THE “GENUINE LINK” REQUIREMENT
IN RELATION TO THE NATIONALITY OF SHIPS**

A Study prepared for the International Transport Workers' Federation

by

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EXECUTIVE SUMMARY

Article 5 of the 1958 Convention on the High Seas and Article 91 of the 1982 UN Convention on the Law of the Sea each provide that there must exist a “genuine link” between a ship and the State purporting to confer its nationality upon that ship. Neither Convention, however, defines or states what is meant by a genuine link, nor does either Convention stipulate what consequences (if any) follow where no genuine link exists. The purpose of this study is to try to discover what is meant by a genuine link and what consequences follow from its absence. The method that has been used to carry out this exercise has been to employ the canons of treaty interpretation laid down in the Vienna Convention on the Law of Treaties. This has involved an examination of the ordinary meaning of Article 5 of the 1958 Convention and Article 91 of the 1982 Convention in their context and in the light of the object and purpose of those Conventions, as well as utilising as subsidiary means of interpretation the *travaux préparatoires* of each Convention. In addition, the relevant case law of international courts and tribunals has been examined, as well as the views of writers.

Notwithstanding the fact that there is no consensus among either States or writers as to what is meant by a genuine link or as to the consequences that follow from its absence, it is nevertheless believed that the following conclusions may legitimately be drawn.

1. Registration of a ship, thereby granting it the nationality of the registering State, obviously creates a link between the ship and that State. Registration does not in itself, however, make that link genuine. There must exist circumstances which mean that the link is a real one, not artificial, casual or tenuous.
2. There is no single or obligatory criterion by which the genuineness of a link is to be established. A State has a discretion as to how it ensures that the link between itself and a ship having its nationality is genuine, be it through requirements relating

to the nationality of the beneficial owner or crew, its ability to exercise its jurisdiction over such a ship, or in some other way.

3. Although it is not an obligatory criterion for establishing the genuineness of a link, the effective exercise of jurisdiction and control over its ships is one of the principal ways in which a flag State may demonstrate that the link between itself and its ships is genuine. To demonstrate that it is able effectively to exercise its jurisdiction and control over a ship, a State must be able to show that the necessary mechanisms for such exercise are in place at the time when the ship is granted its nationality. Such mechanisms could include sufficient and suitably qualified personnel for carrying out the necessary surveys of the ship, checking the certification of the crew, etc.
4. Where there is no genuine link between a ship and the State purporting to confer its nationality upon it, that State may not exercise diplomatic protection in respect of the ship.

1. INTRODUCTION

Article 5(1) of the Convention on the High Seas, 1958 provides as follows:

Each 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. **There must exist a genuine link between the State and the ship;** in particular, the State must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag. (emphasis added)

In similar vein Article 91(1) of the United Nations Convention on the Law of the Sea, 1982 provides:

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. **There must exist a genuine link between the State and the ship.** (emphasis added)

These provisions give rise to two questions:

1. What is meant by “a genuine link” between a ship and the State which has purported to confer its nationality upon that ship?
2. What consequences follow where there is no “genuine link” between a ship and the State which has purported to confer its nationality upon that ship?

No direct answer to these questions is provided by either Convention. It is the aim of this study to attempt to suggest answers to these questions. This will be done by trying to interpret the provisions of the two Conventions in accordance with the rules of international law relating to the interpretation of treaties contained in the Vienna Convention on the Law of Treaties. The reason for engaging in what might appear to some to be a rather technical

exercise is in order to adopt as objective an approach as possible. This is felt to be particularly necessary as a good deal of the extensive writing on the issue of the genuine link has tended to be rather partisan and selective in its use of evidence to support a particular point of view.

Accordingly, section 2 of this study sets out, fairly concisely, the rules on treaty interpretation contained in the Vienna Convention on the Law of Treaties. Section 3 then attempts to interpret Article 5 of the 1958 Convention on the High Seas in the light of these rules, while section 4 engages in a similar exercise in respect of Article 91 of the 1982 UN Convention on the Law of the Sea. It should be noted here that although the 1958 Convention has been replaced by the 1982 Convention as between parties to the latter¹, the 1958 Convention remains important and worthy of study because a number of States are parties to the 1958 Convention which have not (yet) become parties to the 1982 Convention and because (as will be seen in section 4) the provisions of Article 5 served as the basis for drafting the provisions of the 1982 Convention concerning the nationality of ships. Section 5 of this study examines a number of developments since the conclusion of the 1982 Convention which may shed some light on what is meant by “a genuine link”. Finally Section 6 offers some general conclusions as to the meaning of “genuine link” and the consequences that follow where there is no “genuine link” between a vessel and the State which has purported to confer its nationality upon that vessel.

At the outset it must be pointed out that it is beyond the scope of this study to discuss the policy issues relating to the nationality of ships in general, and the genuine link in particular, although the author of this study is aware of what those issues are. The present study is, therefore, a strictly legal one.

¹ See Art. 311(1) of the 1982 Convention.

2. RULES ON TREATY INTERPRETATION

Rules on treaty interpretation, albeit in fairly general terms, are contained in the Vienna Convention on the Law of Treaties, 1969,² in Articles 31-33. Article 31(1) of the Convention contains the basic principle of treaty interpretation. It reads as follows:

A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

Paragraph two of Article 31 provides that the context for this purpose includes not only the text of the treaty (including its preamble and any annexes) but also any agreement relating to the treaty which was made by the parties in connection with its conclusion or any instrument made by the parties in connection with the conclusion of the treaty and accepted as related to the treaty. Paragraph three of Article 31 provides that there is to be taken into account, together with the context, “any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions” and “any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.”

Article 32 provides that:

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31:

- (a) leaves the meaning ambiguous or obscure; or
- (b) leads to a result which is manifestly absurd or unreasonable.

Finally Article 33 deals with treaty texts which are in more than one authentic language. Paragraph one provides that when a treaty has been authenticated in two or more languages the text is equally authentic in each language. Paragraph three provides that the terms of the treaty are presumed to have the same meaning in each authentic text. Paragraph four

² Text in *United Nations Treaty Series*, Vol. 1155, p. 331.

provides that when comparison of the authentic texts discloses a difference of meaning which the application of Articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.

Article 4 of the Vienna Convention provides that the Convention applies only to treaties which are concluded by States after its entry into force. Since the Vienna Convention did not enter into force until 1980, it does not as such apply to interpretation of the 1958 Convention on the High Seas. However, the International Court of Justice has on several occasions stated that the rules contained in Article 31 of the Vienna Convention also represent customary international law: see, for example, the *Territorial Dispute (Libya/Chad)* case³, the *Maritime Delimitation and Territorial Questions (Bahrain/Qatar)* case⁴, the *Oil Platforms (Iran/USA)* case (Preliminary Objections)⁵ and, most recently, the *Kasikili/Sedudu Island (Botswana/Namibia)* case.⁶ The Court has also suggested that the provisions of Article 32 represent customary international law: see the cases just referred to⁷ as well as the *Guinea Bissau/Senegal* case.⁸ Although the International Court does not appear to have pronounced on the question of whether Article 33 represents customary international law, the European Court of Human Rights has taken the view that it does: see, for example, *Golder v UK*⁹ and *James v UK*¹⁰. Thus, the provisions of the Vienna Convention concerning the interpretation of treaties also represent customary international law and therefore may be applied to interpretation of the 1958 Convention on the High Seas, as well as, *qua* Convention, to the 1982 UN Convention on the Law of the Sea.

3. THE CONVENTION ON THE HIGH SEAS, 1958

³ [1994] ICJ Rep. 6 (para. 41).

⁴ [1995] ICJ Rep. 6 (para. 33).

⁵ [1996] II ICJ Rep. 812 (para. 23).

⁶ (2000) 39 *International Legal Materials* 310, para. 18.

⁷ *Libya/Chad* case, paras. 41 and 55; *Bahrain/Qatar* case, para. 40; and *Botswana/Namibia* case, paras. 20 and 46.

⁸ [1991] ICJ Rep. 52 (para. 48).

⁹ Series A No 18 (1975), para. 29.

3.1 Introduction

The Convention on the High Seas¹¹ was adopted at the First United Nations Conference on the Law of the Sea, held at Geneva in 1958. The Convention came into force on September 30, 1962. The Convention currently has 62 parties. As pointed out earlier, the 1982 UN Convention on the Law of the Sea prevails over the 1958 Convention as between parties to it. About two-thirds of the current parties to the 1958 Convention are also parties to the 1982 Convention. Thus, the 1958 Convention at the present time applies only between about 21 States, but they include two States with a significant interest in shipping, Denmark and the USA. Notwithstanding this, the Convention remains of great importance for the reasons that were explained earlier in the Introduction.

Article 5(1) of the High Seas Convention, which was reproduced at the beginning of the Introduction above, provides that there must exist a “genuine link” between a ship and the State which has purported to confer its nationality upon that ship. An attempt will now be made to interpret the meaning of the term “genuine link” and to ascertain the consequences that follow where there is no “genuine link” between a ship and the State which has purported to confer its nationality upon that ship, employing the rules on treaty interpretation set out in the Vienna Convention, which were discussed in the previous section.

3.2 A Preliminary Approach to Interpretation

The first point to note is that the Convention is in five authentic languages - English, French, Spanish, Chinese and Russian. Unfortunately the author of this study has no knowledge of either Chinese or Russian. These language versions of the Convention will therefore not be discussed. The French text of Article 5 reads as follows:

¹⁰ Series A No 98 (1986), para. 42.

¹¹ Text in *United Nations Treaty Series*, Vol. 450, p. 11.

Chaque État fixe les conditions auxquelles il accorde sa nationalité aux navires ainsi que les conditions d'immatriculation et du droit de battre son pavillon. Les navires possèdent la nationalité de l'État dont ils sont autorisés à battre pavillon. Il doit exister un lien substantiel entre l'État et le navire; l'État doit notamment exercer effectivement sa juridiction et son contrôle, dans les domaines technique, administratif et social, sur les navires battant son pavillon.

The Spanish text of Article 5 reads as follows:

Cada Estado establecerá los requisitos necesarios para conceder su nacionalidad a los buques, así como para que puedan ser inscritos en su territorio en un registro y tengan el derecho de enarbolar su bandera. Los buques poseen la nacionalidad del Estado cuya bandera están autorizados a enarbolar. Ha de existir una relación auténtica entre el Estado y el buque; en particular, el Estado ha de ejercer efectivamente su jurisdicción y su autoridad sobre los buques que enarbolan su pabellón, en los aspectos administrativo, técnico y social.

It will be recalled that under Article 33 of the Vienna Convention on the Law of Treaties the different language versions of a treaty are equally authentic and are presumed to have the same meaning; where there are differences of meaning which the application of Articles 31 and 32 does not remove, then the meaning which best reconciles the texts should be adopted. At this stage it is sufficient to note that there may be some difference of meaning between the English “genuine link” and the French “lien substantiel” (“substantial” or “significant” “link”). On the other hand, the Spanish text (“relación auténtica” - “authentic” or “genuine” “connection”) appears to have the same meaning as the English text. As regards the phrase “in particular”, both the French “notamment” and the Spanish “en particular” appear to have the same meaning and emphasis as the English text.¹² The possible differences in the meaning of the various authentic texts will be returned to after (as Article 33 of the Vienna Convention directs) an attempt has been made to interpret Article 5(1) of the High Seas Convention by applying Articles 31 and 32 of the Vienna Convention.

¹² But note that one writer has argued that the French “notamment” carries a different emphasis from “in particular” and means essentially “that is”: see B. Boczek, *Flags of Convenience: An International Legal Study* (1962), p. 275. Consultation of French dictionaries and a British expert in the French language suggests that Boczek is mistaken. Meyers also believes Boczek to be mistaken: see H. Meyers, *The Nationality of Ships* (1967), p. 219.

Accordingly, we begin by trying to interpret the term “genuine link” by applying Article 31 of the Vienna Convention. This Article directs us to interpret a particular provision of a treaty in good faith in accordance with its ordinary meaning in its context and in the light of the object and purpose of the treaty concerned. There are therefore three things to be looked at: the ordinary meaning of the provision, the context, and the object and purpose of the treaty. As regards the ordinary meaning of the term “genuine link”, there is no definition of this term in the Convention. It will become clear, when the drafting history of the Convention is examined in section 3.3 below, that this is not a term with an established meaning in international law. The High Seas Convention is the first treaty having provisions on the nationality of ships, so that there is no earlier history of the use of this or similar terms in treaties dealing with ships. Nor can any help be gleaned from looking at treaties concerned with the nationality of individuals or aircraft because such conventions do not use the term “genuine link” or any similar expression.¹³ Taking the term “genuine link” at face value and in its ordinary sense, it appears to mean that there must be a link or connection between a ship and the State purporting to grant its nationality to that ship, and that that link must be genuine or real, as opposed to sham, artificial, casual or tenuous. Sinclair cautions, however, that the “ordinary meaning” of a term “does not necessarily result from a pure grammatical analysis”, and that “there is no such thing as an abstract ordinary meaning of a phrase” divorced from its context and practical application.¹⁴

Turning to the context of the High Seas Convention, of the various materials mentioned in Article 31(2) as relating to the context of a treaty, the only one that exists in the case of the High Seas Convention is the text of the Convention itself. There is one provision of this text which is relevant in this connection. That is Article 6(1), which provides that “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.” This provision implies that a change of flag (i.e. a change of nationality) is not to be undertaken lightly or casually, but only where there is a real transfer of ownership of the ship, suggesting that the new shipowner must have some real

¹³ See, for example, the Hague Convention on Certain Questions relating to the Conflict of Nationality Laws, 1930, Art. 1 (*League of Nations Treaty Series*, Vol. 179, p. 89) and Convention on International Civil Aviation, 1944, Arts. 17-21 (*United Nations Treaty Series*, Vol. 15, p. 295).

connection with the new State of nationality, or where there is a real change of registry, i.e. that there is some real connection with the new registry.¹⁵

In terms of the materials referred to in Article 31(3) of the Vienna Convention that are to be taken into account with the context, the only possible one is “any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.” Sinclair points out that the value and significance of subsequent practice “depends on the extent to which it is concordant, common and consistent”, and adds that a practice cannot in general be established by one isolated act or even by several individual applications.¹⁶ In similar vein the International Court of Justice in the recent *Kasikili/Sedudu Island* case emphasised that the practice of the parties to a treaty must demonstrate a common understanding of its meaning to be relevant as practice within the meaning of Article 31(3)(b) of the Vienna Convention.¹⁷

There is considerable practice by States parties to the High Seas Convention in the form of the national legislation they have enacted relating to the nationality of ships.¹⁸ The legislation of the 53 States parties to the High Seas Convention having a merchant navy varies considerably, however. In a recent study by Li and Wonham,¹⁹ the legislation of States is divided into three categories: open registers (which equate to flags of convenience); closed registers (by which is meant registers that set requirements as to ownership, management and manning); and compromise registers (by which is meant registers which use conditions

¹⁴ I. Sinclair, *The Vienna Convention on the Law of Treaties* (2nd edition, 1984), p. 121. Aust makes a similar point: see A. Aust, *Modern Treaty Law and Practice* (2000), p. 190.

¹⁵ It is assumed that the word “real” in Article 6(1) qualifies “change of registry” as well as “transfer of ownership”, otherwise the provision about registry would seem to be a tautology as a vessel cannot normally change its flag without a change of registry, and *vice versa*. In the French text, however, “real” qualifies only “transfer of ownership”. On the other hand, in the Spanish text “real” seems to qualify both “transfer of ownership” and “change of registry” (“excepto como resultado de un cambio efectivo de la propiedad o en el registro”).

¹⁶ Sinclair, *op. cit.* in n. 14, p. 137. So, too, Aust, who says that practice must be consistent and common to, or accepted by (even if only tacitly), all the parties to the treaty: *op. cit.* in n. 14, pp. 194-5.

¹⁷ *Op. cit.* in n. 6, paras 63 and 73-75.

¹⁸ It should be noted that of the 62 parties to the High Seas Convention, there are nine landlocked States without a merchant navy of any kind.

¹⁹ K. X. Li and J. Wonham, “New Developments in Ship Registration”, (1999) 14 *International Journal of Marine and Coastal Law* 137.

intermediate between closed and open registers). Of the parties to the High Seas Convention, two (Cambodia and Cyprus) are open registers; fifteen (Austria, Belgium, Bulgaria, Dominican Republic, Finland, Madagascar, Malaysia, Mexico, Netherlands, Poland, Russia, Senegal, Switzerland, Thailand and the USA) are closed registers; six States (Australia, Denmark, Germany, Italy, Japan and the UK) are compromise registers; and no information is given in the study on the remaining 30 States parties to the Convention. Of the fifteen States having closed registers, there is considerable diversity of practice in relation to, for example, the percentage of equity capital required to be held by nationals, the nationality of directors of companies and the nationality requirements for officers and crews. Differences in practice are further accentuated by the fact that some parties to the Convention (Denmark, Germany, Italy) have a second, international register in addition to their original register, while other parties (Netherlands, United Kingdom) have separate registers in their dependent territories. In view of this considerable diversity of practice, it seems impossible to say that it constitutes “subsequent practice” within the meaning of Article 31(3)(b) of the Vienna Convention on the Law of Treaties because the necessary degree of concordance, as noted by Sinclair and the International Court of Justice in the *Kasikili/Sedudu Island* case, is simply lacking.

Finally, Article 31(1) of the Vienna Convention requires an examination of the object and purpose of the High Seas Convention. The Convention itself contains no statement as to its object and purpose. It is reasonable to assume, however, that a principal object and purpose of the Convention is to provide for a system of regulation and order on the high seas. This would therefore suggest that a flag State ought to be able to control its ships on the high seas to ensure that they act in an orderly way and that they comply with any international regulations binding on the flag State. This is especially necessary as ships on the high seas are in principle subject only to the jurisdiction (legislative and enforcement) of their flag States. Apart from a handful of exceptions, such as piracy, no State may exercise jurisdiction on the high seas over a ship having the nationality of another State. This therefore suggests that the link between a flag State and its ships should be of such a character as to allow it to be able to exercise the necessary control and jurisdiction to maintain order on the high seas.

In employing Article 31 of the Vienna Convention, no completely certain or unambiguous meaning of the term “genuine link” emerges. The ordinary meaning of the text of Article 5(1) of the High Seas Convention, taken together with its context and the object and purpose of the Convention, suggest that nationality is not a status casually to be bestowed upon a ship, that the link between a ship and the State purporting to confer its nationality upon that ship must be a real and not an artificial or tenuous one, and that a State must be able to exercise effective control and jurisdiction over ships to which it has granted its nationality. But exactly what is required to constitute a real or “genuine” link is not entirely clear. In view of this uncertainty, it is therefore permissible, and indeed necessary, to invoke Article 32 of the Vienna Convention and employ supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion.

Turning to the second question to be looked at in this study, namely the consequences that follow where there is no “genuine link”, the High Seas Convention contains no provisions dealing directly with this issue nor does it implicitly suggest an answer to the question. Here neither the context nor the object and purpose of the Convention appear to shed any light on the matter. It is therefore necessary, perhaps even more so than in the case of the meaning of the term “genuine link”, to have recourse to Article 32 of the Vienna Convention and consider the materials referred to there, to which accordingly we now turn.

3.3 Travaux Préparatoires

As mentioned above, the Convention on the High Seas was adopted at the First United Nations Conference on the Law of the Sea held in 1958. The Conference had before it a set of draft articles prepared by the International Law Commission, a body of independent legal experts appointed by the UN for the codification and progressive development of international law. The preparatory work of the Convention thus includes both the work of the International Law Commission and the proceedings at the 1958 Conference. The work of the International Law Commission will be looked at first.

3.3.1 The Work of the International Law Commission

The International Law Commission dealt with the law of the sea at its sessions held between 1950 and 1956. The question of the conditions for granting nationality to ships appeared at an early stage in the Commission's work. At the 1951 session the Special Rapporteur on the Law of the Sea, Mr François, emphasised that if there was no real connection between the flag State and the crew and ownership of the vessel, it would be difficult for the flag State to regulate the vessel properly. He also referred to the work of the Institute of International Law, which in 1896 had suggested that, in order to acquire the right to fly the flag of a State, more than half of the ship must be owned by nationals or a national company of the State concerned.²⁰ There was considerable support in the Commission for the Rapporteur's views and at the end of the 1951 session agreement was reached on a text under which a State could fix the conditions on which it would permit a ship to be registered in its territory and to fly its flag, "yet the general practice of States has established minimum requirements which must be met if the national character of the ship is to be recognised by other States." These minimum requirements were that the vessel must either be fifty per cent owned by nationals of the flag State, or be owned by a company in which more than half the shareholders were nationals or domiciled in the flag State, or be owned by a company registered in the flag State and having its head office there.²¹ This proposal was further discussed and minor amendments made at the following sessions of the Commission. In 1955 the Commission produced a set of draft articles on the High Seas.²² Article 5 of this draft read as follows:

Each State may fix the conditions for the registration of ships in its territory and the right to fly its flag. Nevertheless, for purposes of recognition of its national character by other States, a ship must either:

1. Be the property of the State concerned; or
2. Be more than half owned by:
 - (a) Nationals of or persons legally domiciled in the territory of the State concerned and actually resident there; or

²⁰ *Yearbook of the International Law Commission*, 1951, Vol. II, pp. 75-76.

²¹ *Ibid.*, Vol. I, pp. 330-4.

²² *Ibid.*, 1955, Vol. II, p. 20.

- (b) A partnership in which the majority of the partners with personal liability are nationals of or persons legally domiciled in the territory of the State concerned and actually resident there; or
- (c) A joint stock company formed under the laws of the State concerned and having its registered office in the territory of that State.

In its comments on draft article 5 the Commission noted:

Each State lays down the conditions on which sea-going ships may fly its flag. Obviously the State enjoys complete liberty in the case of ships owned by it or ships which are the property of a nationalized company. With regard to other ships, the State must accept certain restrictions. As in the case of the granting of nationality to persons, national legislation on the subject must not diverge too far from the principles adopted by the majority of States, which may be regarded as forming part of international law. Only on that condition will the freedom granted to States not give rise to abuse and to friction with other States. With regard to the national element required for permission to fly the flag, a great many systems are possible; but there must be a minimum national element, since control and jurisdiction by a State over ships flying its flag can only be effectively exercised where there is in fact a relationship between the State and the ship other than that based on mere registration.²³

The Commission also expressed the opinion that the principle contained in the draft article, which it said was found in the national legislation of the great majority of States, “should be regarded as forming part of existing international law” (by which the Commission presumably meant customary international law). The Commission added that “if the practical ends in view are to be achieved, States must work out more detailed provisions when they incorporate the above rules in their legislation.” The Commission had also considered the possibility of requiring the master and a proportion of the crew to be nationals of the flag State, but rejected this idea on the ground that certain States had insufficient trained personnel to enable them to comply with such a requirement.²⁴

This draft article, along with the other draft articles, was circulated to States for comment. Most States were supportive of the Commission’s proposals. Of particular interest are the responses of the Netherlands and the United Kingdom. The Netherlands proposed that “for purposes of recognition of the national character of the ship by other States, there must

²³ *Ibid.*, pp. 22-23.

exist a genuine connection between the State and the ship.” The Netherlands doubted whether it was possible to lay down detailed regulations concerning the right of States to grant their nationality to ships, and proposed that merely the principle of the requirement of a genuine connection be stated.²⁵ The United Kingdom proposed that in order to have the nationality of the flag State and be recognised as such, the flag State must effectively exercise jurisdiction and control over ships flying its flag.²⁶

In 1956 the Commission produced its final set of draft articles,²⁷ which were those before delegates at the 1958 UN Conference on the Law of the Sea. Article 29(1) of these articles read as follows:

Each 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. Nevertheless, for purposes of recognition of the national character of the ship by other States, there must exist a genuine link between the State and the ship.

The Commission’s commentary on this draft article began, as its commentary in 1955 had done, by emphasising the need for certain restrictions on the liberty of States to grant their nationality to vessels. The Commission then went on to explain why, unlike in its 1955 draft, it had decided to omit detailed criteria for the nationality of ships.

At its eighth session, the Commission, after examining the comments of Governments, felt obliged to abandon this viewpoint. It came to the conclusion that the criteria it had formulated could not fulfil the aim it had set itself. Existing practice in the various States is too divergent to be governed by the few criteria adopted by the Commission. Regulations of this kind would be bound to leave a large number of problems unsolved and could not prevent abuse. The Commission accordingly thought it best to confine itself to enunciating the guiding principle that, before the grant of nationality is generally recognized, there must be a genuine link between the ship and the State granting permission to fly its flag. The Commission does not consider it possible to state in any greater detail what form this link should take. This lack of precision made some members of the Commission question the advisability of inserting such a stipulation. But the majority of the Commission

²⁴ *Ibid.*, p. 23.

²⁵ *Ibid.*, 1956, Vol. II, pp. 52-3.

²⁶ *Ibid.*, p. 81.

²⁷ *Ibid.*, p. 256.

preferred a vague criterion to no criterion at all. While leaving States a wide latitude in this respect, the Commission wished to make it clear that the grant of its flag to a ship cannot be a mere administrative formality, with no accompanying guarantee that the ship possess a real link with its new State. The jurisdiction of the State over ships, and the control it should exercise in conformity with article 34 of these articles, can only be effective where there exists in fact a relationship between the State and ship other than mere registration or the mere grant of a certificate of registry.²⁸

3.3.2 Proceedings at the UN Conference of the Law of the Sea, 1958

At the Conference a wide range of views was expressed concerning the International Law Commission's draft article 29. Views ranged from those States (predominantly traditional maritime States such as Denmark, France, Italy, the Netherlands, Norway and Sweden) which thought that the genuine link was an essential requirement and should be developed in detail at the Conference through to States which thought that the requirement of a genuine link was unnecessary, inappropriate or too vague. The latter group of States included Brazil, Greece, Guatemala, India, Lebanon, Liberia, Mexico, Panama, Uruguay and the USA. The majority of States, however, were in favour of the genuine link requirement, at least as a broad statement of principle. A number of States, such as Australia, Czechoslovakia, Portugal and the United Kingdom, thought that further development and elaboration of the concept was necessary and should be done on some subsequent occasion in a different forum. Those supporting the genuine link stressed the importance of the requirement for the control and maintenance of public order on the high seas. However, there was no real consensus as to what the criteria for a genuine link should be, although many States stressed that an essential element was effective jurisdiction and control by the flag State.

In comparison with the International Law Commission's draft article 29, Article 5 of the High Seas Convention, as adopted by the Conference, has two major changes. The first of these is that the phrase, "for the purposes of recognition of the national character of the

²⁸ *Ibid.*, p. 279.

ship,” was deleted. This phrase had attracted criticism, *inter alia*, from Liberia, Panama, the USA and West Germany, because of its uncertainty and the consequences of non-recognition. It seemed anomalous to these and other States to allow on the one hand a State to determine the conditions under which it would grant its nationality to a ship, and then, on the other hand, to allow other States to refuse to recognise that nationality on the ground of the lack of a genuine link. This was all the more problematic because there was no agreement as to what constituted a genuine link. It was argued that this would lead to international friction and disputes, and there would be difficulties over the position vis à vis a ship which was deemed not to have a genuine link with the flag State and the State refusing recognition. Furthermore, the consequences of non-recognition were unclear - would this give third States the right to board a vessel? Was the vessel to be regarded as stateless? In spite of these criticisms, the phrase, “for the purposes of recognition of the national character of the ship”, was retained in committee, a proposal by Liberia to delete the phrase being defeated by 39 votes to 13 with six abstentions.²⁹ In the plenary session of the Conference, however, a renewed attempt to delete the phrase was successful, being adopted by 30 votes to 15 with 17 abstentions.³⁰

The second change made at the 1958 Conference was to add, after “genuine link”, the words, “in particular, the State must exercise effective jurisdiction and control in administrative, technical and social matters over ships flying its flag.” This change was made on a proposal by Italy (supplemented by a proposal by France) and received wide support both amongst the advocates of a genuine link, such as the United Kingdom and the Netherlands, and amongst traditional flag of convenience countries such as Liberia.³¹ However, there was disagreement as to whether the requirement of the effective exercise of jurisdiction and control by the flag State was an indispensable, if not necessarily the only, element of the genuine link (the view of the traditional maritime States), or whether the requirement was independent of the genuine link (the view of flag of convenience States).

²⁹ *United Nations Conference on the Law of the Sea, Official Records*, Vol. IV, p. 75.

³⁰ *Ibid.*, Vol. II, p. 20.

³¹ The proposal was adopted in committee by 34 votes to 4 with 17 abstentions: *ibid.*, Vol. IV, p. 75.

Article 29 of the International Law Commission's draft, as amended in the ways described above, was adopted unanimously in the plenary session of the Conference, to become Article 5 of the Convention on the High Seas.

3.4 Decisions of Courts

This section looks at decisions of courts to see if they shed any light on the questions with which this study is concerned. The courts whose decisions will be examined are the International Court of Justice and the European Court of Justice. No attempt has been made to search for decisions of national courts on this question as rulings of national courts on questions of international law are generally regarded as not being very authoritative.

3.4.1 The International Court of Justice

The International Court of Justice (ICJ) has dealt with three cases which have some relevance to the question of the nationality of ships. These are the *Nottebohm*, *IMCO* and *Barcelona Traction* cases. Each will be looked at in turn.

3.4.1.1 The Nottebohm Case³²

This case concerned the question of whether Liechtenstein could exercise diplomatic protection on behalf of one of its nationals, Mr Nottebohm, in respect of certain acts committed by Guatemala against him which were alleged to be breaches of international law. Nottebohm had been born in Germany in 1881. He possessed German nationality, but from 1905 had spent much of his life in Guatemala which he had made the headquarters of his business activities. He obtained Liechtenstein nationality through naturalisation in 1939. His connections with that country were slight, being limited to a few visits to a brother who lived there. At the outset the Court made it clear that it was not concerned with the law of

³² [1955] ICJ Rep. 4.

nationality in general, but only with the question of whether Liechtenstein could exercise diplomatic protection in respect of Nottebohm vis à vis Guatemala. The Court noted that while under international law it was up to each State to lay down rules governing the grant of its nationality, a State could not claim that:

the rules it has thus laid down are entitled to recognition by another state unless it has acted in conformity with this general aim of making the legal bond of nationality accord with the individual's genuine connection with the State which assumes the defence of its citizens by means of protection as against other States.³³

The Court went on to add:

nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred...is in fact more closely connected with the population of the State conferring nationality than with that of any other State. Conferred by a State, it only entitles that State to exercise protection vis à vis another State, if it constitutes a translation into juridical terms of the individual's connection with the State which has made him his national.³⁴

The Court found on the facts that there was insufficient connection between Nottebohm and Liechtenstein for the latter to be able to exercise diplomatic protection on Nottebohm's behalf vis à vis Guatemala.

There is no doubt that the International Court's judgement in the *Nottebohm* case, given in 1955 when the International Law Commission was nearing the conclusion of its deliberations on the law of the sea, had some influence on both the Commission and on States in their responses to the Commission's 1955 draft articles and at the 1958 Conference itself. There seems little doubt that the use of the word "genuine" in the phrase "genuine link" derives from the use of that word by the International Court in the *Nottebohm* case. However, the

³³ *Ibid.*, p. 23.

³⁴ *Ibid.*

case seems of very limited significance in terms of trying to understand what is meant by a “genuine link” in the context of the nationality of ships. This is both because of the limited issue which the Court was deciding (diplomatic protection) and because the kind of factors which the Court mentioned in the *Nottebohm* case as establishing a genuine connection between an individual and a State granting its nationality - such as habitual residence in the State concerned, business interests there, general ties of sentiment to that State, family ties and so on³⁵ - are largely irrelevant and inapplicable to relations between a ship and a State. Thus, while it seems that the *Nottebohm* case is of some historical significance in terms of its influence on the provisions concerning the nationality of ships in the High Seas Convention, it does not really throw any light on the meaning of the phrase, “genuine link”, in that Convention.

3.4.1.2 The IMCO Case³⁶

In this case the ICJ was asked for an advisory opinion on the question of whether the Maritime Safety Committee had been constituted in accordance with Article 28 of the Convention of the Intergovernmental Maritime Consultative Organisation (as the International Maritime Organisation was then known). This article provides that the Committee shall “consist of fourteen members...of which not less than eight shall be the largest ship -owning nations...” Liberia and Panama, at that time having the third and eighth largest shipping tonnages registered under their flags, were not selected in this category. The Court held, by nine votes to five, that the Committee had not been validly constituted in accordance with Article 28. The Court stated that the phrase, “largest ship -owning nations”, should be read in its ordinary and natural meaning. “Largest” meant the largest tonnage: this was the only practicable form of measurement. “Ship-owning” could mean either owned by nationals of the States concerned or the registered tonnage of the States concerned regardless of beneficial ownership. The latter was the correct meaning: it

³⁵ *Ibid.*, p. 22.

³⁶ Advisory Opinion on the Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organisation [1960] ICJ Rep. 150.

followed from other articles of the Convention and their interpretation by members of IMCO. It was also a much more practicable test than the test of beneficial ownership by nationals. Other conventions also used this test. The concept of the “genuine link” was irrelevant for deciding the issue.

Although the Court’s judgement is open to criticism on various grounds,³⁷ one can understand why the Court was reluctant to get involved in any discussion of the “genuine link” requirement for nationality and its application to flags of convenience. The Court’s judgement therefore throws no light on the meaning of the phrase “genuine link.” Only one of the dissenting judges, Judge Moreno Quintana, discusses the issue and then only briefly. In relation to the phrase “largest shipowning nations”, he observes:

The registration of shipping by an administrative authority is one thing, the ownership of a merchant fleet is another. The latter reflects an international economic reality which can be satisfactorily established only by the existence of a genuine link between the owner of a ship and the flag it flies. This is the doctrine expressed by Article 5 of the Convention on the High Seas which...constitutes at the present time the *opinio juris gentium* on the matter.³⁸

He goes on to add:

A merchant fleet is not an artificial creation. It is a reality which corresponds to certain indispensable requirements of a national economy. . . The flag - that supreme emblem of sovereignty which international law authorises a ship to fly - must represent a country’s degree of economic independence, not the interests of third parties or companies.³⁹

A number of States which intervened in the case referred in some detail to the “genuine link” requirement and it is of interest to note their comments briefly here. The Netherlands

³⁷ See, for example, K. R. Simmonds, “The Constitution of the Maritime Safety Committee of IMCO”, (1963) 12 *International and Comparative Law Quarterly* 56 at 83-7.

³⁸ *Ibid.*, p. 178.

³⁹ *Ibid.*

pointed out that it was clear from the discussions at the 1958 Conference that there was a consensus that mere registration was not sufficient to establish a genuine link between a ship and a State. It argued that the genuine link requirement in Article 5 of the High Seas Convention was codificatory of the rules of international law and clearly imposed limitations on the freedom of a State to determine which ships belonged to that State. The Netherlands concluded that there was no genuine link between Liberia and Panama and the ships registered by them because the legislation of those countries had no provisions on incorporation of ship-owning companies or the nationality of the management, which were common connecting factors in other States.⁴⁰ Norway expressed the view that Article 5 represented established principles of international law, since States could not fulfil their international obligations in respect of ships flying their flag unless there existed a genuine link and, in particular, effective jurisdiction and control. As to the contents of a genuine link, Norway made the following observations:

The International Law Commission decided in the end that 'existing practice in the various States is too divergent to be governed by the few criteria adopted by the Commission' and it also said that these few criteria 'could not prevent abuse' . . . that was why the Commission decided to adopt one general formula. It wanted to include *more*. There is thus . . . no basis for asserting . . . that it follows from the successive drafts of the International Law Commission that a number of the most important criteria must be left out in the application of the 'genuine link' . . .

As for the interpretation of the formula [of the 'genuine link'], it was submitted at the conference, by those who supported it, that *effective jurisdiction and control* were indispensable elements of the genuine link, and that this should, therefore, be added to the text proposed by the Commission, and that was done. Otherwise, it was pointed out that there must be many other links between a ship and the State whose flag it flies . . . but it was emphasised that one could not point out any one of these elements as indispensable. It was the aggregate of these links which, together with the effective jurisdiction and control, constituted the genuine link and it was very difficult to single out certain criteria as necessary and others as insignificant in this respect. It was the sum total which mattered . . .

⁴⁰ ICJ, *Advisory Opinion on the Constitution of the Maritime Safety Committee of the Intergovernmental Maritime Consultative Organisation*, Pleadings, Oral Arguments and Documents, pp. 251-2 and 357.

There is thus no basis for claiming that the contents of the 'genuine link' consist of, or preclude, any particular criteria, except that effective jurisdiction and control, which were added to the text of the International Law Commission, are a condition *sine qua non*.⁴¹

On the other side, Liberia, which did not consider that the question of the genuine link was relevant to the case, denied that the principle of the genuine link was established in international law and asserted that it was not part of customary international law. But even if it were, the principle was not intended to refer to the concept of beneficial ownership, i.e. there was no requirement that for a genuine link to exist, beneficial ownership of the ship had to be vested in nationals of the flag State.⁴² Furthermore, the fact that the 1958 Conference deleted the phrase beginning "nevertheless, for the purposes of recognition", meant that other States were not entitled to question the nationality conferred on ships by a State.⁴³

3.4.1.3 The Barcelona Traction Case⁴⁴

A central issue in this case concerned the nationality of companies. While understandably the International Court did not refer in its judgement to the question of the nationality of ships, some reference to this was made by Judge Jessup in his separate opinion. He argued that the concept of genuine link was common to the nationality of people, ships and companies, and that in each of these cases other States were not bound to recognise the grant of nationality where no genuine link existed.

If a State purports to confer its nationality on ships by allowing them to fly its flag, without assuring that they meet such tests as management, ownership, jurisdiction and control, other States are not bound to recognise the asserted nationality of the ship.⁴⁵

⁴¹ *Ibid.*, pp. 367-8 (emphasis in the original).

⁴² *Ibid.*, p. 298.

⁴³ *Ibid.*, p. 404.

⁴⁴ [1970] ICJ Rep. 1.

⁴⁵ *Ibid.*, p.188.

Although only the views of an individual judge, and therefore of limited authority, Judge Jessup's opinion is of considerable interest not only because he tends to support the views of the Norwegian government in its pleadings in the *IMCO* case that the genuine link may involve a number of possible criteria, but also because it is one of the few pronouncements made by anyone other than an academic writer since 1958 about the consequences that may follow in the absence of a genuine link.

3.4.2 The European Court of Justice

The question of the genuine link has arisen in a number of cases before the European Court. Most notably it arose in the *Factortame* cases. The background to these cases was that in the 1980s Spanish fishing vessel owners began to take advantage of the United Kingdom's liberal rules on registration of vessels. These allowed foreign nationals to set up companies in the United Kingdom and then to acquire vessels which could fly the British flag. Spanish fishing concerns thus set up companies which acquired fishing vessels which flew the British flag. These vessels then fished against the United Kingdom's quotas. The purpose of this was to give what were in reality Spanish fishing vessels larger quotas than they would have obtained otherwise, since under the Common Fisheries Policy Spain is given very limited quotas in Community waters. This practice was known as "quota hopping." One of the United Kingdom's responses to this development was to enact the Merchant Shipping Act 1988. The Act provided that to qualify as a British fishing vessel (and thus be eligible to fish for quotas allocated to the United Kingdom) a fishing vessel had to be British owned, meaning that if it was owned by a company, that company's principal place of business had to be in the United Kingdom and at least 75 per cent of its shares owned by, and at least 75 per cent of its directors be, British citizens resident and domiciled in the United Kingdom. The vessel also had to be managed and its operations directed and controlled from within the United Kingdom. The Act was challenged for its compatibility with Community law both by Spanish fishing companies before British courts (which referred the matter to the European Court for a preliminary ruling on the interpretation of the relevant Community law) and by the EC Commission directly before the European Court in an Article 169 action. The

European Court gave parallel judgements in the two cases.⁴⁶ *Factortame* and the Commission argued that the British legislation was contrary to Community law rules on non-discrimination and freedom of establishment. One of the arguments raised by the British government in defence of the Act was that the Act was required in order to comply with the genuine link requirement in Article 5 of the High Seas Convention, and this therefore justified the Act in not complying with Community law. The Court dealt with this argument very briefly, simply observing:

That argument might have some merit only if the requirements laid down by Community law with regard to the exercise by the Member States of the powers which they retain with regard to the registration of vessels conflicted with the rules of international law.⁴⁷

The Court's observation is scarcely an adequate rebuttal of a complex argument, and certainly sheds no light on the meaning of the genuine link requirement. A fuller and more satisfactory rebuttal of the British government's argument was given by Advocate General Mischo in his opinion. He noted that:

In so far as compliance with the rules of the Treaty in relations between the Member States does not jeopardise non-member countries' rights under the 1958 Geneva Convention, the United Kingdom cannot rely on that Convention in order to justify infringements of those rules.

The Advocate General also came to the conclusion that whilst the criterion of the owner's nationality was consistent with a fairly widespread international practice, it was not part of customary international law.

No provision of the 1958 Geneva Convention obliges it [i.e. the United Kingdom] to have recourse to particular conditions in order to ensure that there is a 'genuine link' between it and the ships to which it intends to grant flag rights. Consequently, even if a non-member country may possibly be entitled not to recognise a flag

⁴⁶ Case C-221/89, *R v. Secretary of State for Transport ex p. Factortame*, [1991] ECR I-3905 ; and C-Case 246/89, *Commission v. United Kingdom*, [1991] ECR I-4585.

granted in a manner contrary to the Geneva Convention, it can do so only insofar as there is no 'genuine link', regardless as to its nature, between the vessel and the State whose flag it is flying.

The Advocate General went on to point out that given that the requirements about the nationality of shareholders and directors etc. were applicable only to fishing vessels and not to other British vessels, this showed that the British government did not regard such requirements as suitable for ensuring the existence of a genuine link.⁴⁸ Thus, the Advocate General suggests that criteria relating to beneficial ownership are not necessarily essential to ensuring a genuine link. Interestingly, he also suggests that other States might be entitled not to recognise the nationality of a vessel in respect of which there was no genuine link between it and its flag State.

The Court has maintained the position that it took in *Factortame* in a number of subsequent cases.⁴⁹ It is also of interest to note Advocate General Tesouro's opinion in one of these cases, *Commission v. Hellenic Republic*. In response to a similar argument to that raised by the United Kingdom in the *Factortame* case, the Advocate General stated:

Article 5 of the Geneva Convention cannot be interpreted as a rule requiring a genuine link between a State and a ship to be in a particular form as a necessary precondition for the grant of nationality. Apart from the fact, not to be overlooked, that it is precisely the definitive version [i.e. Article 5 as opposed to the International Law Commission draft article] which refutes the idea of making the grant of nationality in respect of a ship dependent on the ship's being owned preponderantly by citizens of the flag State, it must be said that the aforesaid provision is silent as to the preconditions for the existence of a 'genuine link', so that it comes to mean effective control and jurisdiction which the State is bound to exercise over ships to which it has irrevocably granted its nationality. If anything, then, far from being a condition for the grant of nationality, the 'genuine link' amounts primarily to a duty of supervision resulting from the grant of nationality. It is consistent with this interpretation of a 'genuine link' to require that the place where the vessel is managed, directed and controlled should be in the territory of the flag State.⁵⁰

⁴⁷ Para. 16 of the judgement in Case C-221/89; para. 14 of the judgement in Case C-246/89.

⁴⁸ Paragraph 15 of the Advocate General's opinion.

⁴⁹ See Case C-334/94, *Commission v. France* [1996] ECR I-1307; Case C-151/96, *Commission v. Ireland* [1997] ECR I-3327; and Case C-62/96, *Commission v. Hellenic Republic* [1997] ECR I-6725.

⁵⁰ Para. 13 of his opinion.

The European Court has also considered the question of whether a ship apparently not having a genuine link with the State of which it has the nationality must nevertheless be regarded as having that nationality. This issue arose in *Anklagemyndigheden v. Poulsen and Diva Navigation*.⁵¹ This case concerned a Panamanian-registered vessel which was both beneficially owned and crewed by Danish nationals. The vessel was arrested and prosecuted when it put into a Danish port with a cargo of salmon on board which had allegedly been caught in contravention of an EC regulation. The case was referred to the European Court by the Danish court for a preliminary ruling. One of the questions the European Court was asked was whether a vessel registered in a non-EC Member State could be treated, for the purposes of the EC regulation, as a vessel with a nationality of a Member State on the grounds that there was a genuine link between that vessel and that Member State. To this question the European Court replied:

Under international law a vessel in principle has only one nationality, that of the State in which it is registered (see in particular articles 5 and 6 of the Geneva Convention on the High Seas . . .).

It follows that a Member State may not treat a vessel which is already registered in a non-Member country and therefore has the nationality of that country as a vessel flying the flag of that Member State.

The fact that the sole link between a vessel and the State of which it holds the nationality is the administrative formality of registration cannot prevent the application of that rule. It was for the State that conferred its nationality in the first place to determine at its absolute discretion the conditions on which it would grant its nationality (see in particular article 5 of the Geneva Convention on the High Seas . . .).⁵²

The European Court here takes an extreme position, apparently suggesting both that administrative formalities alone are sufficient and that there are no other criteria required for the grant of nationality (and therefore that nothing further is required to establish a genuine link). The Court also appears to deny the possibility that other States could ever refuse to recognise the grant of nationality to a vessel by a particular State, however flimsy the

⁵¹ Case C-286/90, [1992] ECR I-6019.

⁵² Paras 13-15 of the Court's judgement.

connections between the vessel and that State might be. The Court's view was also shared by Advocate General Tesouro.

The Court repeated what it said in the *Poulsen* case in a case decided two days later, *Commission v. Ireland*.⁵³ In this case Ireland had sought to justify regulations which prohibited what were effectively Spanish-owned British vessels from fishing in its waters or landing fish in its ports on the ground that under international law it was authorised to decline to recognise the nationality of vessels which did not have a genuine link with the State whose flag they flew.

Finally, it is of interest to consider the Opinion of Advocate General Mischo in the earliest of the cases considered here, *R v. Ministry of Agriculture, Fish, Fisheries and Food ex p. Jaderow*.⁵⁴ This case, like the *Factortame* case, was concerned with the so-called quota-hopping activities of Spanish fishermen. In this case the United Kingdom had issued licences to Spanish beneficially-owned British vessels including a condition that such vessels must operate from British ports. This condition had been challenged by Jaderow as being incompatible with Community law. The Advocate General rejected such an argument and noted that the right of a Member State to require its fishing vessels to operate from its ports could not, in particular, be called into question if one considered the provisions of Articles 5 and 10 of the High Seas Convention. "It appears from those provisions that a Member State may not be criticised for considering that it would be unable to carry out the prescribed verifications if each vessel was not periodically present in one of its ports."⁵⁵ In other words, the Advocate General is saying that in order for a flag State to be able to exercise its jurisdiction effectively, it is entitled to require its vessels to operate from its ports. The Advocate General also took the view that the United Kingdom was entitled to consider that Jaderow's domiciliation of its vessels in the United Kingdom and its payment of taxes in the United Kingdom were insufficient to constitute a genuine link.

⁵³ Case C-280/89, [1992] ECR I-6185.

⁵⁴ Case 216/87, [1989] ECR I-4509. Nothing of relevance to the present discussion was said by the Court in this case.

⁵⁵ Para. 11 of the opinion.

It appears simply from reading Article 5 of the Convention on the High Seas that the Member State in question [i.e. the United Kingdom] cannot be criticised for taking the view that those factors alone do not enable it effectively to exercise its jurisdiction and supervision in technical, administrative and social matters over vessels flying its flag.

It must not be forgotten in this regard that the countries which offer so-called flags of convenience also require companies owning vessels registered with them to have their registered office in their own country and to pay the taxes laid down by the law.⁵⁶

The Advocate General here seems to be coming very close to saying that a flag of convenience State whose only connection with a vessel is the fact that the company owning that vessel has a registered office in its territory does not have a genuine link with that vessel.

Summing up this case law, a rather mixed picture emerges. The European Court appears to take the view that registration alone is sufficient to establish nationality and that nothing further is required to constitute a genuine link. Furthermore, other States may not question the nationality of a vessel, no matter how tenuous the links between it and its flag State. Advocate General Tesauro sees the genuine link less as a condition of nationality and more as laying down an obligation on the flag State to exercise effective jurisdiction and control over its ships. On the other hand, Advocate General Mischo not only sees the existence of a genuine link as an essential condition for the grant of nationality but also takes the view that this entitles the flag State to lay down a variety of conditions to ensure that it is in a position to exercise effective jurisdiction and control, although there is no particular condition that is required by international law. He also appears to suggest that other States may refuse to recognise the nationality of a ship where there is no genuine link between it and the flag State.

It may be asked what authority these judgements of the European Court and opinions of the Advocates General have. Clearly, the European Court is authoritative in its pronouncements

⁵⁶ Paras. 50 and 51 of the opinion.

on European Community law. It is less authoritative in its pronouncements on public international law - clearly it is less authoritative than the International Court of Justice or other international courts, which deal constantly with public international law. At the same time the European Court's pronouncements would appear to have more authority than those of national courts. Overall, it is probably fair to say that the European Court's treatment of international law in its case law has been somewhat mixed. Certainly there have been occasions on which its treatment of the law has not been very cogent and its rulings have received criticism from academic commentators. There has been something of a tendency for the European Court to adopt a view of international law which best suits its conception of Community law: this can be seen, for example, in the *Factortame* case referred to above. The collegiate nature of the Court's judgement whereby the Court gives a single judgement representing the views of all members of the Court, with no separate or dissenting opinions, often leads to its judgements being terse and laconic, and without a full development of the argument: again this can be seen in the *Factortame* case. The Advocate General's opinions, on the other hand, are usually much more fully argued and often more cogent, although obviously considerably less authoritative than the Court's judgements.

3.5 The Views of Writers

Before attempting to draw some conclusions on the basis of the materials which have been examined above, it is desirable briefly to survey the views of writers on the issues under consideration. The question of the meaning of the "genuine link" and the consequences which follow from the absence of such a link have been the subject of a considerable literature. For reasons of space, only a selection of authors on this subject can be examined here, and then, because of linguistic limitations, only those authors writing in English or French.

The views of writers on the meaning of the genuine link vary enormously. At one extreme, there is the policy-orientated New Haven school of jurisprudence, exemplified by

McDougal and his associates⁵⁷ and Boczek⁵⁸, which is opposed to a genuine link requirement and favours a policy of liberalisation as far as shipping is concerned. These writers attack the lack of clarity of definition of the genuine link: in the words of McDougal and Burke, it is “the most ambiguous criterion ever devised for identifying the national character of a ship.”⁵⁹ These writers also criticise the fact that it is not clear whether Article 5 lays down two tests - the genuine link plus the effective exercise of jurisdiction - or whether there is one test, which is the effective exercise of jurisdiction. The lack of clarity as to the consequences that follow where there is no genuine link is also the subject of sustained criticism, and it is argued that insistence on such a link will lead to increasing numbers of stateless ships and to frequent searches of ships flying a flag suspected of not being bound by a genuine link: such developments would put in jeopardy the entire world’s shipping industry. Much is made, too, of the fact that the genuine link is capable of impeding competition in the shipping industry, and that the general community interest is best served by as few restraints on competition as possible. They argue that the only test of nationality should be registration of the vessel concerned in the flag State; and that once the vessel has been registered, other States are bound to accept the nationality thus conferred. Boczek therefore concludes that “the genuine link clause of art. 5 must be interpreted as a general rule laying down, in the interests of safety and order of navigation, the duty of the flag State to control effectively on the high seas the ships flying its flag.”⁶⁰

Other writers, less overtly influenced by policy considerations, have been critical of the genuine link concept. O’Connell, for example, concludes that the concept is impossible to apply because no explicit connection can be established between a State and the shipowner where that owner is a company.⁶¹ McConnell draws particular attention to the lack of clarity concerning the phrase relating to effective jurisdiction and control, and states that the relationship between the genuine link, jurisdiction and control and registration remains

⁵⁷ M. S. McDougal and W. T. Burke, *The Public Order of the Oceans* (1962), Chapter 8; and M. S. McDougal, W. T. Burke and I. A. Vlasic, “The Maintenance of Public Order at Sea and the Nationality of Ships”, (1960) 54 *American Journal of International Law* 25.

⁵⁸ B. Boczek, *Flags of Convenience: An International Legal Study* (1962). See especially chapter IX.

⁵⁹ McDougal and Burke, *op. cit.*, p. 1122.

⁶⁰ *Op. cit.*, p. 283.

⁶¹ D. P. O’Connell, *The International Law of the Sea*, Vol. II (1984), p. 760.

unclear. She asks: “Is effective control proof of genuine link, a consequence of it, or a condition precedent to registration?” She goes on to ask whether effective jurisdiction and control is constituted by the mere fact of registration of the ship with the flag State, or whether something more is required, and if so, what.⁶² Wefers Bettink concentrates on what he regards as the ineffectiveness of the genuine link requirement, arguing that as there is no sanction for its absence, States can in practice implement the requirement as they wish.⁶³ Other authors who are particularly critical of the drafting of Article 5 include Johnson.⁶⁴

A third group of writers are less critical of the drafting and even somewhat supportive of Article 5. Dupuy and Vignes, after pointing out that the 1958 Conference chose not to define a genuine link, conclude that Article 5 leaves it to each State to determine what constitutes a genuine link. The genuine link is a means to achieving the end of effective exercise of flag State jurisdiction. They also conclude that as the 1958 Conference deleted the International Law Commission’s provisions concerning non-recognition, no State has the right to criticise the conditions laid down by other States for the grant of nationality or the right not to recognise that nationality.⁶⁵ In somewhat similar vein Tache argues that the insertion of the phrase beginning “in particular” in Article 5(1) injected a dichotomy into the meaning of the “genuine link”, namely “legal and functional. Legally, all that is required of a flagstate [*sic*] to establish genuine link is the conferment of national character upon a ship. However, the flagstate has a secondary duty, functional in nature, to effectively exercise jurisdictional control over the internal affairs of the ship.” He goes on to add that the requirement of the effective exercise of jurisdiction is not “a precondition for the recognition of nationality”, it is “an implied duty accepted by the flagstate vis à vis the international community.”⁶⁶ Anderson, on the other hand, takes a very limited view of the genuine link requirement; and, relying on the *Nottebohm* case, states simply that once a ship has been registered, a genuine link has been established: thus a genuine link is acquired after

⁶² M. L. McConnell, “‘...Darkening Confusion Mounted Upon Darkening Confusion’: The Search for the Elusive Genuine Link”, (1985) 16 *Journal of Maritime Law and Commerce* 365 at 376.

⁶³ H. W. Wefers Bettink, “Open Registry, the Genuine Link and the 1986 Convention on Registration Conditions for Ships”, (1987) 18 *Netherlands Yearbook of International Law* 69 at 86.

⁶⁴ D. H. N. Johnson, “The Nationality of Ships”, (1959) 8 *Indian Yearbook of International Affairs* 3.

⁶⁵ R.-J. Dupuy and D. Vignes, (eds.), *A Handbook of the New Law of the Sea* (1991), pp. 403-5.

registration rather than before.⁶⁷ Similarly, Ready argues that the genuine link, being expressed in terms of flag State jurisdiction and control over the ship, seems to arise *ex post facto* after the ship has been registered. “If the genuine link is seen in these terms, there seems no reason to deny the existence of such a link in the case of ships entered in a properly administered open registry.”⁶⁸

Finally, there is a group of writers, who come predominantly from the States which were the most ardent supporters of the genuine link requirement at the 1958 Conference and in the *IMCO* case and who are particularly supportive of the genuine link. For example, Sorensen states that while no attempt was made by the International Law Commission or the 1958 Conference to define a genuine link, among the criteria which can be used for such a definition are the nationality or domicile of the owner, his principal place of business and the nationality of officers and crew. In the case of ships owned by companies, the criteria may include nationality or domicile of the shareholders or a proportion of them. As regards the effective exercise of jurisdiction clause, Sorensen concludes that this “in effect relates the ‘genuine link’ not only to the qualities of the ship and its owner, but also to the legal possibilities of the State to control the ship. If such possibilities are absent, the State is not entitled to enter or to maintain the ship on its register.”⁶⁹ This view is also supported by Verzijl,⁷⁰ Mender⁷¹ and various French writers.⁷² In fairly similar vein, Singh suggests that a genuine link will be constituted where one or more of the following factors exist: beneficial ownership of the ship by nationals of the flag State; manning of the ship by officers and crew having the nationality of the flag State; and the enactment of appropriate legislation by the

⁶⁶ S. W. Tache, “The Nationality of Ships: The Definitional Controversy and Enforcement of the Genuine Link”, (1982) 16 *International Lawyer* 301 at 305 (footnotes in original omitted).

⁶⁷ H. E. Anderson, “The Nationality of Ships and Flags of Convenience: Economics, Politics and Alternatives”, (1996) 21 *Tulane Maritime Law Journal* 139 at 149.

⁶⁸ N. P. Ready, *Ship Registration* (3rd edition, 1998), p. 15.

⁶⁹ M. Sorensen, “The Law of the Sea”, (1958) 520 *International Conciliation* 195 at 204-5.

⁷⁰ J. H. W. Verzijl, “The United Nations Conference on the Law of the Sea, Geneva, 1958”, (1959) 6 *Netherlands International Law Review* 115.

⁷¹ P. G. Mender, “Nationality of Ships: Politics and Law”, (1961) 5 *Arkiv for Sjörett* 265 at 350-67. Mender also argues that other States may challenge the exercise of discretion by a flag State in granting its nationality to a ship (at p. 356).

⁷² R. Pinto, “Flags of Convenience”, (1960) 87 *Journal du Droit International* 344 at 363; J-M. Roux, *Les Pavillons de Complaisance* (1961), p. 71; and M-R. Simmonet, *La Convention sur la Haute Mer* (1964), p. 70: all as quoted in Dupuy and Vignes, *op. cit.*, p. 405.

flag State to control the operation, management and running of its ships.⁷³ Last, but very definitely not least, are the views of Meyers, the author of the standard (if somewhat dated) monograph on the nationality of ships.⁷⁴ He points out that while the term “genuine link” is vague, international law in general, and the 1958 Convention in particular, often contain vague and general terms: in this case the expression is manageable. The term “genuine link” is a collective expression for a flag State’s means of establishing and maintaining sufficient authority over its ships. “Means” in this context are, on the one hand, the circumstances of fact relating to the government agencies charged with the control of ships (in particular their number, ability, equipment etc.) and, on the other hand, the circumstances of fact relating to the “ship-users or their goods” (in particular, the circumstances which bring the ship-user within the reach of the said government agencies such as his business connections with the flag State).⁷⁵ Effective jurisdiction and control are not criteria for establishing a genuine link, but the results a genuine link should bring. “It is a condition ‘governing nationality’ that the State should create a link such that it can always exercise effective control over the ship.”⁷⁶ However, it is not a requirement of international law that the genuine link take an economic form, such as requiring the beneficial owner, operator or crew to have the nationality of the flag State. As regards the consequences of the lack of a genuine link, Meyers argues that the fact that the clause beginning “nevertheless, for the purposes of recognition” in the International Law Commission’s draft was deleted at the 1958 Conference, does not necessarily mean that non-recognition is prohibited. There were probably other reasons for the deletion of the clause than a wish to prohibit non-recognition. Thus, Meyers argues that non-recognition is still possible where there is no genuine link, although the burden of proof that the link is not genuine rests on the non-recognising State.⁷⁷

It is obvious from this brief survey that there is no consensus among writers as to what is meant by a genuine link or the consequences that follow from its absence. Indeed, opinions on these questions are so diverse that it cannot even be said that a predominant view emerges.

⁷³ N. Singh, “International Law Problems of Merchant Shipping”, (1962) 107 *Recueil des Cours* 1 at 55-64.

⁷⁴ H Meyers, *The Nationality of Ships* (1967). Chapter IV deals with the genuine link.

⁷⁵ *Ibid.*, pp. 249-52.

⁷⁶ *Ibid.*, p. 218.

⁷⁷ *Ibid.*, pp. 282-3.

3.6 Conclusions

There was general agreement in the International Law Commission and at the 1958 Conference that the registration of a ship (and thereby the conferment of nationality upon that ship) is more than a mere administrative formality; and this conclusion is reinforced by the context of Article 5(1) of the 1958 Convention, namely Article 6(1). There must be a link between the ship and the flag State, and that link must be “genuine”. There is no express definition of “genuine” in the Convention text. If we interpret “genuine” in good faith in its ordinary meaning (as directed by Article 31 of the Vienna Convention on the Law of Treaties), this means that there must be some real link or, in the French text, some substantial link between the flag State and the ship, not an artificial or tenuous link. But it is not clear what is required to constitute such a link. It would seem from the preponderance of views expressed at the 1958 Conference and in the pleadings in the *IMCO* case that with the possible exception of the effective exercise of flag State jurisdiction and control, there is no agreed single requirement for establishing a genuine link. States have a choice of means for doing so. A genuine link could be established by, for example, requiring all or a majority of the beneficial owners and/or crew of a ship to have the nationality of the flag State. It must be pointed out, however, that there was no support either in the International Law Commission or at the 1958 Conference for making such requirements compulsory or the sole criteria for a genuine link. There seems much more agreement that the effective exercise of flag State jurisdiction constitutes an essential requirement of the genuine link. This follows from the *travaux préparatoires*, the *IMCO* case pleadings and the wording of Article 5 itself. Such a criterion best supports the object and purpose of the 1958 Convention (*cf.* Article 31 of the Vienna Convention on the Law of Treaties) which is to ensure that there is order on the high seas. The problem with the effective exercise of jurisdiction criterion is that it is vague and risks being subjectively interpreted and applied. It is also not clear what might be required as a corollary of the effective exercise of jurisdiction;

whether, for example, it requires that the shipowner has a manager or agent resident in the flag State or that the ship calls at ports where the flag State has the necessary facilities to carry out the kinds of surveying and certification activities which are imposed on flag States by various international conventions.

As regards the other issue which is the subject of this study, namely the consequences of the lack of a genuine link, again nothing is said in the High Seas Convention about this, and a proposal by the International Law Commission specifically providing for non-recognition of the national character of a ship in such circumstances was in fact deleted at the 1958 Conference. This action might suggest that it was intended that no consequences should follow where there is a lack of a genuine link. Meyers points out, however, that logically this is not the only conclusion that can be drawn from the Conference's decision to delete the phrase. Alternative conclusions are that the phrase was deleted because of its inelegance, its technical weakness or the risk of its being misinterpreted.⁷⁸ If no consequences followed where there was no genuine link, this would render the requirement of a genuine link pointless, because a ship would be in exactly the same position whether it had a genuine link with the flag State or not. It is a basic maxim of treaty interpretation that the provisions of a treaty should be interpreted to be effective rather than ineffective and should be assumed to have a meaning and a purpose.⁷⁹ It must therefore follow that some consequences must result where there is no genuine link. This is supported both by Judge Jessup's observations in the *Barcelona Traction* case and by the *Nottebohm* case, where the International Court of Justice held that where nationality is conferred by a State under its national law, that nationality will be perfectly valid by national law, but it may not necessarily be entitled to recognition by other States. It may therefore legitimately be concluded that a ship without a genuine link is at risk of having its nationality not recognised by another State, or at least of its flag State being denied the right to exercise diplomatic protection on its behalf. What precise consequences might follow from the non-recognition of nationality are, however, uncertain. It could be that the ship would be regarded as stateless, but this would not necessarily entitle other States to exercise jurisdiction over it on the high seas. While

⁷⁸ Meyers, *op. cit.*, pp. 278-9.

stateless vessels do not have a flag State by definition, this does not mean that other States are entitled to exercise their jurisdiction over them, notwithstanding the decisions of some municipal law courts to the contrary.⁸⁰ The State of the nationality of those on board or the State of nationality of the shipowner might still be able to exercise jurisdiction over activities on the ship, and to exercise diplomatic protection vis à vis other States.⁸¹

⁷⁹ Sinclair, *op. cit.* in n. 14, p. 118.

⁸⁰ For example, *Molvan v. the Attorney General for Palestine (The Asya)* [1948] AC 351; *US v. Marino-Garcia* 679 F. 2d 1373, 1985 AMC 1815 (11th Circ. 1982).

⁸¹ See further R. R. Churchill and A. V. Lowe, *The Law of the Sea* (3rd ed., 1999), pp. 213-4. So, too, Anderson, *op. cit.* in n. 67, pp. 142-3.

4. THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA, 1982⁸²

4.1 Introduction

This Convention is the product of the Third United Nations Conference on the Law of the Sea, which was held between 1973 and 1982. The Convention came into force on November 16, 1994. As of May 5, 2000 the Convention had 133 parties. The principal States with a significant interest in shipping which are not parties to the Convention are Canada, Denmark, Liberia, Turkey and the USA.

Article 91 of the Convention provides as follows:

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. **There must exist a genuine link between the State and the ship.** (emphasis added)

As will be noticed, Article 91 is identical to Article 5 of the 1958 High Seas Convention except for the omission of the phrase at the end of Article 5, namely “in particular, the State must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.” The omitted phrase is now to be found in Article 94(1). The remainder of Article 94 contains an extensive list of the duties of flag States which fill out the general obligation in paragraph 1. The significance of this change from Article 5 of the 1958 Convention is commented on in sections 4.3 and 4.6 below.

4.2 A Preliminary Approach to Interpretation

⁸² Text in (1982) 21 *International Legal Materials* 1245.

Like the 1958 Convention, the 1982 Convention does not state explicitly what is meant by a “genuine link” nor does it specify what consequences follow in the absence of such a link. As with the 1958 Convention, it is therefore necessary to attempt to interpret Article 91 and its provision concerning the genuine link, following the same approach as was taken with the 1958 Convention and Article 5 in section 3. It should be noted at the outset that the French and Spanish terms for “genuine link” in Article 91 of the 1982 Convention (“lien substantiel” and “relacion autentica”) are the same as in Article 5 of the 1958 Convention.

It will be recalled from section 3.2 above that in interpreting a treaty provision the point of departure is Article 31 of the Vienna Convention on the Law of Treaties, which directs us to interpret a particular provision in accordance with its ordinary meaning in its context and in the light of the object and purpose of the treaty. Thus there are three things to be looked at: the ordinary meaning of the provision, the context, and the object and purpose of the 1982 Convention. As regards the ordinary meaning of the term “genuine link” in Article 91, the same comments can be made as were made in section 3.2 about Article 5 of the High Seas Convention.

As far as the context of Article 91 is concerned, of the various materials mentioned in Article 31(2) of the Vienna Convention, the only one relevant here is the text of the 1982 Convention. There are three provisions of the Convention which must be considered as part of the context. The first is Article 92, which is identical to Article 6 of the High Seas Convention (concerning the prohibition of a change of flag during a voyage or while a ship is in port, save where there is a real transfer of ownership or change of registry): the same comments can be made about it as were made in respect of Article 6 in section 3.2 above. The second provision of the 1982 Convention which can be considered as part of the context is Article 94, which, as mentioned above, contains an extensive list of flag State duties. These include, *inter alia*, an obligation on a flag State to maintain a register of its ships and to apply generally accepted international standards in respect of the construction, equipment, seaworthiness and manning of ships, labour conditions and the training and qualifications of crews. The leading commentary on the 1982 Convention points out that paragraph 1 of Article 94 has been taken from Article 5 of the 1958 Convention where it

was originally adopted “for the purpose of strengthening the concept of ‘genuine link’ with regard to the nationality of a ship,” and goes on to say that the article “gives further indication of the link between the flag State and ships flying its flag” and that the “inability of the flag State to exercise its jurisdiction and control with respect to a ship flying its flag may have implications as to whether a genuine link exists between the flag State and that ship.”⁸³ The third provision in the Convention which is relevant as part of the context is Article 217, which requires flag States effectively to enforce rules concerning pollution in respect of their ships. The Nordquist commentary points out that “this corresponds to, and amplifies, the general statement of the powers and duties of the flag State in Article 94,” and appears to suggest that the observance of this obligation is also relevant to the question of the existence of a “genuine link”.⁸⁴

It will be recalled from section 3.2 that Article 31(3)(b) of the Vienna Convention on the Law of Treaties provides that there is to be taken into account, together with the context, “any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.” When discussing the practice of States parties to the High Seas Convention, it was suggested that practice in the form of legislation by States parties (the only form of practice by parties to that Convention) was too diverse to be regarded as “subsequent practice” within the meaning of Article 31(3)(b) of the Vienna Convention and therefore to be relevant to interpretation of the High Seas Convention. The same comment can be made, even more forcefully, in respect of the 1982 Convention, since with many more parties than the 1958 Convention (including all the principal flag of convenience States except Liberia) practice in the form of legislation concerning the nationality of ships is even more diverse. Furthermore, much of this legislation predates the 1982 Convention and is therefore irrelevant, as “practice” in Article 31(3)(b) of the Vienna Convention refers only to practice subsequent to the conclusion of the treaty concerned. One other possible piece of practice may be mentioned. In 1992 the UN Security Council adopted a resolution providing for the enforcement of economic sanctions against Serbia

⁸³ M. H. Nordquist (ed.), *United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol. III (1995), pp. 108, 144 and 150.

⁸⁴ *Ibid.*, Vol. IV (1991), pp. 255 and 257.

and Montenegro, including the stopping and searching of ships on the high seas.⁸⁵ Paragraph 10 of the resolution stipulated that any ship in which the majority or controlling interest was held by a person operating from Serbia and Montenegro should be considered a ship of Serbia and Montenegro for the purposes of implementation of Security Council resolutions, regardless of the flag under which the ship sailed. Could this resolution be regarded as subsequent practice relating to the application of the 1982 Convention, especially as regards the consequences of the absence of a genuine link? The answer must clearly be no. First, the Security Council, consisting as it does of only 15 States, could hardly be said to represent the parties to the Convention. In any case, at the time of the adoption of the resolution in 1992, the Convention was not in force and none of the five permanent members of the Security Council had ratified the Convention. Secondly, the resolution makes it clear that its provisions about looking behind the flag are for the purpose of implementing Security Council resolutions, and not the purpose of interpreting the 1982 Convention or of upholding the genuine link requirement. Overall, therefore, there appears to be no practice by parties to the 1982 Convention which can be used as an aid to interpreting Article 91 as to the meaning of the term “genuine link” or the consequences that follow from its absence.

As far as the third element of interpretation is concerned, the object and purpose of the treaty, the 1982 Convention in its preamble lists a number of objectives of the Convention. Of these, the most relevant is the statement in paragraph 4 of the preamble that the parties to it recognise the desirability of establishing, with due regard for the sovereignty of all States, “a legal order for the seas and oceans which will facilitate international communication, and will promote the peaceful uses of the seas and oceans, the equitable and efficient utilisation of their resources, and the conservation of their living resources, and the study, protection and preservation of the marine environment.” Fairly similar conclusions can be drawn from this statement as to the light it sheds on the meaning of the genuine link as were drawn in respect of the unarticulated object and purpose of the 1958 Convention.

⁸⁵ Resolution 787 of November 16, 1992.

As with the 1958 Convention, employing the approach to treaty interpretation set out in Article 31 of the Vienna Convention on the Law of Treaties reveals no clear and precise meaning of the term “genuine link”, although both the context and object and purpose of the Convention suggest that the link between a ship and its flag State must be such as to enable the latter to exercise effective control over its ships. Furthermore, applying Article 31 of the Vienna Convention sheds no real light as to the consequences that follow in the absence of a genuine link between a ship and its flag State as there are no provisions in the 1982 Convention dealing explicitly (or even implicitly) with this question. In the case of both issues, therefore, it is permissible and necessary to have recourse to Article 32 of the Vienna Convention and consider the materials referred to there.

4.3 Travaux Préparatoires

As mentioned above, the 1982 Convention is the product of the Third UN Conference on the Law of the Sea. This Conference worked in a very different way from the First UN Conference on the Law of the Sea, which produced the 1958 Convention on the High Seas. In particular, it had no set of draft articles before it prepared by the International Law Commission or any other body of experts. Instead it was faced with a mass of proposals put forward by States, either individually or jointly in small groups. As far as the high seas and the nationality of ships were concerned, most of the limited number of proposals which had been made were content merely to reproduce more or less verbatim the provisions of the 1958 Convention. At the first substantive session of the Conference, in 1974, the many and varied proposals which had been made were grouped into a single document called “Main Trends”. Provision 140 of this document was identical to Article 5 of the High Seas Convention.⁸⁶ The Main Trends paper was refined in the following year by the chairman of Committee II (to which committee issues concerning the high seas and the nationality of ships had been assigned) into an Informal Single Negotiating Text, acting on work done (as far as the high seas were concerned) by the Informal Consultative Group on the High Seas. Article 77 of this Text was the same as Article 5 of the High Seas Convention with the

significant exception that the phrase at the end of Article 5, “in particular, the State must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag”, was deleted.⁸⁷ Unfortunately the published records of the Conference do not explain why the Informal Consultative Group on the High Seas and the Chairman of Committee II made this change to Provision 140 of the Main Trends paper. The leading commentary on the Convention suggests that the provision about effective exercise of flag State jurisdiction was dropped from the last part of Provision 140 because it was repeated in paragraph 1 of Provision 142 (which dealt with flag State duties in a more comprehensive way than the 1958 Convention and eventually became Article 94 of the 1982 Convention),⁸⁸ but it does not comment on the possible significance of this change for the meaning of the term “genuine link.”⁸⁹ The Informal Single Negotiating Text was followed by a number of further Negotiating Texts, eventually culminating in a draft Convention, but these made no further changes to the provisions of Article 77 of the Informal Single Negotiating Text. One drafting change made to Article 91 (as Article 77 subsequently became) at the 10th session of the Conference in 1981 was to change the phrase “each State”, used in Article 5 of the 1958 Convention and the various Negotiating Texts, to “every State.” This change was made to harmonise Article 91 with other articles. Overall, while there was considerable focus on the duties of flag States to exercise their jurisdiction effectively over their ships, there appears to have been little discussion of the concept of the genuine link as such at the Third UN Conference.

Thus, unlike the *travaux préparatoires* of the 1958 Convention, the *travaux préparatoires* of the 1982 Convention shed very little light on the meaning of the term “genuine link” or the consequences that follow where no such link exists. Nevertheless, one observation may be made and a possible conclusion drawn. It would not seem permissible to deduce from the difference between Article 5 of the High Seas Convention and Article 91

⁸⁶ *Third United Nations Conference on the Law of the Sea, Official Records*, Vol. III, p. 107 at 130.

⁸⁷ *Ibid.*, Vol. IV, p. 137 at 164.

⁸⁸ Provision 142 derived from a proposal made by the then nine EC Member States: see *Third United Nations Conference on the Law of the Sea, Official Records*, Vol. III, p. 229.

⁸⁹ *Op. cit.* in n. 83, p. 105. The same reason for the change is also suggested by the UN study on the drafting of the Convention: see United Nations, *The Law of the Sea: Navigation on the High Seas. Legislative History of Part VII, section 1 (Articles 87, 89, 90 - 94, 96 - 98) of the United Nations Convention on the Law of the Sea* (1989), p. 66.

of the 1982 Convention that the effective exercise of flag State jurisdiction is no longer an element in the genuine link. It does not seem that the drafters of the 1982 Convention had any intention, when deleting the effective exercise of jurisdiction phrase, of affecting the meaning of the term “genuine link”. Furthermore, as pointed out earlier, the Nordquist commentary, in discussing Article 94 of the 1982 Convention, regards the inability of the flag State to exercise its jurisdiction effectively in respect of its ships as having implications as to whether a genuine link exists between the flag State and its ships.

4.4 Decisions of Courts

This section looks at decisions of courts to see if they shed any light on the questions with which this study is concerned. The courts whose decisions will be examined are the International Tribunal for the Law of the Sea and the European Court of Justice.

4.4.1 The International Tribunal for the Law of the Sea

Of the small number of cases which have so far been decided by the Tribunal, one is concerned to a considerable degree with the issues which are the subject of this study. This is the *M/V Saiga (No.2) Case (St. Vincent and the Grenadines v. Guinea)*, in which the Tribunal gave its judgement in July 1999.⁹⁰ The case concerned the arrest by Guinea of the *M/V Saiga*, an oil tanker used for supplying gas oil to fishing vessels off West Africa, for alleged violations of Guinea’s customs laws. The *Saiga* was registered in St. Vincent, owned by a Cypriot company, managed by a Scottish company, chartered to a Swiss company and its officers and crew were Ukrainian. St Vincent argued that the arrest was contrary to international law.

At the outset of its judgement, the Tribunal had to deal with various objections by Guinea to the admissibility of St. Vincent’s claims. Guinea argued that the *Saiga* had not been validly

⁹⁰ (1999) 38 *International Legal Materials* 323; also on the internet at http://www.un.org/Depts/los/Judg_E.htm.

registered in St. Vincent at the time of its arrest by Guinea, but that even if it had been, there was no genuine link between the *Saiga* and St. Vincent and therefore St. Vincent was not competent to bring a claim on behalf of the *Saiga*. As regards Guinea's first objection, the Tribunal observed that by virtue of Article 91 of the 1982 Convention, which in this respect "codifies a well-established rule of general international law,"⁹¹ the granting of nationality to a ship is a matter within the exclusive jurisdiction of the State concerned and it is up to that State to regulate by its domestic law the conditions for the grant of nationality. The Tribunal found as a question of fact that at the relevant time the *Saiga* was validly registered under the law of St. Vincent as one of its ships and therefore had its nationality. The Tribunal also concluded that by not challenging the nationality of the *Saiga* until its counter-memorial, when it had had every opportunity to do so in the earlier proceedings in the case, including the orders for prompt release of the vessel and provisional measures, and by its other conduct accepting the nationality of the ship, Guinea could not successfully challenge the registration and nationality of the *Saiga* at the merits stage of the case.

As regards Guinea's other objections to admissibility, the Tribunal, rather curiously perhaps, dealt with the question of whether the absence of a genuine link between a flag State and a ship entitled another State to refuse to recognise the nationality of that ship before dealing with the question of whether there was a genuine link between the *Saiga* and St. Vincent. As to the former question, the Tribunal began by noting that the provision of Article 91 concerning the genuine link did not provide an answer to this question, nor did Articles 92 and 94 "which together with Article 91 constitute the context of the provision."⁹² The Tribunal then noted that the International Law Commission's proposal that "for purposes of recognition of the national character of the ship by other States, there must exist a genuine link between the State and the ship" was not adopted at the 1958 Conference. The Tribunal went on to examine Article 94 of the 1982 Convention and to point out that under that Article the action which other States can take where a flag State is believed not to have exercised proper jurisdiction and control over one of its ships is limited to reporting the matter to the flag State. "There is nothing in Article 94 to permit a State which discovers

⁹¹ Judgement, para. 63.

⁹² Judgement, para. 80.

evidence indicating the absence of proper jurisdiction and control by a flag State over a ship to refuse to recognise the right of the ship to fly the flag of the flag State.”⁹³ The Tribunal therefore concluded that:

The purpose of the provisions of the Convention 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 be challenged by other States.⁹⁴

The Tribunal added that its conclusion was “further strengthened” by the 1993 FAO Compliance Agreement⁹⁵ and the 1995 UN Fish Stocks Agreement⁹⁶ which “set out, *inter alia*, detailed obligations to be discharged by the flag States of fishing vessels but do not deal with the conditions to be satisfied for the registration of fishing vessels.”⁹⁷ Nor did the Tribunal find that its conclusion was affected by the 1986 United Nations Convention on Conditions for the Registration of Ships.⁹⁸ The Tribunal therefore held, by 18 votes to 2 (Judges Warioba and Ndiaye dissenting), that “there is no legal basis for the claim of Guinea that it can refuse to recognise the right of the *Saiga* to fly the flag of St. Vincent and the Grenadines on the ground that there was no genuine link between the ship and St. Vincent and the Grenadines.”⁹⁹

As regards the question of whether there was a genuine link between the *Saiga* and St. Vincent, the Tribunal dealt with this in a single sentence, confining itself to finding that “the evidence adduced by Guinea is not sufficient to justify its contention that there was no genuine link between the ship and St. Vincent and the Grenadines at the material time.”¹⁰⁰

As far as the evidence put forward by Guinea is concerned, all that is mentioned by the Tribunal in its judgement is Guinea’s assertion that for a genuine link the flag State must

⁹³ Judgement, para. 82.

⁹⁴ Judgement, para. 83.

⁹⁵ Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, 1993. (1994) 33 *International Legal Materials* 968; discussed further in Section 5.2 below.

⁹⁶ Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, 1995. (1995) 34 *International Legal Materials* 1542.

⁹⁷ Judgement, para. 85.

⁹⁸ (1986) 7 *Law of the Sea Bulletin* 87. The Convention is discussed in Section 5.1 below.

⁹⁹ Judgement, para. 86.

exercise prescriptive and enforcement jurisdiction over the owner or, as the case may be, the operator of the ship. The counter-arguments of St. Vincent referred to by the Tribunal include the fact that the owner of the *Saiga* was represented in St. Vincent by a company formed and established in St. Vincent; the fact that the *Saiga* was subject to the supervision of the Vincentian authorities to secure compliance with the International Convention for the Safety of Life at Sea, the International Convention for the Prevention of Pollution from Ships and other IMO conventions; and the fact that arrangements had been made to secure regular supervision of the *Saiga*'s seaworthiness through surveys conducted by reputable classification societies authorised by St. Vincent.

As far as the question of the meaning of the "genuine link" requirement is concerned, it is submitted that the Tribunal's judgement does not shed much light on this matter. The Tribunal appears to take the view that the burden of proof is on the State asserting the absence of a genuine link to show such absence; in other words, there is a presumption that the link between a State and a ship flying its flag is genuine. This seems a perfectly reasonable position to take. However, the Tribunal does not state specifically what evidence was put forward by Guinea nor why this caused it to conclude that Guinea had not persuaded it that the link between the *Saiga* and St. Vincent was not genuine. It is therefore not clear what factors the Tribunal regards as relevant to the existence or otherwise of a genuine link, although the first part of its conclusion in paragraph 83 on the consequences of the absence of a genuine link, in the indented quotation above, suggests that effective exercise of flag State jurisdiction is a central element in the existence of a genuine link. The failure of the Tribunal to deal with this issue more fully may be due to the fact that Guinea did not apparently argue the point particularly fully or well, and/or to the Tribunal's view (referred to above) that if Guinea was going to contest the competence of St. Vincent to represent the *Saiga*, it should have done so earlier in the proceedings. In the indented quotation from paragraph 83 above, the Tribunal concludes that the purpose of the genuine link is "not to establish criteria by reference to which the validity of the registration of ships in a flag State may be challenged by other States." It is not clear whether the Tribunal also means by this that the existence or otherwise of a genuine link is not relevant to the question

¹⁰⁰ Judgement, para. 87.

of nationality but only to the question of the effective exercise of flag State jurisdiction,¹⁰¹ but if so, this is difficult to accept. The requirement of the genuine link is contained in Article 91, dealing with the nationality of ships, not Article 94 dealing with the effective exercise of flag State jurisdiction. The change between Article 5 of the High Seas Convention and Article 91 of the 1982 Convention if anything strengthens the view that the question of the genuine link is concerned with the question of nationality of ships. Furthermore, the drafting history of Article 5 of the High Seas Convention makes it very clear that the requirement of a genuine link is a requirement for the nationality of a ship.

As has been seen, the Tribunal concludes that the absence of a genuine link between a ship and the flag State does not entitle other States not to recognise the nationality of that ship. This is a tenable conclusion that can be drawn from the drafting history of Article 5 of the 1958 Convention and Article 91 of the 1982 Convention. On the other hand, the Tribunal's apparent suggestion that the non-entitlement of other States not to recognise the nationality of a ship also follows from Article 94(6) of the 1982 Convention (under which a State which believes that a flag State is not exercising proper jurisdiction and control is limited to reporting the matter to the flag State) is surely questionable. As was argued in section 3.6 above and as will be argued below, effective exercise of jurisdiction is not to be wholly equated with the genuine link. It therefore follows that the fact that a State is limited in the action which it can take in respect of a flag State's failure to exercise the various obligations imposed on it by Article 94, does not mean that no action can be taken where there is no genuine link as required by Article 91. The Tribunal does not, however, state what consequences (if any) do follow where the requirement of Article 91 is not met. It was suggested in section 3.6 above that some consequence must follow or the requirement of a genuine link serves no purpose. Of course, the Tribunal was only concerned with the question of whether the absence of a genuine link entitled other States not to recognise the nationality of the ship concerned, not with other possible consequences of such an absence. In any case, having decided that there was a genuine link between the *Saiga* and St.

¹⁰¹ Note that Judge Anderson, in his separate opinion, commented: "I do not read paragraph 83 of the Judgement as going so far as to say that the requirement of a 'genuine link' . . . has no relevance at all to the grant of nationality."

Vincent, the question of the consequence of the absence of such a link did not strictly need to be considered.

Some of the separate judgements given by judges in the majority in the *Saiga* case are worth referring to for the light they throw on the issues dealt with in this study. Judge Anderson pointed out that the requirement of a genuine link “contains an element of good faith in the word ‘genuine’,” while President Mensah, discussing the question of whether St. Vincent had validly conferred its nationality on the *Saiga*, pointed out that while Article 91 of the 1982 Convention accords to each State the exclusive right to set the conditions for the acquisition of its nationality by ships, “that provision does not also support the proposition that a ship can acquire nationality merely because an official of the State declares that it has such nationality.” President Mensah also added that St. Vincent’s practice of allowing ships provisional registration could have considerable implications for the effective implementation of the 1982 Convention’s provisions on nationality of ships, and that allowing a provisional registration to lapse before issuing a permanent registration (as had happened in this case) was contrary to Article 91. These sentiments were also shared by Vice-President Wolfrum and Judge Anderson.

4.4.2 *The European Court of Justice*

It will be recalled from section 3.4.2 above that in a number of cases the European Court of Justice has discussed Article 5 of the High Seas Convention. In two of those cases the Court also referred to Article 91 of the 1982 Convention. In the *Poulsen* case,¹⁰² which concerned a Danish-owned, Panamanian-registered ship engaged in alleged illegal salmon fishing, the Court’s observation that the competence of a State under Article 5 of the High Seas Convention to establish the conditions on which it would grant its nationality to a ship was within its absolute discretion,¹⁰³ applied equally to Article 91. Secondly, and possibly more significantly, Advocate General Tesouro, in his opinion in *Commission v. Hellenic*

¹⁰² *Loc. cit.* in n. 51

¹⁰³ See text at n. 52.

Republic,¹⁰⁴ after concluding that the genuine link requirement of Article 5 of the High Seas Convention was not a condition for the granting of nationality but a duty of supervision resulting from the grant of nationality,¹⁰⁵ added that the same conclusion could be drawn with regard to the 1982 Convention,

which, on the one hand, repeats the wording used in the Geneva Convention without shedding any further light on the concept of 'genuine link' (Article 91) and, on the other, appears to rule out the possibility that States might refuse to recognise the nationality granted to a ship in the absence of a 'genuine link.' A State which has clear grounds to believe that proper jurisdiction and control with respect to a ship have not been exercised may simply 'report the facts to the flag State,' which, 'if appropriate,' may 'take any action necessary to remedy the situation.'¹⁰⁶

This position is, of course, similar to that taken by the International Tribunal for the Law of the Sea in the *Saiga* case, and is open to the same comments and criticism.

4.5 The Views of Writers

It was seen in section 3.5 above that Article 5 of the High Seas Convention and the concept of the genuine link have attracted a considerable literature. By comparison relatively little has been written about Article 91 of the 1982 Convention. Those who have written on the subject (all of whom had done so before the judgement of the International Tribunal for the Law of the Sea in the *Saiga* case) tend to divide into three broad camps - those who consider that the difference in text between Article 91 and Article 5 (the removal of the phrase concerning the effective exercise of jurisdiction by the flag State) has weakened the concept of the genuine link; those who feel that it has made no difference; and those who feel that it has strengthened the genuine link.

The first of these camps is exemplified by Brown. He concludes that the inclusion of flag State duties in a separate article and "the absence of any link between it and the genuine link

¹⁰⁴ *Loc. cit.* in n. 49.

¹⁰⁵ See text at n. 50.

provision in Article 91(1) at the very least increases the difficulty of arguing that a failure by the flag State to perform its duties under Article 94 would provide evidence of the absence of a genuine link between it and the ship concerned.”¹⁰⁷

The second view, that Article 91 of the 1982 Convention makes essentially no change in the position, is taken by McConnell, who states that “the question of attribution of nationality and ‘genuine link’ is not clarified to any extent by the 1982 Convention. Despite increased flag State obligations, the exact tie-in to grant of nationality remains undefined.” She adds that it is difficult to believe that failure of a flag State to comply with the requirements of Article 94 would render national registration a nullity.¹⁰⁸ She also quotes Moore as stating that “there was no intention by the [Third UN] Conference to change existing international law on the question of flags of convenience or open registries in general and there was certainly no intention to add any new requirement of economic link. In fact, I would say that the general intention of the Conference in dealing with these issues was to avoid opening yet another controversial problem . . . and from what I understand the separation of sentences in Articles 91 and 94, . . . was merely a drafting matter.”¹⁰⁹ Likewise Wolfrum is of the view that Article 91 makes no change in the position and adds that the rules of the 1982 Convention “affirm that effective exercise of jurisdiction and control is not a precondition for registration.” A State’s failure to exercise effective jurisdiction and control “therefore cannot invalidate the State’s registration of a ship”.¹¹⁰

A third view is that the genuine link requirement has been strengthened by the 1982 Convention. Kano has argued that the effect of Articles 91 and 94 is that “the concept of ‘genuine link’ no longer lends itself to an interpretation that the State granting its nationality to ships has an obligation to effectively exercise jurisdiction and control in administrative, technical and social matters over ships flying its flag. Instead it must be interpreted to mean

¹⁰⁶ Para. 14 of the Advocate General’s Opinion. In the final sentence the Advocate General is quoting from Art. 94(6) of the 1982 Convention.

¹⁰⁷ E. D. Brown, *The International Law of the Sea*, Vol. I (1994), pp. 288-9.

¹⁰⁸ *Op. cit.* in n. 62, pp. 381-2.

¹⁰⁹ J. N. Moore, speaking at a panel discussion on flags of convenience, cited in *New Trends in Maritime Navigation. Proceedings of the Fourth International Ocean Symposium* (1979), p. 69 at 70-1, as quoted in McConnell, *op. cit.* in n. 62, p. 382.

that the existence of a genuine link between the State and the ship constitutes a requirement for the grant of nationality to ships.”¹¹¹

4.6 Conclusions

Article 91 of the 1982 Convention repeats Article 5 of the High Seas Convention verbatim with the exception that the phrase at the end of Article 5, about the effective exercise of flag State jurisdiction, was deleted. It appears that the sole reason for this change was to avoid repetition with the first paragraph of Article 94, which contains an extensive list of flag State duties. It may therefore be concluded that the requirement of the genuine link has the same meaning in the 1982 Convention as it has in the High Seas Convention, even if this meaning is not made explicit in either Convention. The suggestion made in section 3.6 above that the ability of the flag State effectively to exercise its jurisdiction over its ships is an important element of the genuine link, is bolstered by the context of the genuine link requirement in the 1982 Convention, which includes Articles 94 and 217 which elaborate the duties of flag States in respect of their ships¹¹²; by the object and purpose of the Convention as expressed in its preamble, in particular the need for order on the seas (see section 4.2 above); and dicta in the *Saiga* case. This view is broadly shared by the UN Secretary-General, who in his most recent report on “Oceans and the Law of the Sea” writes:

In view of the obligations of flag States under Articles 94 and 217 of UNCLOS, the requirement of a genuine link in Article 91, while not defined, does imply that the link must be such as to enable the flag State to exercise effective control over the ship and to meet its obligations under UNCLOS and other instruments.¹¹³

¹¹⁰ R. Wolfrum, “Reflagging and Escort Operation in the Persian Gulf: An International Law Perspective”, (1989) 29 *Virginia Journal of International Law* 387 at 392.

¹¹¹ T. Kano, “Flags of Convenience,” in *New Trends in Maritime Navigation, op. cit.* in n. 109, p. 63 at 64, as quoted in McConnell, *op. cit.* in n. 62, p. 382.

¹¹² The importance of the context of the Convention and the need to view the Convention as a whole is underlined by the fact that in its annual Law of the Sea Resolutions the UN General Assembly invariably emphasises the “unified character of the Convention”: see, for example, Resolution 54/31 (1999).

¹¹³ UN Document A/54/429, para. 184.

The *Saiga* case suggests that there is a presumption that a genuine link does exist between a ship and its flag State, so that the burden of proof is on a State which disputes this to show the absence of such a link.

As regards the consequences that follow from the absence of a genuine link, the 1982 Convention, like the High Seas Convention, does not deal with this explicitly and sheds no further light on the matter. It must be noted that both the judgement in the *Saiga* case and the opinion of Advocate General Tesauro in *Commission v. Hellenic Republic* express the view that the consequences of the absence of a genuine link do not include non-recognition of the nationality of the ship by other States. In this connection it is worth noting an interesting comment made recently by Oxman and Bantz.¹¹⁴ They suggest that Article 228(1) of the 1982 Convention (which denies a flag State that has repeatedly disregarded its enforcement obligations the privilege of the suspension of prosecutions by other States for pollution offences by its ships), the UN Fish Stocks Agreement (which denies fishing rights to vessels of States that fail to join regional fisheries organisations or fish in accordance with their measures), and the 1995 amendments to the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (under which a flag State's certificates will be accepted where the compliance of that State with relevant international standards has been confirmed by the International Maritime Organisation) all indicate "an emerging tendency to link the enjoyment of rights to the performance of related duties." Following this line of reasoning, one could equally conclude that the failure of a flag State to comply with its duty to ensure a genuine link between itself and its ships would deny that State the right to exercise rights in respect of such ships, including, for example, the right to exercise diplomatic protection.

¹¹⁴ B. H. Oxman and V. Bantz, case note on the *Saiga* case, (2000) 94 *American Journal of International Law* 140 at 149.

5. SOME RECENT DEVELOPMENTS RELATING TO THE NATIONALITY OF SHIPS

This section examines a number of developments since the adoption of the United Nations Convention on the Law of the Sea in 1982 which, it is believed, shed some light on the meaning of the genuine link requirement. The section focuses particularly on activities within the United Nations Conference on Trade and Development (UNCTAD) and the Food and Agriculture Organisation (FAO).

5.1 UNCTAD

In 1974 UNCTAD's Committee on Shipping unanimously adopted a resolution in which it considered that the question of the "economic consequences for international shipping of the existence or lack of a genuine link between vessel and flag of registry as explicitly defined in international conventions in force" was a matter which was "suitable and ripe for harmonisation."¹¹⁵ At the request of the Committee, the UNCTAD Secretariat subsequently produced a number of reports on this issue. UNCTAD's involvement in this matter was prompted by a desire by developing States (other than flags of convenience) to increase their share of world tonnage to aid their economic development: it was argued that tightening up the conditions of registration would lead to a phasing-out of flags of convenience (open registries) and a transfer of shipping tonnage to developing States.¹¹⁶

In 1977 the Committee convened an ad hoc intergovernmental working group which in 1978 unanimously adopted a resolution in which it *inter alia* considered that elements which were particularly relevant when determining whether a genuine link existed were the contribution of the flag State's ships to its economy, employment of flag State nationals on

¹¹⁵ Resolution 22 (VI), para. 3, as quoted in G. Marston, "The UN Convention on Registration of Ships", (1986) 20 *Journal of World Trade Law* 575.

¹¹⁶ On this issue, see further McConnell, *op. cit.* in n. 62, pp. 387-9.

its ships and beneficial ownership of ships by flag State nationals.¹¹⁷ In other words, there was a strong emphasis on the genuine link being an economic link, the argument being that an economic link was necessary if a flag State was to exercise effective jurisdiction and control over its ships.¹¹⁸

In 1981 the Committee on Shipping decided to recommend the holding of a plenipotentiary conference to consider the adoption of an international agreement on the conditions for registration of ships, which should be preceded by an intergovernmental preparatory group with the task of drawing up a set of basic principles. The Conference thus called for met in three sessions between July 1984 and February 1986. The Conference, and indeed the intergovernmental preparatory group, revealed considerable differences of opinion over what the elements of a genuine link were or should be. On the one hand, developing States argued that for a genuine link to exist the owner, operator, manager and crew of a ship should be nationals of the flag State. The developed States, on the other hand, many of which were now much less ardent supporters of the genuine link than they had been at the First UN Conference on the Law of the Sea in 1958 (in part because an increasing number of their national shipowners had registered their vessels under flags of convenience), were opposed to defining the genuine link in economic terms and stressed the traditional element of effective exercise of jurisdiction and control by the flag State. Flag of convenience States were opposed to any restrictions on the right (as they saw it) of flag States to determine the conditions on which nationality was granted to ships. These differences of view were overcome when the developing States proposed, and the developed States accepted, a compromise whereby nationality requirements would be imposed for manning or ownership, but not for both. On the basis of this compromise, the Conference succeeded in adopting the UN Convention on Conditions for Registration of Ships.¹¹⁹

5.1.1 UN Convention on Conditions for Registration of Ships, 1986

¹¹⁷ Report of the Ad Hoc Intergovernmental Working Group on the Economic Consequences of the Existence or Lack of a Genuine Link between Vessel and Flag of Registry, TD/B/C.4/177, Annex.

¹¹⁸ McConnell, *op. cit.* in n. 62, p. 389.

¹¹⁹ For the text of the Convention see (1987) 28 *International Legal Materials* 1229. For a more detailed account of the work of UNCTAD in relation to the genuine link than that given above, see McConnell, *op. cit.* in

The preamble to the Convention contains several references to the genuine link, which are worthy of reproduction in full.

The States Parties to this Convention...

recalling also that according to the 1958 Geneva Convention on the High Seas and the 1982

United Nations Convention on the Law of the Sea there must exist a genuine link between a ship and the flag State and conscious of the duties of the flag State to exercise effectively its jurisdiction and control over ships flying its flag in accordance with the principle of the genuine link,

believing that to this end a flag State should have a competent and adequate national maritime administration,

believing also that in order to exercise its control function effectively a flag State should ensure that those who are responsible for the management and operation of a ship on its register are readily identifiable and accountable...

reaffirming, without prejudice to this Convention, that each 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,

prompted by the desire among sovereign States to resolve in a spirit of mutual understanding and co-operation all issues relating to the conditions for the grant of nationality to, and for the registration of ships...

Article 1 is headed “Objectives” and provides as follows:

For the purpose of ensuring or, as the case may be, strengthening the genuine link between a State and ships flying its flag, and in order to exercise effectively its jurisdiction and control over such ships with regard to identification and accountability of shipowners and operators as well as with regard to administrative, technical, economic and social matters, a flag State shall apply the provisions contained in this Convention.

Conditions for the registration (and hence nationality) of ships, designed to ensure the objective of the Convention set out in Article 1 of ensuring or strengthening the genuine link, are laid down in Articles 7 - 10. Article 7 requires a State to comply with either Article 8 (relating to equity participation) or Article 9(1) - (3) (relating to manning). Article 8 provides that the flag State shall lay down in its laws and regulations “appropriate provisions

n. 62, pp. 386-94 and H.W. Wefers Bettink, “Open Registry, the Genuine Link and the 1986 Convention on Registration Conditions for Ships”, (1987) 18 *Netherlands Year Book of International Law* 70 at 99-112.

for participation by that State or its nationals as owners of ships flying its flag or in the ownership of such ships and for the level of such participation. These laws and regulations should be sufficient to permit the flag State to exercise effectively its jurisdiction and control over ships flying its flag.” Article 9 provides that a State of registration “shall observe the principle that a satisfactory part of the complement consisting of officers and crew of ships flying its flag be nationals or persons domiciled or lawfully in permanent residence in that State.” In doing so, the State of registration shall have regard to, *inter alia*, the availability of qualified seafarers from that State and “the sound and economically viable operation of its ships.” Article 10 provides that before a ship is registered, the State of registration shall ensure that the shipowning company or a subsidiary company “is established and/or has its principal place of business within its territory.” Where this is not the case, the State of registration shall ensure that there is “a representative or management person” who is a national or is domiciled in its territory. Such a representative or management person must be available for any legal process and to meet the shipowner’s responsibilities in accordance with the laws and regulations of the State of registration. In addition, the State of registration must maintain a detailed register from which the owner and operator, or any other person who can be held accountable for the management or operation of the ship, can be readily identified (Articles 6 and 11). The State of registration must also maintain a competent and effective maritime administration in order to secure compliance with national and international shipping rules concerning safety and pollution control (Article 5).

The compromise nature of the Convention is evident from its drafting. Much of the language is loose and imprecise, especially in relation to the degree of equity participation and manning by nationals which is required under Articles 8 and 9. Although the Convention secures some tightening of the conditions under which States may register ships and thus grant their nationality to them, the State of registration is still left with considerable discretion in this matter.¹²⁰

¹²⁰ For more detailed analyses of the Convention, see M.L. McConnell, “‘Business as Usual’: an Evaluation of the 1986 United Nations Convention on Conditions for Registration of Ships”, (1987) 18 *Journal of Maritime Law and Commerce* 435; S.G. Sturme, “The United Nations Convention on Conditions for Registration of Ships”,

A major drawback of the Convention is that it is not in force. To enter into force the Convention requires ratification by 40 States, the combined tonnage of which amounts to at least 25 per cent of world tonnage. As of December 31, 1999 the Convention had been ratified by 11 States (Bulgaria, Côte d'Ivoire, Egypt, Georgia, Ghana, Haiti, Hungary, Iraq, Libya, Mexico and Oman) whose combined tonnage amounted to about 1.4 per cent of world tonnage. No traditional maritime or flag of convenience State has yet ratified the Convention. Given the pattern and slow rate of ratification, it is likely to be many years, if ever, before the Convention enters into force.

Although the Convention is not in force, the question may be asked whether it can be used as an aid in interpreting the genuine link requirement in the High Seas Convention and the 1982 Convention. Article 31(3) of the Vienna Convention on the Law of Treaties provides that there shall be taken into account, together with the context, "any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions." Can the 1986 Ship Registration Convention be regarded as such a subsequent agreement? Clearly the Convention is subsequent to both the High Seas Convention and the 1982 Convention. However, the following questions need to be asked: (1) does the term "agreement" in Article 31 (3) include agreements not (yet) in force? (2) can the 1986 Convention be said to be between parties to the High Seas Convention and/or the 1982 Convention? and (3) can the 1986 Convention be described as "regarding the interpretation" of the High Seas Convention and/or the 1982 Convention or "the application" of their provisions? There is no discussion of the issues raised by these questions in the commentary of the International Law Commission on the draft articles which subsequently became the Vienna Convention on the Law of Treaties, nor in the case law of international courts and tribunals nor (as far as has been discovered) in the academic literature, probably because instances of subsequent agreements of the kind contemplated by Article 31(3) are relatively rare in practice. However, common sense suggests that the subsequent agreement must be in force and that the parties to it must be largely the same as,

[1987] *Lloyd's Maritime and Commercial Law Quarterly* 97; and Wefers Bettinck, *op. cit.* in n. 119, pp. 112-119.

if not identical to, those of the earlier treaty.¹²¹ Neither of these conditions is satisfied here. Thus the 1986 Convention is not a subsequent agreement within the meaning of Article 31(3) of the Vienna Convention on the Law of Treaties, and thus is not to be taken into account in interpreting the High Seas Convention and the 1982 Convention.

5.2 FAO

The FAO has become involved in the issue of the genuine link as a result of concerns about the activities of vessels registered under flags of convenience fishing on the high seas. In many regions of the world management of high seas fisheries is the responsibility of regional fisheries organisations. These bodies have, in most cases, adopted strict conservation and management measures for the stocks for which they are responsible. However, such measures have been and are being undermined by the owners of fishing vessels flying the flag of a member State of a regional fisheries organisation re-registering their vessels in a State (usually a flag of convenience) which is not a member of the organisation and therefore not subject to its restrictions. In many areas, notably in the Northwest Atlantic, the Southern Ocean and Atlantic tuna fishery, this has been and continues to be a considerable problem and has contributed significantly to the over-exploitation of fish stocks.

In recent years, FAO has been considering and developing methods and means to deter the use of such flags of convenience to evade internationally agreed conservation and management measures in high seas fishing operations. Much of this work has been in the context of the development and elaboration of its Code of Conduct for Responsible Fisheries.¹²² Originally the work of FAO attempted to look directly at the problem of reflagging, although the emphasis later changed first to looking at flag State responsibility and then dealing more generally with illegal, unreported and unregulated (IUU) fishing, including

¹²¹ All the examples of subsequent agreements given by Aust are ones where the parties are identical to those of the treaty to which the subsequent agreement relates. See A. Aust, *Modern Treaty Law and Practice* (2000), pp. 191-3.

¹²² The Code of Conduct was adopted in 1995: FAO Doc. 95/20/Rev.1, reproduced on the FAO website: www.fao.org/fi/agreem/codecond/ficonde.asp. For further information, see W. R. Edeson, "The Code of Conduct for Responsible Fisheries: an Introduction", (1996) 11 *International Journal of Marine and Coastal Law* 233.

that by vessels flying flags of convenience. More recently, however, some attention has been paid again to the reflagging problem, including the concept of the genuine link.

The possibility of developing measures at the international level, possibly through the FAO, was first raised at the International Conference on Responsible Fishing, held in Cancún, Mexico, in May 1992. That Conference, which was attended by 67 States, adopted a Declaration calling on States “to take effective action, consistent with international law, to deter reflagging of fishing vessels as a means of avoiding compliance with applicable conservation and management rules for fishing activities on the high seas,”¹²³ and calling on the FAO, in particular, “to draft, in consultation with relevant international organisations, an international Code of Conduct for Responsible Fishing.”¹²⁴ Similar calls were made at the United Nations Conference on Environment and Development (UNCED) in June 1992,¹²⁵ and by the FAO Technical Consultation on High Seas Fishing in September 1992.¹²⁶ Consequently, when the FAO Council met for its 102nd Session in November of the same year, it was decided that, although the reflagging problem was one of the issues which should be covered in the development of a Code of Conduct on Responsible Fishing, the problem was urgent and should be addressed immediately by the FAO, with a view to finding a solution - in the form of an international agreement - in the near future.¹²⁷ A small informal Expert Group meeting was therefore convened in February 1993 to draft a proposed text.

The Expert Group considered that it was necessary to widen the scope beyond solely the act of changing flags and that the proposed agreement should also include elements of the initial flagging process as well as the responsibility of flag States in respect of fishing vessels in general. Thus, in the draft text formulated by the Expert Group, provisions were included which dealt with, *inter alia*, the registration of fishing vessels, flag State responsibility and, importantly, allocation of flag. As regards the latter, the draft text provided that no party

¹²³ Declaration of Cancun, para. 13. The text of the Declaration is reproduced in FAO, *Report of the Technical Consultation on High Seas Fishing*, FAO Fisheries Report No. 484 (Rome: FAO, 1993).

¹²⁴ *Ibid.*, para. I.

¹²⁵ See UNCED, Agenda 21, Chapter 17, paras 17.45 and 17.52.

¹²⁶ FAO, *op. cit.* in n. 123.

¹²⁷ FAO Document CL 102/REP.

should accord a fishing vessel the right to fly its flag unless it were “satisfied, in accordance with its own national legislation, that there exists a genuine link between the vessel and the Party concerned.”¹²⁸ The draft then elaborated on this requirement, by providing that, in determining whether or not a genuine link existed, each party should “give due weight to all relevant factors, including, in particular: (i) the nationality or permanent residence of the beneficial owner or owners of the vessel in accordance with their national law; (ii) where effective control over the activities of the vessel is exercised.”¹²⁹

During the subsequent governmental negotiations, however, it soon became clear that consensus would be difficult to reach on any agreement which attempted to deal with the allocation of flag - and, in particular, one which attempted to define more closely concepts such as the genuine link – or with the national registration of fishing vessels. Consequently, for fear that the negotiations would be dragged into a “legal quagmire”¹³⁰ and delay the reaching of agreement indefinitely, the provisions dealing with these issues were dropped from the text of the Agreement which was finally adopted in 1993.¹³¹ The focus of the Agreement instead became the authorization of fishing on the high seas, the development of the concept of flag State responsibility and of mechanisms to ensure the free flow of information on high seas fishing operations.¹³² Although it is arguable that the notion of genuine link is still reflected in the Agreement¹³³ - particularly in Article III(3) which prevents a party from authorizing a fishing vessel to fish on the high seas unless it is satisfied, taking into account the links that exist between it and the vessel concerned, that it is able to exercise effectively its responsibilities under the Agreement in respect of that vessel - in reality the Agreement adds little to the concept of genuine link.

¹²⁸ Draft Agreement on the Flagging of Vessels Fishing on the High Seas to Promote Compliance with Internationally Agreed Conservation and Management Measures, Art. IV(1). FAO Document COFI/93/10, Annex 2.

¹²⁹ *Ibid.*, Art. IV(2)(a).

¹³⁰ See G. Moore, “The Food and Agriculture Organisation of the United Nations Compliance Agreement”, (1995) 10 *International Journal of Marine and Coastal Law* 412 at 413.

¹³¹ Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, (1994) 33 *International Legal Materials* 968, reproduced on the FAO website at: www.fao.org/fi/agreem/complian/complian.asp. The Agreement has yet to enter into force. To do so, it requires 25 acceptances but to date has received only 14: www.fao.org/fi/agreem/complian/tab1.asp.

¹³² See, in particular, Articles III and VI. For further information on the Agreement, see Moore, *op. cit.* in n. 130, and D.A. Balton, “The Compliance Agreement” in E. Hey (ed.), *Developments in International Fisheries Law* (1999), p. 31.

¹³³ Moore, *loc. cit.* in n. 130.

Given the high priority initially accorded to the reflagging problem by FAO, it might have been expected that, having failed to deal with it fully in the Compliance Agreement, further attention would have been given to the issue in the Code of Conduct itself. That instrument would have had certain advantages as a forum for elaborating principles on such a difficult issue because it was not designed to be legally binding. However, the Code does not deal directly with the issue. Nevertheless, there is one indirect reference to the matter. Article 7.8.1 of the Code provides that “without prejudice to relevant international agreements, States should encourage banks and financial institutions not to require, as a condition of a loan or mortgage, fishing vessels or fishing support vessels to be flagged in a jurisdiction other than that of the State of beneficial ownership where such a requirement would have the effect of increasing the likelihood of non-compliance with international conservation and management measures.”¹³⁴

Recently, however, the issue of conditions for the registration of fishing vessels has been reactivated within the FAO. At its Twenty-third Session in 1999, the FAO’s Committee on Fisheries (COFI) expressed its concern at the increase in IUU fishing, including vessels flying flags of convenience¹³⁵ and suggested that the FAO co-operate with the International Maritime Organisation (IMO), which was due to discuss issues related to reflagging of fishing vessels and ship registration later in that year in its Sub-Committee on Flag State Implementation.¹³⁶ In response to paragraph 73, the FAO conveyed the results of COFI’s deliberations to the Seventy-first Session of the IMO Maritime Safety Committee (MSC) in May 1999.¹³⁷ Little was resolved at that meeting. In the meantime the matter had also come before the UN General Assembly, which in a resolution adopted in November 1999 called on the IMO, in co-operation with the FAO and other relevant organisations, to “define the concept of the genuine link between the fishing vessel and the State in order to assist in the

¹³⁴ FAO, *op. cit.* in n. 122.

¹³⁵ FAO, *Report of the Twenty-third Session of the Committee on Fisheries*, FAO Fisheries Report No. 595 (1999), para. 72. The Report is reproduced on the FAO website at: www.fao.org/docrep/meeting/x2930e.htm.

¹³⁶ *Ibid.*, para. 73.

¹³⁷ FAO did attempt to make its presentation to the Sub-Committee on Flag State Implementation as requested by COFI, but the document was received too late by the IMO to be considered by this Sub-Committee and it was referred instead to the Maritime Safety Committee, the Sub-Committee’s parent body.

implementation of' the UN Fish Stocks Agreement.¹³⁸ At its eighth session held in January 2000, the Sub-Committee on Flag State Implementation, recognizing that it (and the IMO generally) could provide assistance to the FAO, agreed to refer the matter to the Marine Environment Protection Committee (MEPC) and the Maritime Safety Committee (MSC) for further guidance on how the issues involved could be incorporated in its (the Sub-Committee's) work programme. The Sub-Committee further recommended that these two Committees consider the formation of a joint FAO/IMO *ad hoc* Working Group. The recommendations of the Sub-Committee were endorsed at the 44th Session of the MEPC and at the 72nd Session of the MSC, in which it was agreed to establish a Working Group on IUU Fishing and Related Matters.¹³⁹ The terms of reference of the Working Group do not, however, include any consideration of the genuine link. Rather, they include the preparation of a checklist of the necessary elements for effective flag State control over fishing vessels, including maritime safety, the prevention of marine pollution and mechanisms for reporting information, together with a review of the measures that may be taken by a port State in relation to the technical and administrative procedures for the inspection of other States' vessels.¹⁴⁰

At the same time as pursuing co-operative mechanisms with the IMO, the FAO has also recently begun work on the development of an International Plan of Action to deal with IUU fishing, including fishing by flag of convenience vessels. The impetus for the Plan of Action was the FAO Ministerial Meeting on Fisheries, held in March 1999, which adopted a Declaration outlining, *inter alia*, a commitment to develop such a Plan.¹⁴¹ In May 2000, an Expert Consultation on IUU fishing was held in Sydney¹⁴² and further meetings are planned in October 2000. Among the matters which have been proposed for inclusion in the Plan of

¹³⁸ UN General Assembly Resolution 54/32 of November 24, 1999.

¹³⁹ IMO, *Report of the Seventy-second Session of the Maritime Safety Committee*, May 2000, para. 7.25.

¹⁴⁰ *Ibid.*

¹⁴¹ *Rome Declaration on Responsible Fisheries*, para. 12(j), reproduced on the FAO website at: www.fao.org/fi/agreem/declar/dece.asp. The commitment was followed up by a similar call at the 116th Session of the FAO Council: FAO, *Report of the Hundred and Sixteenth Session of Council* (1999), para. 30.

¹⁴² See the Australian Government website at: www.affa.gov.au/ecoiuuf/.

Action, is the “elaboration of practical criteria for establishing a genuine link” with respect to fishing vessels.¹⁴³

It is thus possible that at some time in the future the FAO, either individually or jointly with the IMO, will elaborate a definition of the genuine link, at least as far as fishing vessels are concerned.

¹⁴³ W. Edeson, *Tools to Address IUU Fishing: the Current Legal Situation*, Consultation Paper submitted to the Expert Consultation on IUU Fishing, Sydney, May 2000, reproduced on the Internet at: www.affa.gov.au/ecoiuuf/ausiuu20008.doc.

6. CONCLUSIONS

Article 5 of the 1958 Convention on the High Seas and Article 91 of the 1982 UN Convention on the Law of the Sea both provide that there must exist a “genuine link” between a State and a ship to which it has granted its nationality. No definition of the term “genuine link” is found in either Convention nor is any explicit guidance given as to its meaning or as to the consequences that follow where there is no such link. In the absence of such definition or explicit guidance, it has been the purpose of this study to try to discover what is meant by a “genuine link” and what consequences follow from its absence.

It is clear that there is no consensus among States as to what is meant by the requirement of a genuine link. This is shown, *inter alia*, by the debates at the 1958 Conference on the Law of the Sea, the pleadings in the *IMCO* case and the drafting history of both the 1986 UN Convention on Conditions for Registration of Ships and the 1993 FAO Compliance Agreement. Equally, there is no consensus among academic writers: a wide range of differing views can be found in the extensive literature, some of which has been surveyed in sections 3.5 and 4.5 above. An authoritative ruling as to what is meant by the genuine link requirement in the 1958 and 1982 Conventions could only be provided by an international court, such as the International Court of Justice or the International Tribunal for the Law of the Sea, or by means of the conclusion of a supplementary agreement to the 1982 Convention. In the absence of such a ruling or agreement,¹⁴⁴ which in any case would be binding only on the parties to the case or to the agreement, anyone seeking the meaning of the genuine link requirement must do so by interpreting the provisions of Article 5 of the 1958 Convention and Article 91 of the 1982 Convention, using the canons of treaty interpretation laid down by international law. This is what this study has attempted to do. It has interpreted Article 5 and Article 91 by following the rules on treaty interpretation laid down in Articles 31 - 33 of the Vienna Convention on the Law of Treaties, utilising the materials there indicated, including the context of the provisions, their object and purpose

¹⁴⁴ Although an agreement as to what is meant by a genuine link (at least as far as fishing vessels are concerned) may eventually result from the work of the FAO and IMO referred to in section 5.2.

and *travaux préparatoires*, and having regard to the various language texts which lie within the linguistic competence of the author of this study. While the author is aware of the various policy considerations related to the genuine link requirement (where there is sharp and deep division between the protagonists of the differing viewpoints), he has tried to avoid allowing such policy considerations unduly to influence the exercise in interpretation described. The conclusions as to the meaning of the genuine link requirement which have been reached on the basis of that exercise are as follows.

1. Some writers have sought to argue that the genuine link requirement does not concern the question of nationality but relates only to the effective exercise of flag State jurisdiction, and there is also a possible suggestion to this effect in the judgement of the International Tribunal for the Law of the Sea in the *Saiga* case. Such a view seems untenable. The genuine link requirement appears in the 1982 Convention in an article headed “Nationality of Ships”, and in both this Convention and the 1958 Convention the sentence containing the genuine link requirement follows immediately on from the provisions dealing with how nationality is conferred on ships. Furthermore, the drafting history of Article 5 makes it clear beyond doubt that the genuine link requirement relates to nationality.

2. The granting of its nationality by a State to a ship, typically by means of registration, by definition creates a link between the ship and that State. However, a mere administrative act, such as registration, is not in itself sufficient. If registration in itself constituted the genuine link (as some writers have sought to argue), the sentence in Article 5 of the 1958 Convention and in Article 91 of the 1982 Convention providing for a genuine link would be completely redundant. The link created by registration must be “genuine”, or “substantiel” (in the French text) or “autentica” (in the Spanish text). It follows from the ordinary meaning of the words, which is the starting point for treaty interpretation under Article 31 of the Vienna Convention on the Law of Treaties, that a “genuine link” is more than just a link. There must be a relationship between the ship and the flag State which makes the link of nationality “genuine.” That this is so follows not only from the ordinary meaning of the words themselves, but from the drafting history of Article 5. It is also supported by Article 6 of the High Seas Convention and Article 92 of the 1982 Convention,

which are part of the context of the genuine link provision and which provide that a ship may not change its flag during a voyage or in port “save in the case of a real transfer of ownership or change of registry.”¹⁴⁵ To say that any link will do would be to make the word “genuine” redundant, which clearly goes against a basic principle of all interpretation, which is to assume that every word has a purpose and a meaning. Judge Anderson, in his separate opinion in the *Saiga* case, is surely right to observe that the requirement of a genuine link contains an element of good faith in the word “genuine”.

3. There is no single or obligatory criterion by which the genuineness of a link is to be established. A State has a discretion as to how it ensures that the link between a ship having its nationality and itself is genuine, be it through requirements relating to the nationality of the beneficial owner or crew,¹⁴⁶ its ability to exercise its jurisdiction over such a ship, or in some other way. This follows from the wording of the first sentence of Article 5 and of Article 91, which leaves it to each State to fix the conditions for the grant of its nationality to ships. This conclusion is also supported by the drafting history of Article 5, where an attempt by the International Law Commission to prescribe specific criteria of genuineness was abandoned. Some support is also provided by the 1986 UN Ship Registration Convention (although the Convention is not a directly relevant aid in interpretation), which, even though designed to tighten conditions for the granting of nationality, gives a State a considerable degree of discretion as to how it ensures links between itself and its ships are genuine.

4. Although it is not an obligatory criterion for establishing the genuineness of a link, the effective exercise of jurisdiction and control over its ships is one of the principal ways in which a flag State may demonstrate that the link between itself and its ships is genuine. This is shown by Article 5 of the High Seas Convention, which, after laying down the genuine link requirement, adds “in particular, the State must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.” The fact that

¹⁴⁵ It is worth noting that in its commentary on draft Article 30, which eventually became Article 6 of the 1958 Convention, the International Law Commission explained that its intention in including the provision cited was to “condemn any change of flag which cannot be regarded as a *bona fide* transaction.” See *Yearbook of the International Law Commission*, 1956, Vol II, p. 280.

this phrase was deleted from Article 91 does not disturb this conclusion as this deletion was simply a drafting change, designed to avoid duplication with the first sentence of Article 94. This conclusion is supported both by the context of Article 91, which includes Articles 94 and 217 (which stress the need for the effective exercise of flag State jurisdiction), and the object and purpose of both Conventions, which are to provide for the orderly regulation of activities on the high seas.

The criterion of the effective exercise of flag State jurisdiction does not mean, as some writers appear to suggest, that there must be actual effective exercise of jurisdiction and control over a particular ship, such that if in practice the exercise of jurisdiction was not effective, the genuineness of the link would be absent. If this were so, it would be difficult for other States to know whether there was a genuine link without a constant examination of how the flag State was exercising its jurisdiction in practice. Moreover, if the existence of a genuine link is a condition for the grant of nationality, it must exist at the time nationality is granted, and not depend on subsequent events. Thus, the criterion of the effective exercise of jurisdiction and control means that a flag State must be in a position to exercise effective jurisdiction and control over a ship at the time that it grants its nationality to that ship. To demonstrate this, a flag State must be able to show that the necessary mechanisms for effective exercise of jurisdiction and control are in place at the time when the ship is granted its nationality. Such mechanisms could include sufficient and suitably qualified personnel for carrying out the necessary surveys of the ship, checking the certification of the crew, etc. It may also be necessary for the flag State to lay down conditions which will ensure that in practice it can enforce applicable international safety, labour and pollution standards against the owners and operators of its ships, by requiring the owner and/or operator to have a significant presence in its territory, such as a registered office or agent, through which any liability resting on the owner or operator of the ship (such as a fine or order to carry out repairs) may effectively be discharged.

¹⁴⁶ Given the complexities of ship ownership (where it is possible for the shipowning company itself to be owned by one or more other companies), it may be unrealistic to look for a genuine link (only) in criteria related to ownership.

5. There is a presumption that the link between a ship and its flag State is genuine. In other words, it is for any State (or other entity) which challenges the genuineness of the link between a ship and its purported flag State to show that that link is not genuine. This was suggested by the International Tribunal for the Law of the Sea in its judgement in the *Saiga* case. It would seem that this must be so, for the opposite presumption, i.e. that a link was not genuine, would tend to cause at best uncertainty, at worst chaos.

6. As far as the consequences of the absence of a genuine link are concerned, as mentioned above neither the High Seas Convention nor the 1982 Convention state what such consequences are, nor do they provide any direct (or even indirect) guidance on the matter. The fact that at the 1958 Conference the initial clause of the International Law Commission's proposal that "for purposes of recognition of the national character of the ship by other States, there must exist a genuine link between the State and the ship" was deleted, suggests that the absence of a genuine link does not mean the loss of nationality of the ship concerned. This was certainly the view taken in the *Saiga* case, although as pointed out in section 3.6 above, it is not the only possible conclusion that can be drawn. But even if the judgement in the *Saiga* case is correct, that loss of nationality does not follow from the absence of a genuine link, some kind of consequence must nevertheless surely follow, otherwise the genuine link requirement serves no purpose; and, as mentioned above, it is a cardinal principle of all interpretation that the wording in a legal text has a purpose. Furthermore, given that the genuine link requirement relates to nationality, the consequences of the absence of a genuine link must also relate to nationality. If loss of nationality is not the consequence, the only other consequence related to nationality which appears possible is that the flag State loses the right to exercise diplomatic protection on behalf of a ship which has no genuine link with it. Such a conclusion is in accordance both with the spirit of the ruling of the International Court of Justice in the *Nottbohm* case, which, as seen earlier, is one of the historical antecedents of the genuine link requirement, and with the emerging trend suggested by Oxman and Bantz (see section 4.6 above), which is to deny rights to flag States which do not properly fulfil their duties. It is true that in the *Saiga* case the International Tribunal for the Law of the Sea rejected Guinea's contention that St. Vincent could not exercise diplomatic protection on behalf of the *Saiga*, but the Tribunal found that

in fact the link between the *Saiga* and St. Vincent was genuine: the Tribunal was also undoubtedly influenced by Guinea's failure to raise its contention at an earlier stage of the proceedings.

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