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Flags of Convenience Before the Law of the Sea Tribunal

TULLIO TREVES*

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I. FLAGGING AND REFLAGGING IN THE CASES BEFORE THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

Reflagged vessels and vessels flying flags of convenience (two phenomena that most often coexist) are frequent features in cases brought before the International Tribunal for the Law of the Sea (ITLOS or the Tribunal). Of all the cases decided by the Tribunal, only the *Southern Bluefin Tuna* cases¹ and the *MOX Plant* case had nothing to do with this phenomenon;² and only the former, which concerns fishing, somehow involves ships.

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1. “Southern Bluefin Tuna” (N.Z. v. Japan, Austl. v. Japan), 117 I.L.R. 148 (Int’l Trib. L. Sea 1999).

2. “MOX Plant” (Ir. v. U.K.), I.T.L.O.S. Case No.10 (Dec. 3, 2001), at http://www.itlos.org/start2_en.html.

The *Saiga* cases,³ the *Camouco*,⁴ the *Monte Confurco*,⁵ the *Grand Prince*,⁶ and the *Volga* cases,⁷ however, all concern ships which had been reflagged one or more times and ships flying a flag belonging to a State that has modest connections with the ship. If we consider the substantive criteria for ship registration used in the ill-fated United Nations Convention on the Registration of Ships of February 7, 1986 (Convention), namely that the flag State or its nationals participate as owners or in the ownership of the ship and that “a satisfactory part of the complement consisting of officers and crew” be “nationals or domiciled or lawfully in permanent residence” in the flag State, we see that neither of them is satisfied in any of the above-mentioned five cases. Of course, the reference to these criteria is broad and general. It does not mean that the ships involved would not qualify for registration under the Convention, according to which the two criteria are alternative rather than cumulative and subject to exceptions. It seems, nonetheless, interesting to consider the situation in the five cases in light of the broad criteria of national ownership and national manning.

- a) *The Saiga*. The flag State was (allegedly) Saint-Vincent and the Grenadines. The owner was a company based in Cyprus and was managed by a company in Scotland. The beneficial owners are not known. The complement of officers, including the Master and crew, were mostly Ukrainian. The ship had previously flown the flag of Malta.⁸
- b) *The Camouco*. The flag State was Panama. The owner was a company in Panama, with Spanish companies as beneficial owners. The Master and most of the crew were of Spanish nationality. The ship after its release was reflagged twice before its final forfeiture by the French authorities.⁹
- c) *The Monte Confurco*. The flag State was the Seychelles. Its owner was a company registered in the Seychelles. The beneficial owners were presumably Spanish. The Master was Spanish, and the crew was from various countries.¹⁰

3. M/V “SAIGA” (No. 1) (St. Vincent & the Grenadines v. Guinea), 110 I.L.R. 273 (Int’l Trib. L. Sea 1997); M/V/ “SAIGA” (No. 2) St. Vincent & the Grenadines v. Guinea, 120 I.L.R. 144 (Int’l Trib. L. Sea 1999).

4. “Camouco” (Pan. v. Fr.), 125 I.L.R. 164 (Int’l Trib. L. Sea 2000).

5. “Monte Confurco” (Seychelles v. Fr.), 125 I.L.R. 220 (Int’l Trib. L. Sea 2000).

6. “Grand Prince” (Belize v. Fr.), 125 I.L.R. 273 (Int’l Trib. L. Sea 2001).

7. “Volga” (Russ. Fed’n v. Austl.) I.T.L.O.S. Case No. 11 (Dec. 23, 2002), at http://www.itlos.org/start2_en.html.

8. M/V “SAIGA (No.2),” *supra* note 3, at para. 31.

9. “Camouco,” *supra* note 4, at para. 25–6.

10. “Monte Confurco,” *supra* note 5, at para. 27. Mr. Gallardo, Counsel for the Seychelles, gave this description: “We have a Seychelles vessel, we have an international

- d) *The Grand Prince*. The flag State was (allegedly) Belize. The owner was a company with its seat in Belize. The beneficial owners were apparently Spanish.¹¹ The Master was of Spanish nationality. The crew was composed of Spaniards and Chileans.
- e) *The Volga*. The flag State was the Russian Federation. The owner was a Russian Company. There are no satisfactory indications as to the nationality of the beneficial owners.¹² The Master was of Russian nationality. The chief mate, the fishing master, and the fishing pilot were of Spanish nationality, while the rest the crew was composed mostly of Chinese and Indonesian nationals.

In two of these cases—the *Saiga* and the *Grand Prince*—the question of the nationality of the ship was discussed thoroughly as its solution was decisive for the disposal of the case. In the remaining three cases, the fact that the Master and crew, as well as the beneficial owners, were not the nationality of the flag State was considered significant.

All of these cases, with the exception of the *Saiga*, were “prompt release” cases, concerning fishing for toothfish in the Southern Ocean. It seems, therefore, useful to separately consider these four “toothfish” prompt release cases and the two “nationality of ship cases” (although, admittedly, the *Grand Prince* case belongs to both categories).

II. THE “TOOTHFISH” PROMPT RELEASE CASES

The “toothfish” prompt release cases follow a common pattern. Fishing vessels flying various flags and most often involving Spanish interests (as beneficial owners, masters, and/or crewmembers) engage in long-term fishing cruises in the waters of the Southern Ocean. Their base-port is in the southern hemisphere, very far from the fishing grounds (Port Louis, Mauritius, and Walvis Bay, Namibia, for instance). The wealth of fish—especially Patagonian toothfish—in the vast expanses of the Southern Ocean, and the relatively remote chance of

crew, Spanish, Peruvians, Chileans, Mauritians, and Namibians, belonging to a mixed, Spanish company established in the Republic of the Seychelles.” Oral Proceedings, Verbatim Records, ITLOS PV/00/5/rev.1, at 13 (Dec. 7, 2000, a.m.), available at http://www.itlos.org/start2_en.html.

11. “Grand Prince,” *supra* note 6, at para. 32–4.

12. “Volga,” *supra* note 7, at para. 75 (Australia insisted to have particulars on the subject, but to no avail).

being caught while fishing in the economic zones of France (Kerguelen and Crozet Islands) and Australia (Heard and McDonald Islands), are the main attraction for such expeditions. The financial stakes are considerable, given that the value of a full cargo of Patagonian toothfish can equal or exceed the very value of the fishing vessel involved. This situation emerged in the *Monte Confurco* case and in the *Volga* case. In *Monte Confurco*, the value of the vessel accepted by the Tribunal was 345,000 U.S. dollars, while the amount for which the cargo was sold was 9 million French francs (approximately 1.5 million U.S. dollars). In *Volga*, the uncontested value of the vessel was 1.8 million Australian dollars, while the amount for which the catch was sold was approximately 1.9 million Australian dollars.

These fishing cruises are considered by concerned coastal States as prime examples of illegal, unreported, and unregulated fishing (IUU), facilitated by frequent reflagging. France underlined this aspect in its pleadings in the *Monte Confurco* case. Its Agent observed:

These facts are very serious but, beyond that, we have a more serious and broader problem of [organized,] illegal fishing that endangers the future of these fish resources. . . . Illegal fishing has indeed been structured in a perfectly well [organized] manner. There are powerful economic and financial interests involved, attracted by considerable profits from these activities. The vessels that carry out illegal fishing are supported by specialist lawyers, which one always finds in this kind of business, and very often they are the first to know about such incidents.

These vessels often change their names. They very often change their flags and are very often the property of so-called “one ship companies.” This is a very useful formula by which to hide the identity of the true interests of the people for whom they are working and also to prevent proper action being taken against the people responsible. It is also a useful means by which to avoid the high fines that are being imposed on such small companies. These vessels are [organized] in a network. They communicate with each other, thanks to codes such as the one that we found on the *Monte Confurco*. It is true that they try to escape the surveillance of coastal states, but they are also ready to help each other and are extremely efficient at doing so.¹³

Similar remarks were made by the Agent of Australia in the *Volga* case:

A fundamental fact of the present case is Australia’s justified concern that, upon release, the *Volga* will resume its role, perhaps under a different flag, perhaps under a different name, in the plunder of the resources of the Southern Ocean.

...

One can see a cycle developing that is inimical to the proper management and conservation of the marine living resources of the Southern Ocean.

...

Australia’s concerns are shared by other sovereign States with a

13. “*Monte Confurco*,” *supra* note 5. Statement by Trinquier, Oral Proceedings, Verbatim Records, ITLOS/PV 00/6/Rev.1, at 5–6 (Dec. 7, 2000 p.m.), available at http://www.itlos.org/start2_en.html.

stake in the conservation and management of the resources of the Southern Ocean.¹⁴

The coastal State parties in these cases urged the Tribunal to take these factual aspects into consideration to support the conclusion that severe penalties were impossible and the high bonds imposed were reasonable. This was stated succinctly in the New Zealand Diplomatic Note of December 6, 2002, that was introduced in Australia's pleadings:

In New Zealand's view, the Tribunal ought to be [cognizant] of the serious and growing problem of IUU fishing in these waters, a result of enforcement difficulties and the very high value of the fishery. These factors mean that the incentive for vessel owners and operators to engage in IUU fishing is significant. Similarly, high rewards are available to vessels released from detention upon the posting of a financial security following detention for suspected earlier IUU fishing. Coastal States, and States Parties to UNCLOS and regional fisheries management organizations, including CCAMLR (Commission for Convention of Antarctic Marine Living Resources), must take steps to compel and encourage better [compliance].¹⁵

In the same vein, Professor Crawford, counsel for Australia in the same case, argued as follows: "*The Tribunal should at all times seek to act in aid of regional fisheries arrangements which are the only way, now and in the long term, of preserving the world's fish stocks The relevant regional fisheries organization here is that established by CCAMLR.*"¹⁶

The Tribunal was not insensitive to these appeals. Its response was, nevertheless, rather restrained. In the *Camouco* judgment, the point was mentioned only in the dissenting opinions.¹⁷ In the *Monte Confurco* judgment, the Tribunal summarized the arguments concerning the "general context of unlawful fishing in the region" and stated: "The Tribunal takes note of this argument."¹⁸ In the *Volga* judgment, the Tribunal again took note of this argument and added: "The Tribunal understands the international concerns about illegal, unregulated and

14. "Volga," *supra* note 7. Statement by Campbell, Oral Proceedings, Verbatim Records, ITLOS/PV 02/ 02, at 6-7 (Dec. 12, 2002, p.m.), at http://www.itlos.org/start2_en.html.

15. *Id.* Statement of Response of Australia, at 50-6, at http://www.itlos.org/start2_en.html.

16. *Id.* Statement by Crawford at 21 (emphasis added).

17. "Camouco," *supra* note 4. See dissenting opinions of Anderson and Wolfrom *supra*.

18. "Monte Confurco," *supra* note 5, at para. 79. Judge Anderson in his dissenting opinion states: "This 'factual background' is relevant in balancing the respective interests of France and the applicant."

unreported fishing and appreciates the objectives behind the measures taken by States, including the States Parties to CCAMLR, to deal with the problem.”¹⁹ The Tribunal did not consider it possible, however, to go beyond such “taking note,” “understanding,” and “appreciating,” even when challenged not to become “an unwitting accomplice to criminal activity.”²⁰ The reasons were made explicit only in the most recent case. In the *Volga* judgment, the Tribunal stated:

The Tribunal must, however, emphasize that, in the present proceedings, it is called upon to assess whether the bond set by the Respondent is reasonable in terms of article 292 of the Convention. The purpose of the procedure provided for in article 292 of the Convention is to secure the prompt release of the vessel and crew upon the posting of a reasonable bond, pending the completion of the judicial procedure before the courts of the detaining State.²¹

The constraints of the prompt release proceedings underlie this explanation. These constraints depend on the fact that the specific purpose of article 292 is to obtain the release of vessels and crews detained in violation of a narrow group of rules of the Convention, without causing prejudice to the decision on the merits.

Reflagging and the use of flags of convenience are among the factual elements of the “toothfish” prompt release cases, pertaining to which some limits to the use of prompt release proceedings might emerge. In the *Grand Prince* case, the Tribunal dismissed for lack of jurisdiction a request for prompt release of a vessel arrested in circumstances similar to those of the *Camouco* and the *Monte Confurco*. It found that the nationality of Belize, on behalf of which the request of prompt release had been submitted, was not established satisfactorily as the documentation gave inconsistent indications. This was possibly connected to the fact that, when apprehended, the *Grand Prince* was on its way to Brazil, where it had already begun to seek reflagging. Regardless of the Tribunal’s conclusions on the merits, and whatever other reasons it may have had for those conclusions, the attention it paid *proprio motu* to the question of nationality, in ascertaining its jurisdiction, seems to be a clear indication of an intention to consider, whenever legally possible, the “background” of prompt release cases.

With the exception of the *Volga* case, all of the “toothfish” prompt release cases were submitted to the Tribunal, as permitted by article 292, paragraph 2, “on behalf” of the flag State, and not directly by it. This possibility was introduced in article 292 of the Law of the Sea Convention as a compromise between those desiring to give the private

19. “*Volga*”, *supra* note 7, at para. 68.

20. *Id.* Crawford, Pleading for Australia, at para. 19.

21. *Id.* at para. 69.

persons interested in the vessel *locus standi* in prompt release proceedings and those who wished not to make an exception to the principle that disputes under the Convention (apart from those concerning the International Seabed Area) should be State-to-State disputes. In practice, article 292 has become an expedient tool for States that wish to avoid the responsibilities of actively protecting ships flying their flag through prompt release proceedings in Hamburg, while at the same time, obtaining an equivalent result as flag States through the action of the private interested persons and consequently enhancing their attractiveness. This has made crucial the authorization that private persons wishing to submit to the Tribunal an application for prompt release on behalf of a State be required to obtain consent from that State.

In its dealings with prospective applicants, the Tribunal has made it clear that the authorization must come from members of the Government entitled to represent the State in foreign relations, such as the Minister of Foreign Affairs or the Attorney General. The Tribunal wishes to minimize the risk of proceeding on the basis of an application signed by an official who is later disowned by higher authorities or whose authority is challenged in the proceedings.

Flag States may assess the pros and cons of authorizing prompt release proceedings on their behalf. In such assessment, considerations based on the policy and bilateral relations of the detaining State will be relevant. Also, diplomatic pressure from the State that has arrested the vessel and possibly the pressure of public opinion and non-governmental organizations (NGOs) may play a part in the decision of the flag State. While the diplomatic notes of France to the Seychelles, which aimed at discouraging the latter from bringing the *Monte Confurco* case to the Law of the Sea Tribunal, are on record, only rumors exist regarding NGO pressure or diplomatic considerations explaining why certain prompt release cases did not reach Hamburg. The desire to avoid such pressures might be part of the explanation of the decision of the Russian Federation, not generally known as a "flag of convenience State," to submit directly to the Tribunal the *Volga* case, even though in fact its defense in the case was mostly ensured by the lawyers of the private company interested.

A further consequence of cases submitted "on behalf" of a flag (of convenience) State is that the function of agent is taken by the private lawyer representing the private interest in the ship. While the situation of a private lawyer acting as agent of a State is not unprecedented before

the International Court of Justice, the roles of agent and counsel remain separate, even though raising some concerns.²² In the “on behalf” prompt release cases, agent and counsel become one. This situation may raise doubts as to whether the agent can always be considered as the representative of the State party and may create difficulties when questions requiring answers on matters of domestic law of the flag State arise. Judge ad hoc Cot expressed his uneasiness for this situation in his declaration to the *Grand Prince* judgment:

The delegation of sovereignty by the flag State in appointing a lawyer as agent raises a different kind of problem. The dispute before the Tribunal remains an inter-State dispute. However, the lawyer-agent is not necessarily in close contact with the authorities of the flag State. The credibility and reliability of the information he provides as to the legal position of the flag State may be questionable. In the present case, the Tribunal had to be satisfied with incomplete and contradictory information concerning the registration of the vessel and the position of Belize as to the nationality of the *Grand Prince*.²³

III. THE “NATIONALITY OF SHIPS” CASES

The *Saiga No. 2* judgment of 1999, the only judgment on the merits of a contentious case handed out so far by the Tribunal, and the 2001 *Grand Prince* judgment mentioned earlier are the two instances in which the Tribunal considered questions concerning the nationality of ships directly. The *Saiga No. 2* case is particularly rich on this matter.

There are three aspects that require some attention. First, the Judgment of the Tribunal decided that the *Saiga* had retained the Vincentian nationality, even though the validity of its certificate of registration had lapsed, by invoking in particular the practice of both parties to the dispute as well as the needs of justice in the case. This shows that the Tribunal had in mind the distinction between nationality and proof of nationality, which makes it possible to substitute elements indicating nationality for the missing registration.

Second, the Judgment states:

The [Convention’s purpose] on the need for a genuine link between the ship and the flag State is to secure more effective implementation of the duties of the flag State [sic] and not to establish criteria by reference to which the validity of the registration of ships in a flag State may be challenged by other States.²⁴

22. Judge Oda, Declaration to the ICJ Order on provisional measures in the case concerning armed activities on the territory of the Congo, Congo v. Uganda, July 1, 2000, paras. 8, 39 I.L.M., 1100, 1114–15 (2000).

23. “Grand Prince,” *supra* note 6. Declaration of Judge ad hoc Cot, para. 14, available at http://www.itlos.org/start2_en.html; see also Jean-Pierre Cot, *Appearing “for” or “on behalf of” a State: The Role of Private Counsel Before International Tribunals*, in LIBER AMICORUM JUDGE SHIGERU ODA 835 (Nisuke Ando et al. eds., 2002).

24. *M/V “SAIGA”* (No. 2), *supra* note 3.

According to the Tribunal, this statement is supported by the evolution of the “genuine link” provision from its formulation in the Geneva High Seas Convention to that set out in the 1982 U.N. Convention on Conditions for Registration of Ships, as well as by subsequent practice. Such practice includes the inability of the 1986 U.N. Convention to enter into force, the weakness of its substantive content, and especially the fact that the recent Straddling Stocks Agreement of 1995 and the FAO Compliance Agreement of 1993 “set out . . . detailed obligations to be discharged by the flag States of fishing vessels but do not deal with the conditions to be satisfied for the registration of fishing vessels.”²⁵

It is significant that negotiations leading to the above mentioned 1993 “Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas” started as concerning “the flagging of vessels fishing on the high seas to promote compliance with internationally agreed conservation and management measures.”²⁶ Indeed, the shift of focus from “flagging” to the consequences of flagging was the main cause of a dispute the European Court of Justice decided in 1996.²⁷ Its significance for the concept and function of the “genuine link” did not escape the attention of the Tribunal, even though it chose to refer to it with the rather elliptic sentence just quoted.

Third, the Judgment provides an interesting clarification of the scope of the nationality of ships in the perspective of nationality of claims for the purposes of diplomatic protection. In discussing whether the flag State could make claims for violations allegedly committed by Guinea to the detriment of persons connected to the *Saiga* (crew members, ship owners, owners of the cargo), which were not of Vincentian nationality, the Tribunal referred to various articles of the Convention (namely 94, 106, 110, 217, and 292) to support its conclusion that

the Convention 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, every thing on

25. *Id.* at para. 85.

26. Rome, 24 November 1993, in United Nations Food and Agriculture Organization, *International Fisheries, Instruments with Index*, United Nations, New York, 1998, 41.

27. Judgment of 19 March 1996, case C-25/94 Commission of the EC v. Council of the E.U., 1996 E.C.R. I-1469. Cf. Tullio Treves, *The European Community and the Law of the Sea Convention: New Developments*, in *THE EUROPEAN UNION AS AN ACTOR IN INTERNATIONAL RELATIONS* 279, 287 (Enzo Cannizzaro ed., 2002).

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.²⁸

This conclusion was strengthened by referring to

two basic characteristics of modern maritime transport: the transient and multinational composition of ships' crews and the multiplicity of interests that may be involved in the cargo on board a single ship. A container vessel carries a large number of containers, and the persons with interests in them may be of many different nationalities. This may also be true in relation to cargo on board a break-bulk carrier. Any of these ships could have a crew comprising persons of several nationalities. If each person sustaining damage were obliged to look for protection from the State of which such person is a national, undue hardship would ensue.²⁹

Commentators (and dissenting judges³⁰) have seen some inconsistency between the approach followed in the *Grand Prince* judgment concluding that the ship had lost the nationality of Belize and the approach followed in the 1999 judgment concluding that the *Saiga* had maintained the Vincentian nationality. This inconsistency may be real or apparent. Considerations of justice in the specific case (explicitly mentioned in the *Saiga No. 2* judgment) may have been relevant, as well as the "background" of frequent reflagging discussed earlier, which the Tribunal has learned to recognize as a recurring feature of the "toothfish" prompt release cases.

A further relevant aspect of the *Grand Prince* judgment is that the Tribunal had to deal with the law of Belize granting its authorities the right to cancel registration of a ship as a punitive measure for violations of the conditions set out in the fishing license. While this was a background element to the alleged loss of nationality of the vessel, its wisdom is not discussed in the judgment. It did not, however, escape the attention of judges. Judge Wolfrum on one side, and the nine dissenting judges, on the other, stated directly opposing views. Judge Wolfrum stated:

I would like to highlight the newly introduced provision in the legislation of Belize that permits the Belizean authorities to de-register a vessel for violations of international conventions and agreements. I consider this to be a commendable approach which in an innovative manner strengthens the role of the flag State with the view to a more effective protection of national and international fishery resources or of the marine environment. It is for Belize to ensure that the respective decisions are not taken in an arbitrary manner and that the shipowners may have recourse to a procedure in which they can defend their rights.³¹

28. M/V "SAIGA" (No.2), *supra* note 3, at para. 106.

29. *Id.* at para. 107.

30. "Grand Prince," *supra* note 6. Joint dissenting opinion of Judges Caminos, Marotta Rangel, Yankov, Yamamoto, Akl, Vukas, Marsit, Eiriksson, and Jesus, at para. 11.

31. *Id.* Judge Wolfrum's Declaration, at para. 5.

The nine dissenting Judges, however, stated:

The decision of the Tribunal has the effect, perhaps unintended, when depriving Belize of its rights as a flag State, albeit for the limited purposes of actions under article 292 of the Convention, [of] condoning a system under which a flag State can in certain circumstances absolve itself of its duties as a flag State, including those laid down in article 94 of the Convention. It will be recalled that, under article 94, paragraph 1, every State must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag. It certainly cannot suffice for a flag State to seek to comply with this obligation merely by revoking, without more, the registration of ships flying its flag.³²

IV. CONCLUSION

Nationality of ships remains an axis of the law of the sea. Inter-State relations concerning activities at sea depend on it. It remains a well-defended preserve of the sovereignty of the States. Attempts at conditioning the sovereign right to fix the conditions for the granting of nationality to ships have not been very successful. The needs underlying these attempts have, however, obtained the effect of making the consequences of the granting of nationality to a ship more precise in terms of duties and responsibilities of the flag State.

32. *Id.* Dissenting opinion of Judges Caminos, Marotta Rangel, Yankov, Yamamoto, Akl, Vukas, Marsit, Eiriksson, and Jesus, at para. 16.

