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2007

## An analysis of flag state responsibility from an historical perspective: delegation or derogation?

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**An Analysis of Flag State Responsibility  
from an Historical Perspective: delegation  
or derogation?**

**A thesis submitted in fulfilment of the requirements  
for award of the degree**

**Doctor of Philosophy**

**from**

**UNIVERSITY OF WOLLONGONG**

**By**

**John Norman Keith Mansell  
Master of Maritime Studies (Distinction)  
University of Wollongong**

**Centre for Maritime Policy  
Faculty of Law  
University of Wollongong**

**2007**

# **Certification**

I, John Norman Keith Mansell, declare that this thesis, submitted in fulfilment of the requirements for the award of Doctor of Philosophy, in the Centre for Maritime Policy, University of Wollongong, is wholly my own work unless otherwise referenced or acknowledged. The document has not been submitted for qualifications at any other academic institution.

**John Norman Keith Mansell**

**14 July 2007**

# Abstract

The starting point for this analysis of flag State responsibilities is to recall the historical development of the extant regulatory regime for jurisdiction and control of ships; from the genesis of ship registration in the thirteenth century, through to the development of the nation State and concept of the flag State, on to the gradual evolution of national law for control of ships, and eventual codification of this law into international law in the twentieth century. The United Nations Convention on the Law of the Sea (LOSC) provides for a State to grant its nationality to ships, to fix the conditions for the grant of its nationality, to register ships in its territory, and for those ships to fly its flag. With these rights come flag State responsibilities. The flag State has a duty to effectively exercise its jurisdiction and control in administrative, technical, social and environmental protection matters over ships flying its flag. The flag State can undertake these duties or has the ability to entrust them to private organizations. A regulatory framework in international maritime law has been established that allows delegation of flag State responsibilities and recognizes the customary role of Classification Societies in inspection, survey and certification of ships. The LOSC also requires that a ship be surveyed before registration. As the flag State has the right to fix the conditions for the grant of its nationality it can choose to not require this survey for reasons of expediency and easy entry of ships onto its register. The regulatory framework for jurisdiction and control of ships provides opportunities for the establishment of regulatory inefficient flag States who have the right in law to delegate, or derogate, all of their statutory functions to equally inefficient private organizations. Such flag States are attractive to shipowners seeking minimum compliance costs and regulatory oversight. Issues of flag State responsibility and performance are analysed in depth to test the hypothesis that the extant regulatory framework is adequate in law but, due to inadequate implementation, monitoring and enforcement, does not deliver the intent of the LOSC that flag States exercise effective jurisdiction and control over ships flying their flag. For the purpose of analysis in this thesis flag States are categorized into National, Quasi-National, International and Pseudo-National according to their degree of regulatory efficiency. It is concluded that the regulatory framework is fundamentally sound but that it requires effective implementation and enforcement through strengthening in law, supported by sanctions upon recalcitrant flag States, and a greater degree of global oversight and monitoring of flag State performance by the International Maritime Organization.

*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, *Safer Ships, Cleaner Seas*, 1994

## Acknowledgements

My late developing interest in the law of the sea was fostered by participation in a LLM course delivered by Joanna Mossop of Victoria University, Wellington, in 2003 and I thank Joanna for that introduction to the law of the sea and her ongoing moral support. An inspirational address at the first evening of that course by Bill Mansfield, who represented New Zealand at the Third United Nations Conference on the Law of the Sea, revealed the range, diversity and topicality of the United Nations Convention on the Law of the Sea; a very small part of which I have focussed upon in the course of undertaking this thesis.

I am very grateful to have then discovered, quite by accident, the wonderfully versatile arrangements offered by the University of Wollongong for study of the law of the sea that effectively enabled me to stumble into a Masters degree, components of which form the nucleus for this thesis. I am more than pleased to be able to record my heartfelt thanks to Professor Martin Tsamenyi, whom I'm pleased to acknowledge as a personal friend as well as a sage and very understanding supervisor. I am also very grateful to Martin for his ongoing support in allowing me to demonstrate my newfound knowledge of law of the sea through lectures on behalf of the University of Wollongong. My sincere thanks also to Myree Mitchell and Dr. Chris Rahman, from the Centre for Maritime Policy, Faculty of Law, of the University of Wollongong, for their friendship and generous administrative support.

I have been very fortunate in that my daily professional involvement in flag and port State control matters at a national, regional and international level has given me opportunities to influence the development of international standards for regulation of ships. I express my sincere appreciation to my employer, Maritime New Zealand, for these ongoing opportunities, for their unquestioning support, and for their generous provision of study leave.



It has proven difficult from a small country at the end of the world, even in this day of electronic communication, to obtain the statistics necessary for analysis of flag State performance. I must express my sincere thanks to Tim Roxby, of Lloyds Maritime Intelligence Unit, for his generous help in this area. My sincere thanks also to Heather Mills for her meticulous proofreading of this thesis.

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<i>United States vs. Mario-Gracia, (1982)</i>	679 F.2d 1373 (1982) at 1382, paras. [18] and [19]	5.5.2
<i>Muscat Dhows Case; France vs Great Britain</i>	<a href="http://www.pca-cpa.org/upload/files/Muscat%20Dhows%20English%20Award.pdf">http://www.pca-cpa.org/upload/files/Muscat%20Dhows%20English%20Award.pdf</a>	7.2
<i>Lauritzen vs Larsen</i>	345 U.S. 571 (1953)	7.2

## 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
GISIS	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 <sup>st</sup> 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 Antartiques 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