

## **GENUINE LINK, REGISTRATION OF SHIPS AND THEIR ROLE TO GLOBAL POLICY OF SHIPPING**

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### **Abstract**

Ships constitute capital investments of significant amounts of financial resources that carry a spectrum of rights and obligations both in national and international level. Additionally, the Flag State that has granted its Nationality to a ship has placed itself to the global community and is a carrier of rights and obligations too that occur from the maritime activity of the ship. In this context there is a wide variety of Ship Registries available to shipowners who wish to register their ships. These Ship Registries can be categorized accordingly, depending on the extent of the application of the principle of the Genuine Link. There are different approaches ranging from the strict application of the rule of the Genuine Link in the Closed Registries to the almost absence of Genuine Link as in the case of the Open Registries.

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### **Keywords:**

Flag State  
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Nationality  
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## **1. Introduction**

The principle of the Genuine Link draws its importance from the wide variety of Ship Registries that are available to shipowners worldwide. In the past centuries shipowners had limited options regarding the choice of the Nationality of their ships. Starting from the 20<sup>th</sup> century, the competition between the traditional maritime countries and the new countries that appeared in the maritime sector has offered new unprecedented opportunities to the shipowners when it comes to the Nationality of the ship.

The definition of the term of the Genuine Link was an issue that concerned the international maritime community for quite a long period of time. Efforts to define the concept and the meaning of the Genuine Link have evolved since the 1950's and it took almost 3 decades, until the 1980's, when the Open Ship Registries were finally widely accepted as credible Ship Registries.

The reaction of the traditional maritime powers resulted to the creation of new types of Ship Registries. These new Offshore and International Ship Registries present a largely differentiated approach concerning the application of the criterion of the Genuine Link.

## **2. Main concepts and definition of the term of Genuine Link**

### **2.1 Definition**

In global literature there are different approaches concerning the definition of the term of Genuine Link. Furthermore, a series of judicial decisions and International Conventions have added extra complexity in the efforts to adopt a uniform definition of the Genuine Link. The main concept of the Genuine Link is the connection that exists between the ship on the one side and the shipping company and the Flag State on the other side. There are different elements that are taken under consideration when we evaluate the connection of the ship with either the shipping company or the Flag State.

We need to keep in mind that the existence of Genuine Link is an important factor when we evaluate the operations of the ship and its interaction with the other members of the shipping company's ownership and management. From the Flag State's perspective it is an element of

crucial importance that forms the basis of the presence of the implied Flag State in the global maritime sector. The Flag State is the carrier of rights and obligations in the international community due to the granting of its Nationality to the ships that fly its flag.

The criterion of the Genuine Link is of significant importance when the various ship registries are assessed and forms the basis of their categorization. Depending on the prerequisites for the registration of ships that are set by any given Ship Registry we can define distinct categories of Ship Registries. Additionally, the regulations that are imposed by the Ship Registries during the operational life of the ship concerning the Genuine Link influence the categorization of Ship Registries and consequently the perception of the international community towards them.

## 2.2. Main concepts

An important factor in examining the interaction between Nationality and other factors affecting the ship is the Genuine Link. From time to time the Genuine Link has been proposed as the basic criterion by which Ship Registries can be categorized into distinct categories. Traditionally, the international community assesses with great gravity the presence or absence of a Genuine Link on matters relating to the ship's relationship with the ship's ownership, the ship with the State in which it is registered, and the relationship of the State in which the ship is registered with the other States. Furthermore, different concepts have emerged regarding the extent of the criteria that have to be taken into consideration when the existence or lack of Genuine Link is assessed. The first approach often called Narrow Interpretation focuses in the typical elements that connect the Nationality of the ship with a spectrum of different elements albeit all of them refer to the status of Nationality. Nevertheless, another approach has evolved known as Broad Interpretation which examines the functional characteristics of the operation of the ship in relation to its status of Nationality and the Flag State.

In the international community, while for decades the need for the existence of the Genuine Link between the ship and the State whose Nationality this vessel carries has been recognized, the phenomenon of different approaches is noticed in attempting to clarify the content of this term. As a result, it is often the responsibility of the judicial authorities to draw conclusions about the insufficient or insufficient evidence of the presence of the Genuine Link [1].

### 2.2.1 Narrow Interpretation of the concept of Genuine Link

Given the diversity observed in the approach to the definition of Genuine Link, it will be attempted to state the main trends in this area. The relationship between the Nationality of the Ship and the Nationality of the Shipowners can be defined as Genuine Link [2]. In the event that the Nationality of the ship is identical with the shipowner's Nationality, then it is assumed that there is a Genuine Link. A crucial question is the percentage of the shipowning which should be the same Nationality as the Nationality of the ship. Of course, it is not uncommon for States that do not make any restrictions on the Nationality of the shareholders in order to subsequently grant their Nationality to the ship concerned.

In addition to the Nationality of the shipowner, the definition of the term Genuine Link can be made on the basis of the Nationality of the persons managing the shipowning company. In this case, the Nationality of the manager and of the persons making up the Board of Directors of the shipowning company shall be taken into account. These companies are required to be listed in the respective Commercial Shipping Companies Registers, in which case the shareholders' composition and the persons who are mandated to implement the business plans of the shipowning company are shown. Of course, it should be noted that with regard to Open Registries, there is a difficulty with the adequate documentation of the Nationality of these individuals [3]. Through specialized types of companies, Open Registries are able to conceal the true identity of the shipowners' management companies, making it often unreliable to identify the Genuine Link if only account is taken of the Nationality of the shipowners' managers.

At the same time, according to other approaches to determining the existence of the Genuine Link, alternatively, the relationship between the Nationality of the ship and the other factors of production can be examined [4]. This methodology expands the criteria taken into account when determining the existence of the Genuine Link. Usually, the Nationality of Officers and Crew [5] are considered. In the case where the Nationality of Officers and Crew is being considered, in order to have a Genuine Link, a minimum level of staffing is made by the workforce of the same Nationality with the Nationality of the ship. In other cases, the Nationality of the shipyard in which the ship is built may be considered.

### 2.2.2 Broad Interpretation of the concept of Genuine Link

The 1<sup>st</sup> United Nations Conference for the Law of the Sea (UNCLOS I) in 1958 also attempted to identify the term Genuine Link. Although this approach did not decipher in technical details, it nevertheless gave the basic parameters of the Genuine Link. According to the analytical approach of Article 5, paragraph 1 of UNCLOS I, we can define the legal and operational responsibilities of a state as a true bond resulting from the award of its Nationality to a ship [6]. The two-way approach to the concept of Genuine Link according to this definition can be analyzed as follows. The legal aspect of state liability concerns the controls and procedures applied at the stage of registration of the ship in the Registry of that State. Thereafter, the State's operational responsibilities for periodic audits arise, which should be applied to ensure that ship and ship ownership of national and international shipping regulations are maintained.

A corresponding broad interpretation of the term Genuine Link has also been adopted by representatives of the scientific community. It has been argued that the adoption by the State of measures and the consequent exercise of compliance control with regard to ships carrying their Nationality is not sufficient [7]. The state must ensure that the existence of national ties is established to link the shipowners with it. This may relate to the Nationality of the shipowning company or its shareholders.

In the same direction is the view that Professor R. Pinto professes. In particular, the State must exercise effective control both at the ship's registration stage and during the phases of its operation, as long as it remains a carrier of the same Nationality [8]. Indeed, these obligations are not limited only to the relations governing the two-state Flag State/ship, as they also extend to the international commitments entered into by the State concerning the granting of its Nationality.

### **3. Evolution of the Genuine Link**

#### **3.1 Early stages of the evolution of the Genuine Link**

Historically, States have had an unlimited freedom to grant their Nationality to the ships that fulfilled their criteria, irrespective of the existence of a relationship linking the ship with that State. We note, therefore, that the development of the Genuine Link institution did not arise ex nihilo, being the evolution of the Hugo Grotius Sea Freedom principle. According to the ruling of

the Hague Permanent Court of Arbitration in 1905 regarding the Muscat Dhows case France's right to grant its Nationality to Muscat's Sultanate ships was virtually recognized, without taking into consideration either the Nationality of the shipowner or another concerning the Nationality of workers on ships [9].

The situation began to change after World War II. Large multinational oil companies that have acquired a privately owned industrial fleet have often chosen to register such ships in a State other than their home. Typically, a State with elastic registration criteria was chosen or alternatively the State from which oil originated or refined [10].

### 3.2 Nottebohm Case (Lichtenstein vs Guatemala)

The beginnings of the concept of Genuine Link can be found in the judgment of the International Court of Justice in 1955 in the Nottebohm case. This particular case did not specifically concern the shipping industry, however, it was the first time that the concept of Genuine Relationship was introduced in global relations and evolved into the Genuine Link. According to the judgment of the International Court of Justice, the Genuine Relationship between the State and the individual as regards living, property and beliefs, as well as the mutual recognition of rights and the assumption of responsibilities, are the basis for the concept of Nationality, and it is not simply the formal attribution of Nationality by a state [11].

### 3.3 International Law Commission

At the level of international treaties, since 1956, the Committee of International Law has prepared the main body of issues that would be of concern at the upcoming Geneva Conference. The adaptation of international relations to real Nationality has now been made on the basis of the level of government sovereignty on ships. The particular Commission in Articles 29 and 34 reflected the spirit that prevailed at the time of recognizing the right of states to choose the very terms and conditions for the award of Nationality while limiting the existence of some form of Genuine Link between the ship and the State [12]. This restriction generally concerned the effective exercise of State control over the activity of the ships which are the carriers of that Nationality and resulted to the UNCLOS I International Conference of 1958.

Here it is worth noting that while the International Law Commission made a conceptual determination of the Genuine Link and the imposition of sanctions in the absence of its application, UNCLOS I, due to the lack of adequate support from the participating States, did not adopt all of this suggestions Commission [13]. The reason for this result was the role of the Open Registers and the impact of their dissemination in the economic and social spheres.

### 3.4 1<sup>st</sup>United Nations Conference for the Law of the Sea (UNCLOS I) in 1958 – Convention on the High Seas

The first official appearance of the term Genuine Link in the global shipping community took place at (UNCLOS I) held in Geneva. In this Conference, the traditional shipping countries, which observed the steady decline in their fleet capacity, with the emerging new maritime forces that advocated the minimal restraints of ships, were struggling against this. It is worth mentioning that the members of the second category, such as Panama, Liberia and Honduras, had the support of the United States. The balancing of the above-mentioned opposing forces took place by establishing the institution of the Genuine Link as an integral part of ship registration at global level.

In particular, Article 5 of UNCLOS I provides for the mandatory existence of a Genuine Link between the State of registration and the ship. However, this apparent prevalence of the views of traditional states has been greatly mitigated by the lack of identification of the characteristics that should be governed by the Genuine Link. There are no specific criteria that will be binding on states when identifying the Genuine Link. By extension, any country that wished for national shipping policy to expand its participation in the international shipping market, under UNCLOS I, adopt tempting terms while avoiding many restrictions on the Nationality of Shipowners, Crew and other components of the shipowning company. Indeed, it is precisely stated in the same article that it is up to each state concerned to establish the conditions required for the registration of a ship and the raising of the national flag. It is, of course, the duty of the State to apply the provisions relating to the administration of the ship and, in general, its activity in relation to its economic and social implications.

The already wide scope of interpretation of the concept of the Genuine Link is even greater if account is taken of the absence of punishments for those states which have shown a defect in the documentation of the existence of a Genuine Link with the ships to which they grant the right to acquire their Nationality [14]. No specific penalties are specified in this Conference, nor are they decided to impose them on States that circumvent the proper protection of the Genuine Link.

### 3.5 Social Conditions and Safety (Seafarers) Recommendation, 1958 (No. 108)

Clear influences from UNCLOS I are also reflected in the 1958 International Labour Organization (ILO) Recommendation. Based on the UNCLOS I findings and decisions, it accepted the concept of Genuine Link specification of its basic features. It was limited to adopting measures that promote the safety of shipboard workers and generally protect their labor rights (International Labor Organization - I.L.O., 2017)[15]. At the same time, the seaworthiness of the ships where sailors are employed is a factor of particular interest as it directly affects the conditions under which sailors live.

### 3.6 International Court of Justice - Advisory Opinion of 08 June 1960

The question of the association of the Nationality of the ship with the State which granted it occupied and the International Court of Justice in 1960 in a case concerning the International Maritime Organization (IMO). At the election of the eight-member Maritime Safety Committee of I.M.O. the issue of the Panama and Liberia candidacy [16] was raised. These applications met the capacity criteria because the capacity of the ships registered in them was in the first eighth of the world, but strong objections were raised within IMO due to the fact that they applied loose criteria when registering ships. The Advisory Opinion of the International Court of Justice focused on the registration of ships, ie registration in the corresponding Registers, considering that the existence or absence of a Genuine Link was not the critical factor in identifying a State as eligible for election to the IMO Maritime Safety Committee.

The admission of Liberia and Panama led to the exit of France and West Germany, which ranked 7th and 8th respectively in terms of tonnage. This phenomenon illustrates the intense reaction of European states to the entry of Liberia and Panama into the IMO's Maritime Safety Committee. On the contrary, the US, which had strong maritime connections with both the Liberia and

Panama Ship Registries, supported the interests of these Open Registries. The most important consequence of this International Court of Justice's Advisory Opinion was the legalization of the Open Registries institution from the legal point of view in the most formal way at a global level [17].

3.73<sup>rd</sup> United Nations Conference for the Law of the Sea (UNCLOS III) in 1982

In the decades that followed the states that were applying loose measures regarding the application of the Genuine Link, they dominated, taking the top positions in the world rankings with the largest Ship Registries. The tolerance regime in this approach was confirmed at the UNCLOS III. In particular, under Article 91, the States concerned may grant their Nationality to ships in accordance with the criteria and standards that those States have set as a precondition. Additionally, the observance of the existence of Genuine Link and its terms is left to the same states without the existence of commonly agreed universally accepted criteria [18]. As can be easily seen, this Conference was a confirmation of the wider acceptance of the practice followed by several developing nations where they imposed limited or even no conditions regarding the Nationality of the shipowner on ships wishing to raise their Flag.

### 3.8 United Nations Convention on Conditions for Registration of Ships

Yet another attempt to clarify the content of the term Genuine Link and the role it plays in global shipping is reflected in the UN Convention on Conditions for Registration of Ships in 1986. Although this Convention is not in force, reference is made to previous UNCLOS I and UNCLOS III Decisions, under which States granting their Nationality to Ships should have an effective administration and to ensure that the United Nations is respected [19]. However, once again, the precise content of the Genuine Link was not determined, leaving much room for interpretation by the parties involved. The main reason for not implementing this Convention is the fact that it was an initiative of the Group of 77 along with the Socialist countries of this era, not raising the support of the countries of the OECD though [20].

### 3.9 Ship Saiga Case (Saint Vincent and the Grenadines vs Guinea)

In international jurisprudence, there is still a court decision that deals with the issue of Genuine Link. The International Tribunal for the Law of the Sea was called upon to rule on the existence

of Genuine Link in the case of the Saiga vessel registered in Saint Vincent and the Grenadines. This Court in Article 83, interpreting UNCLOS III, concluded that the necessity of the existence of the Genuine Link means that the State undertakes all the obligations that will ensure the implementation of effective regulatory and operational control over ships, to which it has granted its Nationality [21]. This characteristic was opposed to the alternative interpretation of the Genuine Link as a selection of the appropriate criteria that could justify or blame the award of Nationality to a ship through the registration procedures.

#### **4. The appearance and the role of Genuine Link in the different types of Ship Registries**

Depending on the extent of the application of the criterion of Genuine Link by the Authorities of the respective Ship Registries, they can be categorized in 4 distinct types. This form of categorization is an accurate method of responding to the needs of assessing the various types of Ship Registries though different opinions have emerged in the past.

##### 4.1 Closed Ship Registries

These Registries can also be called National Ship Registries due to the fact that they follow the restrictions of the Genuine Link in order to register a ship as well as throughout its operational life. The most common criterion applied by these Ship Registries is the connection between the Nationality of ship and the Nationality of the majority of the shareholders of the shipowning company. They both have to share the same Nationality. Furthermore, according to the Broader Interpretation of the concept of the Genuine Link the Closed Ship Registries exercise effective control in the operations of the ship during its service life.

In this category of ships we can find the traditional maritime nations as well as other States that have adopted strict measures regarding the origin of the maritime entrepreneurs. An interesting case is the the British Ship Registry which is regarded member of the Closed Ship Registries. The combination of the Merchant Shipping Act of 1894 and the UK Companies Act of 2006 allows to individuals from other countries to be the owners of British Ships registered to the British Ship Registry [22]. Additionally, the shipowning company has the option to be established outside the United Kingdom, in a Crown Dependency or an Overseas Territory. Thus questions arise concerning the true status of the British Ship Registry as a Closed Ship Registry [23].

#### 4.2 Open Ship Registries

The opposite of the Closed Ship Registries can be found in the concept of the Open Ship Registries. In this type of Ship Registries the Flag State imposes no restrictions regarding the Nationality and this is one the greatest advantages of this type of Ship Registries. Actually, this feature is presented as such by the registration Authorities of these States [24]. The majority of the greatest Ship Registries of the world belong to this category including the top 3 positions (Panama, Liberia, Marshall Islands) and they host 70% of the world tonnage, in spite of the fact that there are virtually no shipowners that hold the Nationality of these States.

#### 4.3 Offshore Ship Registries

In the case of the Offshore Ship Registries the general rule is that there is no application of the principle of the Genuine Link. Hence, a British Citizen who owns a ship is eligible to register this ship to the Offshore Ship Registry of the Isle of Man, Bermuda, Gibraltar and so on. The same rule applies to other Offshore Ship Registries such as Luxembourg and Curacao [25]. The exception in this rule is the case of the Offshore Ship Registry of Kerguelen where the ship and the shipowner share the same France Nationality.

#### 4.4 International Ship Registries

The situation in the area of the International Ship Registries appears more complicated. Overall, the majority of the Ship Registries in this category does not impose strict rules restricting the granting of Nationality to national shipowners. In this way shipowners from other State are welcome to register their ships to the International Ship Registry of Portugal (MAR), Norway (NIS), Denmark (DIS) etc [26]. On the other side there are few International Ship Registries, such as the French (RIF), that allows only the national shipowners to register vessels to respective Ship Registry.

Table 1. Application of the Genuine Link to the various types of Ship Registries

	<b>Closed Ship Registries</b>	<b>Open Ship Registries</b>	<b>Offshore Ship Registries</b>	<b>International Ship Registries</b>
Presence of Genuine Link	Yes	-	-	-
Absence of Genuine Link	-	Yes	Yes in the vast majority	Yes in the majority

#### 4. Conclusion

The issue of the Genuine Link is inherent in the maritime activities from the past centuries. The rising of new economic and politic powers in the 20<sup>th</sup> century has resulted in the need of reorientation of the balance of power in the maritime sector too. With the constant support of the maritime interests of the USA new States such as Panama, Liberia and Marshall Islands benefited from the relaxation of the regulations regarding the application of the Genuine Link. Nevertheless, this trend that resulted to the gradual acceptance of the Open Ship Registries presents many fluctuations. The International Conferences cited in this essay as well as the various court decisions is indicative of the mixture of interests in global level. Most interestingly, the looseness of the application of Genuine Link in the Open Ship Registries that nowadays dominate the maritime sector is the driving force for the creation of new types of Ship Registries such as the Offshore Ship Registries and the International Ship Registries.

It is apparent that the phenomenon of the lack of Genuine Link is a reality in the maritime industry that cannot be reversed. In fact the current trend in the shipping industry is the growing impact of Open Registries as well as of other types of Registries with loose implementation of the criterion of the Genuine Link. On the other hand the quality of services in the shipping sector is affected largely by the procedures that are followed by each Registry. We need to keep in mind that the concept of the Port State Control led to the implementation of strict measures in the surveys on ships. This resulted in the effective control of the quality of the Open Registries and their final acceptance by the maritime community. In this context there are some Open Registries that provide services of the very high quality and consequently can be included in the top performing Ship Registries as opposed to other Open Registries with poor performance collectively known as Flags of Convenience. Concluding, we can assume that the institution of the Open Registries has contributed to the effectiveness of the economics of global shipping and in many cases to the total quality in terms of safety of life, protection of the environment and security of navigation.

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