

International Tribunal for
the Law of the Sea



Tribunal international du
droit de la mer



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NATIONALITY AND REGISTRATION OF SHIP

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Outline

- **Evolution of nationality of ships**
- **Article 91 UNCLOS**
 - Concept of nationality of ships
 - State exclusive jurisdiction over the granting of nationality to ships
 - Modalities for the granting of nationality to ships
 - Registration and documents
 - Meaning of “a genuine link”
- **Limitations to the granting of nationality to ships**



Evolution of nationality of ships

- At the end 19th century established state practice and each State at liberty to decide on the conditions to grant its nationality to vessels.
- Some attempt to establish the ownership requirement and the possibility of non-recognition by other State of unfounded ships nationality.
- **Art. 5 of the 1958 Geneva High Seas Convention**
 - “1. 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.*
 - 2. Each State shall issue to ships to which it has granted the right to fly its flag documents to that effect.”*



Article 91 UNCLOS

- Nationality of ships as a minor issue at the III Conference on the Law of the Sea.
- **Art. 91 UNCLOS**
 - “1. 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.*
 - 2. Every State shall issue to ships to which it has granted the right to fly its flag documents to that effect.”*
- The main difference between Art. 5 High Seas Convention and Art. 91 UNCLOS is that the last part of the third sentence of Art. 5(1) on flag State jurisdiction and control in administrative, technical, and social matters which was dropped, because the obligations of flag States were spelt out in more detail in Art. 94 UNCLOS.



Concept of nationality of ships

- **According to Art. 91(1) UNCLOS “ships have the nationality of the State whose flag they are entitled to fly.”**
- No similarity with nationality of individuals.
- Not a sub-category of the nationality of individuals but a separate category.
- Nationality indicates:
 - which State is permitted under international law to exercise its jurisdiction and control over the vessel;
 - which State is obliged to implement the duties listed in Art. 94 UNCLOS and enforce national and international safety, labour, and environmental protection standards vis-à-vis the vessel;
 - which State is entitled to render diplomatic protection for the vessel and its crew.



State exclusive jurisdiction over the granting of nationality to ships

- According to Art. 91(1) UNCLOS, every State must “*fix the conditions for the grant of its nationality to ships.*”
- Long-lasting customary rule according to which the attribution of nationality is entirely within the domain of the flag State’s domestic law:
 - PCA, *Muscat Dhows arbitration (France v. Great Britain)* 1905 (p. 2): “generally speaking it belongs to every Sovereign to decide to whom he will accord the right to fly his flag and to prescribe the rules governing such grants.”
 - US Supreme Court, *Lauritzen v. Larsen* 1953 (p. 345 U.S. 585): “[e]ach state under international law may determine for itself the conditions on which it will grant its nationality to a merchant ship, thereby accepting responsibility for it and acquiring authority over it.”



State exclusive jurisdiction over the granting of nationality to ships

- ITLOS, *M/V “SAIGA” (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, Judgment 1999 (para. 63): “Article 91 leaves to each State exclusive jurisdiction over the granting of its nationality to ships. In this respect, article 91 codifies a well-established rule of general international law. Under this article, it is for Saint Vincent and the Grenadines to 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. These matters are regulated by a State in its domestic law.”
- ITLOS, *M/V “Virginia G” (Panama/Guinea-Bissau)*, Judgment 2014 (para. 109): “The Tribunal observes that under article 91, paragraph 1, of the Convention a State enjoys a right to grant its nationality to ships and recalls that in the *M/V “SAIGA” (No. 2)* Case it recognized this exclusive right of the flag State (...).”



Modalities for the granting of nationality to ships

- **Art. 91(1) UNCLOS does not contemplate specific means through which a ship might gain a State's nationality.**
- **ITLOS, *M/V Saiga (No. 2) Case* (paras. 64, 65):**
 - *“International law recognizes several modalities for the grant of nationality to different types of ships. In the case of merchant ships, the normal procedure used by States to grant nationality is registration in accordance with domestic legislation adopted for that purpose.”*
 - *“Determination of the criteria and establishment of the procedures for granting and withdrawing nationality to ships are matters within the exclusive jurisdiction of the flag State.”*



Registration and documents

- Nationality is usually conferred upon a ship by registration.
- *ITLOS, M/V Saiga (No. 2) Case* (para. 64): “International law recognizes several modalities for the grant of nationality to different types of ships. In the case of merchant ships, the normal procedure used by States to grant nationality is registration in accordance with domestic legislation adopted for that purpose.”
- **Article 94(2)(a) UNCLOS**
“1. In particular every State shall:
(a) maintain a register of ships containing the names and particulars of ships flying its flag, except those which are excluded from generally accepted international regulations on account of their small size; (...)”



Registration and documents

- Article 91(2) UNCLOS

“2. Every State shall issue to ships to which it has granted the right to fly its flag documents to that effect.”

- E.g. certificate of registration, patent of navigation, certificate of number...
- ITLOS, *M/V Saiga (No. 2) Case* (paras. 66, 68):
 - *“the nationality of a ship is a question of fact to be determined ... on the basis of evidence adduced by the parties.”*
 - the conduct of a flag State, *“at all times material to the dispute”* is important in determining the nationality or registration of a ship.



Meaning of “a genuine link”

- **According to Art. 91(1) last sentence “*There must exist a genuine link between the State and the ship.*”**
- Proposals since the end of the 19th to introduce uniform prerequisites for granting nationality to a ship at the international level.
- 1896 Proposal of the *Institut de droit international* to limit the competence of States to confer their nationality upon merchant vessels.
- 1955 ILC Draft Articles on the Regime of the High Seas requiring, for the recognition of a ship’s nationality by other States, that the ship
 - is a property of the State concerned;
 - or than half owned
 - by nationals of or persons legally domiciled and resident in the territory of the State concerned;
 - or a partnership in which the majority of the partners are nationals of or legally domiciled and resident in the State concerned;
 - or a joint-stock company formed under the laws of the State concerned and having its registered office in the territory of that State.



Meaning of “a genuine link”

- 1956 ILC Draft Articles on the Regime of the High Seas, Art. 29 on a genuine link between the vessel and its flag State whose absence entitles States to refuse recognition of the ship's nationality.
- 1958 Geneva Conference on the Law of the Sea, no refusal of recognition and only reference to the genuine link in Article 5(1) of the High Seas Convention.
- ICJ, *The IMCO Advisory Opinion* 1969, no examination of the contention that the notion of genuine link is relevant to assess the size of a State's merchant fleet.
- ICJ, *Barcelona Traction Case* 1979, Judge Jessup Separate Opinion (para. 46) “[i]f 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 recognize the asserted nationality of the ship.”
- 1986 UN Convention on Conditions for Registration of Ships (not into force) Art. 8 “1. (...) the flag State shall provide in its laws and regulations for the ownership of ships flying its flag. (...)”



Meaning of “a genuine link”

- ITLOS, *M/V Saiga (No. 2) Case* (paras. 79, 80, 83, 85):
 - Question “(...) *whether the absence of a genuine link between a flag State and a ship entitles another State to refuse to recognize the nationality of the ship. (...) [T]he Tribunal notes that the provision in article 91, paragraph 1, of the Convention, requiring a genuine link between the State and the ship, does not provide the answer. Nor do articles 92 and 94 of the Convention, which together with article 91 constitute the context of the provision, provide the answer.*”
 - “(...) *the obligation regarding a genuine link was maintained in the 1958 Convention, the proposal that the existence of a genuine link should be a basis for the recognition of nationality was not adopted.*”
 - “*The conclusion of the Tribunal is 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.*”



The meaning of “a genuine link”

- Conclusion supported by the 1995 Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks and the 1993 Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas 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.”
- ITLOS, *M/V “Virginia G”* (paras. 110 and 113):
 - “(...) article 91, paragraph 1, third sentence of the Convention requiring a genuine link between the flag State and the ship should not be read as establishing prerequisites or conditions to be satisfied for the exercise of the right of the flag State to grant its nationality to ships.”
 - “(...) once a ship is registered, the flag State is required, under article 94 of the Convention, to exercise effective jurisdiction and control over that ship in order to ensure that it operates in accordance with generally accepted international regulations, procedures and practices. This is the meaning of ‘genuine link’.”

Limitations to the granting of nationality to ships



- Certain situations in which a State may not confer its nationality upon a vessel:
 - Express treaty provisions
 - Prohibition upon a State to impose nationality on a ship that already has been granted the nationality of another State.
 - Art. 92(1) UN Convention on the Law of the Sea, according to which
 - “1. Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas. 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.*
 - 2. A ship which sails under the flags of two or more States, using them according to convenience, may not claim any of the nationalities in question with respect to any other State, and may be assimilated to a ship without nationality .”*



Short bibliography

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- König, *Flag of Ships*. *Max Planck Encyclopedias of International Law*, 2009
- Guilfoyle, *Article 91, Nationality of Ships*. Proelss (ed.), *United Nations Convention on the Law of the Sea: UNCLOS*, Baden-Baden, 2017, p. 692 ff.
- Churchill, *The Meaning of the “Genuine Link” Requirement in Relation to the Nationality of Ships, a Study Prepared for the International Transport Workers’ Federation*, Cardiff, 2020



THANK YOU

