

タイトル	Protection of a Ship by the Flag State and Diplomatic Protection : Conceptual Relationship and Admissibility of Claims
著者	加藤，信行
引用	北海学園大学法学部50周年記念論文集：316-297
発行日	2015-03-15

# Protection of a Ship by the Flag State and Diplomatic Protection:

## Conceptual Relationship and Admissibility of Claims

Nobuyuki KATO

### INTRODUCTION

#### 1. DISTINCTION BETWEEN PROTECTION OF A SHIP BY THE FLAG STATE AND DIPLOMATIC PROTECTION AND THEIR PARARELL EXISTENCE

- (1) Definition and Scope of Diplomatic Protection in the ILC's Draft Articles (2006)
  - Diplomatic Protection in *sensu lato*
  - Diplomatic Protection in *sensu stricto*
  - Strict Approach of the ILC: Article 1 of the Draft Articles
- (2) Protection of a Ship by the Flag State as one Mode of Diplomatic Protection
  - Academic Writings
  - Restatement of the Foreign Relations Law of the US
- (3) Protection by the Flag State as Distinct from Diplomatic Protection
  - Protection by the Flag State
  - Diplomatic Protection in Article 18 of the ILC's Draft Articles
  - Academic Writings and the *M/V Virginia G* Case

#### 2. ADMISSIBILITY OF CLAIMS BY THE FLAG STATE

- (1) Flag as the Basis of Protection for the Ship
  - US Practice and Academic Writings
  - HSC and UNCLOS
  - the *M/V Saiga (No.2)* Case
- (2) Requirement of the Genuine Link
  - HSC and UNCLOS
  - the *M/V Saiga (No.2)* Case and the *M/V Virginia G* Case
  - Limited Applicability of the Genuine Link
- (3) Applicability of the Local Remedies Rule and its Exceptions
  - Article 295 of the UNCLOS and its Legislative History
  - “Direct injury” Exception and “Preponderance” Test
  - “Jurisdictional Connection” Exception

### CONCLUDING REMARKS

## INTRODUCTION

The International Tribunal for the Law of the Sea (ITLOS) delivered its judgment on 14<sup>th</sup> April 2014 in the case of “*the M/V Virginia G*”,<sup>1</sup> an oil tanker flying the flag of Panama, which was arrested and confiscated by the authorities of Guinea-Bissau for the reason that the vessel was refueling for foreign vessels in Guinea-Bissau’s exclusive economic zone without proper authorization. On the preliminary issues the Tribunal found that it had jurisdiction over the dispute and then rejected the objections raised by Guinea-Bissau to the admissibility of Panama’s claims based on the alleged lack of genuine link between the *M/V Virginia G* and Panama, the nationality of claims and the alleged failure to exhaust local remedies<sup>2</sup>.

The ITLOS dealt with similar issues already in the *M/V Saiga (No.2) Case (1999)*<sup>3</sup>, where an oil tanker flying the flag of the Saint Vincent and the Grenadines, which was attacked and arrested by a Guinean patrol boat and then confiscated by the authorities of Guinea for the reason that the vessel was refueling for foreign vessels in Guinea’s exclusive economic zone. In this case also, the admissibility of the Saint Vincent and the Grenadines’ claims, *inter alia* existence of genuine link and exhaustion of local remedies, was challenged by Guinea and the Tribunal rejected the Guinea’s objections to admissibility.

When a vessel<sup>4</sup> is suffered damage or crew members on board are injured by an international wrongful act of a State as like these cases, the flag State of the vessel exercises protection on behalf of it vis-à-vis the alleged wrong-doing State and then the respondent State often raises objections based on the nationality of claims and/or the exhaustion of local remedies to the admissibility. In both of the above-mentioned cases the ITLOS affirmed admissibility of claims but the legal nature of claims by the flag State in the context of diplomatic protection is not necessarily undisputed and remains to be resolved. Legal nature of such claims is interrelated with and may affect decisions of admissibility of claims.

This paper provides a cursory overview of protection of a ship by the flag State and elucidates the concept of such protection in the light of, or compared with, the institution of diplomatic protection under international law, especially in terms of admissibility of claims<sup>5</sup>. The paper consists of two parts. The author deals first with conceptual relationship between protection of a ship by the flag State and diplomatic protection by a national State on behalf of private persons, natural or legal. Next the second part examines admissibility of claims by a flag State in the light of the principles and rules developed in diplomatic protection. Finally a brief concluding comment is added.

## 1. DISTINCTION BETWEEN PROTECTION OF A SHIP BY THE FLAG STATE AND DIPLOMATIC PROTECTION AND THEIR PARALLEL EXISTENCE

### (1) Definition and Scope of Diplomatic Protection in the ILC's Draft Articles on Diplomatic Protection

According to J. Dugard, “[d]iplomatic protection is the procedure employed by the injured alien’s State of nationality to secure compliance with the primary rules of international law governing the treatment of aliens or to claim reparation for the injury inflicted upon the alien.”<sup>6</sup> Whereas the term ‘diplomatic protection’ in its broad meaning (diplomatic protection in *sensu lato*) can be used to cover various actions by States or other international legal subjects to protect a private person<sup>7</sup>, the term in its narrow sense (diplomatic protection in *sensu stricto*) is limited to representations or demands that are made under a claim of right by a national State<sup>8</sup>. Diplomatic protection in the latter sense is deemed to be one mode of invocation of State responsibility by an injured State against the responsible State for an internationally wrongful act.

The International Law Commission (ILC) also adopted such a strict approach to the notion of diplomatic protection to confine the scope of its codification and to be consistent with the Draft Articles

of State Responsibility. In describing the ‘salient features’ of diplomatic protection, Article 1 (“definition and scope”) of the Draft Articles on Diplomatic Protection adopted by the ILC after the second reading in 2006 provides that “[f]or the purposes of the present draft articles, diplomatic protection consists of the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility.” According to the commentary to this text, “[d]iplomatic protection is the procedure employed by the State of nationality of the injured persons to secure protection of that person and to obtain reparation for the internationally wrongful act inflicted,<sup>9</sup>” and the procedure embraces all forms of lawful dispute settlement, including judicial dispute settlement<sup>10</sup>. Protection of an agent by an international organization, generally described as “functional protection”, is distinct from diplomatic protection of a natural or juridical person by the national State (diplomatic protection in *sensu stricto*), and therefore generally excluded from the latter category<sup>10a</sup>.

## (2) Protection of a Ship by the Flag State as one Mode of Diplomatic Protection: Traditional Comprehension

As ITLOS acknowledged in *the M/V Saiga (No.2)* case as well as *the M/V Virginia* case, the right of the flag State to seek redress for the ship and/or the ship’s crew member is justified under international law. Such a right of the flag State has heretofore been considered to be one mode of the right of diplomatic protection of a national State. Traditionally, it has widely been accepted that the flag State of a vessel is entitled to exercise “diplomatic protection” for that ship, as in the case of a State for its nationals<sup>11</sup>. Since the flag State has jurisdiction over its ship and control of the ship, it has been deemed that the flag State has the right to give “diplomatic protection” against an internationally wrongful act in regard to the

ship<sup>12</sup>. Thus, *the Restatement of the Foreign Relations Law of the U. S.* (1987) makes a comment that “[t]he flag state has the same right to exercise diplomatic protection with respect to its ships as a state has with respect to its national or companies, and entitled to make claims against other states in case of damage to its ship or injury to the seamen manning it, regardless of their nationality<sup>13</sup>”.

### (3) Protection by the Flag State as Distinct from Diplomatic Protection

Indeed, there is a close resemblance and similarities between protection of a ship by the flag State, i.e., the national State of a ship, on the one hand, and diplomatic protection of a private person by the home national State, on the other. The title of “Nationality of ships” in article 91 of the United Nations Convention on the Law of the Sea (UNCLOS) is an expression which is traditionally used, the word “nationality” signifying the legal connection between a ship and the flag State. There is, however, “no analogy between the nationality of ships and the concept of nationality as applied to individuals or corporations”<sup>14</sup>. Today, the former protection by the flag State is deemed to be distinguished from, and therefore not to be characterized as, diplomatic protection.

Regarding international protection of a ship’s crew, Article 18 of the Draft Articles on Diplomatic Protection provides that “[t]he right of the State of nationality of the crew of a ship to exercise diplomatic protection is not affected by the right of the State of nationality of a ship to seek redress on behalf of such crew members, irrespective of their nationality, when they have been injured in connection with an injury to the vessel resulting from an internationally wrongful act.” The text of this article is just the same as that of the former article 19 in the provisionally adopted Draft Articles on first reading in 2004. Most States that have submitted comments have responded positively to this article<sup>15</sup>.

Finding no fault with the principles expounded in the article, the United States argued that as the right of the flag State to seek

redress on behalf of crew members fell outside the field of diplomatic protection, such a provision should not be included in the Draft Articles on Diplomatic Protection<sup>16</sup>. The ILC decided, however, to retain the provision because the protection offered by the flag State is analogous to that of diplomatic protection, as recognized by the ITLOS in *the M/V Saiga (No.2)* case, remarking that policy considerations demand that both methods of protection be reaffirmed because ships crews are vulnerable and require all the protection they can get<sup>17</sup>.

On the other hand, Mexico requested the ILC to resolve the issue of competing claims if both the national State of crew members and the flag State of the ship should seek redress, and therefore the issue of dual reparation by the offending State<sup>18</sup>. Just as having “resisted this course in respect of claims by dual nationals”, the Commission decided not to do so, considering it to be unwise or unnecessary<sup>19</sup>.

Thus, the original text proposed by the Special Rapporteur was maintained without any alteration in the final Draft Articles. According to the ILC’s Commentary, “[s]upport for the right of the flag State to seek redress for the ship’s crew is substantial and justified. It cannot, however, be categorized as diplomatic protection. Both diplomatic protection by the State of nationality and the right of the flag State to seek redress for the crew should be recognized, without priority being accorded to either.”<sup>20</sup>

Haijiang Yang notes that “[i]t is widely accepted that *only the flag State* of the ship is entitled to exercise diplomatic protection *for the ship*, as in the case of a State for its nationals (*italics added*)”<sup>21</sup>. It seems, however, to be obvious from the above-mentioned discussions in the ILC that the State of nationality of the injured crew members has the right of diplomatic protection, concurrently with and in addition to, the protection by the flag State of a ship under general international law. Moreover, even passengers on board a ship, who have a more limited and transient connection with the ship, can seek protection for their injuries from their State of nationality<sup>22</sup>. Yakushiji remarks that the UNCLOS concentrates and converges the

right of protection on behalf of a ship, including the right of application for prompt release of the vessel or its crew (article 292), in principle upon the flag State<sup>23</sup>. But he does not seem to suggest that possible rights to claim by a national State of persons on board under general international law should be excluded or denied.

The ITLOS held in the *M/V Virginia G* case that the exercise of diplomatic protection by a State in respect of its nationals is ‘to be distinguished’ from claims made by a flag State for damage in respect of natural and juridical persons involved in the operation of a ship who are not nationals of that State<sup>24</sup>. The right of the flag State cannot be characterized as diplomatic protection in *sensu stricto* because of the absence of the bond of nationality between the flag State and the members of a ship’s crew, but the right of the State of nationality to exercise diplomatic protection on behalf of the members of a ship’s crew is not taken away or replaced by that of the flag State. The Draft Articles on Diplomatic Protection does not deal with the issue of protection by the national State of the ship owners, but this does not imply such a State does not have the right of protection<sup>25</sup>. The simultaneous and parallel existence of the right of diplomatic protection exercised by the national State of crew members and other persons on board a ship or of the ship owners should not be overlooked.

## 2. ADMISSIBILITY OF CLAIMS BY THE FLAG STATE

### (1) Flag as the Basis of Protection for the Ship

The U. S. practice and academic writings relied on it used to demonstrate that if a vessel is owned by American citizens, the vessel is entitled to American protection, irrespective of the distinction made in municipal law between registered and unregistered vessels<sup>26</sup>, or that “protection depends upon the vessel’s national character, to be ascertained, if contested, by her papers, and, if need be, by other circumstances, but not by the flag under which she sails”<sup>27</sup>. In his article of 1957, Watts pointed out that the flag as the basis of



protection was unacceptable since it was primarily only a symbol and instead “national ownership” as a basis for protection would be in accord with the law concerning protection in general<sup>28</sup>.

Since 1958 when the Geneva Convention on the High Seas (CHS) was adopted, however, it has been generally accepted that the right of protection of a ship is primarily vested in the flag State<sup>29</sup>. A ship or a vessel can be said to constitute a “self-containing unit”<sup>30</sup>, a sort of an autonomous transportation community, though not a “floating territory” at all, during its navigation and the flag State has exclusive jurisdiction over a ship as a whole in principle, which covers everyone and everything on board as a unity. According to the judgment of *the M/V Saiga (No.2)* case, the UNCLOS “considers a ship as a unit, as regards the obligations of the flag State with respect to the ship and the right of a flag State to seek reparation for loss or damage caused to the ship by acts of other States and to institute proceedings under article 292 of the Convention. Thus the ship, everything on it, and every person involved or interested in its operations are treated as an entity linked to the flag State. The nationalities of these persons are not relevant.”<sup>31</sup>

Therefore, the flag as the basis of protection can be justified and is recognized by prevalent opinions and practices nowadays.<sup>32</sup> In sum, as the ITLOS held in the *M/V Virginia G* case, a ship’s crew and cargo on board as well as its owner and every person involved or interested in its operations are to be treated as an unity linked to the flag State, therefore the flag State is entitled to bring claims in respect of alleged violations of its rights which resulted in damages to these persons or entities<sup>33</sup>.

## (2) Requirement of the Genuine Link

Strongly influenced by the judgment of *Nottebohm* case (1955) in the International Court of Justice (ICJ), article 5, paragraph 1 of the CHS and its successor, art. 91, paragraph 1 of the UNCLOS provide that there must exist a genuine link between the State and the ship. According to Churchill and Lowe, there is almost no agreement as to

what constitutes a “genuine link”<sup>34</sup> and it is uncertain what consequences follow when there is no such link.<sup>35</sup> As to the meaning of ‘genuine link’, the ITLOS defined recently in the *M/V Virginia G* case as follows: Once a ship is registered, the flag State is required, under article 94 of the [UNCLOS], 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<sup>36</sup>. Theoretically, if there is not a genuine link, international validity or opposability of the conferred nationality vis-à-vis other States could be challenged, though the conferment of nationality by the domestic law of the flag State itself would not be denied<sup>37</sup>. The absence of such a link may constitute a bar to a claim submitted by or on behalf of a flag State to an international court or tribunal. If there is shown to be sufficient doubt over the existence or genuineness of the link, international claim by the flag State can be inadmissible<sup>38</sup>. According to Yang, “the genuine link between a ship and a State is much more underlined for the purpose of diplomatic protection than for registration or nationality.”<sup>39</sup>

In the *M/V Saiga (No.2)* case, the Tribunal notes that the purpose of the UNCLOS on the need for a 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<sup>40</sup>”, and rejected the Guinea’s objection to admissibility based on absence of a genuine link because the evidence adduced by Guinea is not sufficient to justify its contention<sup>41</sup>. In the *M/V Virginia G* case, the same Tribunal again rejected the Guinea-Bissau’s similar objection on the ground that “there is no reason to question that Panama exercised effective jurisdiction and control over the *M/V Virginia G* at the time of the incident.”

Considering the present state of affairs where practice of the “flag of convenience” or “open registry” and increasing practice of “bareboat chartering<sup>42</sup>” are widespread, to allow the other States to deny the validity or opposability of registration of a ship and its nationality on the ground of absence of a genuine link would, as

Yakushiji points out, significantly impair the interests of navigation of ships<sup>43</sup>. Ademun-Odeke contends that “[u]nfortunately, ships can neither be equated with individuals nor have sentimental attachments to bond with the flag state”<sup>44</sup> and more fundamentally that ‘with globalization, the genuine legal and/or economic links are not only becoming hard to determine but might, with time, become irrelevant and obsolete’<sup>45</sup>.

It should also be taken into account in this regard that the Draft Articles on Diplomatic Protection deny the general applicability of the theory of a genuine link set out by the judgment of *Nottebohm* case even with respect to nationality of a natural person<sup>46</sup>. Applicability of the requirement would not be necessarily presupposed in general in cases where a natural person has a single nationality only. In the light of the facts of the *Nottebohm* case, it would be limited to cases where the ship in question has much closer ties with the respondent State than the flag State.

### (3) Applicability of the Local Remedies Rule and its Exceptions

Requirement of the exhaustion of local remedies as a prerequisite for diplomatic protection is a well-established rule of customary international law<sup>47</sup>. The requirement may be waived by the respondent State’s consent<sup>48</sup> and dispensed with by an international agreement relating to disputes concerning the law of the sea<sup>49</sup>. But the UNCLOS stipulates in article 295 that “[a]ny disputes between States Parties concerning the interpretation or application of this Convention may be submitted to the procedures provided for in this section [=section 2 of Part XV] only after local remedies have been exhausted where this is required by international law.”

The legislative history shows that various changes have been made on the local remedies rule in the UNCLOS: the proposal of several possible alternatives by the informal working group on settlement of disputes in the 1974 Caracas session; insertion of draft article 14 on ‘Local Remedies’ in the 1975 Geneva session and its abandon-

ment due to a barrage of objections in the 1976 New York session; and finally, reintroduction of a provision on ‘Exhaustion of local remedies’ in draft article 294 [now article 295] in the Informal Composite Negotiating Text<sup>50</sup>. It can safely be said that there was not a definite agreement on the issue of application of the rule of local remedies rule, but it was just agreed that a simplified provision on the rule should be inserted. A commentator concludes that the rules of customary international law “would apply also to law of the sea disputes” and “the final text neither broadens nor narrows the existing rules of international law on the subject.”<sup>51</sup> Consequently, not only weight will be given to subsequent practice and judicial decisions in law of the sea disputes but also the customary rules of local remedies developed in the context of diplomatic protection are to be referred to on this issue.

In *the M/V Saiga (No.2)* case, the Tribunal, invoking the former article 22 of the Draft Articles of State Responsibility provisionally adopted on first reading by the ILC, held that the violations of rights claimed by the plaintiff State (the Saint Vincent and the Grenadines)<sup>52</sup> are not “breaches of obligations concerning the treatment to be accorded to aliens”, but “all *direct violations* of the rights of Saint Vincent and the Grenadines. Damage to the persons involved in the operation of the ship arises from those violations. Accordingly, the claims in respect of such damage are not subject to the rule that local remedies must be exhausted.”<sup>53</sup>

This reasoning of the Tribunal does not seem convincing and is problematic, even if the conclusion itself of non-application of the local remedies rule in this specific case could be accepted. In the *Mavrommatis Palestine Concession Case* (1924), the PCIJ held: “By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, *a State is in reality asserting its own rights -- its right to ensure, in the person of its subjects, respect for the rules of international law* (*Italics added*).”<sup>54</sup> This passage represents the quintessence of the mechanism of diplomatic protection, to which the local remedies rule does

apply. In *the M/V Saiga (No.2)* case, by taking up the case of one of its ship (and the persons on board) by resorting to international judicial proceedings on its (their) behalf, the plaintiff State asserted its own rights to ensure respect for the rule of international law, such as the right of freedom of navigation and other internationally lawful uses of the sea and so on. Indeed, it is not easy to distinguish cases of diplomatic protection to which the local remedies rule applies from the ‘direct injury’ cases to which the rule does not apply. In order to exclude the application of the local remedies rule, however, it is not sufficient that some right of the State is also violated at the same time. If disputes concerning the interpretation or application are only disputes between State Parties arising from alleged violations of State’s rights, article 295 of the UNCLOS would be meaningless<sup>55</sup>. Moreover it should be noted that the relevant provisions concerning the local remedies rule in the provisionally adopted former Draft Articles on State Responsibility (1980), which the Tribunal cited, were totally deleted<sup>56</sup> in the final Draft because they were not necessarily useful nor convincing<sup>57</sup>.

In order to resolve the difficult issue of such ‘mixed claims’ containing elements of both injury to the State and injury to the nationals of the State in application of the rule, the test of preponderance, which the Draft Articles on Diplomatic Protection has adopted<sup>58</sup>, is to be applied. According to this test, a judicial organ has to examine the different elements of the claim and to decide whether the direct element of injury to the State or the indirect element of injury to the nationals of the State is preponderant, and the principal factors to be considered in this assessment are “the subject of the dispute, the nature of the claim and the remedy claimed”<sup>59</sup>. In the *M/V Virginia G* case, quite explicitly applying the preponderance test, the ITLOS found that the claim of Panama as a whole was brought on the basis of an injury to Panama itself and therefore concluded that the claim was not to subject to the local remedies rule<sup>60</sup>.

Whereas the preponderance test can be widely accepted in a case of mixed claims, its practical application to the facts of each specific

case is another difficult problem. Not a few judges in the *M/V Virginia G* case did not agree with the conclusion of the majority decision in this respect<sup>61</sup>. While in the *M/V Saiga (No.2)* case the ship was arrested in the exclusive economic zone after an unjustified hot pursuit, in the *M/V Virginia* case Guinea-Bissau confiscated private property of the ship and cargo after the *Virginia G* had been arrested and detained. At least as far as the latter case is concerned, the rights at issue seems preponderantly those of the private person, not those of the flag State<sup>62</sup>.

In the *M/V Saiga (No.2)* case, the Tribunal held that the local remedies rule did not apply in the present case on the ground that there was no jurisdictional connection between the person suffering damage and the State responsible for the wrongful act which caused the damage. Both parties in this case agreed that in principle there must be such a jurisdictional connection as a prerequisite for the application of the rule<sup>63</sup>. Although neither judicial authority nor State practice provide clear guidance on the existence of such an exception to the local remedies rule, the 'jurisdictional connection' exception has been widely asserted in academic writings and introduced in article 15 (c) of the Draft Articles of Diplomatic Protection, which provides that local remedies do not need to be exhausted where "there was no relevant connection between the injured person and the State alleged to be responsible at the date of injury"<sup>64</sup>. Irrespective of whether the *M/V Saiga (No.2)* case decision not to apply the local remedies rule to the facts in this specific case is appropriate or not, the judgment seems a leading case which obviously accepted and applied the 'jurisdictional connection' exception<sup>65</sup>.

## CONCLUDING REMARKS

Since a ship is not a person who has the nationality of the flag State, but a 'self-contained unit', consisting of persons whose nationalities can be and are often different from that of the flag State, protection of a ship by the latter State is today regarded to be

excluded from the categories of, and distinct from, diplomatic protection in *sensu stricto*, and is set aside from the ILC's Draft Articles on Diplomatic Protection. But there is "a close resemblance" between this type of protection and diplomatic protection in *sensu stricto*, and the rules of admissibility on diplomatic protection including the local remedies rule with its exceptions seem to apply in principle to international claim by the flag State on behalf of a ship.

Due to possible simultaneous existence of both claims a question of priority between them remains to be solved, just as raised in the *Reparation* case (1949), where a question was put to the ICJ on the competition between diplomatic protection by a State for its nationals and functional protection by an international organization for its staff. The Court was of the opinion in this case, "although the bases of the two claims are different, that does *not* mean that the defendant State can be compelled to pay the reparation due in respect of the damage *twice over* (*italics added*)<sup>66</sup>". Furthermore the multiplicity of claims was disapproved of by the ICJ in the *Barcelona Traction* case (1970) in respect of shareholders' claims from the practical considerations relating to the bringing of claims<sup>67</sup>. To quote the words of L. Condorelli, "multitude d'intérêts de particuliers ressortissants d'Etats différents se trouve à être canalisée sous la protection du pavillon prévue par le droit de la mer, et forme donc l'objet d'une seule action judiciaire: celle de l'Etat d'immatriculation du navire", and "à défaut de 'canalisation' par le biais de l'action de l'Etat du pavillon, l'individualité des divers intérêts des particuliers referait surface et la protection diplomatique pourrait alors entrer en jeu à leur avantage, le cas échéant."<sup>68</sup> Based upon such 'canalization', the flag State seems to be more suitable for bringing the claim, although there is no established rule of international law which assigns priority.

As to the question of genuine link, the judgment of the "*Grand Prince*" case (2001)<sup>69</sup> is interpreted as affirming that the formal act of registration can virtually be regarded as sufficient evidence of a genuine link between the ship and the registered State<sup>70</sup>. If registra-

tion is a decisive factor for the genuine link, the flag State is to satisfy this requirement in virtually all cases. According to Ademun-Odeke, “ships can neither be equated with individuals nor have sentimental attachments to bond with the flag State” on the one hand, “the genuine link approach in shipping could perhaps learn from that applied to the nationality requirements for other legal entities, such as business corporations whose nationality follows the state of incorporation” on the other<sup>71</sup>. In the field of diplomatic protection of corporate entities, the ICJ in the *Barcelona Traction* case held that “no absolute test of the ‘genuine connection’ has found general acceptance.”<sup>72</sup> Even in the field of protection of a natural person who has a single nationality, the genuine link requirement is, as already mentioned, of limited scope of application.

Finally, we encounter particularly difficult problems in applying the local remedies rule to the law of the sea disputes. The rule established in the context of treatment of aliens is justified by practical considerations, one of which is the assumption that “aliens by residence and business activity have associated themselves with the local jurisdiction”<sup>73</sup>: “The alien is deemed to tacitly submit and to be subjected to the local law of residence.”<sup>74</sup> This assumption cannot be relied upon in most cases concerning the law of the sea. Supposing an allegedly wrongful act occurs on the high seas where the wrong-doing State has neither sovereign rights nor jurisdiction over foreign ships, the exception of ‘relevant jurisdictional connection’ to the rule is likely to apply. This exception is not easily applied, however, in cases of an act of coastal State within its jurisdiction<sup>75</sup>, not only in the EEZ, but even in the territorial sea where a foreign vessel (and/or the flag State) enjoy(s) the right of innocent passage. Moreover, since the flag State has jurisdiction over its ship and some rights under international law, the distinction between ‘direct injury’ to the State and ‘indirect injury’ to the ship or crew members on board is ‘even more blurred’<sup>76</sup>, and therefore, it is more difficult to apply the test of ‘preponderance’. The ITLOS has addressed some of these issues in the above-mentioned cases, whose



reasoning and consequences still remain to be re-considered.

- <sup>1</sup> ITLOS, Judgment (Case No.19), *The M/V "Virginia G"* Case (Panama v. Guinea-Bissau), 14 April 2014 (<http://www.itlos.org>).
- <sup>2</sup> ITLOS/Press 211, 14 April 2014. The Tribunal held on the merits that by confiscating the *M/V Virginia G* and the gas oil on board and failing to notify Panama of the detention and arrest of the vessel and subsequent actions taken against the vessel and its cargo, Guinea-Bissau violated article 73, paragraphs 1 and 4 of the United Nations Convention on the Law of the Sea (UNCLOS) and decided to award Panama compensation for the confiscation of the gas oil and for the costs of repairs to the *M/V Virginia G*.
- <sup>3</sup> ITLOS, Judgment (Case No.2), *The M/V "Saiga" (No.2) Case* (Saint Vincent and the Grenadines v. Guinea-Bissau), 1 July 1999 (<http://www.itlos.org>). ITLOS/Press 23/Add. 1, 1 July 1999.
- <sup>4</sup> The Term of 'ship' and 'vessel' can be used interchangeably. See, Haijiang Yang, *Jurisdiction of the Coastal State over Foreign Merchant Ships in Internal Waters and the Territorial Sea* (Springer, 2006), pp.7-11.
- <sup>5</sup> In his recent article, Professor K. Yakushiji has dealt with almost the same topic, and expounded the topic extensively. Kimio Yakushiji, "Nationality of Vessels and International Claim of the Flag State: with special reference to Japanese cases" [in Japanese], in: Tadao Kuribayashi and Takane Sugihara, (eds.), *The Law of the Sea and Japan* (Contemporary Law of the Sea Series, Vol.3) (Yushindo, 2010), pp.3-49. There seems to be very little, if any, to add to his comprehensive analysis and arguments as a whole. Focus in this paper, however, is to be upon conceptual relationship between protection of a vessel by the flag State and diplomatic protection of a natural or legal person by a national State and admissibility of claims of the former.
- <sup>6</sup> John Dugard, 'Diplomatic Protection', in: Crawford, Pellet, and Olleson (eds.), *The Law of International Responsibility* (Oxford, 2010), p.1053.
- <sup>7</sup> Geck, W., 'Diplomatic Protection', in: R. Bernhardt (ed.), *Encyclopedia of Public International Law*, Vol.1 (1992), p.1046; Geck, 'Diplomatischer Schutz', in Schlohauer und Hans-Jürgen (hergs.), *Wörterbuch des Völkerrechts*, Erster Band (Verlag Walter de Gruyter & Co., 1960), pp.379-380; Alexandre-Charles Kiss, "Protection diplomatique", in Ph. Francescakis (dir.), *Encyclopédie juridique. Répertoire de droit international* 2 (Dalloz, 1969), pp.690-691.
- <sup>8</sup> Dunn, *The Protection of Nationals* (Johns Hopkins Press, 1932) (Kraus Reprint, 1970), p.20.
- <sup>9</sup> *ILC Report 2006*, p.24, para. 2.
- <sup>10</sup> *Ibid.*, p.27, para. 8.

- <sup>10a</sup> *Ibid.*, p.23, para. 3. A-Ch. Kiss argues that diplomatic protection should be defined in an extensive way to include functional protection within it, as follows: “Il convient donc de corriger la définition traditionnelle en l’élargissant en ce sens que la protection diplomatique est l’action d’un sujet de droit international auprès d’un autre sujet de droit international en faveur de certains individus ayant des liens déterminés avec lui.” A-Ch. Kiss, *supra* note 7, p.690.
- <sup>11</sup> Yang, *supra* note 4, p.28.
- <sup>12</sup> Geck, *supra* note 7, p.1055. Chiyuki Mizukami, *Nationality of Vessels and the Flag of Convenience* (Yushindo, 1994) [in Japanese], pp.52-53.
- <sup>13</sup> *Restatement of the Law, Third, Foreign Relations Law of the United States*, § 502, Comment (h).
- <sup>14</sup> Myron H. Nordquist (ed.) (Center for Oceans Law and Policy University of Virginia), *United Nations Convention on the Law of the Sea 1982. A Commentary*, Vol.3 (Martinus Nijhoff Publishers, 1995), p.106.
- <sup>15</sup> J. Dugard, Seventh report on diplomatic protection, U.N. Doc. A/CN. 4./567., p.36, para. 90.
- <sup>16</sup> Diplomatic protection. Comments and observations received from Governments, U.N. Doc. A/CN. 4/561, pp.49-50.
- <sup>17</sup> J. Dugard, Seventh report on diplomatic protection, U.N. Doc. A/CN. 4./567., p.37, para. 91.
- <sup>18</sup> Diplomatic protection. Comments and observations received from Governments, U.N. Doc. A/CN. 4/561, pp.48-49.
- <sup>19</sup> J. Dugard, Seventh report on diplomatic protection, U.N. Doc. A/CN. 4./567., p.36, para. 90.
- <sup>20</sup> *ILC Report 2006*, p.94, para. 8.
- <sup>21</sup> Yang, *supra* note 4, p.28.
- <sup>22</sup> J. Dugard, Fifth Report on Diplomatic Protection, U.N. Doc. A/CN. 4/538, pp. 29-30, para. 68.
- <sup>23</sup> Yakushiji, *supra* note 5, p.40.
- <sup>24</sup> ITLOS, Judgment (Case No.19), para. 128.
- <sup>25</sup> Chittharanjan F. Amerasinghe, *Diplomatic Protection* (Oxford University Press, 2008), p.120 and footnote 103.
- <sup>26</sup> E. M. Borchard, *Diplomatic Protection of Citizens Abroad* (Banks Law Publishing, 1919), p.479.
- <sup>27</sup> G. H. Hackworth, *Digest of International Law*, Vol.2 (U. S. Government Printing Office, 1941), p.755.
- <sup>28</sup> A. D. Watts, “The Protection of Merchant Ships”, *BYBIL*, Vol.33 (1957), pp. 52-84.

- <sup>29</sup> Yakushiji, *supra* note 5, pp.13–15.
- <sup>30</sup> Soji Yamamoto, *Law of the Sea* (Sanseido, 1992) [in Japanese], p.104.
- <sup>31</sup> Judgment, para. 106.
- <sup>32</sup> Yakushiji, *supra* note 5, p.15.
- <sup>33</sup> ITLOS, Judgment (Case No.19), para. 127.
- <sup>34</sup> R. R. Churchill and A. V. Lowe, *The Law of the Sea, Third edition* (Manchester U. P., 1999), p.262.
- <sup>35</sup> *Ibid.*, p.258.
- <sup>36</sup> ITLOS, Judgment (Case No.19), para. 113. This paper does not go deeply into what constitutes a ‘genuine link’.
- <sup>37</sup> Soji Yamamoto, *supra* note 30, pp.108–109.
- <sup>38</sup> D. Anderson, *Modern Law of the Sea: Selected Essays* (Martinus Nijhoff Publishers, 2008), p.243.
- <sup>39</sup> Yang, *supra* note 4, p.29.
- <sup>40</sup> Judgment, para. 83.
- <sup>41</sup> *Ibid.*, paras. 87–88.
- <sup>42</sup> In bareboat chartering, “a vessel registered on one State is chartered to nationals of another State and during the period of the charter the vessel flies the flag of the second State while its registration in the first State is cancelled or suspended.” Churchill and Lowe, *supra* note 34, p.262. As to more details of bareboat chartering, see, Ademun-Odeke, “An Examination of Bareboat Charter Registries and Flag of Convenience Registries in International Law”, *Ocean Development & International Law*, Vol.36 (2005), pp.339–362.
- <sup>43</sup> Yakushiji, *supra* note 5, p.32.
- <sup>44</sup> Ademun-Odeke, “An Examination of Bareboat Charter Registries and Flag of Convenience Registries in International Law”, *Ocean Development & International Law*, Vol.36 (2005), p.347.
- <sup>45</sup> *Ibid.*, p.348.
- <sup>46</sup> Draft article 4 does not require a State to prove a genuine link between itself and its national, along the lines suggested in the *Nottebohm* case, on the ground, *inter alia*, that “there were certain factors that served to limit Nottebohm to the facts of the case in question, particularly the fact that the ties between Mr. Nottebohm and Liechtenstein (the Applicant State) were “extremely tenuous” compared with the close ties between Mr. Nottebohm and Guatemala (the Respondent State)”. *ILC Report 2006*, pp.32–33, para. 5.
- <sup>47</sup> Interhandel case, *I.C.J. Reports 1959*, p.27.
- <sup>48</sup> Draft Articles on Diplomatic Protection, art. 15 (e).
- <sup>49</sup> *E. g.*, the International Convention relating to Intervention on the High Seas in Cases of Oil Pollution Casualties (1969), art. 8, para. 2, which provides “[t]

he Party which took the measures shall not be entitled to refuse a request for conciliation or arbitration under provisions of the preceding paragraph solely on the grounds that any remedies under municipal law in its own courts have not been exhausted.”

<sup>50</sup> A. O. Adede, *The System for Settlement of Disputes under the United Nations Convention on the Law of the Sea* (Martinus Nijhoff Publishers, 1987), pp.31-33, 59-60, 112-113, 162. Myron H. Nordquist (ed.) (Center for Oceans Law and Policy University of Virginia), *United Nations Convention on the Law of the Sea 1982. A Commentary*, Vol.5 (Martinus Nijhoff Publishers, 1989), pp.79-81.

<sup>51</sup> *Ibid.*, p.81.

<sup>52</sup> They are, *inter alia*, the followings: (a)the right of freedom of navigation and other internationally lawful uses of the seas; (b)the right not to be subjected to the customs and contraband laws of Guinea; (c) the right not to be subjected to unlawful hot pursuit (and (d) and (e)). Judgment, para. 97.

<sup>53</sup> *Ibid.*, para. 98.

<sup>54</sup> *The Mavromatis Palestine Concessions, PCIJ Series A*, No.2, p.12.

<sup>55</sup> Separate Opinion of Vice-President Wolfrum, *The M/V “Saiga” (No.2) Case*, para. 51.

<sup>56</sup> Not only article 22, but also its closely related provisions of, *inter alia*, articles 20 and 21, which stipulate obligations of conduct and obligations of result respectively for the purpose of ascertainment of breach of obligations, were deleted.

<sup>57</sup> See, generally, Nobuyuki Kato, “State Responsibility and the Nature of the Local Remedies Rule: A Critical Analysis of the ILC’s Draft Articles”, *Journal of International Law and Diplomacy*, Vol.90, No.6 (1992) [in Japanese], pp.1-31. See also, James Crawford, *State Responsibility. The General Part* (Cambridge University Press, 2013), pp.219-232.

<sup>58</sup> Draft Articles on Diplomatic Protection, Article 14, para. 3.

<sup>59</sup> *ILC Report 2006*, pp.74-76, paras. (9)-(12).

<sup>60</sup> ITLOS, Judgment (Case No.19), paras. 157-158.

<sup>61</sup> Joint Separate Opinion of Judges Cot and Kelly, pp.3-6, paras. 11-28; Joint Dissenting Opinion of Vice-President Hoffman and Judges Marotta Rangel, Chandrasekhara Rao, Kateka, Gao and Bouguetaia, pp.1-3, paras. 1-10; Dissenting Opinion of Judge Jesus, p.17, paras. 70-71; Dissenting Opinion of Judge *ad hoc* Sérulo Correa, pp.6-11, paras. 8-10.

<sup>62</sup> Joint Separate Opinion of Judges Cot and Kelly, *supra* note 61, p.5, para. 22.

<sup>63</sup> Judgment, paras. 99-100.

<sup>64</sup> *ILC Report 2006*, pp.81-82, paras. (8)-(9).

<sup>65</sup> *The M/V Virginia G* judgment did not address the question of a juris-

dictional link since it did not categorize the claim of Panama into that of diplomatic protection to which the local remedies rule applies. Judgment, para. 159.

<sup>66</sup> *I.C.J. Reports 1949*, p.186.

<sup>67</sup> *I.C.J. Reports 1970*, pp.48–50, paras. 94–98. Dugard, Fifth Report on Diplomatic Protection, U.N. Doc. A/CN. 4/538, p.29, para. 65.

<sup>68</sup> Luigi Condorelli, “L’évolution du champ d’application de la protection diplomatique”, in: Jean-François Flauss (dir.), *La protection diplomatique: Mutations contemporaines et pratiques nationales* (Bruylant, 2003), pp.25–26.

<sup>69</sup> ITLOS, Judgment (Case No.8), *The “Grand Prince” Case* (Belize v. France), 20 April 2001, esp., para. 83.

<sup>70</sup> Maria Gavouneli, *Functional Jurisdiction in the Law of the Sea* (Martinus Nijhoff Publishers, 2007), p.19.

<sup>71</sup> Ademun-Odeke, *supra* note 44, pp.347–348.

<sup>72</sup> *I.C.J. Reports 1970*, p.42, para. 70.

<sup>73</sup> James Crawford, *Brownlie’s Public International Law*, 8<sup>th</sup> Edition (Oxford University Press, 2012), p.711. *See also*, *ILC Report 2006*, p.81, para. (8).

<sup>74</sup> Borchard, *supra* note 26, p.817.

<sup>75</sup> Riphagen points out “the particular difficulties of application of [the local remedies rule] in law of the sea matters, where the ‘functional sovereignties’ of coastal State and flag State collide.” W. Riphagen, “Mechanisms of Supervision in the Future Law of the Sea”, in: Frits Kalshoven, Pieter Jan Kuypers and Johan G. Lammers, (eds.), *Essays on the Development of the International Legal Order* (Sijthoff & Noordhoff, 1980), pp.136–137.

<sup>76</sup> *Ibid.*, p.136. Riphagen based his explanation and argument on classification of the obligations of conduct and those of result in accordance with the former Draft Articles of State Responsibility abandoned in the final Articles.