

Article 91: Nationality of Ships

A Brief Legislative History

David Anderson

March 2020

The Text

• Article 91

- *(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 the right to fly its flag documents to that effect.*

• Article 91

- *1. Chaque Etat fixe les conditions auxquelles il soumet l'attribution de sa nationalité aux navires, les conditions d'immatriculation des navires sur son territoire et les conditions requises pour qu'ils aient le droit de battre son pavillon. Les navires possèdent la nationalité de l'Etat dont ils sont autorisés à battre le pavillon. Il doit exister un lien substantiel entre l'Etat et le navire.*
- *2. Chaque Etat délivre aux navires auxquels il a accordé le droit de battre son pavillon des documents à cet effet.*

Some Indicators of Customary International Law

1. In 1896, the Institut de Droit International (an NGO, expert body) drew up some propositions about permission to fly the flag of a State, including an element of national ownership.
2. In the *Muscat Dhows arbitration* of 1905, France had granted its flag to some dhows based in Muscat (then a British Protectorate): British complaints, made under a Franco-British treaty, were rejected. The ruling in the Permanent Court of Arbitration included the following proposition:

‘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.’

NB Right to fly flag – not nationality of ship.

3. Writing in 1943, Higgins and Colombos stated that ‘international law had no concern’ with national conditions for registration: *International Law of the Sea* (1943) at p 189.
4. The US Supreme Court ruled in *Lauritzen v Larsen* (1953) that the validity of a ship’s registration could be questioned only by the courts of the registering State, not those of third States.

ILC Draft Article 5 (1955)

Right to a flag

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*
 - (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.*

ILC Report 1955 (II YBILC (1955) 23), draft based on wording adopted by the Institut de Droit International in 1896. The ILC's commentary stated that, while the State had complete liberty over the grant of the flag in the case of ships it owned (including those of nationalised bodies), with 'regard to other ships, the State must accept certain restrictions.' There had to be a certain national element in the view of the ILC in 1955.

Comments of Governments 1955-56

1. When comments on the initial draft articles were sought from Governments, many of them pointed out that the terms and conditions for registration varied very widely.
2. The representative of the ILO (Mr Jenks) was also active. (Unfortunately, the IMCO started work only in 1959.) Evidence of legislative diversity was provided by the UN Secretariat's compilation of 'Laws concerning the Nationality of Ships' as ST/LEG/SER. B/s.
3. Many Governments wished to avoid a list of specific links that were required for acquiring national status.
4. Instead, the Netherlands proposed a general formula, namely 'genuine connection' and mentioned the *Nottebohm* case in which the ICJ had referred to the general test of the 'genuine link' in a case involving the diplomatic protection of an individual.

Nationality of ships

ILC Draft Article 29 (1956)

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. 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.*
2. *A merchant ship's right to fly the flag of a State is evidenced by documents issued by the authorities of the State of the flag.*

The Commentary explained that State practice was too varied for the ILC to propose specific links (as in 1955). Instead, it put forward ‘the guiding principle’ that there must be a ‘genuine link’ between the ship and the State granting the flag.

Debate in the Sixth Committee

During the 6th Committee's annual discussion of the Report of the ILC, the following points about draft article 29 were made:

1. The concept of nationality was inapt in relation to a ship. Its introduction would cause difficulties. This was the view of France.
2. The test of the 'genuine link' would be difficult to apply in practice. The test was vague.
3. The reference to the 'recognition' by other States of a ship's national character appeared to derogate from the right of every State to lay down the conditions for the grant of its flag.
4. It would be better either to agree on precise links or to leave the registration of ships to national discretion. A vague compromise was unsatisfactory.

Geneva Conference 1958

1. The arguments voiced in the 6th Committee were repeated.
2. Several proposed changes to the ILC's draft article were considered. The successful amendments were as follows:
 - The words '*Nevertheless for the purpose of recognition of the national character of the ship by other States*' were deleted in Plenary by 15-30-17.
 - The words '*in particular, the State must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag*' were added after the reference to the genuine link.
 - The Netherlands proposed revised wording for paragraph 2 about the need for documents. This was adopted in Committee by 21-10-23.
3. The amended text was adopted by 65 – 0.

Convention on the High Seas (Geneva, 1958)

Article 5

- 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.*

The Third UN Conference on the Law of the Sea

1. Some drafting changes were made to the Geneva text of article 5 without altering the meaning. It became article 91.
2. The main change was that the latter part of article 5 was moved to a separate article (proposal by some EC States including the UK).
3. In 1958, the UK had viewed the ‘genuine link’ as a starting point for further elaboration in technical bodies such as IMCO and the ILO.
4. Prior to the session in Caracas in 1974, discussions in Whitehall about the concept of the ‘genuine link’ noted that:
 - public order on the oceans required that flag State jurisdiction should be effective;
 - it would be futile to try to abolish, adjust or define ‘the genuine link’;
 - instead, the duties of every flag State to exercise effective jurisdiction and control should be stressed and spelt out in detail (see article 94).
5. By moving the duties to a separate article, the sponsors did not intend to change the meaning or effect of the rump of article 5.

Conclusions

1. **Paragraph 1, first sentence** is based on the *Muscat Dhows* case and clearly reflects customary law. Together with the **second sentence**, it reflects the concept of nationality in relation to ships.
2. The ‘genuine link’ in the third sentence was inspired by an analogy from the *Nottebohm* case (concerning diplomatic protection, not nationality). The test was proposed as a general formulation of what the ILC considered at the time to be the legally necessary link, replacing the ILC’s earlier list of specific links. General formulations are usually vague.
3. The sentence contains an ambiguity: Is the test a pre-condition for the grant of the flag? Or instead a rule that applies post grant of the flag?
4. When the proposed phrase about the recognition of national character by other States was rejected at the Geneva Conference, the sentence became focussed rather more on the situation *post* grant of flag.