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MULTINATIONAL CORPORATIONS AND COMPLIANCE WITH INTERNATIONAL REGULATIONS RELATING TO THE PETROLEUM INDUSTRY

EMEKA DURUIGBO*

I. INTRODUCTION

A major problem of international law is the translation of legal provisions into actual practice by states. Over the years, various approaches have evolved as mechanisms for ensuring compliance with international oil pollution standards. These approaches, described in this article as “traditional” as they have been in place for a relatively long period of time, are flag, coastal, and port states’ jurisdiction.¹ A flag state is a state in whose registry a ship is registered. Although both coastal and port states occupy the seashore, port states possess the distinguishing feature that ships visit and use of its ports.

Jurisdiction, whether exercised by the flag, coastal or port state, is of different dimensions. It could involve the power to make decisions or rules, known as prescriptive or legislative jurisdiction. There is also the power to take executive action in pursuance of, or consequent on, the

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1. John Hare, *Port State Control: Strong Medicine to Cure a Sick Industry*, 26 GA. J. INT’L & COMP. L. 571 (1997).

making of decisions or rules, referred to as enforcement or prerogative jurisdiction.² A third category has been identified as adjudicative jurisdiction and involves the power of a court or administrative tribunal to hear a case against a vessel or a person,³ but it appears that this third class is encompassed in enforcement jurisdiction.⁴

Although the traditional approaches have been of immense utility in addressing the complex problem of ship-source oil pollution, there is still room for improvement. This would necessitate consideration of an alternative approach to strengthen the existing scheme of things. One such alternative is an international norm of corporate behavior. Unlike the traditional approaches which are state-centric, focusing attention on states, this approach would shift the emphasis to corporations. The point being canvassed is that the issues of compliance and enforcement would take a back seat if oil and shipping companies, the primary players in international oil trade would conduct their businesses ethically and with due consideration for the interest of society, as opposed to the inordinate desire for profit maximization that defines their current attitude.

To do justice to the important issues discussed here, this article will be divided into three major sections. The first section defines the terms "compliance" and "enforcement" as they are used in this work. The second section contains an exposition of the traditional methods of compliance and enforcement, including their bases, scope, strengths and pitfalls. This part is divided into three subsections, each concentrating on a single method. The third section discusses an alternative approach of a norm of corporate behavior, emphasizing that ethical principles should be given legal teeth in international business and be integrated into the corpus of international law. The conclusion reached is that a concerted and disinterested application of a combination of traditional approaches with the proposed alternative approach will go a long way toward improving compliance and enforcement of international regulations.

2. IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW*, 298 (4th ed. 1990).

3. See D. Bodansky, *Protecting the Marine Environment From Vessel-Source Pollution: UNCLOS III and Beyond*, 18 *ECOLOGY L.Q.* 719, 731 (1991).

4. See C. Wang, *A Review of the Enforcement Regime for Vessel-Source Oil Pollution Control*, 16 *OCEAN DEV. & INT'L L.* 305 (1986), where he asserts that enforcement jurisdiction "grants a state the competence to adopt reasonable measures to compel, induce compliance, or to impose sanctions, for non-compliance with applicable laws, regulations, or enforceable judgments by means of administrative or executive action, or judicial proceedings." *Id.* at 309. See also BROWNLIE, *supra* note 2, and A.V. Lowe, *The Enforcement of Marine Pollution Regulations*, 12 *SAN DIEGO L. REV.* 624 (1975), where both writers settle for the prescriptive-enforcement dichotomy.

II. COMPLIANCE AND ENFORCEMENT: CONCEPTUAL ISSUES

Enhancing or improving compliance with international norms in every given area is a topic that currently preoccupies international legal scholars.⁵ Since many "environmental" treaties now exist,⁶ the issue of eliciting compliance is apparently more prominent in environmental matters: "There are few aspects of international law in which issues of compliance are more salient than in the case of international environmental obligations."⁷

Compliance, in this context, can be defined as "an actor's behavior that conforms to a treaty's explicit rules."⁸ It denotes a voluntary acceptance by a state of the provisions of an international instrument and a corresponding reflection of this acceptance in its conduct. Thus, a state can accept the equipment and discharge standards contained in MARPOL 73/78,⁹ implement them in local legislation, and ensure that its ships abide by them. In view of that, compliance "should be seen as something that goes beyond "implementation," a term which tends to be used in a technical or procedural sense to mean that a state has taken the necessary steps to carry out its obligations under an international agreement."¹⁰ Implementation normally precedes compliance and is a necessary, but not a sufficient, condition for compliance.¹¹

Enforcement, on the other hand, refers to measures jointly or unilaterally adopted by a competent authority to ensure respect for international commitments embodied in agreements if they are not honored

5. Karin Mickelson, *Carrots, Sticks or Stepping Stones: Differing Perspectives on Compliance with International Law*, in *TRILATERAL PERSPECTIVES ON INTERNATIONAL LEGAL ISSUES: FROM THEORY INTO PRACTICE* 35 (Thomas J. Schoenbaum, et al. eds., 1998)

6. More than one thousand treaties have been concluded on this topic. See M. E. O'Connell, *Enforcing the New International Law of the Environment*, 35 *GER. Y.B. INT'L L.* 293, 295-296 (1992).

7. Phillip M. Saunders, *Development Cooperation and Compliance With International Environmental Law: Past Experience and Future Prospects*, in *TRILATERAL PERSPECTIVES ON INTERNATIONAL LEGAL ISSUES: FROM THEORY INTO PRACTICE* 89 (Thomas J. Schoenbaum, et al. eds., 1998).

8. RONALD MITCHELL, *INTENTIONAL OIL POLLUTION AT SEA: ENVIRONMENTAL POLICY AND TREATY COMPLIANCE* 30 (1994).

9. *International Convention for the Prevention of Pollution From Ships*, I.M.C.O. Doc. MP/CONF/WP 35 (Nov. 2, 1973) reprinted in 12 *ILL.M.* 1319, and the Protocol relating thereto, I.M.C.O. Doc. TSP/CONF/11, (Feb. 16, 1978) reprinted in 17 *ILL.M.* 546.

10. Mickelson, *supra* note 5, at 36.

11. *Id.*

voluntarily in practice.¹² The distinction, therefore, is that enforcement has to do with “the act of compelling conformity with a particular norm or regime . . . [and] carries with it the notion of outside intervention of one form or another, while “compliance” implies a decision on the part of an actor to conform to a rule of his or her own accord, according to whatever calculus he or she might employ.”¹³

Both concepts however, are related. One school of thought holds that the possibility of enforcement is a critical factor in the decision to comply. Articulating the views of this school, Gunther Handl asserts that “[t]he prospect of at least symbolic formal enforcement remains a defining characteristic of any legal regime. . . .”¹⁴ An opposite, but no less valid, view is that the connection between compliance and formal enforcement procedures is not that prominent. According to Abram Chayes and Antonia Handler Chayes, “inducing compliance with treaties is not a matter of ‘enforcement’ but a process of negotiation.”¹⁵

An eclectic perspective embracing the two opposing views presents a clearer picture of the existence and resolution of the compliance-enforcement problem. As Oran Young observes, “Enforcement is no doubt a sufficient condition for the achievement of compliance in many situations, but [there is] no reason to regard it as a necessary condition in most realms of human activity.”¹⁶ International oil pollution control has involved a number of negotiations accommodating different interests with a view toward ensuring compliance.¹⁷ There is no noticeable harm in exploring the option of some form of enforcement against states to ensure compliance.¹⁸ At the moment, the approach adopted by international law is to expect flag states to comply with their

12. Ibrahim Shihata, *Implementation, Enforcement, and Compliance with International Environmental Agreements - Practical Suggestions in Light of the World Bank's Experience*, 9 GEO. INT'L ENVTL. L. REV. 37 (1996).

13. Mickelson, *supra* note 5, at 36.

14. Gunther Handl, *Controlling Implementation of and Compliance With International Environmental Agreements: The Rocky Road from Rio*, 5 COLO. J. INT'L ENVTL. L. & POL'Y 305, 330 (1994).

15. Abram Chayes and Antonia Handler Chayes, *Compliance Without Enforcement: State Behavior Under Regulatory Treaties*, 7 NEGOTIATION J. 311, 312 (1991).

16. ORAN YOUNG, COMPLIANCE AND PUBLIC AUTHORITY: A THEORY WITH INTERNATIONAL APPLICATIONS 25 (1979)

17. Mitchell, *supra* note 8, at 115-117.

18. The subject of enforcement against states and inducing state compliance is outside the scope of this article. On this, see Emeka Duruigbo, *Environmental Aspects Of International Oil Trade: Business Ethics And Economic Cooperation as Compliance Tools In International Law* (1998) (unpublished LL.M. thesis on file with the University of Alberta Library). The present article will concentrate on enforcement against ships or in the actual sense, the corporations that own these ships.

international obligations by enforcing international rules against their ships. There is also room for enforcement by coastal states and port states, especially where flag states fail in their duty. Describing the extant system, Wang states as follows:

Because there is no global or regional organization, generally speaking, to enforce international rules and standards and/or national laws and regulations conforming to and giving effect to these international rules and standards . . . the existing enforcement scheme is one wherein measures are taken against a vessel of a state by all or some other states. . . .¹⁹

The next section is devoted to a discussion of the existing enforcement scheme.

III. TRADITIONAL APPROACHES TO COMPLIANCE AND ENFORCEMENT

A. FLAG STATE JURISDICTION

The principle is firmly established in international law that a ship on the high seas is subject to the exclusive jurisdiction of its flag state.²⁰ A corollary of the concept of the freedom of the high seas, the principle was enunciated in the *Lotus Case* by the Permanent Court of International Justice as follows:

Vessels on the high seas are subject to no authority except that of the state whose flag they fly. In virtue of the principle of the freedom of the seas, that is to say the absence of any territorial sovereignty upon the high seas, no state may exercise any kind of jurisdiction over foreign vessels upon them.²¹

19. Wang, *supra* note 4, at 308.

20. Moritaka Hayashi, *Enforcement by Non-Flag States on the High Seas Under the 1995 Agreement on Straddling and Highly Migratory Fish Stocks*, 9 GEO. INT'L ENV'T'L. L. REV. 1 (1996).

21. Case of the S.S. "Lotus" (France v. Turkey), 1927 P.C.I.J. (Ser. A) No. 10, at 25. The law, however, recognizes exceptions to the general principle. See art. 92 (1) of the 1982 *United Nations Convention on the Law of the Sea*, U.N. Doc. A/CONF.62/122 (Oct. 7, 1982) *reprinted in* 21 I.L.M. 1261 [hereinafter "LOSC"]. They include cases such as piracy (LOSC, art. 105), unauthorized broadcasting (LOSC, art. 109), and the right of hot pursuit (LOSC, art. 111).

Since no state has authority over the high seas, this could give rise to a chaotic situation. Flag state jurisdiction therefore serves a need for the preservation of order on the high seas.²²

Freedom of the high seas, while not necessarily wrong, has had enormous implications for the oceans, the resources contained in them, and the marine environment in general, translating into a case of an:

uninhibited liberty to transport oil and other goods over the common resource, the oceans, with each vessel being subject only to the jurisdiction of the flag state for all purposes on the high seas. Incidents of free navigation, such as pollution from ballasting and deballasting, [and] oil spills from collisions and stranding of ships, [become] a liability to be borne by the international community as a whole.²³

The preference for the flag state in control of its ships is premised basically on "territoriality" or "nationality." The territoriality principle posits that a flag state is entitled to exercise its jurisdiction over its ships because a ship is an extension of the state's territory, a floating island.²⁴ The territoriality principle has received attention in Anglo-American jurisprudence²⁵, although courts have had cause on a number of occasions to give cognizance to its perceived limitations.²⁶ The principle received an international judicial imprimatur in the *Lotus Case*²⁷ where the court held that "what occurs on board a vessel on the high seas must be regarded as if it occurred on the territory of the State whose flag the ship flies."

According to the nationality principle, states have jurisdiction over their nationals even in the case of extraterritorial acts because the national owes allegiance to his or her own country. Therefore, the flag state

22. Bodansky, *supra* note 3, at 736.

23. David Dzidzornu and B.M. Tsamenyi, *Enhancing International Control of Vessel-Source Oil Pollution Under the Law of the Sea Convention, 1982: A Reassessment*, 10 U. TASMANIA. L. REV. 269, 270 (1991).

24. See *United States v. Rogers*, 150 U.S. 249 at 264 (1893).

25. See, for instance, *Mali v. Keeper of the Common Jail*, 120 U.S. 1 (1887); *McCulloch v. Sociedad Nacional de Honduras*, 372 U.S. 10 (1963).

26. In *Scharrenberg v. Dollar Steamship Co.*, 245 U.S. 122, 127 (1917) the court said: "It is, of course, true that for purposes of jurisdiction a ship, even on the high seas, is often said to be part of the territory of the nation whose flag it flies: But in the physical sense this expression is obviously figurative, and to expand the doctrine to the extent of treating seamen employed on such a ship as working in the country of its registry is quite impossible." *Id.* at 127. (footnote omitted.) See also *Cheng Chi Cheung v. R.* [1939] A.C. 160 where Lord Atkin rejected the floating island theory.

27. See *infra* note 21.

derives the legitimacy to exercise jurisdiction over its ships because they are its nationals.²⁸ It should be noted, however, that “since the territorial and nationality principles and the incidence of dual nationality create parallel jurisdiction and possible double jeopardy, many states place limitations on the nationality principle.”²⁹

1. Application of Flag State Jurisdiction

The 1954 *International Convention for the Prevention of Pollution of the Sea by Oil*³⁰, as amended, makes elaborate provisions favoring exclusive flag state prescriptive and enforcement jurisdiction. It provides that any discharge of oil prohibited by the Convention “shall be an offence punishable under the laws of the relevant territory in respect of the ship,”³¹ the relevant territory being the state in which a vessel is registered or whose nationality is possessed by an unregistered ship.³²

MARPOL 73/78³³ follows in the footsteps of its predecessor and provides, among other things, that any party shall furnish to the flag state evidence, if any, that a ship has discharged harmful substances in violation of the provisions of the regulation.³⁴ The flag state, in turn, shall investigate the matter and if satisfied that sufficient evidence is available, shall commence proceedings in accordance with its law as soon as possible.³⁵

The 1982 Law of the Sea Convention³⁶ (“LOSC”) is also emphatic on flag state jurisdiction. It provides that unless in exceptional cases provided in international treaties or in LOSC itself, ships shall be subject to the exclusive jurisdiction of the flag state on the high seas.³⁷

28. See *S.S. Co. v. Mellon*, 262 U.S. 100 (1923) where the court accepted the nationality, rather than the territoriality, theory of flag state jurisdiction.

29. BROWNIE, *supra* note 2, at 303 (footnote omitted).

30. 327 U.N.T.S. 3 [hereinafter OILPOL].

31. OILPOL, art. VI (1).

32. *Id.* art. II (1).

33. *International Convention for the Prevention of Pollution From Ships*, I.M.C.O. Doc. MP/CONF/WP 35 (Nov. 2, 1973) reprinted in 12 I.L.M. 1319.

34. *Id.* art. 6 (3).

35. *Id.* art. 6 (4).

36. LOSC, *supra* note 22.

37. *Id.* art. 92.

2. Problems with Flag State Jurisdiction

Flag state jurisdiction is not essentially wrong.³⁸ The problem has had to do with flag states discharging their obligations in international law. Flag states appear reluctant to enforce standards against their ships.³⁹ A study published in 1989 showed that of three hundred referrals by North Sea states, flag states had taken action on only 17 per cent.⁴⁰ This attitude could be associated with the fact that it is in consonance with patriarchal protection for a flag state to be hesitant about punishing its nationals for offenses committed not primarily against it. In any case, some of these vessels are owned by multinational corporations who, in real terms, are more powerful than many flag states.⁴¹ Thus, the government of a flag state ignores their interests at its own peril. Also, since flag states often do not bear the consequences of some of the polluting activities of their vessels, they lack the incentive to act.⁴²

The inability to deal with matters regarding their ships, from a practical standpoint, could also affect a flag state's performance. A ship need not visit ports located in its flag state if such ports do not fall within its normal business route. In that circumstance, it becomes difficult for flag states to see some of these ships and inspect them to ensure compliance with construction and design standards by such vessels.⁴³ The cost of equipping and operating a navy or coast guard large and competent enough to police its massive merchant fleet may also militate against a state's desire to enforce international law.⁴⁴

Some flag states are also involved in "flags of convenience" shipping and this has been linked to the pitfalls of flag state jurisdiction. According to Professor Dempsey, "[t]he legal fiction of flags of

38. Bodansky, *supra* note 3, at 737. "In discussions concerning flag state jurisdiction, the question has not been its permissibility but rather its adequacy."

39. A.V. Lowe, *The Enforcement of Marine Pollution Regulations*, 12 SAN DIEGO L. REV. 624 (1975). Lowe noted that: "Flag States are sometimes unable to institute proceedings against their vessels which may not visit their ports for many months, and some states appear unwilling to do so even when the opportunity arises."

40. MARIE-JOSE STOOP, *OLIEVERONTREINIGING DOOR SCHEPEN OP DER NOORDZEE OVER DE PERIODE 1982 - 1987: OPSPORING EN VERVOLGING* (Amsterdam, The Netherlands: Werkgroep Noordzee, July 1989); *cited in* MITCHELL, *supra* note 8, at 163.

41. T. DONALDSON, *THE ETHICS OF INTERNATIONAL BUSINESS* 31 (1992).

42. Bodansky, *supra* note 3, at 737.

43. P.S. Dempsey, *Compliance and Enforcement in International Law-Oil Pollution of the Marine Environment by Ocean Vessels*, 6 NW. J. INT'L L. & BUS. 459, 526 (1984).

44. P. Dempsey and L. Helling, *Oil Pollution by Ocean Vessels-Environmental Tragedy: The Legal Regime of Flags of Convenience, Multilateral Conventions, and Coastal States*, 10 DENV. J. INT'L L. & POL'Y 37, 63 (1980).

convenience, as well as overriding economic considerations, inhibit the effectiveness of a regime of flag state enforcement over violations in the "commons" of the high seas."⁴⁵ The following subsection will discuss this controversial subject.

3. Nationality of Ships, Registration of Ships, and Flags of Convenience

One of the fallouts of flag state jurisdiction is the sailing of ships under what has come to be known as flags of convenience.⁴⁶ This issue will be discussed under three separate sections: nationality of ships, registration of ships, and flags of convenience practice.

a. *Nationality of Ships*

The notion is fundamental in international law that all ships must possess a nationality⁴⁷, the rationale being that "[t]he registration of ships and the need to fly the flag of the country where the ship is registered are . . . essential for the maintenance of order on the open sea."⁴⁸ A ship enjoys the nationality of the state whose flag it is entitled to fly.⁴⁹

In exercising the right of attributing its nationality to a ship, a state enjoys virtually unfettered powers. The only limitation is that the grant must be in consonance with internationally respected criteria, which nevertheless are few and easy to meet.⁵⁰ In general there are only three criteria set by international law to determine the validity of the exercise of the right to grant nationality to a ship. First, such grants must not impinge upon the rights of other states. For example, a state may not impose its nationality upon vessels that already have, and desire to maintain, the nationality of another state. Second, a grant of nationality will be invalid if there is reasonable ground for suspicion that the ship

45. Dempsey, *supra* note 43, at 557.

46. George Kasoulides, *The 1986 United Nations Convention on the Conditions for the Registration of Vessels and the Question of Open Registry*, 20 OCEAN DEV. & INT'L L. 543 (1989).

47. David Matlin, *Re-Evaluating the Status of Flags of Convenience Under International Law*, 23 VAND. J. TRANSNAT'L L. 1017, 1021 (1991).

48. MARJORIE M. WHITEMAN, 9 DIGEST OF INT'L LAW 21 (1968).

49. *Geneva Convention on the High Seas*, 450 U.N.T.S. 82 art. 5 (1). LOSC, *supra* note 21, art. 91(1). See also, Rachel Roat, *Promulgation and Enforcement of Minimum Standards for Foreign Flag Ships*, 6 BROOKLYN J. INT'L L. 54 (1980).

50. Julie Mertus, *The Nationality of Ships and International Responsibility: The Reflagging of the Kuwaiti Oil Tankers*, 17 DENV. J. INT'L L. & POL'Y 207 (1988).

will be used in violation of international law. Finally, a state must choose a single nationality for its ships.⁵¹

A ship which does not meet, for instance, the criterion of sailing under the flag of one state only, exposes itself to some undesirable consequences. A ship possessing dual or multiple nationality is regarded as a ship without nationality, or a stateless vessel.⁵² A stateless vessel enjoys no protection under national and international law.⁵³ In *United States v. Marino-Garcia*, it was stated: "Vessels without nationality are international pariahs. They have no internationally recognised right to navigate freely on the high seas."⁵⁴

Apart from the above stated restriction, every state has the right to grant its nationality to a merchant ship under conditions which it deems fit.⁵⁵

b. Registration of Ships

The usual administrative mechanism through which vessel nationality is acquired is registration. Ship registration policies of states could be conveniently classified into three types: closed, open, and intermediate. For states operating the closed system, registration is generally closed to ships owned by non-nationals. Manning and crewing of such vessels are also dominated by their nationals. Other stringent conditions for registration also exist. The United States falls into this category, and is described as having "the most stringent registration requirements of any maritime nation."⁵⁶

Open registries, on the other hand, operate an "open door policy" enabling natural and legal persons, regardless of their nationality, to register their ships with them and sail under their flags. Manning and crewing requirements are relaxed, and standards are flexible.⁵⁷ Vessels registered in these states are commonly referred to as "flags of convenience" ships.⁵⁸ In a 1984 report, the United Nations Conference

51. *Id.* at 212.

52. LOSC, *supra* note 21, art. 92 (2).

53. *Naim-Molván v. Attorney-General for Palestine* (1948) A.C. 351. *But cf.* LOSC, *supra* note 21, art. 93, regarding ships flying the flag of the United Nations and its specialized agencies.

54. *United States v. Marino-Garcia*, 679 F.2d 1373, 1382 (1985).

55. *Lauritzen v. Larsen*, 345 U.S. 571, 584 (1983). *See also the Muscat Dhows Case (France v. Great Britain)* Hague Ct. Rep. 93 (Scott) (Perm. Ct. Arb. 1916).

56. H. Edwin Anderson, III, *The Nationality of Ships and Flags of Convenience: Economics, Politics and Alternatives*, 21 TUL. MAR. L.J. 139, 151 (1996).

57. The subject of Open Registries is discussed more fully in the next section.

58. The terms "Open Registry" ("OR") and "Flags of Convenience" ("FOC") will be used interchangeably here.

on Trade and Development (“UNCTAD”) identified five countries as having major open registry fleets: the Bahamas, Bermuda, Cyprus, Liberia and Panama.⁵⁹

The intermediate group is a halfway house combining some of the features of the other two systems. A salient example is the new Luxembourg registry under which registration is allowed if Luxembourg citizens, corporations or a “society anonyme” (public limited company) holds more than 50 percent of the ownership of the ships.⁶⁰ Similar to the practice in closed registries, but quite unlike the general practice in open registries, a company must actually establish a business presence in Luxembourg to be registered.⁶¹

Whichever policy it adopts, a state’s right to admit ships to its registry and under whatever conditions it chooses, remains unequivocal⁶² and other states are under an obligation to recognise the exercise of this right, even if unilaterally made.⁶³ This right is seen as a corollary of the principle of state sovereignty.⁶⁴ The problem is that it tends to elevate FOC states to sovereign positions depicted in Lord Ellenborough’s rhetorical question: “Can the Island of Tobago pass a law to bind the rights of the whole world?”⁶⁵

c. Flags of Convenience Practice

i. Preliminary Matters

Although open registries enjoy a rich history, it will not be necessary for the purposes of this article to undertake an excursion into the archives. Suffice it to say that the practice of using flags other than that of one’s nationality has seen better days.⁶⁶

59. See Kasoulides, *supra* note 46, at 547.

60. See Luc Frieden, *The New Luxembourg Shipping Register*, [1991] LMCLQ 257, 257-258.

61. *Id.* at 258.

62. LOSC, *supra* note 21, art. 91 (1).

63. BOSLAWA A. BOCZEK, *FLAGS OF CONVENIENCE: AN INTERNATIONAL LEGAL STUDY* 94, 102-103 (1962).

64. *Id.* at 104.

65. L.F.E. Goldie, *Environmental Catastrophes and Flags of Convenience - Does the Present Law Pose Special Liability Issues?* 3 PACE Y.B. INT’L L. 63, 68-69 (1991). (footnote omitted).

66. For an excellent historical account of the evolution of flags of convenience, see RODNEY CARLISLE, *SOVERIEGNTY FOR SALE: THE ORIGINS AND EVOLUTION OF THE PANAMANIAN AND LIBERIAN FLAGS OF CONVENIENCE* (1981).

The expression "flags of convenience" is applied to a phenomenon which defies easy definition.⁶⁷ Nevertheless, in his epic work on the subject, *Flags of Convenience: An International Legal Study*,⁶⁸ Dr. Boslaw Boczek defines it as "the flag of any country allowing the registration of foreign owned and foreign controlled vessels under conditions which for whatever the reasons, are convenient and opportune for the persons who are registering the vessels."⁶⁹ A strict interpretation of this definition would reveal some defects. In the 1980s, the United States registry was made available for Kuwaiti-owned and Kuwaiti-controlled vessels for reasons convenient and opportune for the persons involved, among which was the facilitation of commerce during the Iran - Iraq war.⁷⁰ Yet, it would be totally objectionable to classify the United States as a flag of convenience ("FOC") state.

A descriptive approach to the concept is preferable. The Rochdale Committee⁷¹ defined such flags by recourse to their salient characteristics including: ownership by non-nationals, easy access to the registry, taxes that are low and levied abroad, participation mainly by small powers to whom receipts from the business might make a difference to national income and balance of payments, manning of the ships by non-nationals, and lack of the power and administrative machinery to impose regulations or the inclination or capability to control the companies themselves.

It is unlikely that a single case will contain all of the above criteria, and all the conditions need not apply for a state to be categorized as an open registry.⁷² Some states, such as Gibraltar and Netherland Antilles, offer tax incentives, yet ensure control over manning, safety and certification.⁷³

67. Ebere Osieke, *Flags of Convenience Vessels: Recent Developments*, 73 AM. J. INT'L L. 604 n.1 (1979).

68. BOCZEK, *supra* note 63.

69. *Id.*

70. See Margaret Wachenfeld, *ReFlagging Kuwaiti Tankers: A U.S. Response in the Persian Gulf*, 1988 DUKE L.J. 174. It should be noted that an attack on a ship flying the United States flag is deemed an attack on the United States, an act of aggression which the country is entitled to defend, pre-empt or respond to.

71. Committee of Inquiry into Shipping, Report 51 (London: H.M.S.O., 1970) Cmnd 4337.

72. Kasoulides, *supra* note 46, at 545.

73. *Id.*

ii. Reasons for the Open Registry Practice

The past forty years have witnessed a tremendous proliferation of merchant shipping fleets flying flags of convenience.⁷⁴ The reason for this is clearly connected with the perceived benefits of sailing under such flags. The primary reason why multinational corporations involved with shipping and oil interests adopt FOC is the maximization of profit.⁷⁵ Edward Stettinus, a former United States Secretary of State, along with a group of leading American entrepreneurs and multinational corporations, masterminded the creation of the Liberian registry with the object of increasing profits.⁷⁶ This is achieved through the benefits which the open registry ("OR") practice offers.⁷⁷

One such benefit is easy access to registration. Non-nationals of OR states have the opportunity to register their ships under extremely liberal laws⁷⁸ and without necessarily going to the state. For instance, the Liberian registry is administered through International Registries Inc., which is headquartered in New York.⁷⁹

Generous tax terms offered by ORs present yet another attraction to ship owners. Generally open registries impose no taxes for income earned from operating vessels under their flag while engaged in international trade.⁸⁰ They hardly charge any fees beyond a registry fee and an annual fee based on tonnage. A guarantee or acceptable understanding concerning freedom from future taxation may also be given.⁸¹

74. R.T. Epstein, *Should the Fair Labor Standards Act Enjoy Extraterritorial Application?: A Look at the Unique Case of Flags of Convenience*, 13 U. PA. J. INT'L BUS. L. 653 (1993).

75. Richard Payne, *Flags of Convenience and Oil Pollution: A Threat to National Security*, 3 HOUSTON J. INT'L L. 67, 69 (1980).

76. Anderson, *supra* note 56, at 159-160.

77. Registration in a foreign registry or reflagging for a perceived benefit(s) is not new. U.S. and Latin American ships involved in the obnoxious slave trade during the 1800s flew the flags of states that were not signatories to a slavery suppression treaty authorizing Britain to board and arrest ships registered with signatory states. See CARLISLE, *supra* note 66, at xiii. Also in the 19th century, British fishermen registered vessels in Norway with a view toward avoiding fishing restrictions. See *Mortensen v. Peters* (1906) 43 SCOT. L.R. 872.

78. Edith Wittig, *Tanker Fleets and Flags of Convenience: Advantages, Problems, and Dangers*, 14 TEX. INT'L L.J. 115, 121 (1979).

79. Anderson, *supra* note 56, at 155.

80. See Vincent Hubbard, *Registration of Vessels Under Vanuatu Law*, 13 J. MAR. L. & COM. 235. (1982). "The Republic of Vanuatu levies no income taxes of any kind on either business or personal income...." *Id.* at 241.

81. See Rochdale Committee, *supra* note 71.

Open registries are also favored because they assure a better return on investment by minimizing operating costs.⁸² By registering their ships in such registries, shipowners are not saddled with the requirements of employing highly qualified personnel for manning and crewing purposes, thus reducing their salary budgets. The absence of social security requirements and strong unions, constantly agitating for worker rights and improvement in working conditions, are also some of the "blessings" of an open registry.⁸³ According to Exxon Oil Corporation, a tanker with a 28-man crew costing US \$560,000 to run if registered in the Philippines would cost US \$2.5million to run if registered in the United States.⁸⁴

The high standards in closed registries present high hurdles which some ship owners find impossible to surmount. Open registries therefore provide a lifeline for the businesses of those ships that might not meet some international standards. One writer sees this development as an inevitable consequence of tanker economics because as ships age they tend to fall into the hands of less scrupulous owners who want to earn a precarious living.⁸⁵

Further, ship owners have been attracted to these registries by operating on the joint assumptions that the existence of anti-pollution conventions ties the hands of the maritime nations that honor them and that the structure of open registries permits owners of FOC vessels to be loosened from the restrictions of such a regulatory system.⁸⁶

Some of the above reasons may have been overemphasized as determinants of the decision to patronise an OR. Ship owners would probably insist on FOC shipping in the absence of some of these factors or even if some corresponding benefit were offered by non-FOC states.⁸⁷ According to McConnell, many OR fleets are composed of modern, well-maintained vessels and many of the OR states have commenced enforcing safety standards and inspections in compliance with

82. Kasoulides, *supra* note 46, at 565.

83. Payne, *supra* note 75, at 71.

84. Heneghan, *Shipping Guidelines*, Reuters North European Service (April 12, 1982), *cited in* Goldie, *supra* note 65, at 73 n.471.

85. Goldie, *supra* note 65, at 89.

86. Goldie, *supra* note 65, at 90, where he noted that: "In such a context, of course, a flag-of-convenience state can become a party to violation of an anti-pollution convention. It is merely anticipated to fail, conspicuously and consistently, if not conscientiously, in performing its treaty obligation to police effectively the contaminating proclivities of ships privileged to fly its flag."

87. See UNCTAD, *Action on the Question of Open Registries*, at 11, U.N. Doc. TD/B/C.4/220.

international conventions.⁸⁸ Ship owners' preference for open registries is more likely traceable to the freedom from control which FOC states provide.⁸⁹ Modern business philosophy favors less state intervention and control over business activities, as illustrated by the growing significance of the World Trade Organization ("WTO") and the current campaign for introduction of a multilateral agreement on investment ("MAI"),⁹⁰ which (seek to) reduce the influence of individual states over business activities taking place in their territories.

Nevertheless, the underlying reasons behind the genesis and sustenance of FOC shipping can be located in at least two areas. One is the economic position of the states involved in the practice. A characteristic shared by most of them is that they belong to that section of the world community marked by a lack of political power and economic clout.⁹¹ For them, therefore, the practice exists as a means of keeping their sagging economies alive.

Further, the growing importance of petroleum as an energy resource and a tool for industrialization has contributed in no small measure to the fuelling of this practice. Since much of the oil needed in the industrialized world is produced elsewhere, open registries will subsist to "supply" vessels for oil transportation. It therefore follows that oil producing and consuming countries building their economies through commerce in oil share in the blame for the genesis and continuance of this practice.⁹²

iii. Flags of Convenience and Environmental Issues

In some quarters, vessels sailing under flags of convenience have become nearly synonymous with environmental hazards. While the battle

88. Moira McConnell, ". . . Darkening Confusion Mounted Upon Darkening Confusion": *The Search for the Elusive Genuine Link* 16 J. MAR. L. & COM. 365, 368 (1985). Cf. Ademuni-Odeke, *Port State Control and U.K. Law*, 28 J. MAR. L. & COM. 657 (1997) maintaining that FOC states are recalcitrant or ineffective in enforcing anti-pollution standards.

89. McConnell, *Id.* at 368.

90. See Peter C. Newman, *MAI: A Time Bomb With a Very Short Fuse*, MACLEAN'S, March 2, 1998, (Magazine), at 51. "We want corporations to be able to make investments overseas without being required to take local partners, to export a given percentage of their output, to use local parts, or to meet a dozen other restrictions." - quoting Carla Hills, a U.S. Trade Representative.

91. See Kasoulides, *supra* note 46, at 547 for a list of open registry states from 1930 to 1986.

92. This argument can be extended to incorporate the point that maritime oil pollution itself is a direct consequence of petroleum's prominence as the economic basis of the industrialized world. See Anderson, *supra* note 56, at 163; Bill Shaw, Brenda Winslett, & Frank Cross, *A Proposal to Eliminate Marine Oil Pollution*, 27 NAT. RESOURCES J. 157 (1987).

against open registries was earlier fought by organized labor,⁹³ more recently “[e]nvironmental and conservation groups, which, in the context of domestic industrial activities, have not been known to have interests sympathetic with those of the maritime trade unions are the new opponents.”⁹⁴

Open registries do not sign on to marine safety and environmental treaties and have also been said to be apathetic toward enforcement of international law⁹⁵. By so doing, weaken the effectiveness of international regulatory efforts. It becomes a seemingly unwise business practice for a ship owner to allow him- or herself to be placed at a competitive disadvantage by a colleague who does not bear the cost of complying with international standards. Avoiding the standards wherever the opportunity arises becomes almost inevitable, fostering in maritime environmental matters, a “Gresham’s Law” scenario where, as in precious metal currencies, bad practices tend to drive out good ones when external restraints are non-existent or ineffective.⁹⁶

The ineffectiveness of OR states in ensuring compliance stems principally from their foundation. They are founded on the philosophy of improving their economic base through the attraction of shipping business by lowering standards. Rigid enforcement of international law will uproot the practice from the base and rob them of attendant benefits. As UNCTAD rightly observed, the enforcement of standards and the operation of a registry with the sole aim of making a profit are incompatible.⁹⁷ Moreover, OR states generally lack the resources to enforce anti-pollution provisions against their vessels.⁹⁸

Apparently exasperated and disgusted with FOC shipping and the accompanying environmental problems, some scholars have concluded:

93. See Goldie, *supra* note 65, at 63-66.

94. *Id.* at 67.

95. See Ademuni-Odeke, *supra* note 88. It has also been noted that “the modern practice of using flags of convenience has seriously undercut enforcement. Flags of convenience offer ship owners considerable financial benefit, in addition to avenues of avoiding otherwise stringent standards on safety, wages, training, and ship conditions.” See Elissa Steglich, Note, *Hiding in the Hulls: Attacking the Practice of High Seas Murder of Stowaways Through Expanded Criminal Jurisdiction*, 78 TEX. L. REV. 1323, 1336 (2000).

96. L.F.E. Goldie, *Recognition and Dual Nationality - A Problem of Flags of Convenience*, 39 BRIT. Y.B. INT’L L. 220, 221 n1 (1963).

97. UNCTAD, *supra* note 87.

98. *The Channel: Playing Canute With Pollution*, ECONOMIST, April 10, 1971, at 77.

There is but one solution to the problem of oil spills, and that is the abolition of flag of convenience registry. The termination of flags of convenience would put an end to the causes of most oil spills - poorly trained crews and shoddy ship construction. Elimination of the less stringent safety standards under flags of convenience would greatly enhance a tanker's ability to make a voyage without running aground, colliding with objects or other ships, or losing oil because of structural failure.⁹⁹

The above point is forceful, but still faces formidable opposition. While it is undisputed that many of the tanker accidents in the past have involved FOC vessels including the *Torrey Canyon* (1968), *Argo Merchant* (1976), and *Amoco Cadiz* (1978), it is also on record that the most extensive oil spill so far in terms of destruction and costs was that caused by the *MV Exxon Valdez*, a ship registered in the United States, which grounded off the coast of Alaska in 1989.¹⁰⁰

It must be conceded, however, that while oil spills are not the "exclusive preserve" of FOC vessels, the probability of spills being caused by them is higher since operational error is a prominent cause of maritime accidents and unqualified crews (for which FOC ships are noted), are more likely to commit such errors.¹⁰¹

Furthermore, oil spills account for only a small proportion of the total oil discharged at sea. The bulk comes from operational discharges,¹⁰² and every ship is involved in that, legally or otherwise, or is susceptible to it, regardless of place of registry.

The above argument should not be taken too far, however, since it is more consistent with the character of a shipowner who, because of the lure of profit maximization, is involved in FOC shipping, to consider reducing operational expenses by indulging in illegal discharges. The anonymity of open registries also offers an incentive to take such risks and escape punishment.¹⁰³

99. Shaw et al., *supra* note 92, at 185.

100. See Matlin, *supra* note 47, at 1052.

101. According to IMO estimates, 90% of all marine pollution accidents are due to human error. See Bodansky, *supra* note 3, at 730 n.42. See also Anderson, *supra* note 56, at 163; *New Ship Safety Code Targets Human Element in an Effort to Prevent Maritime Accidents*, 33 PETROLEUM GAZETTE 20, 21 (1998).

102. D.W. ABECASSIS AND R.L. JARASHOW, OIL POLLUTION FROM SHIPS 7 (2d ed. 1985).

103. UNCTAD, *supra* note 87.

iv. Control of Open Registries

In view of the pitfalls of FOC shipping, various measures have been taken to deal with this practice. These include the imposition of a "genuine link,"¹⁰⁴ confrontation from organized labor,¹⁰⁵ and increasing port state control under international arrangements.¹⁰⁶ This article will not address the labor approach, which in the author's opinion was not environmentally motivated, but was concerned with workers' welfare. The concept of "genuine link" and increasing port state control are discussed below.

The notion of "genuine link" was made applicable to ships for the first time by Article 5 of the *Geneva Convention on the High Seas*, although it had been used earlier in a case involving the nationality of persons.¹⁰⁷ The article provides as follows:

Each State shall fix the conditions for the grant of nationality to ships for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship; in particular, the State must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.¹⁰⁸

The concept of genuine link concept as applied to ships has been severely criticized.¹⁰⁹ However, efforts to rationalize or criticize this application are a dissipation of energy, since without a clear definition in an international instrument, it is an ineffective tool for controlling FOC shipping. Any state can manipulate its open-ended nature and claim to be abiding by it. Thus, the concept required definition. In 1986, it was proclaimed: "For the first time an international instrument now exists which defines the elements of the 'genuine link' that should exist

104. See McConnell, *supra* note 88, at 366.

105. See Notes, *The Effect of United States Labour Legislation on the Flag of Convenience Fleet: Regulation of Shipboard Labor Relations and Remedies against Shoreside Picketing*, 69 YALE L.J. 498, 502 (1960).

106. Anderson, *supra* note 56, at 167. Port state control will be discussed in section C below.

107. *Nottebohm Case (Leichtenstein v. Guatemala)*, 1955 I.C.J. Rep. 4.

108. *Geneva Convention on the High Seas*, *supra* note 49, art 5 (1). This is substantially replicated in LOSC, *supra* note 21, arts. 91 and 94.

109. See, e.g., Matlin, *supra* note 47, at 1033-1034. From the rich corpus of commentary on the subject. See also H.F. van Panhuys, "The Genuine Link Doctrine" and *Flags of Convenience*, 62 AM. J. INT'L L. 942 (1968); Myres McDougal and William Burke, *A Footnote*, 62 AM. J. INT'L L. 943 (1968); Simon Tache, *The Nationality of Ships: The Definitional Controversy and Enforcement of the Genuine Link*, 16 INT'L L. 301 (1982); Moira McConnell, *supra* note 88.

between a ship and the state whose flag it flies.”¹¹⁰ This was in reference to the 1986 *United Nations Convention on the Conditions for the Registration of Ships*,¹¹¹ (“UNCCORS”) also described as introducing “new standards of responsibility and accountability for the world shipping industry.”¹¹²

The principal provisions of UNCCORS relating to genuine link are contained in articles 8, 9 and 10. Article 8 requires a flag state to make provisions in its laws regarding the ownership of ships flying its flag.¹¹³ Such laws must include appropriate provisions for participation by the flag state or its nationals in the ownership of ships flying its flag and “should be sufficient to permit the flag state to exercise effectively its jurisdiction and control over [those] ships. . . .”¹¹⁴ Although a state can establish its genuine link through ownership, as indicated above, it can also do so through manning.¹¹⁵ A flag state, therefore, is required to observe the principle that a satisfactory part of the complement consisting of officers and crew of ships flying its flag be nationals or persons domiciled or lawfully in permanent residence in the state.¹¹⁶

The problem with the above option on the establishment of genuine link is that it suggests that a flag state that chooses to establish its genuine link by recourse to the manning option would still be unable to exercise effective jurisdiction and control since in real terms, such control is dependent on ownership.¹¹⁷

The role of the flag state in respect to management of ship owning companies and ships is covered in article 10. The flag state has a duty to ensure that ship owners seeking entry into its register are established or have a principal place of business in its territory.¹¹⁸ In the alternative, the shipowner is required to appoint a representative or management person who is a national of the flag state or is domiciled in that state.¹¹⁹ The flag

110. UNCTAD Information Unit, Press Release, U.N. Doc. TAD/INF/1770 (7 February 1986).

111. United Nations Convention on the Conditions for the Registration of Ships, *reprinted in* 26 I.L.M. 1229 (1987) [hereinafter UNCCORS].

112. UNCTAD Information Unit, *supra* note 110.

113. UNCCORS, *supra* note 111, art 8 (1).

114. *Id.* art. 8 (2).

115. *Id.* art. 7.

116. *Id.* art. 9 (1).

117. S.G. Sturmey, *The United Nations Convention on Conditions for Registration of Ships*, 1987 LMCLQ 97, 101. A measure of control is exercisable over crew members by an issuing authority upon application for or renewal of licenses to operate or man a ship or seagoing vessel.

118. UNCCORS, *supra* note 111, art. 10 (1).

119. *Id.* art. 10 (2). The representative could be a natural person or juridical person such as a corporation.

state is also directed to ensure that persons accountable for the management and operation of a ship flying its flag are in a position to meet the financial obligations that may arise from the operation of such a ship.¹²⁰

The above provision is weakened by the use of hortatory language. Sturmeý derides this and opines that the only valid arguments against open registries are the lack of protection to seafarers employed in their ships and the fact that owners can escape their liabilities for pollution damage. Therefore, “[i]f the Convention has only recommendatory force in these regards, then perhaps it really was a case of “much ado about nothing” as so many commentators have observed.”¹²¹

It would seem that UNCCORS virtually left the problem unsolved. “It is obvious that the 1986 UNCCORS reaffirmed the flag state’s supremacy and institutionalized the *status quo*, leaving the concept of “genuine link” still nebulous and controversial.”¹²² In general, “it [failed] to achieve its stated objective. It appears to have come no closer to truly identifying an enforceable “genuine link” and, rather than phasing out open registry practice, its provisions appear to have legitimized the practice”¹²³ It may be worthwhile to note, however, that while UNCCORS did not go far enough, it surely was an improvement on the existing scheme.¹²⁴ The fact that it has not been ratified by some traditional maritime and FOC states who accepted previous Conventions’ position on genuine link¹²⁵ suggests, at least, their recognition that UNCCORS makes inroads into their sphere of authority, a legal authority they are not yet ready to surrender.

120. *Id.* art. 10 (3). This covers insurance, maritime lien and worker-interest protection measures.

121. Sturmeý, *supra* note 117, at 106.

122. GEORGE KASOULIDES, PORT STATE CONTROL AND JURISDICTION 75 (1993).

123. Moira McConnell, “Business as Usual”: An Evaluation of the 1986 United Nations Convention on Conditions for Registration of Ships, 18 J. MAR. L. & COM. 435, 449 (1987). (footnote omitted).

124. See George Kasoulides, *The 1986 United Nations Convention on the Conditions for the Registration of Vessels and the Question of Open Registry*, 20 OCEAN DEV. & INT’L L. 543, 566 (1989), asserting that the requirements of the Convention are more onerous than existing national practices.

125. Treaty status information provided by IUCN and last updated as of March 1, 1997 shows that no major maritime power or FOC state is a party to UNCCORS. The treaty has not entered into force as a result, being unable to garner the necessary support in terms of tonnage. The parties at present include Algeria, Bolivia, Cameroon, CoteD’Ivoire, Egypt, Ghana, Haiti, Hungary, Indonesia, Iraq, Libya, Mexico, Morocco, Oman, Poland, Russian Federation, and Senegal. See <<http://sedac.ciesin.org/prod/charlotte>>.

d. Observations

Marine environmental degradation and endangerment of the safety of life at sea are matters which are always condemned. Operation of a registry that facilitates these evils is thus abhorrent. In that connection, any measure aimed at eradicating FOC shipping could easily be embraced. In the considered opinion of this author, however, whatever is done in this regard, and considering the circumstances that surround open registries, the problem could best be solved by an approach that does not ignore the economics and equities of the situation.

A pertinent question may be whether some FOC states can lay legitimate claim to equity since they might not come with clean hands. Yet the fact remains that most OR states are poor countries involved in the practice mainly to make ends meet. Where are the fairness and fraternal bond in an international community interested in extinguishing some countries' source of sustenance without assisting in fashioning alternative economic bases for them? Where is the equity in targeting OR states without requiring oil producing and consuming nations to be accountable for their actions, since their inordinate desire for economic development at the expense of environmental well-being has substantially led to the creation and sustenance of open registries? Where is the justice in allowing oil and shipping companies to go scot-free, and be free to continue promoting sharp business practices regardless of environmental implications, rather than implementing a system that makes them legally and socially responsible, and accountable to humanity and the environment?

After all, if justice is done in this area, it will go a long way toward repairing past damage, safeguarding the present, and securing the future of the marine environment for the benefit of the present generation and generations yet unborn.

B. COASTAL STATE JURISDICTION

The approach of international law toward coastal state jurisdiction, another type of jurisdiction mentioned earlier, is to define it in terms of

distinct zones of the oceans namely, internal waters,¹²⁶ the territorial sea,¹²⁷ the contiguous zone¹²⁸, and the exclusive economic zone (EEZ).¹²⁹

Coastal states have plenary prescriptive and enforcement powers in their internal waters, subject only to restrictions accepted by treaty.¹³⁰ Under MARPOL 73/78, a coastal state may inspect a vessel in its internal waters or ports to ensure compliance with international standards on vessel construction and design,¹³¹ or to ascertain any violation of international discharge standards.¹³²

The coastal state is empowered to regulate pollution in its territorial sea. LOSC specifies matters on which the coastal state may legislate, including the safety of navigation, the preservation of the coastal state's environment, and the prevention, reduction, and control of pollution.¹³³ A coastal state is free to adopt its own pollution discharge rules for foreign vessels in the territorial sea, as there is no requirement for conformity of these rules with international law.¹³⁴

The above prescriptive jurisdiction is, however, limited by the obligation not to hamper, deny, or impair the right of innocent passage.¹³⁵ Passage is not innocent, however, when a vessel engages in an act of wilful and serious pollution.¹³⁶ The fact that the pollution must be "wilful and serious" before the right of innocent passage is extinguished may likely exclude most typical operational discharges of oil since they are rarely "serious," although they may be "wilful."¹³⁷ The second limitation is the

126. These are waters landward of the coastal state's baseline and include bays, river mouths, estuaries and ports. *See* LOSC, *supra* note 21, art. 8.

127. This is the band of water seaward of the coastal state's baseline, over which it is sovereign. LOSC, *supra* note 21, art. 2. LOSC establishes a maximum breadth of 12 miles for the territorial sea. *See id.* art. 3.

128. This is a narrow band of water seaward of a state's territorial sea in which the state has limited jurisdiction to protect its territorial sea. LOSC, *supra* note 21, art. 33. It comprises a breadth of 24 miles measured from the baselines of the territorial sea. *Id.*

129. This is an area beyond and adjacent to the territorial sea extending up to 200 nautical miles from the baseline of the territorial sea. LOSC, *supra* note 21, arts. 55 and 57. In essence, if a state has a 12-mile territorial sea, the EEZ would not be more than 188 miles in breadth since its 200-mile maximum breadth is measured from the same baseline as the territorial sea. *See* DAVID ATTARD, *THE EXCLUSIVE ECONOMIC ZONE IN INTERNATIONAL LAW* 44 (1987).

130. Bodansky, *supra* note 3, at 745.

131. MARPOL 73/78, *supra* note 9, art. 5.

132. MARPOL 73/78, *supra* note 9, art. 6.

133. LOSC, *supra* note 21, arts. 21 and 211 (4).

134. *See* LOSC, *supra* note 21, art. 211(4).

135. LOSC, *supra* note 21, arts. 24 and 211(4).

136. LOSC, *supra* note 21, art. 19 (2) (h).

137. A.E. Boyle, *Marine Pollution Under the Law of the Sea Convention*, 79 AM. J. INT'L L. 347, 359 (1985).

exclusion of coastal state regulation of the construction, design, equipment, and manning ("CDEM") standards in connection with foreign ships unless such rules give effect to generally accepted international rules and standards.¹³⁸

Concerning the contiguous zone, the coastal state is permitted to "exercise the control necessary to prevent infringement of its customs, fiscal, immigration or sanitary regulations within its territory or territorial sea."¹³⁹ It is doubtful that this encompasses measures to prevent or control pollution.¹⁴⁰

With regard to enforcement, coastal states are empowered to investigate, arrest, and prosecute vessels in the territorial sea for contravention of pollution laws.¹⁴¹ Coastal states also have limited jurisdiction to enforce EEZ pollution standards.¹⁴² They can only do so when a vessel has committed a discharge violation of such a nature that results in or threatens major damage to the coastal state.¹⁴³ Otherwise, a coastal state can only require information about the identity of the ship and its next port of call and relay the information to the vessel's flag state or next port of call, so that either of these states can take appropriate action. A coastal state can act also in the event of maritime casualties with actual or potential harmful consequences.¹⁴⁴

The coastal state's powers are further restricted by the requirement that it release vessels on bond¹⁴⁵ which generally limits available sanctions to monetary penalties.¹⁴⁶ The foregoing indicates very clearly that coastal state jurisdiction as a mechanism for ensuring compliance with international law is not structured to be a major tool. The preference of the international community has been the concentration of powers in the flag state or a division of powers between the flag and port states. The

138. LOSC, *supra* note 21, art. 21 (2).

139. LOSC, *supra* note 21, art. 33.

140. See Yoram Dinstein, *Oil Pollution by Ships and Freedom of the High Seas*, 3 J. MAR. L. & COM. 363 (1972). "[W]ith some stretch of the imagination, [oil pollution] may be considered as falling within the ambit of the sanitary clause." *Id.* at 367. Footnote omitted. See LOSC, *supra* note 21, arts. 219 & 220 (1) & (3).

141. LOSC, *supra* note 21, art. 220 (2).

142. LOSC, *supra* note 21, art. 220 (3).

143. LOSC, *supra* note 21, art. 220 (5) and (6).

144. LOSC, *supra* note 21, art. 221.

145. LOSC, *supra* note 21, art. 226 (1) (b).

146. LOSC, *supra* note 21, art. 230 (1).

rationale is that enhanced coastal state powers would pose a threat to navigation.¹⁴⁷

C. PORT STATE JURISDICTION

As the name implies, port state jurisdiction is jurisdiction and control over ships by a port state.¹⁴⁸ It is jurisdiction based solely on a ship's presence in port.¹⁴⁹ Otherwise, a port state whose coastal waters have been affected by a ship's polluting activities can exercise jurisdiction as a coastal state. The basis of the policy entrenching port state jurisdiction has been well articulated by Professor Bodansky as follows:

From a policy standpoint, port state enforcement represents a compromise between coastal and flag state enforcement. On the one hand, port states may be more inclined than flag states to enforce environmental norms, since port states are themselves coastal states and, as such, are at risk from substandard and delinquent vessels. Port state jurisdiction therefore serves as a useful corrective to inadequate flag state enforcement. On the other hand, port state enforcement is preferable to coastal state enforcement since it interferes much less with freedom of navigation and can generally be performed more safely. Stopping and boarding a vessel in transit at sea for inspection purposes directly interferes with the vessel's movement and can be hazardous, depending on the weather and location. In contrast, inspecting a vessel while in port imposes little if any burden on navigation and can be performed safely.¹⁵⁰

This form of jurisdiction will be examined from the international and regional perspectives.

1. International Legal Provisions on Port State Jurisdiction

The Law of the Sea Convention of 1982 vested port states, for the first time, with authority over pollution incidents occurring on the high seas

147. Boyle, *supra* note 137, at 364.

148. A port state is a "state in the territorial waters of which a vessel is at any particular time, provided that the vessel is destined to or has just left a port in that state." See Sir Anthony Clarke, *Port State Control or Sub-Standard Ships: Who is to Blame? What is the Cure?* 1994 LMCLQ 202.

149. Bodansky, *supra* note 3, at 738.

150. Bodansky, *supra* note 3, at 739. Moreover, the port state also provides facilities for investigation and collection of evidence. Boyle, *supra* note 137, at 364.

or in another state's coastal waters.¹⁵¹ The port state may conduct inspections and institute proceedings against vessels that have violated "applicable international rules and standards."¹⁵² It may also conduct inspections for discharge violations in another state's coastal waters, and may prosecute for such discharges, however, subject to flag state pre-emption for pollution offenses occurring on the high seas.¹⁵³

Controversy rages as to the scope of jurisdictional competence conferred on port states by LOSC. Sally A. Meese¹⁵⁴ construes a port state's powers to enforce international discharge standards against any vessel in a way that presupposes that LOSC gives port states prescriptive authority to extend the application of international discharge standards to vessels on the high seas.¹⁵⁵ McDorman adopts a similar line of reasoning, maintaining that port states have prescriptive jurisdiction on the high seas.¹⁵⁶

Bodansky seriously questions this reasoning, arguing that article 218 is in section 6 of Part XII, which is devoted to enforcement jurisdiction, rather than in section 5, which deals with prescriptive jurisdiction.¹⁵⁷ This scholar is of the view that when a port state exercises its enforcement powers by, for instance, inspecting a vessel to determine whether the vessel has committed a discharge violation on the high seas, "the port state is investigating a violation of another state's law, not its own, which it lacks jurisdiction to prescribe."¹⁵⁸ Support for this view can be found in Cheng-Pang Wang's assertion, with respect to article 218, that "[t]he port state has been thereby recognized as having the competence to apprehend a foreign ship, which is voluntarily within the port . . . of that state, for a discharge of oil pollution as defined by another State."¹⁵⁹

This latter view that a port state's powers for high seas offenses is limited to enforcement, certainly has merit. However, it also brings to the fore the difficulties that would arise if the position of port states is so limited. For instance, if a ship that has been apprehended by the port

151. LOSC, *supra* note 21, art. 218.

152. LOSC, *supra* note 21, art. 218 (1).

153. LOSC, *supra* note 21, art. 228.

154. Sally A. Meese, *When Jurisdictional Interests Collide: International, Domestic and State Efforts to Prevent Vessel Source Oil Pollution*, 12 OCEAN DEV. & INT'L L. 71, 92 (1982).

155. Bodansky, *supra* note 3, at 762.

156. Ted McDorman, *Port State Enforcement: A Comment on Article 218 of the 1982 Law of the Sea Convention*, 28 J. MARIT. L. & COMM. 305, 315 (1997).

157. Bodansky, *supra* note 3, at 762.

158. Bodansky, *supra* note 3, at 740.

159. Wang, *supra* note 4, at 309.

state for high seas discharge violations is from a flag state that either is not a signatory to the relevant international conventions or has not implemented the “applicable international standards” in local legislation, the port state will be unable to proceed against that ship.

Other international measures on port state control also exist, an example of which is the consolidated port state control measures of the International Maritime Organization (“IMO”).¹⁶⁰ The consolidated resolution and its annexures outline and stipulate the procedures for port state control. Inspections fall into two broad categories: initial port state inspections and more detailed inspections. There are also guidelines for detention and reporting procedures.

2. Regional Port State Control Efforts

Regional efforts relating to port state control are in place in different parts of the world, with the West and Central African Region adopting them most recently. Until the latter part of 1999, regional measures on port state control did not exist in West Africa, notwithstanding the lengthy existence of a legal framework for such a cooperative venture.¹⁶¹ The Abidjan Convention, drafted under the auspices of the United Nations Environment Programme’s Regional Seas Programme, makes provisions which enjoin covered countries from embarking on individual or joint measures, in accordance with the Convention and its protocols, to “prevent, reduce, combat and control pollution of the Convention area, and to ensure sound environmental management of natural resources [using] the best practicable means at their disposal, and in accordance with their capabilities.”¹⁶²

These countries must also cooperate with international, regional, and subregional organizations to adopt standards and practices that would enable them to accomplish these goals.¹⁶³ Parties’ responsibilities to

160. Resolution A787 (19): Procedures for Port State Control; adopted Nov. 23 1995. Full text of this document is reproduced on the University of Cape Town Marine and Shipping Law website, <<http://www.uct.ac.za/depts/shiplaw/portstate.htm>>.

161. That is, the 1981 *Convention for Co-Operation in the Protection and Development of the Marine and Coastal Environment of the West and Central African Region*, U.N. Doc. UNEP/IG.22/7 (March 31, 1981) reprinted in 20 I.L.M. 746 [hereinafter, Abidjan Convention]. A few years ago, one African scholar wrote that the Abidjan Convention had “yet to elicit even a basic level of political commitment in the form of majority ratification or accession, the equipping of national institutions to carry out its requirements, or financial support for its implementation.” See David Dzidzornu, *Marine Pollution Control in the West and Central African Region*, 20 QUEEN’S L.J. 439, 477 (1995).

162. Abidjan Convention, *Id.* art. 4 (1). See also art. 4 (3).

163. *Id.* art. 4 (4).

work toward preventing, reducing, combating, and controlling pollution arising from incidents related to shipping are also underscored.¹⁶⁴

A number of factors, mainly political and economic, accounted for the slow pace of translating these provisions into reality in West Africa. For the past ten years, that region has had various forms of commotion and civil disturbance, including guerrilla warfare in Liberia, Sierra Leone, and Guinea-Bissau.¹⁶⁵ In such an atmosphere, it is wishful thinking to expect much to be accomplished.

Financial constraints also impede cooperative efforts. A study conducted by the United Nations Environment Programme on a West African sub-regional arrangement for marine oil pollution control covering Nigeria, Cameroon, Equatorial Guinea, and Sao Tome and Principe, was suspended partly due to failure of the member states to pay their assessments to a Trust Fund for that purpose.¹⁶⁶

The economic policies of West African countries also play a role. Because of their desire to catch up with the rest of the world, these countries are often unmindful of the environmental implications of their development aspirations. Thus, one has observed:

Indeed, foundational to the success of marine regionalism for purposes of pollution control is the character of the national economic policies of each participating State, especially of the coastal States . . . African States favour economic development over ecological preservation.¹⁶⁷

Policy reformulation is necessary in West African countries. It is dangerous for developing countries to be obsessed with economic development to the exclusion of environmental protection.¹⁶⁸ Moreover, the trend in the global community is toward an understanding that economic development and environmental protection are not mutually exclusive, as encapsulated in the concept of sustainable development,

164. *Id.* art. 5.

165. See Jackson *Urges Liberians to Bury the Hatchet*, AfricaNews Online (February 12, 1998) <http://www.africanews.org/usafrica/stories/19980212_feat4.html>.

166. See Dzidzornu, *supra* note 161, at 479 n.119 and accompanying text.

167. *Id.* at 464.

168. See Ambrose Ekpu, "Environmental Impact of Oil on Water: A Comparative Overview of the Law and Policy in the United States and Nigeria," 24 DENV. J. INT'L L. & POL'Y 55, 105-106 (1995).

which emphasizes that "environment and development are not only interrelated but inseparable."¹⁶⁹

Moreover, developed countries are not necessarily more concerned about the environment, nor less concerned with economic growth, than developing countries,¹⁷⁰ yet some of them were able to fashion a functional regional arrangement on port state control long before now.¹⁷¹ What is required, therefore, is a "comprehensive process of resource management, informed by ecosystemic knowledge and progressively integrated with economic development planning."¹⁷²

The advantages of a regional arrangement are legion. In the first place, it emphasizes a preventive approach to oil pollution which suits African states since they lack the technical resources and equipment to deal with any major maritime casualty.¹⁷³ The importance of this cannot be overemphasized, considering that West Africa is a major tanker route and tanker-handling port facilities are located in all but six countries in the region.¹⁷⁴ Thus, the region is at high risk of pollution arising from tanker collision, grounding, loading and unloading, and offshore oil and gas production accidents.¹⁷⁵

A coordinated system of port state inspection would also go a long way toward minimizing financial costs incurred by individual state efforts and addressing the problem of substandard vessels.¹⁷⁶ West Africa is a marine-resource-rich zone that should be interested in their conservation and revenue through concerted pollution control and prevention

169. Mickelson, *supra* note 5, at 42. The Brundtland Report simply defines sustainable development as "development that meets the needs for the present without compromising the ability of future generations to meet their own needs." WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, *OUR COMMON FUTURE*, 43 (1987). It is heartening to note that the 1989 Lome IV Convention between the European Economic Community and the African, Caribbean, and Pacific States, as well as the 1991 Treaty signed in Abuja, Nigeria, establishing the African Economic Treaty, "emphasize the necessity of integrating environmental concerns with ecologically-rational, economically-sound, and socially-acceptable development." Aboubacar Fall, *Marine Environmental Protection Under Coastal States' Extended Jurisdiction in Africa*, 27 J. MAR. L. & COM. 281, 287 (1996).

170. See D. Westbrook, *Environmental Policy in the European Community: Observations in the European Environment Agency*, 15 HARV. ENV'T L. REV. 257 (1991); O. Lomas, *Environmental Protection, Economic Conflict and the European Community*, 33 MCGILL L. J. 506, 508-510 (1988).

171. Paris Memorandum of Understanding, *infra* note 179 and accompanying text.

172. Jaro Mayda, *Environmental Legislation in Developing Countries: Some Parameters and Constraints*, 12 ECOLOGY L.Q. 997 (1985).

173. Fall, *supra* note 169, at 283.

174. Dzidzornu, *supra* note 161, at 469-70.

175. *Id.* at 470.

176. See Kasoulides, *supra* note 122, at 149.

measures.¹⁷⁷ The fact that the years between 1991 and 2000 have been declared the decade for marine and coastal environmental protection,¹⁷⁸ made this period an auspicious time to introduce a regional port state regime. This newly introduced scheme, like those in other parts of the world, follows in the footsteps of the Paris Memorandum of Understanding¹⁷⁹ (“MOU”), discussed below.

The Paris MOU provides a legal foundation for the cooperative efforts of a number of European countries concerning port state control.¹⁸⁰ Under it, certain categories of ships are targeted for inspection purposes. These include ships that may present a special hazard, for example, oil tankers and gas and chemical carriers as well as ships with recent deficiencies.¹⁸¹ A maritime authority is enjoined to avoid inspecting ships which have been inspected by the maritime authority of another state within the preceding six months, unless there are clear grounds for inspection.¹⁸² This avoids duplication of inspection exercises with the attendant costs on state revenue and maritime transport.

When an inspection reveals deficiencies which are “clearly hazardous to safety, health or the environment,” the maritime authority must ensure that the ship does not proceed to sea and “for this purpose will take appropriate action, which may include detention.”¹⁸³ If the port state does not have appropriate repair facilities, it should allow the ship to proceed to another port subject to any conditions the authority deems appropriate,

177. See Fall, *supra* note 169, at 285. Tuna can be found in abundance here. See also Dzidzornu, *supra* note 169, at 465 stating that the West and Central African region contains fifty-per cent of all of Africa’s fish potential.

178. Declared by the African Ministerial Conference on the Environment. See Fall, *Id.* at 287. The Memorandum of Understanding for West and Central African countries was signed in 1999 by sixteen countries. See David Ogah, *IMO pleads for implementation of port control treaty*, THE GUARDIAN, May 10, 2000; <http://www.ngrguardiannews.com/maritime/mr785004.html> (Last visited February, 16, 2001).

179. Done at Paris, January 26, 1982, reprinted in 21 I.L.M. 1. (Hereinafter Paris MOU). The Paris MOU binds the maritime authorities of Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Netherlands, Norway, Portugal, Spain, Sweden, United Kingdom and Northern Ireland. The Russian Federation became a member on January 1, 1996. “Cooperating authorities” including the United States’ Coast Guard, Croatia and Japan are also admitted. See IMO News 2 / 96 available at <<http://www.imo.org/imo/news/296/summary.htm>>. Port state control has been extended to other parts of the world including the Caribbean and the Mediterranean. See Ted L. McDorman, *Regional Port State Control Agreements: Some Issues of International Law*, 5 OCEAN & COASTAL L.J. 207 (2000).

180. The MOU format adopted here is ostensibly a reflection of the intention of states involved to avoid binding obligations. This is accentuated by the fact that it was concluded among maritime authorities and not state governments. See Kasoulides, *supra* note 122, at 151.

181. Paris MOU, *supra* note 180, § 3 (3).

182. *Id.* § 3 (4).

183. *Id.* § 3 (7). Undue detentions may, however, give rise to a claim for compensation. Kasoulides, *supra* note 122, at 158.

with a view toward ensuring that the ship can proceed without unreasonable danger to safety, health, or the environment.¹⁸⁴ The MOU also obliges members to cooperate in the detection of operational discharge violations.¹⁸⁵

The MOU is supplemented by the 1995 Council Directive of the European Union, which went into effect on July 1, 1996.¹⁸⁶ The Directive contains even more stringent port state inspection requirements and promotes detailed inspections of vessels from countries with an above average detention rate in the MOU database housed in Saint Malo, France.¹⁸⁷ The Directive also requires that the ownership of detained vessels or vessels that fail inspection be published in its quarterly publication. Since one of the major reasons for “flagging under an open registry is the ability to conceal ownership,” this is a direct attack on open registries aimed at eroding the advantage it confers.¹⁸⁸

This regional port state regime has come under attack from the International Shipowners Association (“INSA”) which considered the inspections embarked upon as an illegal means of delaying vessels and a detriment to shipping interests.¹⁸⁹ Doubts have also been raised as to its effectiveness as a tool for eradicating substandard shipping and improving the quality of vessels visiting European ports.¹⁹⁰ Notwithstanding the criticisms, it cannot be denied in good faith that an arrangement of this nature is of considerable value in effectuating and enforcing international rules and is worth replicating.¹⁹¹ To substantiate this, it may be noted that it was the effectiveness of the Paris MOU that led IMO to pass Resolution A. 682 (17) on “Regional Co-operation in the Control of Ships and Discharges” and to invite governments to form regional initiatives for port state control in cooperation with IMO.¹⁹²

184. *Id.* § 3 (8). Notification should also be given to the next port of call in the region, to the flag state and to other interested authorities.

185. *Id.* § 5.

186. Anderson, *supra* note 56, at 168.

187. *Id.*

188. *Id.*

189. L. Buchingham, *INSA Sees Inspections as Means of Illegal Delay*, Lloyd's List, October 25, 1982, cited in Kasoulides, *supra* note 122, at 175.

190. Kasoulides, *Id.* at 162.

191. *Id.* at 176 - 177.

192. Hare, *supra* note 1, at 578 n22. See also *Shipping Safety in a Changing World*, address of the IMO Secretary-General, Mr. William A. O'Neill, to the Hong Kong Shipowners Association Luncheon, March 27, 2000. In that address, the secretary-general looked at the rationale for the introduction of the port state control regime and its importance. He added: “IMO has encouraged the development of regional port State control systems as a means of ensuring that ships do in fact

3. Assessments

Port state control obviously has advantages as an enforcement tool, some of which have been discussed in preceding paragraphs. In summary, port state control minimizes the need to detain ships in transit for arrest or inspection, as such actions may take place at any port in the vessel's scheduled voyage. It also reduces the burden on coastal states to police their adjacent waters, which in the case of developing states with wide economic zones may be severe, since coastal states can now be assisted by port states. Furthermore, this increases the number of potential prosecutors and could thus facilitate pollution control and circumvent the problems created by those flag states which are unwilling or unable to effectively exercise jurisdiction over their ships. Moreover, by offering increased control over polluters, it addresses the basis for the clamor by coastal states for extensive zones of enforcement jurisdiction.¹⁹³

Accolades have been heaped on this mechanism, especially in contradistinction to the previous regime of exclusive flag state jurisdiction. For instance, one writer refers to it as "the most effective cure of the malaise of the maritime industry."¹⁹⁴ In a similar vein, in June 1993, Roger Nixon, who has recently retired as the Chairman of the Joint Hull Committee of the Institute of London Underwriters, said:

Flag states are just a laugh. You tighten up one flag state and another one starts. It is just ludicrous. You never get a lasso on all those different flag states. Most of the flag states are not serious players, they are just in it for the money. But port states have a serious interest in the quality of the ships coming in because of their local environment and because they do not want ships screwing up port facilities. I believe port state control is the best answer because ports have no axes to grind, no contractual liabilities or contractual obligations to the owner. If the port authority does not like [a] ship, they should have no problem about making it pretty damned public.¹⁹⁵

While the merits of port state control are acknowledged, they should not prevent anyone from noticing its pitfalls, a number of which have been addressed earlier in this article. Indeed it would be naive to place a

comply with the internationally agreed upon rules." *Id.*; <http://www.imo.org/imo/speech-1/hongkong.htm> (Last visited August 20, 2000).

193. A.V. Lowe, *supra* note 4, at 642-643.

194. Hare, *supra* note 1. Footnote omitted.

195. *Quoted in* Clarke, *supra* note 148, at 204.

premium on port state control as a complete panacea to oil pollution problems. Port states are more likely to protect the environment by proceeding against polluters when there are incentives to act. Therefore, except for pollution incidents that are directly harmful to it, a port state or a flag state would be reluctant to take enforcement measures concerning pollution on the high seas or in another state's coastal waters.¹⁹⁶

Developing states obviously lack an incentive to vigorously participate in port state enforcement measures since their fragile economies cannot sustain a backlash from shipowners by way of a boycott. While a boycott would obviously mean lost revenue from shipping, it could actually amount to economic stagnation in the case of port states who do not have large shipping fleets and are virtually dependent on foreign ships for their exports.¹⁹⁷ For a country like Nigeria with a mono-cultural economy dependent on oil production and export, that would be a disguised suicide attempt in broad daylight.

It has been acknowledged by IMO's Marine Environment Protection Committee on several occasions that "full compliance by ships with all MARPOL discharge requirements is contingent upon the availability of adequate reception facilities in ports."¹⁹⁸ The need for concerted efforts toward meeting this contingency cannot be overemphasized, and until it is met, calling the port state regime a phenomenal success would be misleading.

In recognizing the peculiar problems of developing states and the importance of reception facilities to the Convention's success, MARPOL 73/78 included the construction of reception facilities on the list of technical assistance projects that it urged developed countries to assist in financing.¹⁹⁹ A 1992 working group of the United Nations Conference on Environment and Development ("UNCED") estimated that the cost of

196. See Sonja Boehmer-Christiansen, *Marine Pollution Control: UNCLOS III as the Partial Codification of International Practice*, 7 ENVTL POL'Y & L. 71, 73 (1981).

197. R. M'GONIGLE & A. ZACHER, POLLUTION, POLITICS AND INTERNATIONAL LAW 338 (1979). The authors opine that "[t]he most serious [enforcement problem] has been the lack of interest on the part of the oil exporting states to inspect tankers in their ports."

198. MEPC 27/5/3 (7 February 1989). Tanker owners have categorically stated that the lack of adequate port reception facilities necessitates violation of discharge limits. See e.g. MEPC 27/5 (January 17, 1989); MEPC 27/5/4 (February 15, 1989); MEPC 32/10 (August 15, 1991); *IMO, Tanker Owners Urge Increase in Facilities Accepting Oily Wastes*, International Environment Reporter, March 8, 1989, at 130; *Tanker Orders Contribute to Pollution*, International Environment Reporter, October 10, 1990, at 428.

199. MARPOL 73/78 *supra* note 9, art. 17.

installing oily waste reception facilities in developing countries would be US \$560 million for the period between 1993 and 2000.²⁰⁰ This is definitely beyond such countries' means, as they are also saddled with other responsibilities and debt obligations. A centralized funding mechanism designed to offer such assistance would certainly help. It has rightly been pointed out that "whether noncompliance [with the requirements on provision of reception facilities] arose from an absence of capacity or of incentives, financial mechanisms could have overcome the problem, but IMO has never established a program to finance facility costs for developing countries."²⁰¹

In considering the importance to be placed on port state control, one should not lose sight of the fact, as IMO has also observed, that measures by port states "should be regarded as complementary to national measures taken by the flag states."²⁰² Where there are no flag state measures to complement, the efforts of port states will amount to nothing. Thus, effective port state control is dependent on strong flag state cooperation. This takes us back to the flag state issue and its associated problems. Until the world community devises a system that dissuades flag states from indulging in activities inimical to the environment and encourages them to be actively involved in the fight to save the ocean environment and resources, the battle may take longer than anticipated to win, if it is won at all.

Therefore, in the remaining part of this article, other areas will be explored that might fine-tune and strengthen the port state regime and to help to induce flag state cooperation. In that regard, Section III below will briefly examine an alternative approach.

IV. AN ALTERNATIVE APPROACH TO COMPLIANCE AND ENFORCEMENT

The primary players in international oil trade are oil and shipping companies involved in the transportation of the resource. The existing rules require states to enforce the law against them when they fail to

200. Preparatory Committee for the United Nations Conference on Environment and Development, *Protection of Oceans, All Kinds of Seas Including Enclosed and Semi-Enclosed Seas, Coastal Areas and the Protection, Rational Use and Development of Their Living Resources* U.N. Doc. A/Conf. 151/PC/100/Add. 21 (New York: United Nations, 1991).

201. MITCHELL, *supra* note 8, at 208.

202. See I.M. Sinan, *UNCTAD and Flags of Convenience*, 18 J. WORLD TRADE L. 95, 103 (1984).

meet the law's demands. However, if the companies take it upon themselves to act appropriately, we will not only have better laws, but the need for enforcement will be greatly reduced.

This part of the article will discuss the activities of the business community considered inimical to international efforts and how a change in industry behavior can change the face of things in this area. To ensure that this change occurs, it may be necessary to have a binding legal obligation to do so. This part of the article is divided into two sections. Section A will discuss the role of the corporate sector, while section B will lay a groundwork for a norm of corporate behavior and its applicability to international law.

A. THE ROLE OF OIL AND SHIPPING COMPANIES

There is no doubt that the industry has made some positive contributions toward the control of oil pollution. For instance, it has been at the forefront of supplying IMO with information on adequate reception facilities in states. In 1983, 1985, and 1990, the International Chamber of Shipping ("ICS") carried out a survey on ship masters and summarized captains' complaints regarding ports where reception facilities were absent, had limited capacity, were costly to use, or required long delays; an undertaking that was successful.²⁰³

In general, however, the activities of the industry have been geared toward favoring its own cause, even when its course of action might place the overall interest of humanity in jeopardy. The activities of the business community founded upon profit maximization manifests as an inordinate desire to amass wealth at the expense of the health and well being of humanity. To the industry, resistance to any regulation that would increase costs is a virtue.²⁰⁴ This is accentuated by the fact that oil and shipping interests have been quite visible in coordinating domestic-level lobbying to influence positions that governments bring to international oil pollution negotiations.²⁰⁵

It is also this quest for safeguarding their economic interests at the expense of everything else that informed the reluctance of the industry to apply adequate technologies that would best address the problem of pollution from ships. Contrary to the views of an industry

203. MITCHELL, *supra* note 8, at 129.

204. *Id.* at 110.

205. *Id.* at 111.

spokesperson²⁰⁶ that the industry has made enormous contributions to the reduction of operational oil pollution, for instance, by introducing technologies, it has been revealed that the industry's attitude had been one of frustration with international efforts, acting only when it would suit them. In their seminal work, *Pollution, Politics, and International Law*, R. Michael M'Gonigle and Mark Zacher presented the grim picture in the following words:

The entire process of technical standards since 1954 reflects the constraints imposed by a dependence on technologies which have been developed and made public by the shipping and oil industries. The 1954 and 1962 discharge regulations for non-tankers were, in effect, emasculated because the necessary technologies were supposedly unavailable. Meanwhile, the industry kept its own "load-on-top" system for tankers under wraps until it - and not governments or IMCO - decided to unveil it. This was also to an extent the case with crude-oil-washing, a system which had been considered as early as 1967 but was rejected as "uneconomical." Only when its use became profitable after the OPEC price rise was the system touted for its environmental advantages. Even then the oil industry supported it as a mandatory requirement only as a way to rebut the more expensive proposal for the retrofitting of segregated ballast tanks.²⁰⁷

The practice of flags of convenience shipping also owes its genesis and sustenance to multinational oil and shipping companies who see in it an avenue for enhancing their business interests. As one writer observes, a "typical group of [open registry] firms will include oil and other multinational companies that they manage and that operate their tonnage with the primary objective of minimizing ocean transport costs and maximising profit."²⁰⁸ This practice, as already shown in the earlier part of this section, is a significant contributor to environmental degradation through international oil transactions as well as to the low level of compliance with international rules by some states.²⁰⁹

206. DAVID ABECASSIS, *OIL POLLUTION FROM SHIPS* 42 (1978).

207. See M'GONIGLE ET AL., *supra* note 197, at 262.

208. See George Kasoulides, *The 1986 United Nations Convention on the Conditions for the Registration of Vessels and the Question of Open Registry*, 20 OCEAN DEV. & INT'L L. 565 (1989).

209. See Part II, section A above, especially pages 14, 19 - 21.

In view of the foregoing, this writer is of the opinion that if corporations are made to readjust their practices and behave in an environmentally desirable way, the problems of ocean pollution and enforcement of laws will belong to the dustbins of history. It is with that in mind that a case is stated in the next section for a binding international norm of corporate behavior.

B. CHANGES IN MULTINATIONAL CORPORATE BEHAVIOR

A code of multinational corporate behavior should be premised on the traditional notion of corporate social responsibility and the progressive movement toward corporate accountability.

The concept of social responsibility demands that the interest of society be taken into consideration in a company's decisions, actions and operations.²¹⁰ This implies a duty to incorporate ethical values in business and to contribute positively toward the welfare of the general public.²¹¹ It refers to "the assumption of responsibilities by companies, whether voluntarily or by virtue of statute, in discharging socio-economic obligations in society."²¹²

The traditional notion is that the business of business is to make money and a company is a vehicle for profit maximization for its members and does not owe any responsibility to other persons including the society as a whole.²¹³ It is thought that through profit maximization, a company makes its optimal contributions to society's welfare.²¹⁴ This "fundamentalist" approach to the role of the corporation is flawed. It emphasizes roles and functions instead of capabilities. If a corporation is able to assume other roles in society, it would be wrong to shy away from that simply because its function has been compartmentalized into maximizing profits only. When every member of society does that which he or she is capable of doing, society receives optimal benefits.²¹⁵ Moreover, times change and corporate law is not immune from the winds of change. The fact that companies were originally created for

210. Sita C. Amba-Rao, *Multinational Corporate Social Responsibility, Ethics, Intentions and Third World Governments: An Agenda for the 1990s*, J. OF BUS. ETHICS 553, 554 (1993).

211. Moses L. Pava, *The Talmudic Concept of "Beyond the Letter of the Law": Relevance to Business Social Responsibilities*, 15 J. BUS. ETHICS 941 (1996).

212. SALEEM SHEIKH, CORPORATE SOCIAL RESPONSIBILITIES: LAW AND PRACTICE 1 (1996).

213. See generally, MILTON FRIEDMAN, CAPITALISM AND FREEDOM 133 et seq. (2d ed 1982).

214. This sentiment is captured in Milton Friedman's often quoted statement: "The Social Responsibility of Business is to Increase Profits," NEW YORK TIMES [Magazine] September 13, 1970, at 32.

215. LEE PRESTON AND JAMES POST, PRIVATE MANAGEMENT AND PUBLIC POLICY 31 (1975).

maximizing profits does not impugn the point that their role could be restructured to accommodate social objectives.

Furthermore, in the normal routine of business, a company benefits from certain facilities and public goods for which it does not pay, even though they enhance its profit-making ability. Examples include good roads, oceans for transportation, a stable and peaceful society, and educational institutions funded or supported by other segments of society. Schumacher notes that "large amounts of public funds have been and are being spent on what is generally called the "infrastructure," and the benefits go largely to private enterprise free of charge."²¹⁶

The growing consensus at the moment appears to be that in their economic transactions, corporations should act ethically and assume some responsibility for social welfare.²¹⁷ This is not only important but inevitable. If companies fail to assume non-profit obligations, people will be disenchanted with them²¹⁸ and the whole concept of free market economics upon which unrestricted profit maximization is founded.²¹⁹ Writing for the industry, Alfred Farha asserts that a "corporation certainly is in business to earn profits for its owners or shareholders in accordance with the precepts of the free enterprise system: At the same time, though, a corporation can be a responsible and productive member of the society it serves. The fact is that a company cannot continue to exist without being profitable, and without exercising its responsibilities to society"²²⁰.

It is pertinent to note that multinational and other corporations have incorporated corporate social responsibility into their policies and practices. These have been pursued in some cases through self-regulatory, non-binding codes, examples of which include the International Chamber of Commerce's *Environmental Guidelines for World Business* and *Business Charter for Sustainable Development*, the

216. E.F. SCHUMACHER, *SMALL IS BEAUTIFUL: ECONOMICS AS IF PEOPLE MATTERED* 257 (1973).

217. Amba-Rao, *supra* note 210.

218. John Carson and George Steiner, *Measuring Social Performance: The Corporate Social Audit*, C. E. D., 1974 at 16, cited in Howard F. Sohn, *Prevailing Rationales in the Corporate Social Responsibility Debate*, 1 J. BUS. ETHICS 139, 144 (1982).

219. H.J. Glasbeek, *The Corporate Social Responsibility Movement - The Latest in Maginot Lines to Save Capitalism*, 11 DALHOUSIE L. J. 363 (1988). Prof Glasbeek, writing from an ideological left wing position, sees corporate social responsibility's agenda as that of continued legitimization of capitalist liberal democracy. *Id.* at 368.

220. Alfred S. Farha, *The Corporate Conscience and Environmental Issues: Responsibility of the Multinational Corporation*, 10 NW. J. INT'L L. & BUS. 379, 381 (1989).

U.S. and Canadian Chemical Manufacturers Association's *Responsible Care* Program, the European Council of Chemical Manufacturers Federation's *Principles and Guidelines for the Safe Transfer of Technology*, and the Japanese Business Council (Keidanren) *Global Environmental Charter*.²²¹

While these efforts are commendable, their weakness stems from the fact that these codes "offer no mechanism for ensuring compliance apart from those which exist in any event, such as adverse publicity."²²² Thus, notwithstanding the improvements they have brought to the attitude of multinational companies toward the environment, "it is an enormous act of faith to trust almost entirely in self-regulation . . ."²²³ A legal formulation to back the above policies is therefore necessary.²²⁴

At the moment, such a legal framework exists in some measure at the domestic level in some countries.²²⁵ Because of the nature and structure of multinational corporations, it would be more appropriate to bring them under international control.²²⁶ This notion is premised on the "economic power of multinationals, the international character of multinational corporations, and the limited ability of Third World countries to regulate the activities of multinationals."²²⁷ These types of companies have grown beyond the control of most national governments and operates in a legal and moral vacuum where individualism is the cardinal rule.²²⁸

221. See Robert J. Fowler, *International Environmental Standards for Transnational Corporations*, 25 ENVTL. L. 1, 29 (1995).

222. *Id.*

223. *Id.*

224. Studies conducted by two environmental groups, Friends of the Earth and Public Data Project, indicate that American multinational corporations involved in chemical manufacturing in Europe were not willing to release data on toxic emissions unless they were legally required to do so, notwithstanding that 12 of the companies are members of the Chemical Manufacturers Association, which requires its members to subscribe to its *Responsible Care Program*. See Melissa S. Padgett, *Environmental Health and Safety - International Standardization of Right-to-Know Legislation in Response to Refusal of United States Multinationals to Publish Toxic Emissions Data for the United Kingdom Facilities*, 22 GA. J. INT'L & COMP. L. 701 (1992).

225. At least 27 states in the United States, including Connecticut, Indiana and Delaware, have legislation along those lines. See David Millon, *Redefining Corporate Law*, 24 IND. L. REV. 223 (1991).

226. By the early 1990s, multinational corporations in the world numbered up to 37,000, with tremendous influence on the global economy. In 1990, the worldwide outflow of foreign direct investment ("FDI"), which measures the productive capacity of multinationals, totalled US \$234 billion. By 1992, the stock of FDI had risen to US \$2 trillion. Parent multinationals have generated some 170,000 foreign affiliates. Fowler, *supra* note 221.

227. Matthew Lippman, *Transnational Corporations and repressive regimes: The Ethical Dilemma*, 15 CAL. W. INT'L L.J. 542, 544 (1985). Lippman argues for direct regulation of multinationals by international law.

228. See Fowler, *supra* note 221, at 2

The situation is even worse in the case of developing countries which, in their quest and scramble for economic investments of multinational companies, are too enfeebled to regulate or control the multinationals. Indeed, the companies are more likely to show a preference for those countries with lax regulations over multinational business activity.²²⁹ The absence in developing countries of the technical expertise and legal development necessary to monitor or regulate complex activities such as environmental pollution also militates against any efforts by these countries to control the activities of multinational corporations.²³⁰

The closest international law has come to imposing duties akin to social responsibility on multinational corporations was through a series of draft codes. Efforts by members of the United Nations to agree on a non-binding code of conduct for multinational corporations met with persistent failure until they were abandoned in 1993.²³¹ The 1988 Draft Code contains the most recent provision relating to environmental protection. It provides:

Transnational corporations shall carry out their activities in accordance with national laws, regulations, established administrative practices and policies relating to the preservation of the environment of the countries in which they operate and with due regard to relevant international standards. Transnational corporations should, in performing their activities, take steps to protect the environment and where damaged to rehabilitate it and should make efforts to develop and apply adequate technologies for this purpose.²³²

The danger with provisions couched in such language is that they could represent mere moral adjurations honored more in the breach than in the observance. One writer has pointed out that the problem with hortatory provisions is that they do not “compel business leaders to address the larger problems of our society which corporations have either helped to create through their irresponsible conduct or failed to ameliorate by any meaningful philanthropic activity.”²³³ Writing about Europe, Dr Sheikh contends that, for corporate social responsibility to be effective in the

229. Lippman, *supra* note 227, at 545.

230. *Id.*

231. Fowler, *supra* note 221, at 3.

232. U.N. Draft Code of Conduct on Transnational Corporations, U.N. ESCOR, Org. Sess., 1988, Provisional Agenda Item 2, at 11; U.N. Doc. E/ 39/Add.1 (1988).

233. Daniel J. Morissey, *Toward a New/Old Theory of Corporate Social Responsibility*, 40 SYRACUSE L.REV. 1005, 1030 (1989).

European Union, it is necessary to create a compulsory regulatory framework applicable to all member states rather than relying on companies to undertake social responsibilities of their own volition.²³⁴

Instituting a clearly defined, binding norm on corporate activities would go a long way toward ordering corporate behavior so as to facilitate companies' compliance with international regulations and reduce the burden on states to enforce them. It would also harmonize different individual efforts of corporations to contribute to the welfare of society. The thrust of such a norm would be the entrenchment of ethical values as a *sine qua non* in international business and the imposition of a responsibility to contribute positively toward societal well-being. Such contributions could be put into a common international fund and applied to needed areas. In oil pollution matters, this could translate into a mandatory payment by oil and shipping companies of a certain percentage of their profits for marine environmental issues.

Two major problems confront this alternative: enforceability and acceptance by states, especially those keenly interested in protecting the interests of their corporations. On the issue of enforceability, the question arises whether states that were less willing or generally ineffective in enforcing international rules would suddenly wake up to embrace this idea and enforce it. A possible solution may be found in the establishment of an international judicial forum vested with jurisdiction to enforce such norms. This forum could serve as an international court for the environment.²³⁵ Such a court would be able to "judge," not merely "mediate,"²³⁶ and would be structured in such a way as to allow individuals and non-state actors in the international realm (such as multinational corporations) the opportunity to sue and be sued. This idea is premised on the point that states, perpetrators of environmental abuses themselves, cannot be entrusted with the sole responsibility and privilege of enforcing environmental rights.²³⁷

The reality, however, is that only a handful of individuals possess sufficient financial resources to institute an action in a foreign land. Considering the fact that many victims of marine pollution are local

234. SHEIKH, *supra* note 212, at 210.

235. Joshua Eaton, *The Nigerian Tragedy, Environmental Regulation of Transnational Corporations and the Human Right to a Healthy Environment* 1997 B.U. INT'L L.J. 261, at 303.

236. Amedeo Postiglione, *A More Efficient International Law on the Environment and Setting Up an International Court for the Environment Within the United Nations*, 20 ENVTL L. 321, 325 (1990).

237. Eaton, *supra* note 235, at 305.

fishermen and farmers, the envisaged right could amount to nothing more than a hole in a doughnut, fanciful and beautiful, but useless and ephemeral. A way out would be for Non-Governmental Organizations (“NGOs”) to involve themselves actively and undertake prosecutions on behalf of needy individuals.

For the effective discharge of its functions, the court would be granted powers to prevent and remedy injuries through injunction and compensation. A comparable standard is that under the Inter-American Commission on Human Rights, which has the power to grant injunctive relief to obviate irreparable damage to individuals.²³⁸

The major problem with this option is the question of the enforcement of the court's decisions. In that regard, it has been suggested that the judgments of the court which award damages to an injured party, whether by default or by adjudication, should be enforceable in domestic courts.²³⁹ This idea is merely academic, considering that one of the factors that makes the international court concept attractive is the inefficiency of domestic courts in some places. If judgments still have to pass through this ineffective system, then the whole process and expense of going to the international court would be a huge waste and an empty rigmarole.

Another way of enforcing decisions would be through an international police force. Nevertheless, this idea raises a number of hurdles for, notwithstanding that “most reformers in the field of international law have accepted the notion that the basic way of enforcing law is by a policeman, and that the way to improve compliance with international law is to establish an international police force strong enough to impose the law on any country,”²⁴⁰ it has yet to gain the concurrence and acceptance of policy makers. Considering states' obsessions with the notion of sovereignty, it does not appear that they would embrace the idea any time soon.

This leaves us with the option of considering enforcement of the proposed international norm through domestic courts. This in turn has its own problems. As earlier stated, the existence of an efficient judicial system is foreign to some states. Moreover, litigants have had

238. Scott D. Cahalan, Recent Developments, *NIMBY: Not in Mexico's Backyard? A Case for Recognition of a Human Right to Healthy Environment in the American States*, 23 GA. J. INT'L & COMP. L. 409, 415 n27 (1993).

239. Eaton, *supra* note 235, at 305.

240. ROGER FISHER, IMPROVING COMPLIANCE WITH INTERNATIONAL LAW 13 (1981).

unpalatable experiences in the few instances they have mustered enough courage to bring actions against multinational corporations in domestic courts of some states.²⁴¹ For instance, corporations are in the habit of employing the services of expert witnesses whose evidence cannot be contradicted by the often poor litigants who cannot afford the services of their own expert witnesses.

Further, some states may decide not to be parties to the international arrangement or refuse to translate its provisions into local legislation. This will inevitably deprive their citizens of the opportunity of enforcing the rules against delinquent vessels. It may be worthwhile, therefore, to consider couching the norm in such a way as to allow actions against the vessels in any country in which they operate or which they visit. This may leave a sour taste in the mouths of the maritime powers as it represents an incursion into flag state jurisdiction. This leads us to the second major problem confronting an international norm of corporate social responsibility: acceptance by states.

The international system is structured in such a way that state sovereignty is viewed with deference. It is a major paradox of our times that "[i]nternational law is based upon two apparently contradictory assumptions: first, that the states, being sovereign, are basically not subject to any legal restraint; second, that international law does pose such restraints."²⁴²

Because of the nature and structure of the international system, states choose treaty obligations which they assume.²⁴³ A state interested in protecting the interests of its ships would be less inclined to accede to a treaty that imposes high obligations on the shipping industry. This is particularly true, as we have seen earlier, of FOC states who are in business basically because they have lower standards and fewer restrictions which are attractive to the corporate world.

241. See e.g., *Allar Irou v. Shell-BP*, Suit No. W/89/71, Warri HC 26/11/73 [Unreported] cited in M.A. Ajomo, "An Examination of Federal Environmental Laws in Nigeria" in ENVIRONMENTAL LAW AND SUSTAINABLE DEVELOPMENT 11, 22 (M.A. Ajomo & O. Adewale, eds., 1994). In that case, the plaintiff's application for an injunction to restrain the defendant from polluting its land, fish pond, and creek was refused. The court contended that nothing should be done to disturb the operations of a trade which serves as the country's main source of revenue.

242. JOSEPH FRANKEL, INTERNATIONAL RELATIONS IN A CHANGING WORLD 23, (4th ed 1988); quoted in Gary L. Scott and Craig L. Carr, *Multilateral Treaties and the Formation of Customary International Law*, 25 DENV. J. INT'L L. & POL'Y 71 (1996).

243. See G.M. DANILENKO, LAW MAKING IN THE INTERNATIONAL COMMUNITY 67 (1993).

It seems that the only solution, therefore, is to substantially restructure the international system in relation to the notion of sovereignty. An effective maritime pollution regime must involve a cession of a measure of sovereignty by states for the common good.²⁴⁴ The port state regime represents a step in that direction, but that does not foreclose further consideration of a reduction in flag states' influence and, accordingly, sovereignty. Mitchell comments that "[r]emoving these legal barriers often requires negotiating redefinitions of the boundaries and definitions of sovereignty. The new right of port states to inspect and detain tankers decreased the sovereign rights of flag states. Without fundamentally threatening the structure of the international system or current core notions of sovereignty, minor modifications can significantly improve enforcement in a given issue area."²⁴⁵

It appears that the consensus in the international system at the moment is that the era is fast receding when it was thought that membership in the international community conferred enormous rights and virtually no responsibility.²⁴⁶ In the light of that understanding, sovereign rights of states have been encroached on when it was thought that the states involved had lost the ability or inclination to address actions for which they were ordinarily responsible and which impact the global community. This provides an explanation for the current scenario in international war crimes²⁴⁷ and high seas fishing.

The *Osaka Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks*, concluded in 1995,²⁴⁸ broke new ground as the first global instrument to establish a framework procedure allowing non-flag states to board and inspect fishing vessels of another state on the high seas. It "constitutes the global legal basis for permitting the inspecting state to bring a suspected vessel to a port for further

244. Dempsey, *supra* note 42, at 561. "The common, long-term interest of humanity must first develop an ingenuity and influence surpassing that of national sovereignty before vessel-source pollution can be effectively controlled."

245. MITCHELL, *supra* note 8, at 323.

246. See John A. Perkins, "The Changing Foundations of International Law: From State Consent to State Responsibility," 15 B.U. INT'L L.J. 433 (1997).

247. *Id.* at 442-43. Despite the objections of the United States and others on the ground of sovereignty, an international criminal court treaty was concluded recently in Rome, Italy. See Mike Trickey, *U.S. Balks as World Court Wins Approval*, EDMONTON JOURNAL, July 18, 1998, at A4. The U.S. has now signed on to the treaty, though it has not ratified it yet. See Clinton's Words: 'The Right Action,' NEW YORK TIMES, January 1, 2001, <<http://archives.nytimes.com>> (last visited February 26, 2001).

248. U.N. Doc. A/Conf. 164/37 [Hereinafter Agreement].

investigation in case there are reasonable grounds for believing that it has committed a "serious violation," as defined in the agreement."²⁴⁹

The idea behind the above model could be extended to oil pollution matters as it would help de-emphasize sovereignty and possibly enable actions to be brought against ships in other states to enforce international norms. The added advantage is that flag states would be propelled or compelled to live up to their responsibilities if they know that their ships would be without their protection and at the mercy of other states. Of course, it cannot easily be assumed that the introduction of this idea into high seas fishing would automatically mean that states would be favorably disposed toward introducing it to oil pollution control.

In the first place, states have greater incentive to protect their fish stocks since they are revenue generators, and would consider it to their benefit to interfere with illegal fishing. The same cannot be said of pollution, which does not yield any direct financial returns, but instead costs money to fight. Nevertheless, the issues can be intermingled, an example of which is the involvement of states in anti-pollution measures in their territorial seas to protect money-yielding ventures including fishing.²⁵⁰

The wide powers conferred by the Agreement on non-flag states and the reduced powers of flag states are quite feasible with regard to fishing because with fishing, cessation of the violation would, in most cases, remove the need for the fishing vessel to remain in the area. On the other hand, violations of pollution regulations are incidental to the principal purpose of maritime transport, and such exercise of authority on the high seas is therefore far less likely to be tolerated by maritime states.²⁵¹

From another perspective, high seas fishing is unique in the sense that it is an area in which there has been a great deal of regional cooperation, including agreement on the enforcement of regionally adopted measures.²⁵² Moreover, it enjoys the full blessings of the Law of the Sea Convention, which encourages and even obligates such cooperation, especially with regard to the conservation and management of straddling stocks and highly migratory stocks. It was this interplay between

249. Hayashi, *supra* note 20, at 27.

250. *E.g.*, consider the case of Greece which has strong incentives to prevent pollution in its territorial waters because of its fishing and tourist industries which are major contributors to its national economy. Accordingly, Greece has adopted a tough stance favoring port state enforcement. See Dempsey, *supra* note 42, at 499-502.

251. See Lowe, *supra* note 4, at 642 n87.

252. Hayashi, *supra* note 20, at 27.

regional and global agreements that provided an essential basis for the new enforcement mechanism.²⁵³ As regional efforts intensify in maritime oil pollution matters, the prospects of a similar arrangement seem brighter.

In the meantime, though, judging by current developments in the international system, the prospects of acceptance of environmental measures that impinge on sovereignty are strengthening. There is an emerging notion that the environment is now the common concern of humanity, whose preservation transcends national interests. Commenting on this notion, Professor Brunnee has written:

The notion describes threats to the well-being of the international community as a whole. One might argue that, as a result, all states have a legal interest in such issues and, in certain situations, an obligation to contribute to their solution. Seen in this manner, "common concerns" would limit state sovereignty in the interest of the international community - ultimately even where the cause of the "common concern" is located within the jurisdiction of a given state.²⁵⁴

The bottom line is that the global community is becoming progressively compacted,²⁵⁵ and the idea of a global village is becoming increasingly realistic. It is even expected that the global village concept will soon give way to a new idea - the global family.²⁵⁶ In such circumstances, it is clear that the old concept of state sovereignty is now moribund.

It is therefore with great expectations that this article proposes the enforcement of an international norm of corporate behavior through the use of domestic courts in states into which ships' operations extend.

253. *Id.*

254. Jutta Brunnee, *A Conceptual Framework for an International Forests Convention: Customary Law and Emerging Principles*, in *GLOBAL FORESTS AND INTERNATIONAL ENVIRONMENTAL LAW* 41, 55-56 (Canadian Council on International Law, ed. 1996).

255. Dr. C. N. Okeke, former Deputy Vice-Chancellor of the Enugu State University of Science and Technology, Nigeria, and currently a professor of International and Comparative Law at Golden Gate University School of Law, San Francisco, California, in a personal communication with the author.

256. Arthur Clarke, *quoted in* Hans Zimmermann, *Emergency Telecommunications: Telecommunications in the Service of Humanitarian Assistance*, unpublished paper (on file with author).

V. CONCLUSION

Methods of states' compliance with and enforcement of international regulations have, for some time now, presented real obstacles to realization of the fruits of long deliberations from which international regulations emerge. International law has devised various means of surmounting these problems including the traditional approaches of flag, coastal, and port states' jurisdiction. These measures have been somewhat effective, although some loopholes are noticeable. In recent times, modern mechanisms of influencing states' and corporate behavior have also emerged. While they may not present a panacea to these multifaceted problems, they are likely to contribute substantially to an improved state of affairs, especially if merged with traditional methods.

Nevertheless, the problem of rational beings' inclination to act in their own interests remains a major challenge to improving such behavior. Thus, in many cases states exhibit an inclination to cooperate only with regimes favorable to them. A realistic approach that considers this inclination while formulating legal rules is essential.