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The Nationality of Ships: The Definitional Controversy and Enforcement of Genuine Link

Abstract

This article examines the meaning of genuine link and concludes that the cardinal problem with the genuine link controversy is not definition but lack of enforcement measures. Consequently, an alternative approach to the application of genuine link is suggested. The system consists of the creation of international marine inspection centers at strategic locations worldwide. Marine inspectors at these centers would survey vessels unable to return to their home ports before the expiration of their navigable certificates.

The issue of genuine link¹ between flagstate² and ship³ has aroused intellectual and political controversy since its inception at the 1958 Convention on the High Seas.⁴ Subsequently, genuine link has been translated into a legal principle with political consequences.⁵ Whatever the merits of the genuine

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¹Genuine link as a legal principle was formulated as constituting a legal bond connecting an individual with the state vesting upon him its nationality. *Liechtenstein v. Guatemala (Nottebohm)*, 1955 I.C.J. 4. Liechtenstein had extended its nationality to Nottebohm under questionable circumstances. Arguing that actual bond between state and individual, not verbal preferences, was the test, Guatemala withheld recognition of Liechtenstein's naturalization of Nottebohm.

²The state whose flag the ship carries as symbol of diplomatic protection. When a state confers upon a ship the right to fly its flag, the state extends to that ship certain rights and privileges. McDougal, *Maintenance of Public Order at Sea and Nationality of Ships*, 54 AM. J. INT'L L. 25 (1960).

³Ship or vessel as used in this paper means merchant men, i.e., those engaged in ocean commercial activities. A ship or vessel includes all water craft and other artificial contrivances of whatever description and at whatever stage of construction, whether on the stocks or launched, which are used or are capable of being used or intended to be used as a means of transportation on water. 46 U.S.C. 801. The crew must be added to this general technical definition making a ship the totality of contrivance, machinery or propulsion and crew.

⁴United Nations Conference on the Law of the Sea, Final Act, April 26, 1958, UN Doc. A/CONF.13/L52.

⁵Nottebohm, *supra* note 1.

link polemic, the controlling question has evaded its proponents. Basically, the dispute is not definition,⁶ but enforceability⁷ of genuine link.

Historically, the first attempt to grant nationality⁸ to ships occurred in 1826 when Sweden, Norway, and Denmark entered into a treaty.⁹ When the International Law Commission codified laws concerning the attribution of nationality to persons¹⁰ in 1930, the concept was extended to ships. Particularly, parties to the treaty on International Commercial Navigation Laws¹¹ recognized the discretionary authority of a flagstate to determine and regulate the conditions under which to grant nationality to ships.¹² The 1958 Convention on the High Seas converted this doctrine into a general principle of international law. Article 5(2) provides that, "[e]ach 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. . . ."¹³ While the right to grant nationality is exclusive, the right to fly the flag of a state is necessarily conditioned upon the registration of the ship in the territory of the flagstate.

Registration¹⁴ is the administrative mechanism by which a state confers its nationality upon a ship. The process comprises the documentation¹⁵ of a

⁶Genuine link was defined in the *Nottebohm* case as a legal bond between state and individual. Yet, for the past twenty years the international community has failed to formulate an acceptable formula. A failure that underscores the contention that a definitional solution has eluded the international community because the controversy is not definitional.

⁷A better perspective of the genuine link dispute is apparent with the substitution of the word *definition* by *enforcement*. Jurisdictional control connotes enforceability, a further indication that the source of the genuine link controversy pertains to enforcement procedures.

⁸Differences of opinion exist concerning the nationality of ships, but two schools of thought have prevailed. Some states consider the nationality of ships very much analogous to that of natural persons and insist on stringent standards for the conferral of that nationality upon ships. Other states consider ship nationality as pseudo-nationality and are not likely to require the same standards as those applicable to humans. The rationale for the pseudo-nationality concept is inferred from the declaration of the participants in the Versailles Peace Treaty that, "nationality was to be the method of classifying the human race. . . ." JOSEPH BERNARD, *NATIONALITY, ITS NATURE AND PROBLEMS*, (1929), at 17.

⁹De Martens, *Treaty between Sweden, Norway and Denmark, Nov. 2, 1826*, 6 NOUVEAU RECUEIL DES TRAITES, 1075 (1826).

¹⁰Convention on Certain Questions Relating to Conflict of Nationality Laws, signed at the Hague in 1930, 179 U.N.T.S. 89 (1930).

¹¹See, M. Hudson, *Treaty on International Commercial Navigation Law*, 8 INT'L LEGIS. 462 (1941). See also, 37 AM. J. INT'L L. SUPP. 109 (1943).

¹²This had been the practice prior to 1940, *Muscat Dhows*, Hague Court Reports, 94 (1906).

¹³Convention on the High Seas, April 27, 1958, UN Doc. A/CONF.13/L53 (1958).

¹⁴As distinguished from enrollment which evidences national character of vessels engaged in coastwise navigation. *Craig Ltd. v. Ships of the Sea, Inc.*, 401 F. Supp. 1051 (D.C. Ga. 1975).

¹⁵Documentation is an assembly of a dossier containing evidence and proof of the requirements necessary for the attribution of national character on a ship. While these requirements differ with the state, in general, they include: (a) citizenship of ownership, (b) bill of sale, (c) measurement, (d) builder's certificate, (e) certificate of financial responsibility, (f) mortgage certification, and (g) designation of home port.

Rules and regulations for the documentation of vessels in the United States appear in 46 C.F.R. 67.03-1 *et seq.* (1980), in implementation of 46 U.S.C. 11 as amended in Pub. Law No. 84-327 (1959).

ship to evidence its national character.¹⁶ The nature and purpose of registration is to identify the nationality of a vessel engaged in ocean transportation¹⁷ and to enable her to assert that national character wherever found.¹⁸

States' practices in the grant of national character to ships through registry have consistently been guided by the general principle to individually establish the criteria for such conferral.¹⁹ An examination of national legislations²⁰ reveals that states have characteristically adopted one of three systems in the attribution of national character to ships. These approaches can be classified as closed,²¹ hybrid form, and open registry.

Closed registry is the practice of a state to bestow national character only to ships wholly owned by its citizens and manned primarily with national crew.²² The hybrid form is a modified version of closed registry with the provision for reciprocity to nationals of qualifying states.²³ Ownership and manning requirements are limited only to the majority of flagstate's citizenry. The hybrid form represents an attempt to reconcile the extreme exi-

¹⁶National character is synonymous with nationality. It symbolizes the flagstate's jurisdictional control and notice of the ship's nationality to other nations. Courts in the United States have interpreted national character to mean a prima facie case of proper registry and nationality of ownership. *St. Clair v. United States*, 154 U.S. 134, 14 S. Ct. 1002, 38 L. Ed. 936 (1894).

¹⁷The transport of goods or services in a ship from place of origin to destination. See LANE KENDALL, *THE BUSINESS OF SHIPPING*, (1973).

¹⁸*The Mohawk*, 70 U.S. 566, 3 S. Ct. 424, 18 L. Ed. 67 (1866).

¹⁹*Lauritzen v. Larsen*, 345 U.S. 571, 584, 73 S. Ct. 921, 97 L. Ed. 1254 (1954).

²⁰National Legislations and Treaties Relating to the Law of the Sea, U.N.T.S., ST/LEG/SER.8/2 (1970).

²¹Excludes countries with public ownership, although some of these nations, including the Soviet Union, permit the employment of foreign crew on board certain vessels. See *Laws Concerning the Nationality of Ships*, U.N.T.S. ST/LEG/SER.8/5 (1955).

²²The practices of the United States are typical of closed registry states. Under 46 U.S.C. 11, vessels engaged in the foreign trade of the United States must be:

- a. built in the United States and belong wholly to citizens of the United States;
- b. wholly owned by the citizens of the United States or a company organized under the laws of the United States, if foreign built; and
- c. officers must be U.S. citizens.

In addition, all steam vessels navigating any American waters and foreign private steam vessels carrying passengers from any port within the United States must be subject to annual inspections. 46 U.S.C. 367. The purpose of these inspections is to protect life and property. *Ace Waterways, Inc. v. Fleming*, 98 F. Supp. (D.C.N.Y. 1951).

²³The hybrid form is practiced by the majority of nations. Canada provides an excellent example. Under the Canadian Shipping Act, 1934, Ch. 44, § 1, 7 CAN. REV. STAT. 1 (1970), Canadian national character is conferred upon ships:

- a. owned by Canadians or British subjects;
- b. owned by companies incorporated under the laws of a commonwealth country;
- c. whose majority of ownership is resident in Canada; and
- d. whose officers are Canadians or landed immigrants.

Furthermore, vessels are subject to annual inspections of hull, machinery, and equipment. An exception is provided for Canadian Safety Convention ships. 7 CAN. REV. STAT. 466 (1970). A significant aspect of the Canadian approach is the option to register ships in other commonwealth nations by those qualified to register the ships in Canada. However, this option is unavailable where the ship is subject to the control of a foreign government. CAN. REV. STAT. 29 Art. 20.

gencies of both the closed and open registry. Open registry is the practice of a state to allow the conferment of national character upon ships regardless of ownership, control or manning.²⁴ Open registry expresses the maximum and literal²⁵ application of article 5(2) of the High Seas Convention. Such a policy of the liberalization²⁶ of national character has been dubbed the flag of convenience²⁷ and generated the purported genuine link controversy.²⁸

The scope of this controversy widened when in 1958 delegates to the Convention on the High Seas formalized and adopted genuine link as a test for effective flagstate jurisdictional control over ships flying its colors. Principally, article 5(1) provides, "[t]here must exist a genuine link between the state and the vessel flying its flag; in particular, the state must effectively exercise its jurisdiction and control in the administrative, technical, and social matters over the vessel."²⁹

Two prominent factors precipitated and influenced the genuine link controversy. One consideration is the persistent adherence to the consensus that the convention failed to define the meaning of the term genuine link.³⁰ The distinction between enforcement standards and definition of genuine link provides the basis for the contrary view. Attribution of nationality to ships was never intended to convert them into natural persons, but rather to offer a mechanism for the recognition of the flagstate sovereignty over ves-

²⁴Liberian practice is typical of open registry. Under the Liberian Maritime Code of Dec. 12, 1948, as amended Dec. 22, 1949, 22 LIBERIAN CODE OF LAWS 51 (1973), national character is conferred upon ships:

- a. that are seagoing, wherever built and regardless of tonnage;
- b. owned by Liberians or nationals of any foreign state who maintain an operating office or qualified business agent in Liberia;
- c. whose officers are citizens of any country, but duly licensed.
- d. with Monrovia as home port.

Title IX of the General Maritime Laws of Liberia incorporates the inspection and other regulations of U.S. marine inspection laws, except those provisions which are inconsistent with the Liberian code. In essence, Liberia seeks to enforce the same safety standards as the United States.

²⁵The rational basis for this literal approach is the provisions of articles 2, 4, and 6 of the Convention on the High Seas, *supra* note 13.

²⁶This practice has been called flags of convenience, necessity, runaway, attraction, fictitious, Panlibhon, etc. Today the practice is exercised by the Bahamas, Cyprus, Liberia, Oman, Panama, Singapore and Somalia. Economic Consequences of the Existence or Lack of a Genuine Link between Vessel and Flag of Registry, UNCTAD, TD/B/C.4/177, 42, (1978).

²⁷Defined as the [*sic*] practice of any country allowing the registration of foreign-owned and foreign controlled vessels under conditions which, for whatever reasons, are convenient and opportuned for the person registering the vessels. B. BOCZEK, *FLAGS OF CONVENIENCE* (1962) at 4.

²⁸The genuine link controversy was triggered by organized labor's concern over the economic and social security of seafarers. The International Labor Organization claimed that open registry vessels were attractive because they are manned and operated under substandard conditions. Argiroffo, *Flags of Convenience and Standard Vessels*, 110 INT'L LAB. REV. 437 (1974).

²⁹Convention on the High Seas, *supra* note 13.

³⁰54 AM. J. INT'L L. *supra* note 2.

sels of its registry. In short, the purpose of genuine link is to ensure active flagstate control and protection over flagvessels.

Active jurisdictional control requires a meticulous and consistent application of enforcement measures. While a definition explains the meaning of a term, an enforcement standard serves as a calibration device for comparison of different national practices. Indeed, when opponents poignantly argue that the precept of genuine link is unmanageable and dangerously vague,³¹ they are actually advocating enforcement standards. Paradoxically then, both sides of the genuine link controversy are implicitly in unanimity regarding the lack of enforcement procedures. This paradox underscores the contrary view that the genuine link dispute is not one for a precise definition, but for the need to develop adequate enforcement measures. States' right to confer national character on ships is an established legal tenet.³² Thus, genuine link as an enforcement procedure cannot be a precondition for the recognition of nationality without engendering inconsistency.³³

Besides the definitional consideration, the insertion of the phrase *in particular* in article 5(1) injected a dichotomy into the meaning of genuine link; namely, legal and functional.³⁴ Legally, all that is required of a flagstate to establish genuine link is the conferment of national character upon a ship. However, the flagstate has a secondary duty, functional in nature,³⁵ to effectively exercise jurisdictional³⁶ control over the internal affairs of the ship.³⁷ Unlike the legal component, the functional is not a precondition for the recognition of national character. The functional is an implied duty accepted by the flagstate vis-à-vis the international community. Control

³¹Statement by the Liberian Delegate, Committee II, UN Conference on the Law of the Sea, UN DOC.A/CONF.13/40, 22 (1958).

³²Lauritzen v. Larsen, *supra* note 19.

³³By a vote of 30 to 15, 17 abstentions, delegates to the Law of the Sea Convention rejected a provision that would have permitted other nations to withhold recognition of nationality of ships not exhibiting genuine link. The Senate of the United States ratified the convention with the understanding that the national character of a ship can only be questioned by the flagstate. Executive Report no. 5, Law of the Sea, 106 CONG. REC. 11, 190 (86th Cong., 2d Sess. 1960).

³⁴The Ad Hoc Working Group on the Economic Consequences of the Existence or Lack of a Genuine Link between Vessel and Flagstate adopted the term *material requirement* as necessary for the effective enforcement of genuine link. See *UNCTAD*, *supra* note 26 at 20.

³⁵The functional component of the genuine link test relates to the administrative procedures for the grant of national character. Control over the technical affairs of the vessel pertains to the enforcement of marine regulations such as annual surveys, safety standards, and personnel training. Control over the social matters of the ship means providing better working conditions, wages, and adequate procedures for enforcement of contractual obligations. IMCO Resolution A, Doc.A. IX/Res. 321 (1975).

³⁶Jurisdictional control need not be physical, but suffice that the state is recognized to have the authority over the affairs of the vessel. *Eleferiou v. The Archontissa*, 443 F.2d 185 (4th Cir. 1971).

³⁷Jurisdictional control of the internal affairs of the ship simply means matters of the vessel are conducted in a manner consistent with the laws of the flagstate and applicable international principles. The actual running of the daily affairs of the ship is the responsibility of the crew and management. *Cf.* *The Southwark*, 191 U.S. 1, 24 S. Ct. 1, 48 L. Ed. 65 (1903) (by implication).

over ownership is neither relevant nor necessary to exercise this functional duty.³⁸

Therefore, genuine link can be defined as the legal and functional responsibilities assumed by the flagstate when it confers its national character upon a ship. Registration represents the legal requirement while the functional component pertains to periodic surveys, safe and proper working conditions, and social welfare of the crew. The dichotomy in the meaning of genuine link notwithstanding, both the legal and functional components are not mutually exclusive. On the contrary, they are interdependent with the legal being mandatory and functional implied as directly emanating from the former.

The competence to confer national character is an internal act orchestrated by the flagstate under its domestic laws. The functional duty falls within the discretionary authority of the flagstate. In the absence of an internationally accepted standard, any attempt to dictate the functional component amounts to interference in the internal affairs of a state.³⁹ Of course, the international arena remains the proper medium for the development of enforcement measures.

Another interpretation of the phrase *in particular* is that it serves as a modifier and the words following it simply explain or define genuine link. Conceivably, having proposed the requirement for a genuine link between state and vessel, delegates to the convention were compelled to elucidate the legal significance of genuine link. Effective flagstate jurisdictional control over the administrative, technical, and social affairs of the vessel is that legal significance. The functional component provides the method by which that legal responsibility is translated into social reality.

A recent proposal⁴⁰ by the United Nations Conference on Trade and Development (UNCTAD) defines genuine link as comprising of inter alia:

- a. registration,
- b. substantial share of the beneficial ownership in the vessel by nationals of the flagstate,
- c. principal place of business and effective management of the legal entity which has beneficial ownership of vessel be in the flagstate, and
- d. principal officers of the legal entity beneficially owning the vessel be nationals of the flagstate.

The fundamental purpose of genuine link has been asserted to be a reflection of national policies directed toward the protection of national⁴¹

³⁸Watts, *The Protection of Merchant Ships*, 33 BRIT. Y.B. INT'L L. 52 (1957). This author advocated nationality of owners as a basis for the exercise of genuine link (functional duty) over ships.

³⁹Sumner Welles, *Intervention and Interventions*, 26 FOREIGN AFFAIRS 116 (1947).

⁴⁰See UNCTAD Proposal, *supra* note 26, at 20.

⁴¹Some states have construed national merchant marine to mean one controlled and owned by the flagstate. Conversely, while this construction is true for some countries, the proper interpretation is ships endowed with national character irrespective of ownership.

merchant marine fleets.⁴² Consequently, the UNCTAD proposals must be evaluated by this standard. Proposal (a) requiring registration of ships as a factor of genuine link is consistent with the legal component of the test.⁴³

Requirement (b) poses no real obstacle except its failure to state precisely what constitutes *substantial share*. If it represents an attempt to impose a quantitative value on flagstates, it may violate article 5(2) of the Convention on the High Seas. Even if the proposal were a collective limitation⁴⁴ on the discretionary authority of flagstates to grant national character to ships, it would not be a viable consideration⁴⁵ because it sanctions *tie-in* arrangements.⁴⁶

Proposal (c) would vest both the control of the principal place of business and management of ownership in the flagstate. The principal place of business is ambiguous and susceptible to interpretation.⁴⁷ One interpretation is the location of the home office of the legal entity or corporation.⁴⁸ The other interpretation is the locus of the bulk of activity of the legal entity, even though the home office may be located elsewhere.⁴⁹ A third interpretation is a combination of the home office and locus of activity.⁵⁰

Effective management of ownership in effect would transform international shipping into public enterprises. Given the complexity of ownership⁵¹ in multinational corporations, proposal (c) is not only impractical,

⁴²R. Pinto, *Flags of Convenience*, JOURNAL DU DROIT INT'L 354 (1960).

⁴³Administrative procedures for the registration of vessels are substantially identical in every country. Differences exist only in the enforcement of the functional component of genuine link. See UNCTAD Proposal, *supra* note 26, at 8.

⁴⁴A collective limitation is an international agreement that limits the exercise of sovereign authority in a given activity.

⁴⁵The truism that states will always protect their interest dictates that flagstates provide for participation by their nationals in the benefits accruing from vessels under their flags. The determination of that quantitative value becomes a matter of internal concern subject to the discretion of the flagstate. Proposal (b) would seem to suggest that some states lack the ability to protect their own interest. If this were the case, there would be no genuine link controversy.

⁴⁶A tie-in arrangement exists when Company A in state B transfers ownership to citizens of state C who act as *strawmen* while actual control remains with Company A. Multinational Shipping Enterprises, Report by the Secretary of UNCTAD, TD/108/Supp.1/Rev.1 (1976).

⁴⁷Courts in the United States have adopted both interpretations. *Kelly v. U.S. Steel*, 284 F.2d 850.

In Canada there is no differentiation between place of business and principal place of business. A branch office satisfies place of business. *The Corporation of the City of Kingston v. The Canadian Life Assurance Co.*, 18 O.R. 18 (1889).

While subscribing to the American practice, Britain may assert the right of the sovereign to give residence in law if not in fact to a company. *Wood v. Hartford F. Ins. Co.*, 13 Conn. 202, 33 Am. Dec. 395 (1838).

Thus, finding an acceptable definition for principal place of business may become the source of another dispute.

⁴⁸*Id.*

⁴⁹*Egan v. American Airlines*, 324 F.2d 565, (2d Cir. 1963).

⁵⁰*Kelly v. U.S. Steel*, *supra* note 47.

⁵¹This fact was conceded by the UNCTAD Working Group. See UNCTAD Proposal, *supra* note 26, at 34.

but would introduce an extraneous economic concept⁵² into ship nationality. The proposal would encourage governmental meddling, nationalization of international shipping interests without just compensation,⁵³ and disrupt shipping activities of multinational corporations.

For example, to require beneficial owner, Company *A* producer of steel in State *B* to transfer its principal place of business or subject the bulk of its activities to the control of State *C* in order to register a ship⁵⁴ is to insemminate chaos. The natural consequence would be the emergence of dual or even multiple registry⁵⁵ in contravention of article 6(1)⁵⁶ of the Convention on the High Seas.⁵⁷

Proposal (d) would require corporate officers of the company owning the vessel to be nationals of the flagstate.⁵⁸ By assuming that ship ownership is necessarily corporate, the effect of the proposal would be underinclusive⁵⁹ and sanction multiple registry in cases of ownership in partnerships.⁶⁰ Another fallout of the proposal is the inadvertent boost of the creation of dummy corporations and institution of puppet corporate officers.⁶¹

Of the four UNCTAD proposals only (a) bears any rational relation to the grant of national character to vessels and the establishment of genuine link between flagstate and ship. Conceivably, proposals (b-d) are fashioned to represent the functional component of genuine link. Nevertheless, these requirements relate to ship ownership in ways which should not play any significant role in the attribution of national character to vessels. The effect of flagstate control over ownership on the enforcement of genuine link is speculative at best. Thus, the relevance of any proposal that equates mandatory public control of ship ownership to genuine link, if any, is doubtful and ought to be a matter of national discretion. Apparently, the ultimate purpose of these proposals is a deliberate design to eliminate open registry. Yet, considering the immediate threat they pose to international

⁵²A requirement which provides for the management of the legal entity which has beneficial ownership of a vessel is a prelude to public control of international shipping. Under such a proposal, the threat of nationalization constantly lurks on the horizon.

⁵³Most constitutional governments, and in particular, the United States, prohibit the taking of private property for public use without just compensation. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, S. Ct. 422, 67 L. Ed. 322 (1922).

⁵⁴Shipping in this example is an ancillary activity to the owner and proposal (c) cannot be enforced without opposition from state *B*.

⁵⁵Such a situation would develop where Company *A* with multinational activities is considered by different countries to have its principal place of business in their territory. Since each state determines by its laws the meaning of principal place of business, the permutations of multiple registry are infinite.

⁵⁶Article 6(1) provides that ships shall sail under the flag of only one state.

⁵⁷Convention on the High Seas, *supra* note 13.

⁵⁸This requirement is consistent with the practices of closed registry states, but should be discretionary not mandatory, *supra* note 22.

⁵⁹*E.g.*, *Railway Express Agency v. New York*, 366 U.S. 106, 69 S. Ct. 463, 93 L. Ed. 533 (1949) (Ownership by partnership is excluded and by analogy.)

⁶⁰*Supra* note 55.

⁶¹In addition, proposal (d) would leave status quo the practice of open registry which it seeks to eliminate and destroy the reciprocal arrangements of the hybrid form of registry.

shipping, their legal, economic, and political consequences should be carefully evaluated.⁶²

Until the exclusive right to attribute national character by flagstates provided in article 5(2)⁶³ is modified, proposals such as (b-d) would engender inconsistencies⁶⁴ with dire ramifications. Even in areas of concurrent jurisdiction, as ports or territorial waters,⁶⁵ the practice has been to recognize flagstates' national character irrespective of the functional component of genuine link.⁶⁶

Exercise of the functional component of genuine link is dependent upon the willingness and ability of the flagstate.⁶⁷ The mere grant of national character to a ship is an expression of the flagstate's willingness to exercise jurisdictional control over the affairs of that ship. Conversely, the ability of the flagstate to enforce the functional component of genuine link is dependent on both internal and external forces occasionally beyond the state's control.

Internally, the flagstate must enjoy stable political climate,⁶⁸ sound financial standing, adequate economic resources, and disciplined trained manpower. Externally, conditions, such as, uniform international standard or rule,⁶⁹ fixed shipping trade routes,⁷⁰ and stable economic and political relations, must prevail to facilitate enforcement of the functional component of genuine link.

The flag displayed by a ship is not as determinative in the enforcement of genuine link as is the need to protect the safety of crew, ship, and marine environment. Whatever the correlation between registry and marine disas-

⁶²If proposals (b-d) became law, the immediate effect would be the withdrawal of shipping interests by citizens of industrialized states from the registry of developing nations. In 1975, 51 percent of all ships under open registry flags were owned by citizens of eleven industrialized countries. UNCTAD Proposal, *supra* note 26, at 33.

⁶³Convention on the Law of the Sea, *supra* note 4.

⁶⁴Arguably the right to confer national character upon a ship is not absolute and other states are not compelled to recognize it. However, concurrent application of article 5(2) and the UNCTAD proposals does not create certainty which is a fundamental characteristic of any legal principle.

⁶⁵Article 17, Convention on the Territorial Sea and the Contiguous Zone, 516 U.N.T.S. 205, 15 U.S.T. 1606, T.I.A.S. 5639 (1964).

⁶⁶Since 1887, the United States has consistently adhered to the principle of non-interference in the internal affairs of vessels of other nations. (The exception to this rule appears *supra* note 22(c). *Wildenhuis*, 120 U.S. 1, 7 S. Ct. 385, 30 L. Ed. 565 (1887). *See also* *Windward Shipping Ltd. v. AFL-CIO*, 415 U.S. 104, 94 S. Ct. 959, 39 L. Ed. 2d 195 (1974).) Of course, the employment of an American longshoreman by a foreign ship in an American port would be another exception. *Contra*, *AFL-CIO v. Ariadne Shipping Co.*, 397 U.S. 195, 90 S. Ct. 872, 25 L. Ed. 2d 218 (1970).

⁶⁷This assertion is valid for the fulfillment of all international obligations of any nation.

⁶⁸In addition to cheap labor, capital financing, favorable tax incentives, and convenient repatriation of profits, the predominant factor influencing the attractiveness of open registry is political stability.

⁶⁹An international uniform standard is an authoritative model to guide the conduct of nations and is applicable *prima facie* to specified activities. *Cf.* *Edye v. Robertson*, 112 U.S. 580, 5 S. Ct. 247, 28 L. Ed. 798 (1884) (by analogy).

⁷⁰"[T]he totality of all the voyages between major geographic areas. . . ." *See THE BUSINESS OF SHIPPING*, *supra* note 17, at 1.

ters,⁷¹ open registry is a fact of international practice.⁷² Equally true is the uncertainty surrounding the resolution of the genuine link controversy in the foreseeable future.⁷³ Meanwhile, a few unsafe vessels continue to ply the oceans.

Having posited the thesis that the essence of the genuine link dispute is for the development of enforcement measures, a proposal for an alternative approach is in order. The underlying assumption of this proposal is that the safety of vessels and crew is an activity of collective concern.⁷⁴ In retrospect then the development of enforcement standards of the functional component of genuine link is an international problem. The resolution of this problem can be achieved without resort to the drastic method of mandatory flagstate control over vessel ownership. Enforcement efforts should be limited to the jurisdictional control of the administrative, technical, and social matters of ships.⁷⁵

In order to strengthen current international practices, the Inter-Governmental Maritime Consultative Organization (IMCO)⁷⁶ should establish marine inspection centers in the eight functional regions⁷⁷ depicted in Figure 1. Special inspectors⁷⁸ appointed by IMCO should be stationed in these functional regions. The primary duty of the inspectors should be to survey ships unable to return to their ports of registry before the expiration of their certificates of navigability.⁷⁹ During these periodic surveys, the inspectors should ensure that the safety and working conditions of both the ship and crew meet the minimum international standards.⁸⁰

⁷¹No correlated study has been undertaken although the unsafe conditions of ships has frequently been used as argument against open registry.

⁷²Open registry ships carried 31 percent of world gross tonnage in 1977. Review of Maritime Transport, UN Doc. TD/B/C.4/178/Rev. 1, 11 (1977).

⁷³*U.S. Opposes Tighter Ship Registry Law*, 304(158) Philadelphia Inquirer (1981) col. 3, at 19A.

⁷⁴An ocean activity is of collective concern if it can cause or is capable of causing extraterritorial, management, environmental or distributional effects.

⁷⁵The functional component of genuine link has been explained. *Supra* note 35.

⁷⁶IMCO is the leading organ of the United Nations in the development of shipping regulations. JOHN HARGROVE, *WHO PROTECTS THE OCEAN?* (1975) at 33.

⁷⁷These Functional Regions would include:

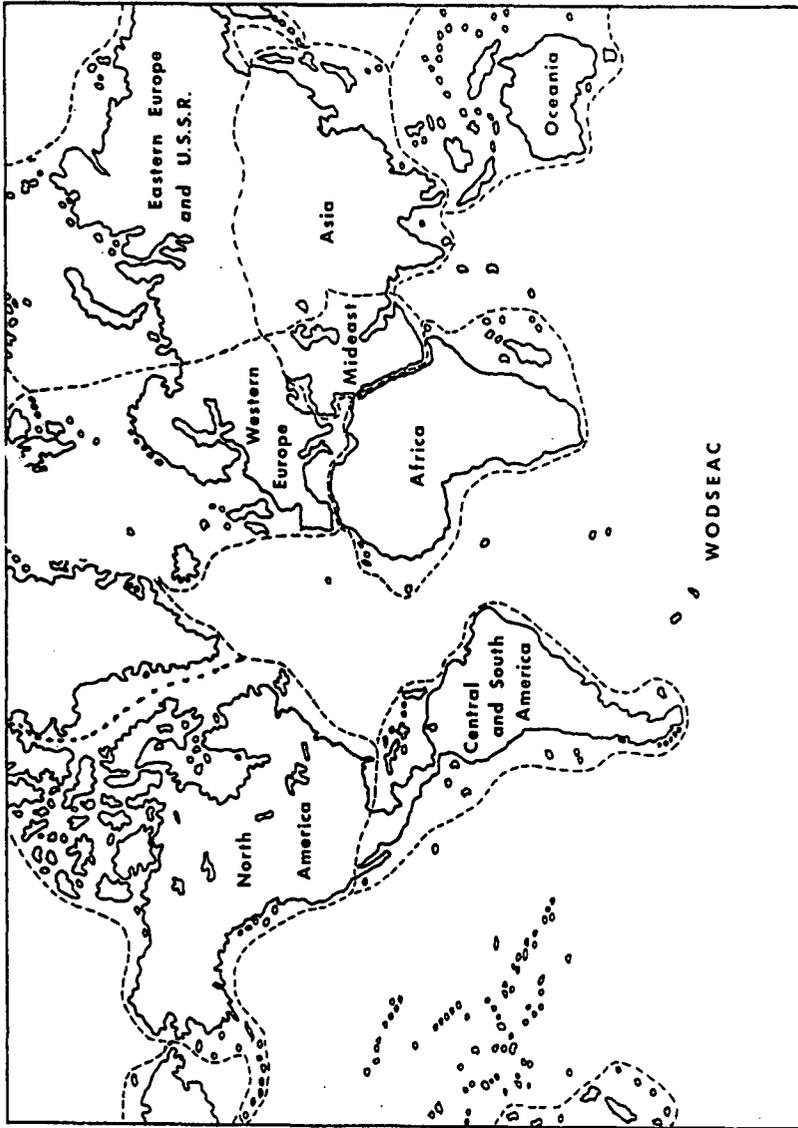
- a. Africa,
- b. Asia (includes Japan),
- c. Central and South America,
- d. Eastern Europe and the Soviet Union,
- e. Middle East (includes Iran),
- f. North America,
- g. Oceania (includes Indonesia and Papua New Guinea), and
- h. Western Europe.

⁷⁸Such inspectors will be experts in the field of marine inspection, but not nationals of the flagstate.

⁷⁹The document issued to a vessel as evidence of its seaworthiness following an inspection.

⁸⁰While some states may impose more stringent standards, the duties of the inspectors would be limited to internationally accepted minimum requirements.

Figure 1. Functional Regions



Most accidents are caused by human error either through negligence or ignorance. While the licensing of merchant marine officers⁸¹ is the responsibility of flagstates, a common international competency test⁸² should be administered to prospective candidates. These tests should be developed at the IMCO headquarters and channelled to the regional and state centers for processing. At the conclusion of the examination, a list of the successful candidates at the regional centers should be forwarded to the respective governments for the actual issuance of licenses.

An analysis of the meaning of genuine link led to the proposition that the cardinal problem with the genuine link controversy is the lack of enforcement measures. Despite international efforts to develop an acceptable formulation of genuine link, the results have been inconclusive. Genuine link consists of a legal and functional components. The main thrust of the current, proposed UNCTAD definition of genuine link pertains to control of ship ownership and would not provide the enforcement procedures necessary for the application of the functional component of genuine link.

Genuine link can be enforced through the creation of marine inspection centers at strategic locations worldwide. Marine inspectors at these centers would be responsible for the survey of safety standards on board oceangoing vessels unable to return to their home ports.⁸³ Hopefully, implementation of this alternate approach would result in effective control and enforcement of the functional component of genuine link, resolution of the genuine link controversy, and elimination of the risk of creating chaos in international shipping.

⁸¹Merchant marine officers engaged in coastal trade and unlicensed crew are excluded.

⁸²Unlike safety standards which may impose additional measures, the common test must be uniform and reflect the best possible available knowledge.

⁸³Home port is synonymous to port of registry. *Supra* note 15(g).