

Flag State Responsibility

John N.K. Mansell

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Historical Development
and Contemporary Issues

 Springer

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Disclaimer

The views and opinions expressed in this book are entirely those of the author and not those of Maritime New Zealand.

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Acronyms and Abbreviations

ABS	American Bureau of Shipping
BV	Bureau Veritas
CIC	Concentrated Inspection Campaign
Class	Classification Society
COLREG	International Regulations for the Prevention of Collisions at Sea, 1972
CSD	United Nations Commission on Sustainable Development
DIS	Danish International Ship Register
DNV	Det Norske Veritas
DWT	Deadweight tonnage
EC	European Commission
EU	European Union
FAO	(United Nations) Food and Agriculture Organization
FIR	French International Ship Register
FLASCI	Flag State Conformance Index
FOC	Flag of convenience
FSC	Flag State Control
FSI	Sub-committee on Flag State Implementation (IMO)
GATT	General Agreement on Tariffs and Trade
GIS	German International Ship Register
ISIS	Global Integrated Shipping Information System
GMDSS	Global Marine Distress and Safety System
HSC	Convention on the High Seas, 1958
IACS	International Association of Classification Societies
IALA	International Association of Lighthouse Authorities
ICAO	International Civil Aviation Organization
ICJ	International Court of Justice
IHO	International Hydrographic Organization
IIS	International Italian Ship Register

ILO	International Labour Organization
IMCO	Intergovernmental Maritime Consultative Organization
IMO	International Maritime Organization
ISM	International Safety Management Code
ISPS	International Ship and Port Facility Security Code
ITF	International Transport Workers' Federation
ITOPF	The International Tanker Owners' Pollution Federation Ltd
LOAD LINE	International Convention on Load lines, 1966
LOSC	United Nations Convention on the Law of the Sea, 1982
MARPOL	International Convention for the Prevention of Pollution from Ships, 1973/1978
MEPC	Marine Environment Protection Committee (IMO)
MSC	Maritime Safety Committee (IMO)
MTA	Maritime Transport Act, 1994 (New Zealand)
MSA	Maritime Safety Authority (New Zealand)
MNZ	Maritime New Zealand
MOU	Memorandum of Understanding
NIS	Norwegian International Ship Register
NGO	Non-Governmental Organization
OECD	Organization for Economic Co-operation and Development
OEEC	Organization for European Economic Co-operation
OILPOL	International Convention for the Prevention of Pollution of the Sea by Oil, 1954
OPA 90	Oil Pollution Act, 1994
Paris MOU	Paris Memorandum of Understanding on Port State Control
P&I	Protection and Indemnity Club
PSC	Port State Control
PSCO	Port State Control Officer
Qualship 21	Quality Shipping for the 21 st Century Program (USCG)
REB	Registro Especial Brasierio
RO	Recognized Organization
SAF	Self Assessment Form
SOAP	Universal Safety Oversight Programme
SOP	Voluntary Safety Oversight programme
SOLAS	International Convention for the Safety of Life at Sea, 1974
SRA	Ship Registration Act, 1992 (New Zealand)
STCW	International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978/1995
STUFT	Ship taken up from trade
TAAF	Terres Antariques et Anstrales Francaises
TONNAGE	International Convention on Tonnage Measurement of Ships, 1969

TOKYO MOU	Memorandum of Understanding on Port State Control in the Asia-Pacific Region
UK	United Kingdom
UN	United Nations
ULCC	Ultra Large Crude (Oil) Carrier
UNCLOS I	First United Nations Conference on the Law of the Sea
UNCLOS III	Third United Nations Conference on the Law of the Sea
UNCTAD	United Nations Conference on Trade and Development
USA	United States of America
USCG	United States Coast Guard
VIMSAS	Voluntary IMO Member State Audit Scheme
VLCC	Very Large Crude (Oil) Carrier
WTO	World Trade Organization

Chapter 1

Introduction

In an ideal world flag States, whose flags are worn by the world's shipping, would lay down, and enforce upon their shipowners, standards of design, maintenance and operation which would ensure a very high standard of safety at sea. Coastal States, along whose coasts shipping passes, and Port States, at whose ports or anchorages shipping calls, would have no cause to concern themselves with the maintenance of such standards. The present system of Flag State Control falls well short of this ideal ... Regrettably it is beyond argument that not all flag States live up to their responsibilities. (Lord Donaldson: 1994)

1.1 Shipping as a Global Industry

Shipping is the oldest truly global industry and continues to play a vital role in the carriage of cargo and people in support of the world economy. Ninety per cent of world trade is currently carried by almost fifty thousand ships crewed by more than one million seafarers of virtually every nationality. Total world seaborne trade has more than quadrupled over the last 40 years to a total of 6.7 thousand million tons carried annually over a distance of four million miles. It has been estimated that the operation of merchant ships contributes about US\$380 billion in freight rates within the world economy; about five per cent of total world trade.¹ The 51,538 ships trading internationally in 2007, totalling 737.3 million gross tons, are registered in more than 150 flag States, with the 20 largest flag States accounting for 82% of this total world tonnage.²

¹ All statistics as at January 2006 from the International Chamber of Shipping website; <http://www.marisec.org/shippingfacts/home/>

² Lloyd's Register – *Fairplay, Statistical Notes 2007*, p.12. Tonnages (in millions of gross tons) of the twenty largest flag States as at January 2007 are: Panama (165.4); Liberia (75.3); Bahamas (41.3); Hong Kong, China (35.8); Greece (35.6); Marshall Islands (35.1); Singapore (35); Malta (27.5); China (23.6); Cyprus (18.8); Norway (NIS) (14.4); United Kingdom (12.7); Italy (12.7); Germany (12.7); Korea (South) (12.5); Japan (11.7); USA (9); Bermuda (8.8); India (8.4); Denmark (DIS) (8.6).

All of these flag States have the right to sail ships flying their flag on the high seas (LOSC Article 90); and those ships enjoy the freedom of navigation upon the high seas (LOSC Article 87). With this freedom comes a concomitant duty upon the flag State to effectively exercise its jurisdiction and control in administrative, technical, social (LOSC Article 94 (1)) and environmental protection (LOSC Article 217) matters over ships flying its flag.

1.2 Flag State Responsibility

The absence of any authority over ships sailing the high seas would lead to chaos. One of the essential adjuncts to the principle of freedom of the seas is that a ship must fly the flag of a single State and that it is subject to the jurisdiction of that State. (Brown 1994, p. 287)

This opinion of the International Law Commission in 1956 on a draft article of the High Seas Convention (HSC) was a product of its time; a time of traditional maritime States and responsible long-established shipping companies operating for the most part under the effective maritime administrations of their national flag³. The Convention establishing the Inter-Governmental Maritime Consultative Organization (IMCO) had not yet received sufficient ratifications for the Organization to begin its work and there was very little international regulation of ships. The traditional flag States of the time relied largely upon a framework of unilateral national law for the regulation of ships flying their flag.

In 1958 the States Parties to the HSC, desirous of “codifying the rules of international law relating to the high seas”, recognised the customary right of a State to 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 (HSC, Article 5(1)). Agreement was also reached on the measures necessary to ensure the safety of ships flying the flag of a State over which the flag State must exercise jurisdiction (HSC, Article 10). These flag State responsibilities were reaffirmed, expanded upon and clarified through the Law of the Sea Convention (LOSC) in 1982. IMCO took an active role in development of the LOSC to ensure that the instruments IMCO was developing would be consistent with the LOSC⁴.

³See Chap. 6 for a detailed discussion on the state of the shipping industry in the 1950s and its subsequent development through the second half of the twentieth century.

⁴IMO Interface with the Law of the Sea Convention (2000), p.2: “The interaction between treaty making activities at the Third Conference and those at IMO is reflected not only in continuous consultations to avoid overlapping but also in temporary clauses included in IMO treaties indicating that these treaties should not be interpreted as prejudicing the codification and development of the law of the sea being undertaken by UNCLOS III. Another proviso establishes the basis for the avoidance of jurisdictional conflicts between the law of the sea and IMO rules and standards. It stipulates that nothing in these treaties shall prejudice present or future claims and legal views of any State concerning the law of the sea and the nature and extent of coastal and flag State jurisdiction”. http://www.imo.org/InfoResource/mainframe.asp?topic_id=406&doc_id=1077

The international regulation of ships agreed upon by the member States of the International Maritime Organization (IMO) and the International Labour Organization (ILO) is brought into effect through the national law of those States and “transforming these universally accepted goals and rules into a binding legal obligation is each State’s sovereign privilege” (Alderton and Winchester 2002, pp. 35–43). This privilege brings with it the freedom to act, but also, freedom *simpliciter*, the freedom not to act (IMO 2000). The provisions of the LOSC that allow a State the freedom to fix the conditions for the grant of its nationality to ships reflect this principle in international law (LOSC Article 91(1)). Regulatory inefficient flag States can choose to exercise the freedom not to act. “Where the nation State is the bulwark of international regulation, sovereignty is for sale in the context of ship registration, and the State enjoys privilege” (Alderton and Winchester 2002, p. 8).

A nation State, in exercising its sovereignty, can make the conscious economic decision not to exercise certain aspects of its authority as a flag State in order to attract tonnage that either does not, or cannot, conform to acceptable international standards. The sovereign act of grant of nationality, through registration, can be a negation of sovereign responsibility. The ongoing commercial success of such flag States depends upon the benefits that accrue from the grant of that nationality, such as freedom from a regulatory oversight that would require the ship to conform with international standards, and the lack of any constraints upon the shipowner from grant of that nationality, apart from incorporation of a shelf company in that State and payment of annual registration fees.

1.3 The Extant International Regulatory Regime and Associated Issues

The regulatory regime that has been developed by the member States of the IMO over the past half-century has, of necessity, recognized the primacy in international law of the flag State and has also recognised customary State practice of authorization of private organisations to carry out technical inspections, surveys and certification of ships. Standards have been developed by the IMO for this delegation of statutory duties and responsibilities.

A fundamental issue in effective flag State responsibility is the will and ability of flag States to provide the necessary maritime infrastructure and legal capability to administer and enforce the applicable laws they have enacted. An associated issue is the ineffectiveness of the IMO under its present mandate in carrying out an oversight role of flag State implementation and inability to have an enforcement role in the regulation of ships. When considering the effectiveness and fairness of their juridical existence, flag States and the IMO have clearly demonstrated an individual and collective inability to administer and regulate ships in a consistent and uniform manner. The International Commission on Shipping summarised the status quo in 2001:

There were constant demands for nations registering ships to be held more accountable in performance of their responsibilities. A major concern was the inability of a significant

number of registers to provide adequate legal and administrative infrastructure to meet their obligations in international law, in particular the United Nations Convention on the Law of the Sea, 1982...A general consensus is that there are sufficient regulations to do the job, the problem is their lack of implementation. Major reasons stated for the failure to implement the necessary measures were the lack of competent personnel and financial resources, and a lack of political will in many cases...There was a widespread view throughout the Commission's inquiry that the IMO's work on flag State performance has been largely ineffective. (International Commission on Shipping 2000)⁵

Regulatory inefficient flag States issue statutory safety and pollution prevention certificates to ships, either directly or through delegated power to a recognized organisation and, although they may not be underpinned by survey and inspection, these certificates must be accepted by other nation States⁶ as *prima facie* of compliance with international rules and regulations, on the presumption that all nation States are equal. There is a clear conflict between the global business of shipping and reliance upon Conventions being brought into effect under the national law of regulatory inefficient States.

1.4 Effective Flag State Control

In order to effectively discharge flag State duties and responsibilities, along with those as a port and coastal State, it is necessary for there to be an effective national maritime administration. This administration should be adequately resourced, both financially and with appropriately qualified and experienced personnel, and be embedded into the Government structure. The flag State, as a contracting party to Conventions, must have the political will and legal capacity to bring these Conventions into effect in its internal law. The maritime administration should have the ability and resources to register and administer the ships flying its flag on a worldwide basis, and to effectively monitor organisations to which it has delegated statutory responsibilities. The principal maritime and labour Conventions should be brought into effect through the State's internal law and there should be active participation in appropriate standards setting international organisations such as the IMO, ILO, and port State control regimes. Regular reporting of the flag State's activities should be made to the IMO and ILO as required by various instruments.

As well as ensuring that there is effective control over ships flying their flag in administrative, technical, social and environmental protection matters, flag States are charged by the LOSC with conformity to generally accepted international procedures, practices and enforcement (LOSC Article 94 (5)), investigating

⁵Paragraphs 2.24–2.26 and 10.46–10.48 relate specifically to flag States.

⁶For example, as provided for by SOLAS I/17 *Acceptance of certificates*: "Certificates issued under the authority of a Contracting Government shall be accepted by the other Contracting Government for all purposes covered by the present Convention. They shall be regarded by the other Contracting Governments as having the same force as certificates issued by them."

reports by other States who believe that the flag State jurisdiction and control is inadequate (LOSC Article 94 (6)), and investigating serious casualties to ships flying their flag (LOSC Article 94 (7)). Flag States are also required to maintain a register of ships (LOSC Article 94(2)(a)); to ensure that ships are surveyed before registration and at appropriate intervals thereafter (LOSC Article 94(4)(a)); that appropriate charts and navigational instruments are aboard (LOSC Article 94(4) (a)); that the ships on their register are crewed by properly trained and qualified personnel (LOSC Article 94(4)(b) and (c)); that those ships do not pollute the marine environment (LOSC Article 217 (1)); are regularly inspected and certificated (LOSC Article 217(3)), and do not proceed to sea unless they are seaworthy (LOSC Article 217(2)). If ships flying their flag pollute the marine environment the State is required to investigate the incident and, if necessary, institute proceedings (LOSC, Article 217(4)).

These flag State duties and responsibilities are succinctly summarised in the Code for the Implementation of Mandatory IMO Instruments (IMO, Resolution A.973(24))⁷ that recalls the requirements of the LOSC as follows:

... the Government of the State must have:

1. the ability to promulgate laws which permit effective jurisdiction and control in administrative, technical and social matters over ships flying its flag and, in particular, provide the legal basis for general requirements for registries, the inspection of ships, safety and pollution-prevention laws applying to such ships and the making of associated regulations.
2. a legal basis for the enforcement of its national laws and regulations including the associated investigative and penal processes; and
3. the availability of sufficient personnel with maritime expertise to assist in the promulgation of the necessary national laws and to discharge all the responsibilities of the State, including reporting as required by the respective conventions.

1.5 Issues of Flag State Implementation

The central hypothesis of this examination of flag State responsibility is that the extant regulatory regime is adequate in law but its implementation and enforcement does not deliver the intent of the LOSC, in that it allows a regulatory inefficient flag State to register ships without any assurance that they are seaworthy. The regulatory regime further allows a flag State to delegate its responsibility for inspection, survey and certification to private organisations that often do not have the capacity

⁷Further detailed guidance on the measures required by flag States to effectively discharge their responsibilities are contained in Part 2 of the Annex to A.973(24). A possible framework for national legislation to give effect to the provisions of relevant IMO instruments is referenced to in “Guidelines for Maritime Legislation”, a United Nations’ publication, ST/ESCAP/1076.

to carry out these technical and administrative duties on behalf of the flag State. Some flag States delegate all of their duties and responsibilities under the LOSC to private organisations. These issues are compounded by reliance in international law upon flag States to exercise effective jurisdiction and control over ships flying their flag, and the lack of any mandate for the IMO to enforce effective implementation of its mandatory instruments. Enforcement of international maritime instruments is, by default, reliant upon other flag States or port States. These problems are researched and analysed and it is concluded that the regulatory framework in itself is adequate. The fundamental problem is ineffective implementation of IMO instruments by regulatory inefficient flag States, and a lack of effective global oversight and measurement of flag State performance.

1.6 Research, Background and Sources

Research carried out in the course of this study focuses upon the historical development of registration and control of ships and, in particular, upon the major changes that have taken place in the shipping industry, and associated regulatory environment, over the past half-century, from adoption of the HSC and foundation of the IMCO in 1958 to the present day. Serendipitously, this timeframe exactly spans the author's working life in the shipping industry and there has, therefore, been a close personal and professional involvement with many of the issues identified in this study. It has been possible to complement and authenticate much of the research carried out from the personal experience of 35 years of seafaring experience, including 20 years in command of ships, and involvement for 14 years at the highest levels of national, regional, and international regulation of shipping.

For the past 14 years the author has been General Manager, Maritime Operations directly responsible, within the maritime administration of New Zealand, for, amongst other things, flag and port State control along with registration of ships and licensing of seafarers. During this time almost all sessions of the Maritime Safety Committee (MSC) were attended between 1995 and 2000; a period during which many of the issues identified in this study were debated. The 10th, 11th, 13th, 14th and 16th sessions of the Sub-Committee on Flag State implementation (FSI) were also attended during which time serious concerns about flag State implementation of IMO instruments resulted in development of the Voluntary IMO Member State Audit Scheme (VIMSAS). The opportunity was taken at these meetings to carry out research in the IMO library.

Under his direct responsibility for port State control matters in New Zealand the author has attended almost all of the meetings of the Tokyo MOU⁸ on port State control since its inception in 1993, as well as serving a term of three meetings as Chairman of the Port State Control Committee. This has provided invaluable

⁸Memorandum of Understanding on Port State Control in the Asia-Pacific Region (Tokyo MOU) concluded in Tokyo on 1 December 1993 by 18 maritime authorities in the Asia-Pacific region.

opportunities for an in-depth understanding of port State control and its impact upon the flag State issues identified in this study, and for access to data from the Paris⁹ and Tokyo MOUs.

The author is recognised by the IMO as an expert consultant on flag, port and coastal State matters and was approved in 2006 as an IMO Auditor under the Voluntary IMO Member State Audit Scheme; taking part in two audits of other Member States of the IMO to date and organising an audit of New Zealand. These experiences have provided an in-depth knowledge of the IMO audit process and contributed to some of the remedies identified to address issues of ineffective flag State implementation and enforcement of IMO instruments.

1.7 Existing Literature

A literature search revealed a limited and fragmented body of work on flag State responsibility; principally on matters of registration of ships, the “genuine link”, flags of convenience, and analysis of the safety records of various categories of flag State. Valuable work on various aspects of flag State control is available from reports by the United Nations Conference on Trade and Development (UNCTAD) and the Maritime Transport Committee of the Organization for Economic Co-operation and Development (OECD). Documents from FSI, along with IMO resolutions, circulars and information sheets provide a history of the development of initiatives to address flag State issues as do papers, reports and statistics from port State control regimes. Industry sources proved invaluable, particularly the detailed statistics that have been produced by Lloyd’s Register for many years, although it was sometimes difficult to access these at a distance. Journal articles, industry magazines and online sources, such as Google Scholar, also provided useful material.

1.8 Structure of the Book

The starting point for this analysis of flag State jurisdiction and control is to examine the component parts: the flag, the State, and the principles of flag State jurisdiction. The historical development of the flag as a powerful symbol of nationality, and visible evidence of the nationality of a ship, and the protection conferred upon it of the sovereign is recalled. The parallel development of the nation State is traced prior to, and beyond, the Treaty of Westphalia which was adopted at the same time as Grotius was expounding the revolutionary concept of freedom of the seas. The

⁹Paris Memorandum of Understanding on Port State Control (Paris MOU) signed in Paris in 1982 between 14 European maritime administrations and Canada.

entwining of the flag and the State into the concept of the flag State is discussed along with the differences in juridical principles between the nation State and the flag State. Differences in law between nation States and flag States are identified as are the historic difficulties faced by landlocked States in registration of ships in their territory.

The LOSC provides for a State to unconditionally grant its nationality to a ship, to register the ship, and authorise it to fly the flag of that State. This most ancient of customary maritime laws was the genesis of flag State jurisdiction in the fourteenth century. The development of registration from a device to provide the protection of the sovereign, through protection of trade, to its present day status is recalled and examined in Chap. 3. The one failed attempt to codify registration in international law is discussed and the reasons why there is no requirement in any mandatory IMO instruments for registration are identified and analysed. The requirement of the LOSC that a ship sail under one flag only is discussed, and it is established that modern registration devices are not the dual nationality forbidden by the LOSC. Transfer of registration to another flag State is analysed and it is concluded that the IMO has failed to establish clear and binding guidelines to address this sometimes vexed issue. The lack of any requirement in maritime law for a survey before a ship is registered to ensure that it is seaworthy is identified along with the resultant implications for maritime safety as demonstrated by a case study.

With the rapid development of steam propulsion for ships, principally in the United Kingdom, a need arose for the State to exercise more jurisdiction and control over the activities of ships and their interaction upon the high seas; principally in matters of signalling and collision prevention. Britain, as the leading maritime power throughout the nineteenth century, took a worldwide lead in the introduction of national law for the safety regulation of ships. Some of these laws applied to foreign ships in British waters and many were adopted by other maritime nations. The development of this national law, which was mainly reactive to shipping disasters, is examined in Chap. 4 along with its consolidation in the Imperial Merchant Shipping Act 1894; the basis of maritime law for most nations well into the twentieth century. The transition of this widely accepted national law into international law is identified, analysed and discussed. It is concluded that the British model of flag State jurisdiction that was developed throughout the nineteenth century was still appropriate for codification through the HSC in the mid-twentieth century.

Chapter Five traces the gradual development of law for jurisdiction and control of ships from its foundation in customary and national law into international law during the twentieth century through the HSC and the LOSC. An analysis is carried out of the powers of jurisdiction and control that were codified through the HSC and it is concluded that they were appropriate for the nature of the shipping industry at that time. The drivers for change in the shipping industry between the HSC at UNCLOS I and the LOSC at the third United Nations Conference on the Law of the Sea (UNCLOS III) are identified; in particular the tanker disasters that occurred during this period. A comparative analysis is carried out of the requirements of the HSC and the LOSC for flag State jurisdiction and control, to test the hypothesis that the lawmakers at UNCLOS III may have been influenced more by environmental

than safety issues in matters of jurisdiction and control of ships. It is concluded that this was not the case; that the extant model of flag State jurisdiction was strengthened through the LOSC, but that it was becoming increasingly irrelevant due to the sea change that had taken place in the nature of the shipping industry over the preceding quarter century.

The year of 1958, which saw adoption of the HSC and entry into force of the IMCO Convention, was also the beginning of a major revolution in shipping that was to have significant implications for the suitability of the model of flag State responsibility codified by the HSC. Chapter Six recalls the very traditional state of shipping in 1958 and benchmarks the size of ships, the industry, and crewing levels at this time; again in 1982, the year of adoption of the LOSC; and the present day. The chapter identifies and analyses the drivers for change to the shipping industry throughout the turbulent half-century from 1958, and the impact these changes had upon the size of ships, their crews, and the world map of flag States. It is concluded that the traditional model of flag State jurisdiction and control that was adopted by the HSC, and reinforced by the LOSC, was seaworthy enough to weather the storms of change that occurred throughout the period of this second revolution in shipping, but that implementation and enforcement of IMO instruments was increasingly proving to be inadequate due to the changes that took place over this period in the nature of flag States.

Issues associated with the vast increase in numbers and types of flag States that developed, particularly during the last quarter of the twentieth century, are identified and analysed in Chap. 7. The history of the pejorative term “flag of convenience” is recalled, and supported by a detailed analysis of the development of Panama as a flag State. The beneficial ownership of ships and linkages to flags of convenience, both in definition of the term and in practice, is identified and analysed to demonstrate that the majority of ships registered under so-called flags of convenience are owned by residents of OECD countries that are themselves flag States. In order to provide a framework for analysis of flag State statistics the characteristics of various flag States are identified and these are categorised into four main groups: National, Quasi-National, International and Pseudo-National. All active flag States are identified and are grouped into these four categories. Singapore is used as a case study of the influence of a government upon the nature and category of a flag State. The different types of Classification Society (Recognized Organizations [RO]) are also identified and, for purposes of analysis, are categorised into Conventional RO and Convenient RO. A case study is presented of how issues with the extant regulatory regime can lead to an unseaworthy ship having the ability to trade worldwide.

Chapter Eight closely examines the regulatory regime for discharge of flag State duties that has evolved in international law over the past half-century and the two principal players in this regime: the IMO and Classification Societies. The concurrent development of membership of the UN, IMO, and ILO in the years after the Second World War is summarised to set the scene for discussion of the international regulatory regime. The establishment of IMCO, predecessor to the IMO, is recalled along with early flag State issues of mandate and governance faced by the organisation. The much longer historical development of Classification Societies is also recalled in order to

clearly define and explain their changing role in the survey and certification of ships, and issues associated with the conflicts of interest that arise from their dual private and public roles. The ability, under the extant regulatory framework, for a flag State to recognise organisations to carry out statutory functions is identified in the regulatory framework for flag State jurisdiction and control, along with associated issues of exploitation of this ability by unscrupulous flag States and ROs. Burgeoning concerns late in the twentieth century at the IMO over the effectiveness of flag State implementation and the enforcement of mandatory instruments are identified along with initiatives to address these issues. The most effective current measure against substandard ships of port State control is examined in light of the derogation by many flag States of their duties and responsibilities under the LOSC and IMO instruments. Development of the Voluntary IMO Member State Audit Scheme, and its derivation in the aviation industry, is examined along with methods for making this scheme mandatory in international law.

The LOSC requires flag States to effectively exercise jurisdiction and control in administrative, technical and social matters over ships flying their flag. Attention is turned in Chap. 9 to measures of flag State performance for administrative and social matters. Ratification of IMO instruments and compliance with IMO mandatory reporting requirements are used as measures to carry out a detailed analysis of flag State administrative efficiency. Similar measures are used with regard to ILO instruments to measure social performance of flag States. The vital role of the International Transport Workers' Federation (ITF) in promotion of living and working conditions for seafarers is recalled, along with the ITF's identification of flag States that are deemed to be not fulfilling their social requirements. Detailed analysis of a wide range of available data and statistics, including one academic and one industry measure, and data from port State control statistics, confirms the hypothesis that International and Pseudo-National flag States have lower levels of performance of administrative and social duties than the majority of National flag States.

Examination of measures of performance of flag State duties continues in Chap. 10 with analysis of the performance of the various argued categories of flag State and Recognized Organizations in undertaking the technical duties required by the LOSC and IMO instruments. These technical duties primarily involve matters of inspection and survey to verify that the ship meets construction, equipment, and seaworthiness standards. A considerable amount of port State control inspection and detention data is analysed to determine the performance of flag States and Recognized Organizations; both individually and jointly as appropriate. Contributing factors to substandard ships of age, tonnage, and type of ship are analysed in depth to establish any correlation with detention. Non-serious and serious casualties, total losses, and lives lost are also analysed as measures of flag State performance. It is argued that there is a correlation between the safety records of certain National and Pseudo-National flag States and the age and types of ships registered. It is demonstrated that International flag States have lower than average detention and casualty rates.

The final chapter summarises the issues that have been identified throughout the study and concludes that the extant regulatory framework for jurisdiction and control of ships is adequate, albeit flawed in its implementation and enforcement, and requires strengthening in law. A suggested alternative model of governance for

ships that does not rely upon the primacy of the flag State is examined and discounted. The customary law of refusal of access to substandard ships is analysed and proposals are made for codification of this sanction. The powers of a coastal State to refuse access for substandard ships to coastal waters under its jurisdiction are examined. The need for increased capacity within the IMO to monitor flag State performance on a global basis, and the transition of a number of critical IMO resolutions in the flag and port State control regulatory framework from voluntary to mandatory, are identified. Included in this tranche of work should be urgent reconsideration by the member States of the IMO of the voluntary nature of the IMO Member State Audit Scheme and inclusion in IMO mandatory instruments of a universal sanction of refusal of entry by coastal States to substandard ships.

1.9 Summary

The maintenance of good order and governance of ships navigating upon the high seas is of critical importance for the safety of those ships, their crews, and for protection of the marine environment. The existing model of governance of ships in international law depends upon the primacy of the flag State and the exercise by that State of effective jurisdiction and control.

This study undertakes, for the first time, a comprehensive examination and analysis of flag State responsibility from an historical perspective. It was not possible to find any literature that draws together the core issues of weaknesses in application of the regulatory framework; the missing link between registration and survey; nor of the historical development of national law for regulation of shipping and its codification into international law. This study provides maritime administrators, lawmakers, and students of international maritime law with a single comprehensive document for information, guidance, and reference.

It is hoped that this study will generate comment and discussion within the international maritime community, and this will be welcomed. As many of the proposed remedies to strengthen the regulatory regime involve the Member States of the IMO, and the instruments drafted by that organisation, it is proposed to introduce this study to the organisation for the information of Member States and possible guidance with regard to future work to strengthen the regulatory framework for jurisdiction and control of ships.

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Chapter 2

The Concept of the Flag State

Abstract The starting point for this study of flag State jurisdiction and control is to trace the historic development of its component parts: the flag as a symbol of nationality, development of the nation State, and how these two concepts came together to form the flag State that assumed responsibility for jurisdiction over ships flying its flag. The important role that the flag plays as a potent symbol of pride in nationhood is examined from its very earliest records, through its evolution as a visible sign of the protection of a sovereign for ships, to its codification in modern national law as a symbol of the flag State. The development of the nation State is recalled from prior to Westphalia to the present day, along with concurrent formation of the concept of the freedom of the high seas. The concept and evolution of the flag State are discussed along with the status of the flag State in international law. Essential differences between nation States and flag States are identified along with associated matters of exercise of sovereignty and ability to ratify international instruments. Historical issues associated with the ability of landlocked States to register ships are discussed, along with resolution of these issues post the First World War.

2.1 The Flag as a Symbol of Nationality

Symbols are sacred things, and one of the chief that every man holds dear is the national flag. Deep down in our nature is the strong emotion that swells the heart and brings the tear and makes us follow the flag and die around it rather than let it fall into the hands of an enemy. This is no new emotion, no growth of a few generations, but an inheritance from ages before history began. (Gordon, 1915)

From the vexilloid of ancient Greece, to the ensign flying today from the stern of a Greek ship, including countless pennants, flags, standards, burgees and banners over the intervening millennia, the flag has played a central role in the identity of people, tribes, armies, cities, states and, particularly, ships. Its symbolism has entered our everyday vocabulary, almost entirely from the long-standing traditions formed aboard those ships. We “nail our colours to the masthead” to symbolise