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ENVIRONMENTAL ASPECTS OF INTERNATIONAL OIL TRADE AND SHIPPING: BUSINESS ETHICS AND ECONOMIC COOPERATION AS COMPLIANCE TOOLS IN INTERNATIONAL LAW

by

Emeka Alexander Duruigbo 

A thesis submitted to the Faculty of Graduate Studies and Research in partial fulfilment of the requirements for the degree of Master of Laws.

Faculty of Law

Edmonton, Alberta

Fall 1998

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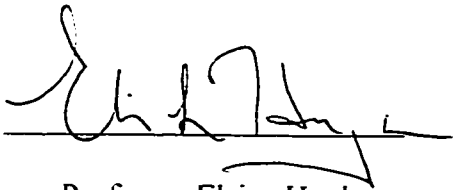

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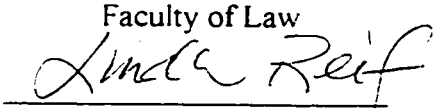

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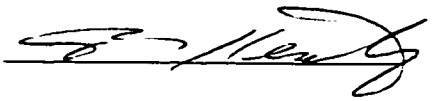

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ABSTRACT

The international trade in oil and petroleum products is a breeding ground for a number of environmental problems. The Nigerian Government intends to promulgate a maritime decree to deal with some of these problems. In this area, however, national measures have consistently proven to be inadequate, thus, leading to the establishment of international arrangements.

The International measures, in turn, suffer from the problems of implementation, compliance and enforcement that characterize virtually every aspect of international law. The attitude of the multinational corporations founded upon inordinate profit-maximization and the forces of national interest manifested through economic considerations, are at the root of the unpleasant state of affairs.

This thesis addresses these problems and proffers some solutions. Chapters one and two outline the extant domestic and international regulatory framework. In chapters three and four, I examine ways of improving on existing treaties, strengthening international arrangements, and, consequently impacting national measures.

This thesis is lovingly dedicated to everyone who believes in, and works toward, the divine destiny of Nigeria

AND

To all those who have an insight into the basis of the increasing significance of the international system.

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From the depth of my heart I acknowledge the support of friends, colleagues,

brethren, and other persons I came in contact with in the course of this project. It will be impossible to mention every name. I must not fail, however, to thank the following: Ezim Chukwudebe, Dave and Vicky Iyalomhe, Adamma Obiajunwa, Dr. Chiemeka Ihejirika and Dr. Phil Okeke, Donna Neustaster, Gloria Strohschein, Kim Cordeiro and my LL.M classmates - Albert, Bob, Boniface, Brian, Catherine, and Paul.

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LIST OF ACRONYMS

CDEM	Construction, Design, Equipment, and Manning [standards].
COW	Crude Oil Washing.
EEZ	Exclusive Economic Zone.
FDI	Foreign Direct Investment.
FEPA	Federal Environmental Protection Agency.
FOC	Flags of Convenience.
GEF	Global Environment Facility.
GESAMP	Joint Group of Experts on the Scientific Aspects of Marine Pollution.
ICS	International Chamber of Shipping.
IMCO	Intergovernmental Maritime Consultative Organisation.
IMO	International Maritime Organisation.
INSA	International Shipowners Association.
INTERTANKO	International TankerOwners Association.
LOSC	Law of the Sea Convention 1982.
LOT	Load-on-Top.
MAI	Multilateral Agreement on Investment.
MARPOL 73/78	International Convention for the Prevention of Pollution from Ships 1973 and the Protocol of 1978 Relating Thereto.

MEPC	Marine Environment Protection Committee.
MOU	Paris Memorandum of Understanding.
NCP	Non-Compliance Procedures.
NGO	Non-Governmental Organisation.
OILPOL	International Convention for the Prevention of Pollution of the Sea by Oil 1954.
OR	Open Registry.
SBT	Segregated Ballast Tanks.
UNCCORS	United Nations Convention on the Conditions for Registration of Ships 1986.
UNCED	United Nations Conference on Environment and Development.
UNCTAD	United Nations Conference on Trade and Development.
UNDP	United Nations Development Programme
UNEP	United Nations Environment Programme

INTRODUCTION

> By any standards, oil is the world's leading industry in size; it is probably the only international industry that concerns every country in the world; and as a result of the geographical separation of major production from regions of high consumption, it is of first importance in its contribution to the world's tonnage of international trade and shipping.[1]

International oil trade is a significant aspect of global economic activity. More than three thousand oil tankers traverse the oceans every day, each carrying its own portion of the 1.7 billion gallons of crude oil and oil products shipped each year by sea.[2] It is projected that the volume of this trade will increase in the future as a result of growing demand for this resource by the industrialized world.[3]

This development, however, has phenomenal implications and ramifications for the environment of the coastal communities, the oceans and the resources contained in them, and the well being of humanity as a whole. This is because oil itself is a polluting agent, and joins other major pollutants such as refuse and hazardous wastes as the principal causes of marine pollution. Marine pollution is a product of three major sources namely, land-based, atmospheric, and vessel-source. There is disparity in the accounts on the extent of marine pollution traceable to ships. Most estimates however, place ship-source pollution as contributing roughly from between 40% and 50% of the total pollution on a world wide basis.[4]

Pollution of the sea by oil could take any of any of the following forms:

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[1]Peter R. Odell, *Oil and World Power*, **7th ed** (Harmondsworth: Penguin, 1983) at 11.

[2]Stephen Darmody, "The Oil Pollution Acts Criminal Penalties: On a Collision Course with the Law of the Sea" (1993) 21 B.C. Envtl Aff. L. Rev. 89 at 92.

[3]See ibid. See also "U.S. oil imports rise to 57% of demand in May" Oil and Gas Journal (22 June, 1998) at 29.

[4]D. Brubaker, *Marine Pollution and International Law,* (London: Bellhaven Press, 1993) at 119.

(i) deliberate pumping of oil into the ocean by seagoing vessels;

(ii) unintended spilling of oil into the ocean by vessels;

(iii) oil spills arising from shipping accidents and casualties;

(iv) oil spills due to accidents or negligence at onshore oil installations;

(v) oil spills due to accidents or negligence at offshore drilling stations; and

(vi) miscellaneous spillage.[5]

The main attention of this thesis will be on marine oil pollution arising from the activities of ships.[6] Operational discharges of oil and accidental spills that have almost become inevitable in the course of maritime transportation have tremendous impact on all. For coastal communities, this translates to a negative impact on coastal resort areas including beaches and other places of tourist attraction.[7] Considering the revenue loss that this occasions, oil pollution, to these communities, is therefore something to be dreaded.

Aquatic life is also affected by the entry of oil into the oceans. Birds have been killed in large numbers due to suffocation and poisoning.[8] Shellfish, fish and large marine mammals have also suffered a similar fate.[9] This imports the loss of a source of livelihood to local fishermen and huge revenue losses to nations and their citizens that are involved in commercial fishing.[10] The fact that this affects humanity's protein needs is almost too trite to be specially mentioned. Health hazards also flow from the presence of oil in the oceans.

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[5]E. Gold, "Pollution of the Sea and International Law: A Canadian Perspective" (1972) 3 J. Marit. L. & Comm. 13 at 15.

[6]The terms "vessel" and "ship" will be used interchangeably here and refer to any sttructure capable of transportation on navigable waters.

[7]David Iyalomhe, *Environmental Regulation of the Oil and Gas Industry in Nigeria: Lessons from Alberta's Experience*, (LL.M. Thesis, University of Alberta, 1998) at 42.

[8]P. Dempsey and L. Helling, "Oil Pollution by Ocean Vessels - Environmental Tragedy: The Legal Regime of Flags of Convenience, Multilateral Conventions, and Coastal States" (1980) 10 Denv. J. Int'l L & Pol'y 37 at 45.

[9]Ibid. at 46.

[10]On the implications, generally, of transnational shipment on marine life, fishing and tourism, see R.P. Cote, "The Health of Canada's Marine Environment: Problems and Opportunities" in D. VanderZwaag, ed., *Canadian Ocean Law and Policy*, (Toronto: Butterworths, 1992), 317 at 333.

Thus, it is not only marine life that is imperilled, as human beings also contend with the dangers inherent in an environmentally-disastrous use of the oceans.

The planetary system is not spared. Tiny ocean plants known as phytoplankton participate actively in the invaluable oxygen and carbon cycles. These unicellular life forms annually expel a massive pulse of oxygen estimated at 300 million metric tons into the earth's atmosphere.[11] Unlike land plants, which proportionately use the oxygen they produce, these plants are net producers of oxygen. The human respiratory system is closely linked to these activities thus making the oceans "as important to planetary life as human lungs are to our individual lives."[12]

Equally important is the fact that phytoplankton is a net consumer of carbon and, accordingly, contributes to reducing the pace of accumulation of carbon dioxide in the atmosphere. As the scourge of ozone depletion and global climatic change have been associated with the presence in unwanted quantities of some "green house" gases including carbon dioxide,[13] the significance of the role played by these plants in the preservation of the planet earth cannot be overemphasized. Indeed, a healthy ocean stands between us and a climatic catastrophe.[14] Unfortunately, these plants also bear the brunt of oil pollution. One writer summarizes the impact of oil on water as follows:

> Oil . . . coats the seaweed causing it to be easily torn free by wave action, resulting in beach erosion. At the same time, some oil begins to biodegrade, reducing the life supporting dissolved oxygen in the water available to living organisms . . . The slick itself interferes with phytoplankton photosynthesis, the food source for much of the world's protein and a source of oxygen for the atmosphere.

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[11]M.O. Andreae, "The Oceans as a Source of Biogenic Gases" (1986) 29 Oceanus 27-35, cited in Davis, infra note 12 at 168.

[12]W. Jackson Davis, "The Need for a New Global Oceans Governance System" in Jon Dyke, et al. eds., *Freedom for the Seas in the 21st Century*, (Washington DC: Island Press, 1992) 147 at 148.

[13]See Allan Chambers, "The global warming storm: making sense of the science and politics of climate change" Edmonton Journal (18 January 1998) F1.

[14]Davis, supra note 12 at 149.

> Interference with water evaporation may cause reduced water vapor in the air with a proportionate decrease in rainfall.
>
> In addition to genetic changes and deformities, observers have reported increasing cancerous lesions of fish in areas of high oil pollution, raising the specter that oil pollution may induce cancer in man.[15]

While the above problems could emanate either from shipping accidents or operational discharges, the focus here will be on the latter which is unarguably the dominant form of ship-source oil pollution. The dangers posed by operational discharges of oil consequent to the international commerce in the commodity has elicited the reaction of states. One such response is the recent indication by the Federal Government of Nigeria of an intention to promulgate a new maritime decree "to boost local shipping companies and protect the security and environment of Nigeria's coastlines."[16]

Nigeria is one of the world's leading producers and exporters of oil.[17] It has also become a major importer of petroleum products including gasoline. A country in the West Coast of Africa,[18] Nigeria shares borders with the Atlantic ocean. It has an extensive coastline dominated in the Delta area by mangrove swamps and large numbers of offshore rigs and oil port facilities.[19] The environmental degradation of Nigeria's coastlines is

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[15]Andrew W. Anderson, "National and International Efforts to Prevent Traumatic Vessel Source Oil Pollution" (1976) 30 U. Miami L. Rev. 985 at 992 - 993. Citations omitted.

[16]Mobolaji Aluko, "In brief" Nigerian News Du Jour, October 21, 1997; <http://search.dejanews.com/dnquery.xp~g soc.culture.nigeria> It should be noted however, that in view of the recent changes in government in Nigeria, and with the current emphasis of the new administration on political transition, it is uncertain whether this features in the latter's programme.

[17]Nigeria's daily productive capacity for 1990 stood at between 1.8 - 1.9 million barrels of oil. See *International Petroleum Encyclopedia,* **Vol. 24** (Tulsa, Oklahoma: Pennwell Publishing Co., 1991) at 133. By the second quarter of 1992, the productive capacity had risen to 2 million barrels of oil per day. See Lawrence Atsegbua, *A Critical Appraisal of the Modes of Acquisition of Oil Rights in Nigeria,* (LL.M. Thesis, University of Alberta, 1992) at 5 n13.

[18]See Larry Awosika, et al. eds., *Coastlines of Western Africa*, (New York: American Society of Civil Engineers, 1993).

[19]Patrick D. Okonmah, "Right to a Clean Environment: The Case for the People of Oil-Producing Communities in the Nigerian Delta" (1997) 41 J.A.L. 43 at 54.

invariably an offshoot of oil exploration and production since the discovery of the resource in commercial quantities in the country more than forty years ago.[20] Available statistics reveal that between 1976 and 1990, Nigeria recorded numerous oil spills involving more than 88 million gallons of crude oil.[21] Therefore, Nigeria appears to be paying a huge price for economic development.

A greater danger to the environment of Nigeria's coastlines however, resides in the activities of ocean going tankers.[22] It is in obvious realization of this predicament that the federal government was prompted to consider promulgating the said maritime decree. This is a welcome development, especially when considered in the light of the fact that this area has received but scant attention from the government until now, as evidenced by the fact that the extant legislative framework on the subject is minimal.

It may be important to caution however, that the time for jubilation has not yet come. Ship-source oil pollution is bedevilled with complexities which emasculate national governments and hamstring virtually every national effort to deal with it. It has long been recognized that only concerted international measures can arrest the hydra-headed monster, due to such factors as the ambulatory character of oil, the cross-national characteristic of shipping, and the enormity of the problem.

Accordingly, the environmental dangers posed by international oil trade has attracted international attention culminating in the conclusion of a number of treaties on the subject.[23]However, dealing with the pollution problems caused by spills is further complicated by the jurisdictional issues inherent in the international law on the subject.

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[20]See S.R. Pearson, *Petroleum in the Nigerian Economy*, (California: Stanford University Press, 1970) at 15.

[21]See Ambrose Ekpu, "Environmental Impact of Oil on Water: A Comparative Overview of the Law and Policy in the United States and Nigeria" (1995) 24 Denv. J. Int'l L. & Pol'y 55 at 56 n4.

[22]G. Etikerentse, *Nigerian Petroleum Law*, (London: Macmillan Publishers, 1985) at 80.

[23]They include the 1954 *International Convention for the Prevention of Pollution of the Sea by Oil*, 327 U.N.T.S. 3; the *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, and the Protocol relating thereto, I.M.C.O. Doc. TSPP/CONF/11, (Feb. 16, 1978) *reprinted in* 17 I.L.M. 546 [collectively referred to as MARPOL 73/78].

Primacy over the regulation of the activities of ships is given to the state of the ship's nationality or registry. This privilege enjoyed by these states (also known as flag states) has not been totally acceptable to the coastal states who usually suffer the consequences of the activities of these ships. Some flag states also encourage ship owners to use their registry by the application of generally lax standards and reluctance to exercise effective control over the vessels. This has conferred on them a comparative advantage over other shipping nations.

The effectiveness of the international regulations has also been weakened by the fact that the vast majority of the members of the international community are not parties to many of the conventions. Thus, the problems of implementation, compliance, and enforcement that have plagued virtually every facet of international law are also present here. It becomes imperative therefore to fashion a system that aims, not at the conclusion of more treaties, but the implementation of existing ones. The question I intend to address in my research is how to improve and enhance implementation, compliance and enforcement of international law, and in turn facilitate the success of national policy initiatives.

In addressing the question raised, my observation is that two major reasons account for the present state of affairs in relation to the effectiveness of international law. First is the fact that states are expected to implement and comply with the stipulations of the international conventions, with little consideration for their capacity to do so. Developing countries are also expected to forego their development aspirations and refrain from economic activities which their counterparts in the developed world enjoyed without inhibition, yet it is not considered appropriate to compensate them for the lost opportunities.

Developed countries, whose unbridled quest for development without regard to the environmental impact contributed to the current state of affairs, have also not deemed it appropriate to step out and remedy the effect of their international oil trading activities. Instead, efforts have been concentrated in developing a strong port state control regime, whereby substandard vessels are turned away from their ports. But the problem persists because these ships can trade in other states with less stringent requirements, and considering the ambulatory character of oil, any oil spill will impact even states far removed from the incident.

The second problem with the current international legal framework is that it is state-centric, focusing attention on the efforts of states to control international oil pollution. Thus, the flag state is expected to ensure that its ships abide by international rules. The state whose port a ship visits - the port state - has also been given a supplementary role. Some flag states, however, have not been alive to their responsibilities while port states may be lackadaisical with regard to pollution incidents that do not impact them directly. My humble contention in this research work is that the issues of compliance and enforcement will be pushed to the background if oil and shipping companies, the primary players in international oil trade, were to conduct their businesses ethically and with due consideration for the interest of the society and the environment. This is in sharp contrast to the inordinate desire for profit maximisation that defines their current attitude.

Thus, this thesis is intended to accomplish a number of objectives:

(1) Assist the Nigerian lawmakers in fashioning legislation that is consonant with the requirements of international law, while at the same time aiming for the environmental and economic well being of the country.

(2) Promote international cooperation and mutual interest as a recipe to increase the effectiveness of international rules and regulations.

(3) Suggest ways of improving implementation, compliance and enforcement of international law by integrating and economically empowering developing countries.

(4) Extend the role of corporations in ensuring a better world by holding them accountable for their actions that have international implications, and making them have due consideration for business ethics as opposed to considerations only of profit maximisation.

In addressing the demands placed by this task, I have undertaken, in the first two chapters, to identify, analyze, organize and synthesize international conventions and protocols, statutes, judicial decisions and commentary as well as domestic legislation on the subject. This is aimed at assisting in laying the foundation by stating the law as it is and involves the following:

(a) a consideration of the problem of oil pollution from ships and an evaluation of the law relating thereto in terms of the contribution it makes to the remedy of the problem.

(b) setting forth a systematic exposition of the development of that law.

(c) examining, where possible, the practice of those involved in the administration or working of that law, especially the International Maritime Organization.

(d) suggesting, where appropriate, the best direction in which further development should take place.

Chapter 1 is a comparative overview of the petroleum, maritime and environmental legislation in Nigeria and Canada. The similarities and differences between the two jurisdictions are noted and areas of divergence highlighted. Chapter 2 involves an exposition of the international law on the subject, the basis for it, and its impact in addressing the problems posed.

In Chapter 3, I address the concepts of implementation, compliance, and enforcement of international law. A discussion of the practical approaches adopted by the international system on the subject of oil pollution from ships follows. I also consider the possibility of an alternative approach in the form of a binding international norm of corporate social responsibility.

Chapter 4 examines the problem of compliance from an interdisciplinary perspective, drawing from the thinking of scholars in the fields of international relations and economics. The argument is that states will continue to renege in their duty or refrain from assuming obligations if they lack the capacity to do so or face circumstances inimical to their interest. I suggest the construction of a system based on an identification and realization of states' interests in this area as a means of bringing states to assent to or comply with treaties in this area. This will generally take the form of financial and technical assistance organized under the auspices of an international fund.

Chapter 5 consists of my recommendations and conclusions which logically follow from the foregoing. While the recommendations and the ideas explored in this work essentially focus on improving implementation, compliance and enforcement of international rules in respect of oil pollution from ships, it is expected that the ideas will be useful in, and could be applied to, virtually every aspect of international law.

CHAPTER 1

OIL POLLUTION CONTROL REGULATION IN NIGERIA AND CANADA

I. INTRODUCTION

The importance of oil in the economic life of any nation cannot be overemphasized. Since the discovery of oil in Nigeria in commercial quantity forty years ago, oil's influence in Nigeria's socioeconomic calculations has steadily risen to the point of dominance. Nigeria, however, has not completely closed its eyes to the negative impact of the pervasive use, production, and marketing of oil and its derivatives, the most prominent of which is environmental degradation. Thus, a number of laws have been enacted to deal with the issue. I will examine some of this legislation paying particular attention to federal laws that address oil pollution of the marine environment. While these enactments cover the different sources of oil in water, I will emphasize that aspect of the legislative framework dealing with vessel-source pollution. The objective is to assess their adequacy to meet present demands to protect marine environmental quality and to suggest ways of improving on the existing position, notably through the maritime decree which the federal government has indicated its interest in promulgating.[1]

This chapter is divided into two major parts, for ease of communication. The first part discusses relevant Nigerian laws on the subject and is subdivided into three sections each dedicated to petroleum, maritime and environmental laws respectively. In the second part, I will discuss Canada's maritime legislative framework. Canada comes as a ready choice since it shares a common colonial and legal heritage with Nigeria, and has an advanced marine environmental protection policy. It is intended that this will present useful pointers to the emerging Nigerian maritime law and policy in the march to boost local shipping and protect the security and environment of Nigeria's coastlines.

At the end, appropriate conclusions will be drawn suggesting that Nigeria at the moment has an array of legislation on marine environmental protection that can at best be

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[1]Mobolaji Aluko, "In brief" Nigerian News Du Jour, October 21, 1997; <http://search.dejanews.com/dnquery.xp`g soc.culture.nigeria>.

described as obsolete and inadequate. Accordingly, the country should attune itself to modern realities, although with a due consideration of the socioeconomic implications of such an undertaking.

II. NIGERIAN LEGAL FRAMEWORK

A. Petroleum Law

The principal enactment under this head is the *Petroleum Act* of 1969.[2] The Act provided for delegated legislation[3] upon which the state authority then responsible for such matters, the Federal Commissioner for Mines and Power, promulgated the *Petroleum (Drilling and Production) Regulations* 1969.[4] The most prominent provision of the regulations bearing on environmental protection is contained in regulation 25. Under it, the licensee or lessee of an oil exploration or prospecting licence or a mining lease:

> shall adopt all practicable precautions, including the provision of up-to-date equipment approved by the Chief Petroleum Engineer, to prevent the pollution of inland waters, rivers, water courses, the territorial waters of Nigeria or the high seas by oil, mud or other fluids or substances which might contaminate the water, banks or shoreline or which might cause harm or destruction to fresh water or marine life, and where any such pollution occurs or has occurred, shall take prompt steps to control and, if possible, end it.

The possibility of the above provision accomplishing the objectives of environmental protection and pollution control is remote, since the provisions lack any real teeth and expect

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[2]Petroleum Act 1969 (Nigeria), 1990, c.350. This statute repealed and replaced the *Petroleum Act* of 1916. However, the Regulations of 1967 made under the 1916 Act (some of which dealt with marine pollution) were saved, pending such a time that there would be other provisions covering matters dealt in the regulations. See s. 13 (2), Sch. 3 and Sch. 4 para. 4 of *Petroleum Act* 1969.

[3]Ibid. S. 8.

[4]L.N. 69 of 1969.

to elicit compliance by mere adjuration. Moreover, it speaks in generalized terms without any conscious effort to specify or prescribe ways of effectuating its intent.[5]

The Regulations contain other provisions which could be construed as having an inclination toward preservation and protection of the environment. For instance, compensation is required in the case of an unreasonable disturbance of fishing rights.[6] All waste oil, brine and sludge or refuse from all storage vessels, boreholes, and wells are also required to be drained into proper receptacles constructed in compliance with safety regulations made under the Act.[7]

It is also necessary to make mention of the *Oil Pipelines Act* enacted in 1956.[8] The Act provides that the Governor General (now the Head of State) may by regulation prescribe "measures in respect of public safety, the avoidance of interference with works of public utility in, over and under any land and the prevention of pollution of any land or water."[9]

The foregoing clearly reveals that Nigeria's petroleum legislation does not necessarily champion the cause of environmental well being. This could be traced to the fact that the environment is a relatively recent topic, especially in developing countries, and therefore could secure nothing more than a passing glance from the country's legislators. More importantly, the focus of Nigeria's petroleum policy makers has not essentially been on using petroleum legislation to enhance or secure environmental protection, but to use such laws as instruments for promoting economic development through petroleum exploration and production.[10]

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[5]Oluwole Akanle, *Pollution Control Regulation in the Nigerian Oil Industry*, (Lagos: N.I.A.L.S., 1991) at 11.

[6]Petroleum Drilling Regulations, supra note, Regulation 23.

[7]Ibid. Regulation 40.

[8]C.145 Laws of the Federation of Nigeria 1958 [enacted as Ordinance 31 of 1956].

[9]Ibid. S 31 (c).

[10]See Akanle, supra note 5 at 11.

This is rather unfortunate and it is expected that policies in the future would seek to promote economic prosperity without necessarily neglecting or compromising environmental quality. Indeed, a lot has happened in the global community since these laws were passed and the modern thinking is sustainable development,[11] which emphasizes that "environment and development are not only interrelated but inseparable."[12] It is therefore expected that the Nigerian legal framework on the subject should be updated to incorporate environmentally sustainable and economically viable operations in the oil industry.

B. Maritime Law

Nigeria's most significant legislation on oil pollution of the marine environment by ships is the *Oil in Navigable Waters Act* [13] which is the implementing legislation of the *International Convention for the Prevention of Pollution of the Sea by Oil* 1954[14] and its 1962 amendment.[15]

The Act makes it an offence for any Nigerian ship to discharge oil (defined to include crude oil, fuel oil, lubricating oil and heavy diesel oil) into the "prohibited sea area."[16] Prohibited sea areas, following the lead in the above-mentioned international convention, include areas within 50 miles from land and outside the territorial waters of Nigeria and some listed seas.[17] This accords with the notion of flag state jurisdiction by which discharge violations in areas

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[11]The Brundtland Report defines sustainable development simply as "development that meets the needs for the present without compromosing the ability of future generations to meet their own needs." See World Commission on Environment and Development, *Our Common Future*, (New York: Oxford University Press, 1987) at 43.

[12]Karin Mickelson, "Carrots, Sticks or Stepping stones: Differing Perspectives on Compliance with International Law" in Thomas J. Schoenbaum,et al, eds., *Trilateral Perspectives on International Legal Issues: From Theory into Practice*, (Ardsley, N.Y.: Transnational Publishers, 1998) 35 at 42.

[13]*Oil in Navigable Waters Act* 1968 (Nigeria), 1990 c.337.

[14]327 U.N.T.S. 3 [hereinafter OILPOL].

[15]Oil in Navigable Waters Act, supra note 13, Preamble.

[16]Ibid. S.1.

[17]Ibid. Parts 1 and 2 of the Schedule to the Act.

outside another state's territorial or internal waters are punishable by the state of the ship's registry and under its law.[18]

Discharge of oil into Nigerian navigable waters by any vessel or from a place or land adjoining such waters, or from an apparatus transferring oil, is an offence for which the owner or master of the ship, the occupier of the land or the operator of the apparatus in question respectively, may be culpable.[19] Navigable waters of Nigeria refer to all navigable inland waters and the whole of the sea within the seaward limits of the country's territorial waters.[20]

The Act empowers the Minister of Transport to make regulations requiring Nigerian vessels to be fitted with prescribed equipment and vests the surveyor of ships with authority to carry out tests with a view to ascertaining whether such fittings comply with the regulations.[21] The penalty for oil discharge violations is a fine which should not exceed two thousand Naira in the case of trial by a magistrate court.[22] Accordingly, where the case is tried by a high court, the court has unlimited powers concerning the extent of fine to be imposed.

The Minister of Transport may also make regulations requiring masters of Nigerian ships of a gross tonnage of 80 tons and above to keep records in a prescribed form regarding oil discharges, oil spills and ballasting activities.[23] The responsible harbour authority, that is, the Nigeria Ports Authority, is also required to provide oil reception facilities for the disposal of oil residues.[24]

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[18]See G. Etikerentse, *Nigerian Petroleum Law*, (London: Macmillan Publishers, 1985) at 72.

[19]*Oil in Navigable Waters Act*, supra note 13, s. 3 (1).

[20]Ibid. S 3 (2).

[21]Ibid. S. 5.

[22]Ibid. S. 6. That is, approximately forty dollars.

[23]Ibid. S. 7 (1).

[24]Ibid. S 8.

The Act provides a number of defences to the offences created by it and this has been criticised for substantially whittling down the efficacy of the provisions:[25] "Surely, by the time all these defences are pleaded, it is hardly feasible to convict anybody under the provisions of the enactment."[26]

Some of these criticisms however, either are misplaced or are of questionable import. For instance a number of commentators criticise the defence available to a person who discharges oil in order to save lives, viewing it as alarming.[27] There is nothing inherently or patently wrong with excusing ship masters who discharge oil into the sea in the event of a maritime casualty or real likelihood of it, if such discharge will lighten the ship and save lives. It must be conceded that it opens an avenue for unscrupulous ship masters to discharge oil in other cases and claim that it was necessary for the safety of lives, but that does not afford enough ground to deny other persons the opportunity to do so legitimately.

The critics also create the impression that the Nigerian enactment is weakened by the fact of "the myriad of very liberal defences it allows."[28] The point is that it is not the enactment that allows them; the legislature was in general, simply complying with the provisions of the international law upon which the Nigerian law was based.[29] That being the case, what ought to have been pointed out is the fact that the law is based on an international arrangement that deserves criticism.

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[25]See David Iyalomhe, *Environmental Regulation of the Nigerian Oil and Gas Industry: Lessons from Alberta's Experience*, (LL.M Thesis, University of Alberta, 1998) at 60.

[26]Akanle, supra note 5 at 9.

[27]See Akin Ibidapo-Obe, "Criminal Liability for Damages Caused by Oil Pollution" in J.A. Omotola, ed., *Environmental Laws in Nigeria*, (Lagos: Faculty of Law, University of Lagos, 1990) 231 at 239 - 240; A. Ekpu, "Environmental Impact of Oil on Water: A Comparative Overview of the Law and Policy in the United States and Nigeria" (1995) 24 Denv. J. Int'l L. & Pol'y 55 at 83.

[28]Ekpu, ibid. at 83.

[29]See OILPOL, supra note 20 art. IV.

The real problem therefore with the *Oil in Navigable Waters Act is* that it is based on an obsolescent and inadequate arrangement which has been overtaken by later events.[30] The 1954 convention and its 1962 amendment have undergone further amendments in 1969 and 1971[31] which are not reflected in the legislation. The gravity of the lack of the incorporation of the amendments into Nigerian law pales into insignificance when juxtaposed with the fact that the 1954 OILPOL and its amendments are hardly considered as law by many countries in these present times. This is because the convention has been replaced, in the case of a number of the parties, by the 1973 *International Convention for the Prevention of Pollution from Ships.*[32] This latter convention has in turn undergone changes including the 1978 Protocol relating thereto[33] and the 1992 amendments introducing the double hull arrangement for oil tankers.[34] That Nigeria should be relying on the 1954 convention and its 1962 amendment in this day and age is comparable to using a printing press of the industrial revolution era in this computer epoch. The case for an updating of Nigerian law on oil pollution of the marine environment by ships therefore cannot be overemphasized. The time has therefore come to move with the times. Thus, Nigeria should become a party to MARPOL 73/78 and reflect its provisions in the proposed maritime decree.[35]

The proposed law should also serve as a vehicle for the internal adoption of such other international oil pollution conventions as the 1969 *International Convention on Civil*

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[30]See R. M'Gonigle & M. Zacher, *Pollution, Politics, and International Law: Tankers at Sea* (Berkely: University of California Press, 1979) at 219; R.B. Bilder, "The Canadian Arctic Waters Pollution Act: New Stresses on the Law of the Sea" (1970) 69 Mich. L. Rev. 1 at 34.

[31]See D.P. O'Connell, *The International Law of the Sea,* Vol. II (I.A. Shearer ed.,) (Oxford: Clarendon Press, 1984) at 1002.

[32]I.M.C.O. Doc. MP/CONF/WP 35 (Nov. 2, 1973) *reprinted in* 12 I.L.M. 1319. The Convention is meant to supersede the 1954 convention for those states who are parties to the two treaties.

[33]*The Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships,* I.M.C.O. Doc. TSPP/CONF/11 (Feb. 16, 1978) *reprinted in 17 I.L.M. 546* [hereinafter MARPOL 73/78].

[34]"MARPOL 73/78 Amended for New and Existing Tankers" [1992] 2 IMO NEWS 3.

[35]Treaty status information provided by IUCN on MARPOL 73/78 and last updated as of March 1, 1997 indicates that Nigeria has neither signed nor ratified the treaty. See http://sedac.ciesin.org/prod/charlotte.

Liability for Oil Pollution Damage[36] and the 1971 *Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage*[37] to which Nigeria is a party, but has not internally adopted through domestic legislation.[38] It is imperative that these treaties are incorporated into Nigerian law so that Nigerians will be availed the benefits flowing from them, including compensation in the event of pollution arising from maritime casualties.

C. Environmental Law

Under this heading, I will be discussing the *Federal Environmental Protection Agency Act* 1988.[39] The FEPA Act was the response of the Federal Military Government of Nigeria to "the growing tide of global demands for legislative and non-legislative efforts at protecting and preserving the environment."[40] Under section 1 of the Act, a Federal Environmental Protection Agency (FEPA) is established as a body corporate consisting of a chairman, distinguished scientists, representatives of certain federal ministries and the Director of the Agency.[41] The Agency was initially placed under the supervision of the Federal Ministry of Housing and the Environment, but by an amendment to the original enactment, FEPA now operates under the Presidency.[42]

FEPA is assigned with the "responsibility for the protection and development of the environment in general and environmental technology, including initiation of policy in

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[36]973 U.N.T.S. 3 *reprinted in* 9 I.L.M. 45 (1970).

[37]1110 U.N.T.S. 57 *reprinted in* 11 I.L.M. 284 (1972)

[38]Ekpu, supra note 27 at 94 and 95.

[39]*Federal Environmental Protection Agency Act* 1988 (Nigeria), 1990 c. 131 [hereinafter FEPA Act].

[40]Ameze Guobadia, "The Nigerian Federal Environment Protection Agency Decree No. 58 of 1988: An Appraisal" (1993) 5 RADIC 408 at 409.

[41]See also S. 2 (1) (a) and (b) of the FEPA Act for a full composition of the membership of the agency.

[42]*Federal Environment Protection Agency (Amendment) Decree* (Nigeria) 1992, c.59.

relation to environmental research and technology."[43] FEPA's general mandate and the scope of the enactment extend to the territorial waters of Nigeria and the Exclusive Economic Zone.[44] However, by section 9 of the FEPA Act, the Director of the Agency, working within the policy framework put in place by FEPA, is empowered to "establish programmes for the prevention, reduction and elimination of pollution of the nation's air, land and interstate waters, as well as national programmes for the restoration and enhancement of the nation's environment." This section is silent on international waters and could be a salient indication of the intention of the Federal Government to *concentrate* FEPA's activities on domestic issues relating to marine pollution, notwithstanding the general reference to international waters in the Act. This leaves a lacuna in Nigeria's legal framework for the protection and preservation of the marine environment and the prevention and control of oil pollution of Nigeria's coastlines, which extend beyond the interstate waters. A panacea would lie in the creation of an additional agency on marine environmental issues, thereby also reducing the load on FEPA.

Part II of the legislation pertains to National Environmental Standards. Under it, the Agency is required to make recommendations establishing water quality standards.[45] Such standards are for the purposes of protecting the public health and enhancing the quality of water.[46]

The discharge of hazardous substances into the air, land, waters and shorelines is prohibited except for cases permitted by law.[47] Hazardous substances are not defined, but acting under powers vested on it by section 20(5) of the FEPA Act, FEPA has defined those substances (even though oil is not specifically mentioned) to include some waste from the

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[43]FEPA Act, supra note 39, S. 4

[44]Ibid. S. 38.

[45]Ibid. S. 5(1) & S. 15 (1).

[46]Ibid. S. 15 (1).

[47]Ibid. S. 20 (1).

refining process such as slop oil, emulsion solids and leaded tank bottoms.[48] Any breach of the above provision is punishable and attracts a fine or a term of imprisonment or both.[49] A person accused of an offence under this head could plead that the offence was committed without his or her knowledge or that he or she exercised all due diligence to prevent the commission of such offence.[50]

The above however, does not exonerate the owner or operator of any vessel or facility that causes such discharge of hazardous substances from bearing the cost of removing such substances, or the "restoration or replacement" of natural resources damaged thereby[51] or the responsibility for cleaning up the affected areas and removing the substances.[52] There is also a duty on the "spiller" to promptly inform the Agency and other relevant bodies in the event of a discharge.[53]

In the pursuance of the powers vested on it by the FEPA Act, FEPA has issued a number of regulations relating to oil pollution issues one of which is the *National Environmental Protection (Effluent Limitation) Regulations.*[54] The Regulations allow an oil and grease content in brine and other production wastes of not more than 10 mg/litre for discharge into Nigeria's inland waters. The second of the statutory instruments issued by FEPA is the *National Environmental Protection (Pollution Abatement in Industries Generating Wastes) Regulations.*[55] Under these regulations, the release of hazardous or toxic substances into the air, water or land of Nigeria's ecosystems beyond the approved

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[48]FEPA, "Guidelines and Standards for Environmental Pollution Control in Nigeria" (1991).

[49]FEPA Act, supra note 39 S. 20 (2).

[50]Ibid. S. 20 (4).

[51]Ibid. S. 21.

[52]Ibid. S. 21 (2) (b).

[53]Ibid. S. 21 (2) (a).

[54]S.I. 8 of 1991.

[55]S.I. 9 of 1991.

limits is prohibited. In more specific terms, there is a prohibition on the discharge of oil, in any form, into public drains, rivers, lakes, sea, or underground injection without a permit issued by FEPA or any organization designated by it.[56]

The FEPA Act is without doubt an improvement on Nigeria's previous attempts to address environmental questions through legislation. For instance, unlike previous regimes, it realizes that its provisions could be mere postulations and hollow admonitions in the absence of an enforcement scheme and proceeds to prevent that from the onset by providing for an arrangement for the enforcement of its provisions.[57]

Nevertheless gaps exist and there is still room for further improvement in the nation's march toward a better environment. The Act places an emphasis on pollution arising from industrial activities including voluntary discharge of hazardous substances into the air, on land, and the waters of Nigeria. This is a restrictive approach as environmental degradation also arises from those economic activities that are considered "normal" and with which we are confronted from day to day.[58]

In addition, the legislation creates unnecessary problems for the enforcement agency. For instance, under section 20, the discharge of hazardous substances must be in "harmful quantities," thus requiring a case by case determination before liability can be established.[59] A similar language was used in the United States *Clean Water Act*[60] and this was interpreted to impose a requirement to show that a discharge caused actual harm before liability could attach to that discharge.[61] The section underwent amendment thereafter and the new provision prohibits discharge of oil or hazardous substances in such quantities "as may be

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[56]Ibid. regulation 15 (2).

[57]Guobadia, supra note 40 at 416. See Akanle, supra note 5 at 15 on this pitfall of previous legislation.

[58]Guobadia, ibid. at 414.

[59]Ekpu, supra note 27 at 85.

[60]*Federal Water Pollution Control Act*, 33 U.S.C. 1251 - 1387 (1988). The Act was originally enacted in 1948.

[61]*United States* v. *Chevron Oil Company*, 583 F.2d 1357 (5th Cir. 1978).

harmful" as determined by regulations made under the legislation.[62] The effect of the amendment, from judicial reasoning, is that actual harm to the environment is not a relevant factor in the determination of the question of the violation of the discharge prohibition in the relevant section.[63] The added advantage is that it removes the administrative burden of case-by-case proceedings.[64] It is submitted that this latter legislative approach is better for Nigeria since FEPA might find it nearly impossible to cope with the demands of the present position, considering the volume of spills and its other constraints.[65]

Furthermore, the provisions of the Act on the clean up of spills are unlikely to have any significant effect as it can at best only serve a minimal purpose to either deter such occurrence or provide an incentive to undertake a clean up where hazardous substances are discharged. Corporations would certainly prefer the payment of the paltry penalty of one thousand Naira (about 20 dollars) for every day the offence persists to mapping out huge sums of money for clean up or to take precautionary measures.[66]

In general, one could conveniently conclude that "in its present form the [Act] is only a beginning. Further legislation and policy decisions will have to be initiated by government and other bodies to bring the desired changes."[67] In the next part, I will discuss Canada's legislative framework to show the apparent contrast with the Nigerian situation and with a view to drawing useful lessons from it which could be applied to Nigeria to enhance its utility and efficacy.

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[62]33 U.S.C. 1321 (b) (3).

[63]*Chevron U.S.A., Inc.* v. *Yost*, 919 F.2d 27 (5th Cir. 1990).

[64]Ibid. See also *Orgulf Transport Co.* v *United States*, 711 F. Supp. 344 (W.D. Ky. 1989).

[65]Ekpu, supra note 27 at 85. These constraints include budget facilities, personnel competencies, and the role of the government in the oil industry. Ibid. at 98 - 99.

[66]Joshua P. Eaton, "The Nigerian Tragedy, Environmental Regulation of Transnational Corporations, and the Human Right to a Healthy Environment" (1997) 15 B.U. Int'l L. J. 261 at 288.

[67]Guobadia, supra note 40 at 415.

III. CANADIAN MARITIME LAW [68]

For more than two decades, the protection and preservation of the marine environment from vessel-source marine pollution has enjoyed a position of prominence in Canadian maritime law.[69] Canada's legal and policy framework for controlling ship-source pollution is replete with a plethora of enactments.[70] Thus, Canada is said to have had "some of the most advanced and far-reaching legislation aimed at protecting the marine environment from vessel-source pollution."[71] For the purposes of this work, the focus will be on three of the major statutes: the *Canada Shipping Act,*[72] the *Oceans Act,* and the *Fisheries Act.*[73]

A. Canada Shipping Act

The Canada Shipping Act is the principal legislation governing ship-source pollution in Canada.[74] Its pollution prevention and control provisions are contained in Part XV of the Act and cover all Canadian internal, territorial and fishing zone waters except shipping

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[68]The law is currently undergoing a review to bring it in conformity with international conventions. See R.F. Southcott and J.B. Wooder, "Canadian Maritime Law Update: 1995-1996" (1997) 28 J. Marit. L. & Com. 469.

[69]David VanderZwaag, "Canada and Marine Environmental Protectiom" in D. McRae and G. Munro, eds., *Canadian Oceans Policy - National Strategies and the New Law of the Sea* (Vancouver: U.B.C. Press, 1989).

[70]They include the *Navigable Waters Protection Act*, R.S.C. 1985, c. N-22; *Arctic Waters Pollution Prevention Act* R.S.C. 1985, c. A12; *Canada Shipping Act* R.S.C. 1985, c.S-9, as amended by R.S.C. 1985, c. 6 (3rd Supp.); *Canadian Environmental Protection Act* R.S.C. 1985, c.16 (4th Supp.) (especially Part VI which controls ocean dumping);*Canada Oil and Gas Operations Act* R.S.C. 1985, c.O-7 re-en. S.C. 1992, c.35(which governs offshore drilling); and *Oceans Act* S.C. 1996, c.31.

[71]N. Letalik and E. Gold, "Shipping Law in Canada: From Imperial Beginnings to National Policy?" in D. VanderZwaag, ed.,*Canadian Ocean Law and Policy* (Toronto: Butterworths, 1992) 261 at 284-85.

[72]Hereinafter *Shipping Act,* cited supra note 70.

[73]R.S.C. 1985, c.F-14, particularly sections 36-43.

[74]D. VanderZwaag, *Canada and Marine Environmental Protection,* (London:Kluwer, 1995) at 348.

safety control zones in the Arctic.[98] The Act specifically authorizes regulations to implement the International Convention for the Prevention of Pollution from Ships and the 1978 Protocol (MARPOL 73/78).[99]

Under the Shipping Act, the Governor in Council is vested with the jurisdiction to make regulations concerning some pollution-related matters[100] Thus, regulations may be passed prohibiting discharges or requiring ships to report on discharges. Other matters that they may regulate include the use of electronic and navigation equipment by ships, reception facilities for oily residues and ship design, construction and equipment.

MARPOL's documentation, construction and equipment standards have now been incorporated into Canada's local legislation by the 1993 Oil Pollution Prevention Regulations,[101] thus, bringing Canada into line with the operational arm of international marine pollution prevention.[102] In line with MARPOL's provisions however. tankers are allowed to discharge oil in accord with international standards. Thus, oil tankers are at liberty to discharge a maximum of 30 litres of oil per nautical mile if they are more than 50 nautical miles from land.[103] Under the previously prevailing Canadian regime, discharge by ships of oil and oily mixtures into marine waters was totally prohibited. Canada is therefore, also paying a price to meet its international obligations.

The 1993 Regulations are also geared toward strengthening, to a substantial extent, oil pollution emergency planning, ship inspections and supervision of oil transfer operations. Oil tankers of 150 tons or more and other ships of 400 tons or more are required to have

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[98]R.S.C. 1985, c. S-9, s.655. More stringent requirements apply to the Arctic zone pursuant to the *Arctic Waters Pollution Prevention Act*, supra note 70.

[99]Shipping Act, ibid.,s.658.

[100]Ibid., s. 656-657.

[101]SOR/93-3.

[102]See Letalik & Gold, supra note 71 at 285.

[103]SOR/93-3, s.34.

shipboard Oil Pollution Emergency Plans with effect from April 4, 1995.[104] Also established are initial, intermediate and annual inspection requirements for such ships.[105] The Regulations also require that competent supervisors be present on ships at loading and unloading facilities to oversee oil transfer operations.[106] The *Shipping Act* also provides for the managing of navigational practices for the purpose of protecting the marine environment. It empowers the Governor in Council to enact regulations authorizing compulsory routing and navigational limitations for environmental purposes out to 200 nautical miles[107]. Also the Commissioner of the Canadian Coast Guard may direct a ship to leave when there is a "reasonable apprehension of pollution in the Vessel Traffic Services Zone."[108]

Contravention of the Act's Regulations by discharging a pollutant is a punishable offence and penalties are specified for persons and ships culpable in that regard.[109] This includes fines that may extend up to one million dollars, a term of imprisonment for up to three years, and additional court orders an example of which is a directive to make monetary payment toward the conduct of research into the ecological use and disposal of the pollutant involved in the offence.

The Civil Liability Convention of 1969[110] has also been incorporated into Canadian law by virtue of Part XVI of the *Canada Shipping Act.* Accordingly, ship owners are made strictly liable for pollution damage.[111] The limitation of liability provisions of the convention

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[104]SOR/93-3, s.7. For oil tankers and ships put into service before April 4, 1995.

[105]Ibid., s.20-24.

[106]Ibid., ss. 40, 41.

[107]R.S.C. 1985 c. S-9, s.562.1 added, R.S.C. 1985, c.6 (3rd Supp.), s. 78.

[108]Ibid., s.562.18 (1)(d)(v). Vessel Traffic Services Zones may be created by the Governor in Council within the internal waters, territorial sea and the Arctic shipping safety control zones.

[109]R.S.C. 1985, c.S-9, s664 re-en, S.C. 1993, c.36, s.9

[110]Supra, note 36.

[111]R.S.C. 1985, c. S-9, s.677 re-en, R.S.C. 1985, c. 6 (3rd Supp.).

are also adopted[112] and for Convention Ships[113] damages are payable for actual or anticipated oil pollution damage to Canadian territory, internal waters and territorial waters.[114] The Act also establishes a Ship-source Oil Pollution Fund (SOPF), financing for which is provided through levies on marine movements of oil. The Fund covers, among other matters, compensation cases that would otherwise be unavailable under the Civil Liability Convention including where damage claims exceed the Convention limits and where a ship owner is not liable by reason of defences.[115]

The *Shipping Act* also requires Convention ships carrying, in bulk as cargo, more than 2,040 tonnes of persistent oil to have certificates attesting to financial responsibility.[117] It is expected that this would deter ships of poor financial state from the Canadian waters and provide a guarantee of funds for compensation in the event of an oil discharge.

B. The Oceans Act

Canada has not ratified the Law of the Sea Convention 1982.[118] However, that Canada is not yet a party is treated as a technical matter unrelated to the incorporation of much of the Convention into national practice and international law. [119] A reflection of this

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[112]Ibid., s.679.

[113]"Convention Ship" is defined as "a sea-going ship, wherever registered, carrying, in bulk as cargo, crude oil, fuel oil, heavy diesel oil, lubricating oil, whale oil or any other persistent oil"; Ibid., s.673.

[114]Ibid., s. 675(2).

[115]S.667 (3) of the *Shipping Act* replicates the defences under the Convention including act of war, a natural phenomenon of an exceptional character, an act or omission of a third party with intent to cause damage and negligence by a government authority responsible for lights and other navigational aids.

[117]R.S.C. 1985, c. S-9, s. 684 re-en, R.S.C. 1985, c.6 (3rd Supp.), s.84.

[118]Infra, note 120.

[119]Ted McDorman, "Port State Enforcement: A Comment on Article 218 of the 1982 Law of the Sea Convention" (1997) 28 J. Marit. L. & Comm. 305.

fact is Canada's recent legislation entitled the *Oceans Act.*[120] This new piece of legislation sets out on an environment-friendly note as the preamble thereto indicates.

The Act is divided into three parts. Part I deals with the delineation of Canada's maritime zones into the territorial sea, internal waters, contiguous zone, the newly-created exclusive economic zone and the continental shelf. This Part also affirms Canada's jurisdiction with regard to the protection and preservation of the marine environment. Cognizance is however given to the fact that the federal laws or laws of a province shall be applied in the EEZ only in a manner that is consistent with the rights and freedoms of other states under international law and, in particular, with the rights and freedoms of other states in relation to navigation and overflight.

Part II deals with oceans' management strategy. Therein, it is explicitly stated that Canada's natural ocean management strategy will be premised on the principles of sustainable development, the integrated management of activities in estuaries, coastal waters and marine waters, and the precautionary approach.[121]

Part III provides for the duties of the Minister of Fisheries and Oceans. The Minister is assigned the responsibility for encouraging activities that are necessary to foster understanding, management and sustainable development of oceans and marine resources and the provision of coast guard and hydro-graphic services to ensure the facilitation of marine trade, commerce and safety, in collaboration with other ministers.[122]

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[120]Supra, note 70.

[121]*Ibid.* s. 30(a),(b),(c).

[122]Ibid., s.40(2).,

C. Fisheries Act

It is pertinent also to mention the *Fisheries Act*[123] which is Canada's principal federal enactment for water pollution control.[124] The major object of the Act is to safeguard fish and fish habitat from damage occasioned by polluting activities. It is an offence under the statute to throw overboard "ballast, coal ashes, stones or other prejudicial or deleterious substances" in fishing waters, or to deposit offal or remains of fish or marine mammals upon beaches or shores.[125] There is also a prohibition against the deposit, or permitting to deposit, by any person "of a deleterious substance . . . in water frequented by fish or in any place or under any conditions where the deleterious substance that results from [it] . . . may enter any such water."[126]

It should be noted however, that no offence is committed where the deleterious substances are deposited in quantities or concentrations and under conditions authorized by regulations made by the Governor in Council pursuant to powers conferred on it by section 36 (5). These powers of exemption have been employed to make regulations on an industry by industry basis - including petroleum refining - setting out contaminant standards.[127]

The underlying reason behind this approach (as opposed to blanket prohibitions on discharges) seems to be a desire to ensure that businesses are not injured by unnecessary restrictions on the discharge of substances that may be inevitable and yet do not constitute any danger to acquatic life. [128] The beauty of this approach is its flexibility which allows standards to be set for each industry, for particular regions, and even for individual

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[123]Supra note 73.

[124]Alastair R. Lucas, "Federal Regulatory Controls" in A. Lucas and R. Cotton, eds., *Canadian Environmental Law*, 2nd ed Vol. 1 (Toronto and Vancouver: Butterworths, 1991) Comm. 4.35 S 4.85.

[125]*Fisheries Act*, supra note 73, s. 36 (1).

[126]*Ibid.*, s. 36 (3).

[127]See *Petroleum Refinery Liquid Effluent Regulations*, C.R.C. 1978, c. 828.

[128]See Kerneghan Webb, Pollution Control in Canada: The Regulatory Approach in the 1980's. Study Paper, Administrative Law Series (Ottawa: Law Reform Commission of Canada, 1988), excerpted in E. Hughes, et al. eds., *Environmental Law and Policy* (Toronto: Emond Montgomery Publications, 1993) at 167.

operations.[129] The disadvantage is that it is prone to manipulation by business executives who may be able to influence government officials to decide in a way that suits their interests. This has been referred to as "agency capture" - a situation in which the regulators essentially serve the interest of the regulated and thereby jettison or hamper the interest of the public.[130] It is therefore necessary that public participation in such decision making process be given a place of importance. This system also comes with a disadvantage to the business sector in the sense that it represents an increased government involvement or intervention in business decision making.[131]

From the foregoing review of the relevant Canadian laws, it is evident that Canada's legislative scheme, to a good extent, is characterised by a posture of improving the quality of life even if economic development is somewhat curbed. Thus, conscious efforts are made to deter activities that could endanger the marine environment, examples of which are permitting the coast guard to turn away hazardous ships, and the imposition of reasonable fines. The institution of a Fund to compensate victims of ship-source pollution and financing it through the ships themselves is worthwhile and worthy of emulation. However, the idea of turning ships away does not look too appealing since it could be detrimental economically especially with ships avoiding Canada's waters. This argument is largely academic though, since Canada is a large economy and thus impossible to ignore by the maritime community. Other less endowed states however, may be advised to approach the matter differently.

IV. CONCLUSION

Most probably in reflection of its position as an oil producing, exporting and importing nation state, Nigeria has an array of legislation covering petroleum, maritime, and environmental issues in the oil industry. These enactments in the main, represent

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[129]Webb, ibid. at 168.

[130]See Kathryn Harrison, "Is Cooperation the Answer? Canadian Environmental Enforcement in Comparative context" (1995) 14 J. Pol'y Analysis & Mgmt 221 at 241.

[131]See ibid.

experimental attempts and are often inadequate. Some of them are also obsolete and out of tune with modern reality.

However, the need to prevent oil pollution (especially the type arising from shipping activities) and ensure marine environmental quality remains important in Nigeria. The clearest demonstration of this in recent times is the announcement by the Federal Government of an intention to promulgate a new maritime decree to boost local shipping and preserve the security and environment of Nigeria's coastlines.

In drafting the said decree, it may be worthwhile to draw from the experiences of those who have already commenced this journey of which Canada is a striking example. While Canada may present a useful model, Nigeria cannot, however, afford to adopt the latter's policies hook, line, and sinker, considering the vastness of the difference that exists between the two countries economically. It should also be pointed out that ship-source oil pollution is an issue of international concern and however brilliant the efforts of any state may be in addressing the problem, it would amount to little, in the absence of a strong and effective international legal framework. It is in view of this fact that the next three chapters are devoted to the international scheme, examining its strong points, pitfalls, and possible ways of improving the extant state of affairs.

CHAPTER 2

INTERNATIONAL REGULATION OF SHIP-SOURCE OIL POLLUTION

I. INTRODUCTION

The quality of the marine environment and the rational utilisation of its resources is a national and international policy issue. Policy-makers have essentially relied on regulatory instruments, such as regulations and standards, in the protection of the environment from oil pollution arising from ships. This chapter will focus on the application of these policy instruments at the international level in environmental protection and ocean management. The choice of the international perspective is anchored on the severe limitations surrounding, and the gross inadequacies that have characterized, national solutions to the problem.

In the first part of this chapter, I will illustrate how the complexities of the problem of ship-source oil pollution hamstring national efforts to address the issue, thus establishing a strong basis for the international legal control of the area. I will devote the second part of the chapter to a discussion of the regulatory instruments in place in international law to combat the scourge of ship-source oil pollution. An assessment of how far the legal provisions go in enhancing the ecology of the oceans and the lot of the vast majority of humanity that has a stake in them or is affected by their degradation, will be considered next. After that I will conclude on a note of optimism sincerely believing that all is not lost yet, if only we can respond in the appropriate manner.

II. THE BASIS OF INTERNATIONAL REGULATION

National measures aimed at limiting, eliminating or preventing oil pollution occasioned by shipping activities are commendable and should be encouraged. Some of these measures have ranged from the adoption of provisions of international conventions into local legislation to unilateral measures aimed at protecting the particular state's interests. In such events there is usually the perception that common action in that aspect is inadequate, unclear or simply nonexistent. While in some of these cases, states might have acted within

the confines of their international obligations or believed they were doing so, in some others questions have been raised as to the international legal validity of the acts involved.[1]

The common thread that runs through all such laws - irrespective of the presence or the absence of their legal validity as the case may be - is the revelation that national law and policy present a substantially inadequate tool for maritime oil pollution control. The truth is that the best national efforts would still face an uphill task in passing the adequacy test. This is premised on the fact that the scope and implications of marine pollution in general[2] and ship-source oil pollution in particular, are wide and transcend national boundaries and solutions. The pollutant oil when emitted into the oceans through the activities of a ship may be carried for hundreds of miles, damaging the environment in one or more other countries or in areas beyond national jurisdiction.[3] "The problem of maritime oil pollution defies solutions based on the assertion or allocation of national jurisdictions. Too many elements of the situation are transnational."[4] These include the fact that the polluting agent itself - oil and other hydrocarbons - has a tendency to spread quickly over the surface of the sea; thus

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[1]The furore that surrounded the enactment of the Canadian *Arctic Waters Pollution Prevention Act* (now R.S.C. 1985, c. A12) clearly illustrates this. Concerned by the danger posed to the arctic environment, the Government of Canada in April 1970 introduced into Parliament the Arctic Waters Pollution Prevention Bill. The object was to assert Canadian jurisdiction for pollution prevention in all waters up to 100 nautical miles from every point of Canadian land above the sixtieth parallel of north latitude. This action by Canada was swiftly challenged as being at variance with international law. In a formal note issued on April 15, 1970, the United States Department of State objected to Canada's move stating that international law provides no basis for the proposed unilateral extension of jurisdiction on the high seas, and that they would neither accept nor acquiesce in the assertion of such jurisdiction. In justification of its action, the Canadian Government responded that they based it, among others, on the international right of self defence arguing that a danger to the environment of a State constitutes a threat to its securuty. For more on this and for interesting arguments on the legality or otherwise of Canada's action in international law, see R.H. Neuman, "Oil in Troubled Waters: The International Control of Marine Pollution" (1971) 2 J. Marit. L. & Comm. 349; J.A. Beesley, "Rights and Responsibilities of Arctic Coastal States: The Canadian View" (1972) 3 J. Marit. L. & Comm. 1; and E. Gold, "Pollution of the Sea and International Law: A Canadian Perspective" (1972) 3 J. Marit. L. & Comm. 13.

[2]The international character and implications of marine pollution has been given judicial imprimatur by the Supreme Court Canada in *R v Crown Zellerbach Canada Ltd* (1988) 40 C.C.C. (3d) 289, [1988] 1 S.C.R. 401, where the Canadian apex court veered its tentacles in that direction and leaned in favour of that view.

[3]See L. Reif, "International Environmental Law" in G. Thompson, M.L. McConnell, L.B. Huestis, eds., *Environmental Law and Business in Canada* (Ontario: Canada Law Books Inc., 1993) 71.

[4]Neuman, supra note 1 at 351.

a spill may rapidly disperse over an enormous sea, forming a slick only a few molecular layers thick. Currents and winds join in conducting the spill in an unpredictable fashion.[5] This ambulatory character can frustrate efforts to deal with the problem in view of the jurisdictional barriers to acquiring control over its sources[6]. A legal scholar has painted a graphic picture of the scenario in this light:

> A ship may strand on the high seas and cause pollution in two neighbouring states, i.e., France and England (as with the Torrey Canyon in 1967). She may be owned by a Liberian company, bareboat chartered to a Bermuda company, managed by an English company, time chartered to a Greek company and voyage chartered to an American company. Her cargo may have been sold during the voyage by the American company to a Japanese one. The officers may be English and the crew Indian. The International nature of the shipping business creates such diversity of interests, with potential conflicts of law and jurisdiction[7].

Furthermore, in illustrating the limits of national efforts, even if a state by unilateral action could eliminate pollution within its jurisdiction, it is well known that without international controls the state would be powerless to protect itself from discharges of oil occurring just beyond its territorial waters[8]. Also, from a practical perspective, a single ship visiting ports in various countries over the course of a year would be hard pressed to comply

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[5]Ibid. at 351 - 352.

[6]A. Ayorinde, " Inconsistencies Between OPA '90 and MARPOL 73/78: What is the Effect on Legal Rights and Obligations of the United States and other Parties to MARPOL 73/78" (1994) 25 J. Marit. L. & Comm. 55.

[7]D. Abecassis, " Marine Oil Pollution Laws: The View of Shell International Marine Limited " (1980) 8 Int'l Bus. Law 3.This is not merely hypothetical as illustrated by past tanker accidents. See J. Sweeney, "Oil Pollution of the Oceans" (1968) 37 Fordham L. Rev. 115 at 156.

[8]T. M. Alcock, ' "Ecology Tankers" and the Oil Pollution Act of 1990: A History of Efforts to Require Double Hulls on Oil Tankers ' (1992) 19 Ecology L.Q. 97 at 126.

with a multiplicity of opposing, potentially conflicting and disparate standards imposed by each port state[9].

Moreover, the present dispensation has witnessed an increasing recognition that concern for the marine environment must transcend narrow individual national interests to include concern for those areas of the seas falling outside the jurisdiction of any state.[10] The major conclusion drawn therefore is that only massive and urgent international action, on an unprecedented scale, can alleviate the steadily deteriorating situation.[11] This has been the basis for the development of international arrangements for the protection of the marine environment and the continued march toward the elaboration of an international order that would protect and preserve the planet Earth for the better use and greater enjoyment of all.

III. INTERNATIONAL LAW OF SHIP-SOURCE OIL POLLUTION

Within the main corpus of international law exists an appreciable volume of rules and regulations on oil pollution from ships. These are contained in the new notion of "soft" law,[12] and more importantly, in the traditional sources[13] of international law namely custom, conventions, and general principles of law recognized by "civilized" nations.[14] The focus of this work however will be on international conventions, commonly referred to as treaties.

An impressive array of treaties regarding the subject or related issues exists, the outcome of the collaborative efforts of the world's nations with their differences in

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[9]S.A. Meese, " When Jurisdictional Interests Collide: International, Domestic, and State Efforts to Prevent Vessel Source Oil Pollution " (1982) 12 Ocean Dev. & Int'l L. 71 at 86.

[10]Thomas Mensah, "International Environmental Law: International Conventions Concerning Oil Pollution At Sea" (1976) 8 Case W. Res. J. Int'l L. 110 at 111.

[11]Gold, supra note 1 at 44.

[12]See A. Kiss and D. Shelton, *International Environmental Law*, (Ardsley-on-Hudson: Transnational Publishers, 1991) at 109.

[13]Article 38 of the Statute of the International Court of Justice.

[14]The use of the word "civilized" in the provision has been condemned by developing states who regard it as offensive and exclusive. See C.N. Okeke, "International Law in the Nigerian Legal System" (1997) 27 Cal. W. Int'l L. J. 311 at 315. The term is now considered obsolete. See Reif, supra note 3 at 73.

motivation and divergence of interests.[15] Starting from 1926[16] when the first but unsuccessful attempt was made to internationally regulate maritime oil pollution, up to the recent times, the regulation of this area has come a long way making it one of the highly regulated areas at the international level.[17] I will however concentrate on those treaties that are most relevant to the issue of operational discharges of oil by ships namely, the 1954 International Convention for the Prevention of Pollution of the Sea by Oil,[18] the International Convention for the Prevention of Pollution from Ships 1973[19] and its Protocol of 1978[20] as well as the United Nations Convention of the Law of the Sea concluded in 1982.[21]

A. The 1954 International Convention for the Prevention of Pollution of the Sea by Oil[22]

OILPOL which came into effect in 1958 for a small number of states[23] was a product of a conference held in London in 1954. The Convention proceeded on the premise that prohibiting all discharges of oily waste was impossible. It therefore created room for the discharge of oil without restriction in an area outside a prohibited zone of fifty miles from the coasts of states parties to the treaty. Within the prohibited zone however, only discharges

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[15]D. Bodansky, "Protecting the Marine Environment from Vessel-Source Pollution: UNCLOS III and Beyond" (1991) 18 Ecology L.Q. 719 at 726.

[16] C. Colombos, *The international Law of the the Sea,* **6th ed.** (New York: D. McKay Co., 1967) at 430-431.The Convention was not ratified. See N. Healy & G. Paulsen, "Marine Oil Pollution and the Water Quality Improvement Act of 1970 " (1970) 1 J. Marit. L. & Comm. 537 at 539.

[17]D. Brubaker, *Marine Pollution and International Law*, (London: Bellhaven Press,1993) at 119.

[18]327 U.N.T.S. 3.

[19]I.M.C.O. Doc. MP/CONF/WP 35 (Nov. 2, 1973) *reprinted in* 12 I.L.M. 1319.

[20]The Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships,I.M.C.O. Doc. TSPP/CONF/11 (Feb. 16, 1978) *reprinted in* 17 I.L.M. 546.

[21]U.N. Doc. A/CONF.62/122 (October 7, 1982) *reprinted in* 21 I.L.M. 1261.

[22]Hereinafter, OILPOL .

[23]Gold, supra note 1 at 19.

with an oil content of less than 100 parts per million (ppm) were permitted[24]. Any contravention was declared an offence punishable under the laws of the territory in which the ship is registered[25].

It also made provisions requiring ships registered in the territory of contracting states to be fitted with certain pollution prevention facilities, and that the main ports of the contracting states be installed with facilities for the disposal of oily substances, within three years of the coming into force of the Convention. OILPOL also requires ships to carry an oil record book, in which entries must be made of the details of oily discharges, and which authorities of a contracting state may inspect within that state's port.

OILPOL has attracted severe criticisms from scholars. It has been described as possessing very few real 'teeth'[26], inadequate[27] and unenforceable in practice[28]. Most significantly, the 100 ppm rule was fraught with detection problems. Since it is quite possible to cause a visible film behind a ship though the oil content of the effluent is well below 100 ppm, the possibility of policing to discover breaches disappears as it cannot be proved by observation of a streaming film that the ship was exceeding the Convention's definition of pollution. [29]While acknowledging that OILPOL provided a not too effective tool[30] for

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[24]OILPOL, supra note 24, Art. III.

[25]Ibid Art. III (3).

[26]Gold, supra note 1 at 19.

[27]R. M'Gonigle & M. Zacher, *Pollution, Politics, and International Law: Tankers at Sea* (Berkely: University of California Press, 1979) at 219; R. B. Bilder, "The Canadian Arctic Waters Pollution Prevention Act: New Stresses on the Law of the Sea" (1970) 69 Mich. L. Rev. 1 at 34 argues that OILPOL adopted a method that has been proven to be ineffective.

[28]N. Wulf, "Contiguous Zones for Pollution Control" (1972) 3 J. Marit. L. & Comm. 537 at 541. The author's contention is based on the difficulties associated with proving in a court of law that a given discharge contained the requisite proportion of oil.

[29]James Kirby, "The Clean Seas Code: A Practical Cure of Operational Pollution" in International Conference on Oil Pollution of the Sea 7-9 October 1968, (Rome, Italy: 1968) 201 at 209.

[30]Especially by concentrating enforcement powers on the flag state. Indeed, OILPOL also failed in its lack of appreciation of the fact that pollutants legally discharged outside the designated prohibited zones could afterwards drift into the prohibited zones. It could then be said to approbate and reprobate simultaneously

pollution prevention and control, sight should not be lost of the fact that it was the first real attempt at addressing a multi-pronged problem. Thus like any other first effort, it could not but exhibit to an extent, its own share of naivete and rough edges.

Nevertheless, efforts[31] were made toward strengthening OILPOL resulting in the 1962 amendments.[32] However, these did not have much effect.[33] Further amendments were made to OILPOL in 1969 and 1971. A salient feature of the 1969 amendment was the adoption and legitimization of the load - on -top (LOT) system by which a special tank in the vessel is used to collect the oily mixture that ordinarily would have been discharged. This goes through a separation process and the water is drained from the bottom. Consequently, new cargo can be loaded on top of the residue of oil. This system however presented a mere camouflage to effective pollution prevention, ironically promoting a diversion from, and not a prelude to, attaining more effective port and tanker recovery techniques.[34] It also proved difficult to use efficiently.

B. International Convention for the Prevention of Pollution from Ships[35]

Arguably influenced by the 1972 United Nations Conference on the Human Environment, MARPOL 73 is without doubt the main convention on vessel-source pollution today and its provisions principally govern this type of pollution.[36] MARPOL contains far

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- affording protection to coastal states with one hand and withdrawing it with another.

[31]This was an aftermath of the formation in 1958 of the Inter-Governmental Maritime Consultative Organisation (which later metemorphosed into the International Maritime Organisation).

[32]600 U.N.T.S. 332.

[33]M'Gonigle & Zacher, supra note 27 at 222.

[34]S.Z. Pritchard, "Load on Top - From the Sublime to the Absurd" (1978) 9 J. Marit. L. & Comm 185 at 187.

[35]Supra note 19 (hereinafter, MARPOL 73).

[36]Brubaker, supra note 17 at 122.

reaching provisions and contains five annexes the first two of which were to be compulsory with the ratification of the convention.

Annex I is concerned with the regulation of oil pollution while Annex II deals with noxious liquid substances.[37] Under Annex I, operational discharges of oil are permitted outside the special areas[38] or beyond fifty nautical miles from land.[39] Outside the special areas, certain standards are specified for tankers[40] that share some similarities with those contained in the 1969 and 1971 Amendments to OILPOL. However differences exist in that new[41] tankers must not discharge more than 1/30,000 of their cargo-carrying capacity, while all other tankers need only adhere to a 1/15,000 figure. Moreover discharges are not considered lawful if the tanker does not have in operation an oil discharge monitoring and control system and a slop tank arrangement required by Regulation 15. Furthermore, it defines oil to include non-persistent oil - a step up on previous Conventions which dealt with only persistent oils.[42] Annex I also requires that all new tank vessels more than 70,000 deadweight tons have segregated ballast tanks (SBT).

In relation to enforcement, MARPOL makes three innovations.[43] These include: the introduction of the International Oil Pollution Prevention Certificates which state parties

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[37]Annex III (I.M.C.O. Doc. MP/CONF/WP.21/Add.2 of October 31, 1973) deals with harmful substances carried by sea in packaged forms or in freight containers, portable tanks or road and rail tank wagons; Annex IV (I.M.C.O. Doc. MP/CONF/WP.21/Add.3 of October 31, 1973) controls sewage; and Annex V (I.M.C.O. Doc. MP/CONF/WP.21/Add.4 of October 31, 1973) applies to garbage. Both the compulsory Annex II (I.M.C.O. Doc. MP/CONF/WP.21/Add.1 of October 31, 1973) and the optional Annexes III - V are outside the scope of this thesis. References herein to regulations pertain to those in Annex I (I.M.C.O. Doc. MP/CONF/WP.21 of October 31, 1973).

[38]These include the whole of the Mediterranean sea, the Baltic, Black, and Red seas and the Persian Gulf. See Regulation 10.

[39]Regulation 9 (1) (a) (ii).

[40]Regulation 9 (1) (a) (iii) - (vi).

[41]Essentially those ordered after 31/12/75; see Regulation 1 (6).

[42]Regulation I and Appendix I; see generally, D. Abecassis, *Oil Pollution from Ships*, (London: Butterworths, 1978) at 29-30.

[43]Ibid, at 73-74.

issue to ships that satisfy the structure, equipment, fittings, arrangements and materials requirements of the Convention[44], and which are accepted by other parties as possessing the same validity as the ones issued by themselves;[45] and, the inspection and cooperation provisions by which an obligation is placed on parties to cooperate in the detection of violations.[46] The third innovation is the mandatory requirement on ships to carry an oil discharge and monitoring control system, fitted with a recording device to provide a continuous record of the discharge in litres per nautical mile and total quantity discharged.[47] The idea was that this would help in strengthening evidence of violations and obviate the perceived pitfalls in the LOT system then in use which placed heavy reliance on the human element, that is, the effort and conscientiousness of tank vessel operators, in the implementation of discharge standards. At the time of the conclusion of the convention however, there were no commercially viable monitoring systems and this constituted a problem.[48]

MARPOL 73 failed to secure ratification mainly because of the provisions of Annex II, which were considered onerous by some states parties. This consequently led to the birth of the *Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships*.[49] The Protocol made some procedural and substantive changes to MARPOL 73 ostensibly to facilitate its ratification. It stated that the 1978 Protocol and MARPOL 73 shall be read and interpreted together as one instrument[50] A basic feature of the

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[44]Regulations 4, 5 & 6.

[45]Art. 5 (1).

[46]Art.6; see also Regulations 9 (3) and 10 (6).

[47]Regulations 15 & 16.

[48]J.B.Curtis, "Vessel-Source Oil Pollution and MARPOL 73/78: An International Success Story?" (1985) 15 Envt'l L. 679 at 695.

[49]Supra note 20.

[50]Hereinafter referred to as MARPOL 73/78. The instrument has since entered into force in October 1983 with the ratification by Greece and Italy thus fulfilling the requirements of Art. V of the Protocol which is to the effect that the Protocol shall enter into force twelve months after the date on which not less than fifteen

1978 Protocol is the birth of a new Regulation 13 which now requires that all new oil tankers of 20,000 deadweight tons and new product tankers of 30,000 deadweight tons be equipped with segregated ballast tanks and use crude oil washing (COW) as a cargo tank cleaning system. There is also a requirement for inert gas systems in each cargo and slop tank, a response to the potential for tank explosions.[51]

MARPOL 73/78 specifies the scope of responsibilities attaching to flag and port states. For instance, while a duty resides in the flag state to initiate proceedings for an alleged violation of a provision wherever it occurs, [52] it is incumbent upon a port state to take proceedings for violations occurring within its jurisdiction[53] or to furnish information as regards evidence of violation to the flag state.[54] A port state may inspect a ship which enters a port or offshore terminal under its jurisdiction if there is enough evidence to establish a violation.[55] It does not permit the port state however, to take any action in those cases of violation occurring outside its territorial waters other than to forward a report of such inspection to the party requesting it, or to the flag state which in turn is expected to take appropriate action.

Where a port state is aware of a ship that does not meet equipment standards, it could stop it from sailing pending such a time that it could proceed without constituting an 'unreasonable threat of harm to the marine environment.'[56] The convention, however, also requires states to take every possible measure to avoid undue detention of ships and a breach

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states, the combined merchant fleets of which constitute not less than fifty per cent of the gross tonnage of the world's merchant shipping, have become parties. See "5 Current Reports" INT'L ENV'T REP.(BNA) (13 October 1982) 432.

[51]Regulation 13 (b) (3).

[52]Art. 4 (1).

[53]Art. 4 (2) (a).

[54]Art. 4(2) (b).

[55]Art. 6 (5).

[56]Art. 5 (2).

of this could result in compensation for damages suffered.[57] It also places a duty on the master of a ship which is involved in an actual or probable discharge to prepare a report to the State administering the vessel as well as any other state that could be affected by the incident.[58]

MARPOL underwent major amendments in 1992 regarding the design and construction of both new and existing tankers.[59] These amendments which came into force in July 1993,[60] require tankers to be fitted with either a double hull or an equally effective alternative. The double hull arrangement was chosen because of its perceived utility in preventing extensive damage and outflow of oil in the event of a grounding or accidental collision, since the outer hull is separated from the cargo tanks by a large space that could absorb low speed impacts. The new design requirement met with a cold reception from shipowners who questioned the choice and effectiveness of the double hull design, arguing that there were other less costly design solutions which should have been favourably considered.[61]

One of the weaknesses of MARPOL 73/78 though, is the failure to provide a satisfactory regime for port and coastal states[72]. It happened that "[w]hile much drastic increases in port state and coastal state enforcement powers were discussed during the Conference, they were defeated due to the political power of the major flag states."[73] This

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[57]Art. 7.

[58]Art. 8 and Protocol 1.

[59]See "MARPOL 73/78 Amended for New and Existing Tankers" [1992] 2 IMO News 3.

[60]Andrew Griffin, "MARPOL 73/78 and Vessel Pollution: A Glass Half Full or Half Empty?" (1994) 1 Ind. J. Global Legal Stud. 489 at 490.

[61]Ibid.

[72]See Brubaker, supra note 17 at 253 where he calls for an upgrading of port state inspection of Certificate of Compliance as well as an upgrading of detainment procedures by the port states, of ships showing substantial non compliance with MARPOL 73/78 standards.

[73]Ronald Mitchell, *Intentional Oil Pollution At Sea*, (Cambridge, Mass.:MIT Press,1994) at 99. See also M'Gonigle and Zacher, supra note 27 at 231-234. The authors are also of the view that some coastal states traded port state enforcement, a procedural power, for the more substantial coastal state jurisdiction which they

is unfortunate considering the fact that a clear revelation of the 1978 Conference was that the maritime states and the industries they represented continued to have strong incentives to avoid standards that imposed costs on those industries, suggesting that they also had strong incentives not to implement and enforce existing agreements with vigor[74].

Mention may also be made of the limitation inherent in Regulation 20 which constitutes another weakness of MARPOL 73/78. Thereunder, ship operators are required to maintain an oil record book, which can be inspected by any state party, showing all loading, transferring and unloading of oil cargo, ballasting, cleaning and discharge of ballast from cargo tanks and discharge of water and residues. Exception is granted to discharges from segregated ballast tanks. This requirement, while more comprehensive than that under OILPOL, suffers the same pitfall since compliance is dependent upon the conscientiousness of the operators.[75]

The criticisms notwithstanding, some scholars opine that the rules in MARPOL 73/78 are sufficient for dealing with ship-source pollution, stating that what is needed is compliance[76] by the contracting states. This argument fails to consider the point, however, that the inability of the Convention to promote a mechanism by which compliance with its provisions would be ensured is an inadequacy and thus a shortcoming of the Convention.[77] Any future effort to address ship-source pollution must therefore squarely meet this challenge. The present international set up needs restructuring to strengthen it and make it more relevant. As one writer sees it:

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hoped to get at the third United Nations Conference on the Law of the Sea.

[74]Mitchell, ibid. at 103.

[75]Brubaker, supra note 17 at 141 n44.

[76]Indeed like other Conventions before it, MARPOL 73/78 suffers the similar problems of state enforcement practices and of compliance by member states in providing reception facilities for vessels carrying their discharges from port to port. Ibid at 249.

[77]It is conceded that this is a general problem in international law. Thus another structure to augment the extant legal stipulations will be suggested in the course of this work.

> [a] legitimate concern is the ability of the current international legal system to implement and monitor environmental protection laws. Treaty obligations that encroach upon the customary law of freedom on the high seas are difficult to enact and enforce. In practice, verification of a ship's activity on the high seas is impossible, and compliance depends upon the integrity of the ship's operators. At this time, economic or legal motivations to comply with MARPOL 73/78 do not exist.[78]

This thesis proceeds on that premise, i.e., that there should be a radical departure from the current international legal approach to ship-source oil pollution prevention and control. Much of the problem as has been observed is not with the structure, content or quality of the legal stipulations, but lies somewhere between the inability to enforce and lack of motivation for compliance. It is imperative therefore to create an enabling environment that would motivate states to comply.

C. The Law of the Sea Convention 1982[80]

LOSC was eventually concluded in 1982 after nine years of deliberations and negotiations and came into force after an even longer period[81], thus bringing afore afresh, the debate on the desirability of the continued use of detailed multilateral treaties as a mechanism for espousing principles of international environmental law. It has now become axiomatic that such multilateral treaties are "slow to be concluded, slow to come into force."[82] One model that presents itself as an attractive alternative is the new notion of soft

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[78]Curtis, supra note 48 at 705.

[80]Supra note 21. [hereinafter, LOSC].

[81]The Convention came into force in November 1994- i.e. one year after the deposit of the 60th instrument of ratification as required by the Convention. See P.W. Birnie and A.E. Boyle, *Basic Documents in International Law and the Environment* (Oxford: Clarendon Press, 1995) at 153.

[82]C. Chinkin, **Remarks** (1988) 82 Proc. Am. Soc. Int'l L. 389.

law. Its attractiveness lies especially in the fact of its characteristic speed.[83] Another option may be found in jettisoning the 'all-inclusive treaty' idea represented by LOSC in favour of conventions that address specific subjects, also known as the framework convention-protocol approach.[84] This latter approach would avert the kind of problem that dogged the entry into force of the rest of the Law of the Sea Convention due to the disagreements over its Part XI (dealing with deep seabed mining).

LOSC dedicates a whole part and more than forty articles[85] to the marine environment, attempting a balance between the need for marine environmental protection from ship-source pollution and the need to ensure that the rights of navigation are not hindered except as may be specifically authorized.[86] The Convention makes a substantial departure from its precursors by creating a general duty to regulate all sources of marine pollution, as opposed to a mere empowerment to do so. It establishes a primary obligation to protect and preserve the marine environment and to prevent, reduce and control pollution.[87] However the only obligations the Convention imposes to prevent, reduce and control ship-source pollution are imposed on flag states; coastal and port states have limited jurisdiction to prescribe and enforce environmental standards, but they are not required to do so.[88]

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[83]See Linda C. Reif, "International Environmental and Human Rights Law: The Role of Soft Law in the Evolution of Procedural Rights to Information, Participation in Decisionmaking, and Access to Domestic Remedies in Environmental Matters" in M.K. Young &Yuji Iwasawa, eds., *Trilateral Perspectives on International Legal Issues: Relevance of Domestic Law and Policy*, (Irvington, N.Y.: Transnational Publishers, 1996) 73 at 78. An opposite argument has been presented to the effect that the potential disadvantages of treaties notwithstanding, " the reality is that the process of negotiating a soft law instrument can often be as complex and lenghty as that for the negotiation of a treaty ": C. M. Chinkin, " The Challenge of Soft Law: Development and Change in International Law " (1989) 38 I.C.L.Q. 850 at 860.

[84]D. Magraw, "International Law and Pollution" in D. Magraw ed., *International Law and Pollution*, (Philadelphia: University of Pennsylvania Press, 1991) 3 at 11.

[85]LOSC, supra note 22, Part XII, arts. 192-237.

[86]Meese, supra note 9 at 89.

[87]LOSC, arts. 192, 194.

[88]Bodansky, supra note 15 at 741.

On the high seas, LOSC favours the exclusivity of flag state prescriptive jurisdiction and primacy of flag state enforcement jurisdiction.[89] At the Exclusive Economic Zone(EEZ),[90] although coastal states made some achievements, LOSC only permits them to adopt legislation that is based on international rules and standards (such as those contained in MARPOL 73/78) and excludes authority over construction, design, equipment and manning, from their domain[91]. Nevertheless, within their territorial seas, coastal states continue to enjoy the power to adopt national, rather than, international rules. This is however, subject to certain limitations including the obligation not to hamper, deny or impair the right of innocent passage.[92]

One innovation of LOSC is that it grants the coastal state, in ice-covered areas, a general power to apply national standards to EEZ pollution control, provided they have due regard for navigation and are nondiscriminatory.[93] Here therefore, the otherwise applicable 'innocent passage regime' is superseded by the Arctic exception regime according to the canon *lex specialis generalis derogat*[94]. This provision was obviously in recognition of Canada's interests in the Arctic Ocean,[95] but its limited application does not seriously affect

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[89]LOSC, Arts 211 and 217; But see T.McDorman, "Port State Enforcement: A Comment on Article 218 of the 1982 Law of the Sea Convention" (1997) 28 J. Marit. L. & Comm. 305 at 322, who has argued that port states are not estopped from exercising prescriptive jurisdiction on the high seas.

[90]The Exclusive Economic Zone, an area of 200 nautical miles from the continental baselines, was created by the Law of the Sea Convention. Before the Convention came into force however, it had become a rule of customary international law having satisfied the two requirements for that, i.e. widespread state practice and *opinio juris* - a psychological component defined as a conviction felt by a state that a certain practice is required by international law and distinguishes common practices motivated by a legal obligation from common practices done out of expediency or convenience. See Editors of Harvard Law Review, *Trends in International Environmental Law*,(American Bar Association, 1992) at 28 n.73.

[91]Art. 211 (6) (c).

[92]Ibid. arts. 24 and 211(4).

[93]Ibid. art. 234.

[94]C. Wang, "A Review of the Enforcement Regime for Vessel-Source Oil Pollution Control" (1986) 16 Ocean Dev. & Int'l L. 305 at 326.

[95]M' Gonigle & Zacher, supra note 27 at 246-247.

the general conclusion that for vessel pollution in the EEZ, LOSC favours the application of international, rather than national, rules and standards.[96]

On the issue of enforcement, the Convention approaches with a basic understanding that there had been a generally abysmal record of enforcement and compliance with marine pollution regulations internationally.[97] It is therefore to LOSC's credit that it imposes a duty on states to enforce regulations on vessel source pollution.[98] It incorporates in stronger terms than ever before the flag states obligation to ensure that its vessels comply with applicable pollution standards, encompassing such matters as the prohibition of the sailing of substandard vessels[99], and the investigation and prosecution of alleged violation of pollution laws.

The Convention preserves the coastal state's jurisdiction in respect of investigation, arrest and prosecution of vessels in the territorial sea for violation of pollution laws.[100] This is however, limited by the right of innocent passage. The coastal state is also empowered to arrest and prosecute for pollution which occurs at the EEZ and which causes or threatens major damage to the coastal state,[101] and to inspect the vessel before there is substantial discharge causing or threatening significant pollution.[102] The phrases "major damage," "substantial discharge" and significant pollution" used here are shrouded in uncertainty and

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[96]A.E. Boyle, "Marine Pollution Under the Law of the Sea Convention" (1985) 79 A.J.I.L. 347 at 362.

[97]Ibid. at 362-363.

[98]LOSC, art. 217.

[99]Ibid. art. 217(2).

[100]Ibid. art. 220(2).

[101]Ibid. art. 220(6).

[102]Ibid. art. 220(5).

this confusion could constitute a fertile ground for potential conflicts[103]. A clear definition of these terms is seriously required.

In the absence of the above, the powers of the coastal state do not go beyond requiring information about the identity of the ship, the port of registry, its last and next port of call and other relevant information required to establish whether a violation has occurred.[104]

Port states now possess an enhanced jurisdiction not only, as was previously the case, to investigate and prosecute any violation of applicable rules in its own territorial sea[104] or economic zone, but also to investigate and prosecute discharge violations on the high seas or within the jurisdictional zones of other states.[105] However, where such violations occur in the coastal waters of another state, the port state may only exercise this jurisdiction upon the request of the coastal state or flag state concerned. [106]Commenting on Article 218, a legal scholar notes thus:

> The innovation of Article 218 is that it permits a port State to initiate action even where the offending discharge had no effect in the port State. The restriction in Article 218 is that irrespective of the polluting effect of a discharge violation in the port State, both the flag State and the State in which the incident occurred can usurp port State jurisdiction.[107]

The above innovation therefore appears to be nothing more than a mirage and leaves the problem where it was, as a port state may be lackadaisical about acting on pollution that did not affect it at all and flag states, in a bid to favour or protect the interest of their vessels, may

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[103]They however demonstrate the imprecision with which provisions in international agreements are sometimes couched to elicit widespread acceptance where it is perceived that states would not want to commit themselves to clearly defined and workable obligations.

[104]LOSC,art. 220(3).

[104]Ibid. art. 220(1).

[105]Ibid. art. 218.

[106]Ibid. art. 218(2). For those occuring on the high seas, no such limitation exists.

[107]McDorman, supra note 89 at 322.

be unwilling to allow the port state exercise the jurisdiction where the pollution affects the port state.

Under Article 228(1), the flag state has the right of preemption, entitling it in the above cases of coastal state and port state enforcement, to insist on taking over the proceedings itself, unless major damage had occurred to the coastal state. This right is prone to abuse and if not properly checked could make "a mockery of port state and coastal state enforcement."[108] The preemptive right may be lost however, where the flag state in the exercise of it, fails to act in good faith, for instance, by repeatedly disregarding its obligations.[109] It should be further noted that the right of preemption does not apply to coastal state proceedings for territorial sea offences or port state proceedings for offences in its own territorial sea or EEZ.

States can continue to intervene beyond the territorial sea in cases of maritime casualties.[110] LOSC even permits intervention where there is merely "actual or threatened damage" to the coastline, suggesting the possibility of an earlier action than might be permissible under the 1969 Intervention Convention.[111] Complementing the above right is a requirement that flag states now adopt regulations that place obligations on vessels to promptly notify coastal states likely to be affected by incidents, including maritime casualties, involving discharges or the probability of discharges.[112] Where there is the likelihood that a state will be affected by pollution and another state becomes aware of this

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[108]J. P. Bernhardt, "A Schematic Analysis of Vessel-Source Pollution: Prescriptive and Enforcement Regimes in the Law of the Sea Conference" (1980) 20 Va. J. Int'l L. 265 at 307 -308.

[109]Ibid. art. 228(1).

[110]Ibid. art. 221.

[111]Boyle, supra note 96 at 369. Under the Intervention Convention(The International Convention relating to Intervention on the High Seas in cases of Oil Pollution Casualties, Brussels, Nov. 29 1969 (1970) 64 AJIL 471; 9 I.L.M. 25) which was a direct response to the *Torrey Canyon* disaster, coastal states are permitted to take measures against foreign vessels on the high seas that are in imminent danger of causing pollution damage. For a critique of this Convention, see Y. Dinstein, "Oil Pollution by Ships and Freedom of the High Seas" (1972) 3 J. Marit. L. & Comm. 363.

[112]LOSC, art. 211(7). The right to notification applies to all pollution incidents.

fact, the state with such knowledge is also required to inform the former state.[113] The Convention also affirms the concept of state responsibility for environmental damage caused by marine pollution,[114] but it lacks concrete standards and the means of implementation.[115]

LOSC made some remarkable inroads toward the achievement of cleaner and safer seas. Nevertheless, a pertinent question is whether it went far enough, especially when considered in the light of the immensity of the investment made into it including time and material resources. "[F]rom an ideal perspective," the Convention is "woefully inadequate."[116] Nevertheless, we cannot but note its achievements a major one of which is encapsulated in the fact that in:

> . . . addressing issues of regulation, enforcement and cooperation, it reflects a fundamental shift from power to duty as the central controlling principle of the legal regime of the marine environment, and a regime based on obligations of responsibility for damage to one based on obligations of regulation and control.[117]

IV. ASSESSMENT

Concerted international efforts at controlling ship-source oil pollution have achieved a degree of success. The international regulations, though not without their fair share of imperfections reminiscent of every human endeavour, have nonetheless brought a measure of sanity to ocean governance and improvement of the marine environment.[118] In other

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[113]Ibid. art. 198.

[114]Ibid. art. 235.

[115]Kiss and Shelton, supra note 12 at 159.

[116]M'Gonigle & Zacher, supra note 27 at 241-251.

[117]Boyle, supra note 96 at 370.

[118]See *Safer Ships, Cleaner Seas: Report of the Lord Donaldson's Inquiry into the Prevention Of Pollution from Merchant Shipping*, (London: H.M.S.O, 1994)para. 3.4 where the Committee relying on data from the 50th Report of the Joint Group of Experts on Scientific Aspects of Marine Pollution(GESAMP), sought to illustrate the decline of quantities of oil reaching the sea since more stringent regulations were

words, their presence has been justified to an extent and their absence would have entailed a far worse scenario. Whatever achievements made, however, could have been surpassed but for the fact that the regulations have been robbed of their full force and influence by the predicament in which states have found themselves.

This predicament is a function of the problems of implementation, compliance and enforcement that have stood as an albatross on the neck of international law generally.[119] It is a trite fact that international law is chronically weak on enforcement.[120] Speaking in 1924, James Brierly made the following observation that reverberates seven decades later and still holds relevance today: "The world regards international law today as in need of rehabilitation . . . a prime cause of its weakness is the absence of an effective sanction by which its rules can be enforced."[121]

Environmental agreements often share in this common problem, lacking the basic mechanisms to ensure their full effectiveness.[122] The norm has been, therefore, to have a plethora of rules emasculated by the inability or unwillingness of the parties to secure or ensure their compliance. Without doubt, the greatest problem of controlling oil pollution is that of enforcement[123] as it is one thing to establish a ban on specified discharge of oil, but

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introduced. Cf. the objections of the Environmental Non-Governmental Organisation, Friends of the Earth International on the ground that the figures used were inconsistent. See Mark W. Wallace, ' "Safer Ships, Cleaner Seas": The report of the Donaldson Inquiry into the Prevention of Pollution from merchant shipping" [1995] LMCLQ 404 at 405.

[119]Ibrahim Shihata, "Implementation, Enforcement and Compliance with International Environmental Agreements - Practical Suggestions in Light of the World Bank's Experience" (1997) 9 Geo. Int'l Envtl. L. Rev. 37.

[120]Elli Louka, "Cutting the Gordian Knot: Why International Environmental Law is not only about the Protection of the Environment" (1996) 10 Temp. Int'l & Comp. L. J. 79.

[121]J. Brierly, "The Shortcomings of International Law" in H. Lauterpacht and E. Waldock eds., *The Basis of Obligation in International Law and Other Papers* (1958) at 68 cited in P.S. Dempsey, "Compliance and Enforcement in International Law - Oil Pollution of the Marine Environment by Ocean Vessels" (1984) 6 NW. J. Int'l L. & Bus. 459 at 526.

[122]Shihata, supra note 119.

[123]Sir Colin Goad, former I.M.C.O.Secretary General, quoted in M'Gonigle & Zacher, supra note 28 at 327.

an entirely different thing to ensure that offenders will be detected, identified and sanctioned.[124] Yet an "essential virtue of any worthwhile legislation is the possibility of enforcement."[125] Indeed enforcement, to a reasonable extent, is the crucible of the law.[126]

A vivid illustration of the contention that compliance and enforcement are the bane of this area of the law is presented by the ambition surrounding the foundations of MARPOL 73 and the optimism that prevailed at its conclusion. Despite its description by the International Maritime Organisation as "the most ambitious international treaty covering maritime pollution ever adopted"[127] and its drafters' expectation that its promulgation would result in "the complete elimination of intentional pollution of the marine environment by oil and other harmful substances and the minimization of accidental discharges of such substances,"[128] the reality 25 years later, is a far cry from the envisaged achievement of the objectives, having failed to elicit states' compliance as desired.[129]

The sad story is that the international community has been busy chasing shadows while the substance remains unaffected. If there is much the community of nations has done, it is to lend its approval to the continued existence of this state of affairs. States clearly have been lackadaisical or have generally refrained from enforcing international oil pollution standards mainly because of their preoccupation with what is essentially in their interest without much consideration for the interest of others. The protection of the marine environment has been apathetically and appallingly viewed essentially as a 'no man's

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[124]E. Brown, *The Legal Regime of Hydrospace* (London: Stevens, 1971) at 138.

[125]M.P. Holdsworth, "Convention on Oil Pollution Amended" 1 Marine Pollution Bulletin (November 1970) 168.

[126]W. M. Reisman, "Sanctions and Enforcement" in C.E. Black & R.A. Falk, eds., *The Future of the International Legal Order, Vol. 3: Conflict Management* (Princeton, N.J.: Princeton University Press, 1971) 273 at 275.

[127][1982] 4 IMO NEWS 10.

[128]Mensah, supra note 10 at 117, quoting the International Convention for the Prevention of Pollution From Ships, Fourth preambular paragraph.

[129]Lord Donaldson's report supra note 118.

business.' The rationale appears to be anchored on the belief that "the economic 'property of all' [should] be the environmental responsibility of none."[130] This is surely a classic reflection of the tragedy of the commons,[131] where as in Greek drama, an unfolding catastrophe is being revealed and though aware of the consequences, everybody watches while the potential ruin of all unfolds.[132]

The time has come to redesign international law to make it more relevant. This requires the cooperation of a vast majority of the international community. To achieve this however we need to build a system that recognizes the role states' interests play in the effectiveness of the international legal system and accommodate them. I share the views of the Editors of the Harvard Law Review that "[f]uture environmental regimes can succeed only by advancing a common locus of states' interests. The challenge for global environmental management rests in identifying these interests and constructing a system based on them."[133]

The task which this thesis undertakes is to construct such a system, realizing the importance of the compliance equation to the success of any international arrangement. While the task appears daunting, it is not necessarily impossible. I do not pretend however, to have the only solution to the problem as there are "dozens of ways in which to strengthen the ability of the international legal system to deal with the compliance problem."[134]

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[130]J. W. Kindt, "The Effect of Claims by Developing Countries on LOS International Marine Pollution Negotiations" (1980) 20 Va. J. Int'l L. 313 at 315.

[131]G. Hardin, "The Tragedy of the Commons" (1968) 162 Science 1243. Professor Hardin's thesis, using the example of a common grazing ground, is that there is the tendency for every herdsman to keep on adding to his herd to maximise gains without considering that other herdsmen would also take a similar course, thereby depleting the resources of the commons. "Therein is the tragedy. Each man is locked into a system that compels him to increase his herd without limit - in a world that is limited. Ruin is the destination toward which all men rush, each pursuing his own best interest in a society that believes in the freedom of the commons. Freedom in a commons brings ruin to all." Ibid. At 1244.

[132]J. Owen Saunders, "The Economic Approach" in E. Hughes, A. Lucas & W. Tilleman, eds., *Environmental Law and Policy* (Toronto, Ontario: Emond Montgomery Publications, 1993) 363 at 373.

[133]Editors of the Harvard law Review, supra note 90 at 17.

[134]Roger Fisher, *Improving Compliance With International Law*, (Charlottesville: University Press of Virginia, 1981) at 350.

V. CONCLUSION

The measures designed by the international community to combat the problems occasioned by the fledgeling international commerce in oil, though remarkable have not been very successful in attacking the problem. This has largely been due to the difficulties in getting states to implement, comply with or enforce international standards contained in the various conventions. States have been reluctant to live up to their obligations as the cost of compliance seem to far outweigh the benefit of noncompliance. Because of the structure of the world community, international law lacks the necessary mechanisms to abide by its rules in any event. A system structured on the basis of states' interests would go a long way in facilitating compliance and effectuating the intention of the existing regulatory framework. The result will be the coexistence of a qualitative marine environment and a thriving international trade in crude oil and petroleum products in a mutually beneficial atmosphere.

In the next chapter, I will take a detailed look at the concepts of compliance, enforcement and implementation, the practical ways in which international law has approached them, the problems arising from that, and a possible solution.

CHAPTER 3

ENHANCING COMPLIANCE AND ENFORCEMENT OF INTERNATIONAL LAW

I. INTRODUCTION

A major problem of international law, as indicated in chapter 2, 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 devices, described as the traditional approaches in this work basically by reason of the fact that they have been in place for a relatively long period of time, are flag, coastal, and port states' jurisdiction.[1]

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 making of decisions or rules, referred to as enforcement or prerogative jurisdiction.[2] A third category has been identified as adjudicative jurisdiction involving 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 the 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

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[1]John Hare, "Port State Control: Strong Medicine to Cure a Sick Industry" (1997) 26 Ga. J. Int'l & Comp. L. 571.

[2]Ian Brownlie, *Principles of Public International Law*, 4th ed.(Oxford: Clarendon Press,1990) at 298.

[3] See D. Bodansky,"Protecting the Marine Environment from vessel-source pollution: UNCLOS III and Beyond" (1991) 18 Ecology L.Q. 719 at 731.

[4]See C. Wang, "A Review of the Enforcement Regime for Vessel-Source Oil Pollution Control" (1986) 16 Ocean Dev. & Int'l L. 305. The writer 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." Ibid. at 309. See also Brownlie, supra note 1, and A.V. Lowe, "The Enforcement of Marine Pollution Regulations" (1975) 12 San Diego L. Rev. 624. Both writers settle for the prescriptive-enforcement dichotomy.

necessitates a consideration of an alternative approach, to strengthen the existing scheme of things. One such alternative is the concept of corporate social responsibility. Unlike the traditional approaches which are state-centric, focusing attention on states, this approach shifts the emphasis to corporations. The point being canvassed is that the issue of compliance and enforcement will take a back seat if oil and shipping companies, the primary players in international oil trade, conduct their businesses ethically and with a due consideration for the interest of the society - as opposed to an inordinate desire for profit maximisation that defines their current attitude.

In doing justice to the enormous demands of this chapter, I will address the issues in three major parts. The first part will incorporate a definitional and conceptual discussion of the terms "compliance" and "enforcement" especially as they are used in this thesis. The second part involves an exposition on the traditional methods including their bases, scope, strengths and pitfalls. This part will be subdivided into three sections, each concentrating on one of the methods. The third part discusses the alternative approach of a norm of corporate social responsibility, emphasizing that ethical principles be given legal teeth in international business and integrated into the corpus of international law.

In the concluding part, I will submit, drawing from my discussion of the previous parts, that a concerted and disinterested application of a combination of the traditional and alternative approaches will go a long way in improving the problems of compliance and enforcement. Their efficacy should not be overestimated though, in the absence of a consideration and analysis of the economics of the problem, the subject of the subsequent chapter.

II. COMPLIANCE AND ENFORCEMENT

Enhancing or improving compliance with international norms 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 behaviour 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]

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[5]Karin Mickelson, "Carrots, Sticks or Stepping Stones: Differing Perspectives on Compliance with International Law" in Thomas J. Schoenbaum, et al. eds., *Trilateral Perspectives on International Legal Issues: From Theory into Practice*. (Ardsley, N.Y.: Transnational Publishers, 1998) at 35.

[6]They are approximately 1000 in number. See M. E. O'Connell, "Enforcing the New International Law of the Environment" (1992) 35 Ger. Y.B. Int'l L. 293 at 295-296.

[7]Phillip M. Saunders, "Development Cooperation and Compliance with International Environmental Law: Past Experience and Future Prospects" in Schoenbaum, et al. eds., supra note 5 at 89.

[8]Ronald Mitchell, *Intentional Oil Pollution At Sea: Environmental Policy and Treaty Compliance*, (Cambridge, Mass.: MIT Press, 1994) at 30.

[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 I.L.M. 1319, and the Protocol relating thereto,I.M.C.O. Doc. TSPP/CONF/11, (Feb. 16, 1978) *reprinted in* 17 I.L.M 546.

[10]Mickelson, supra note 5 at 36.

[11]Ibid.

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 honoured 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, share a relationship. One school of thought believes 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

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[12]Ibrahim Shihata, "Implementation, Enforcement, and Compliance with International Environmental Agreements - Practical Suggestions in Light of the World Bank's Experience" (1996) 9 Geo. Int'l Envtl. L. Rev. 37.

[13]Karin Mickelson, supra note 5 at 36.

[14]Gunther Handl, " Controlling Implementation of and Compliance With International Environmental Agreements:The Rocky Road from Rio" (1994) 5 Colo. J. Int'l Envtl. L. & Pol'y 305 at 330.

[15]Abram Chayes and Antonia Handler Chayes, "Compliance Without Enforcement:State Behaviour Under Regulatory Treaties." (1991) 7 Negotiation J. 311 at 312.

[16]Oran Young, *Compliance and Public Authority: A Theory With International Applications* (Washington D.C.: Resources For the Future,1979) at 25.

negotiations accommodating different interests with a view to 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 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 renege 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 part will be 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

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[17]Mitchell, supra note 8 at 115-117.

[18]I will be discussing enforcement against states and inducing states compliance in Chapter 4. This chapter will concentrate on enforcement against ships.

[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" (1996) 9 Geo. Int'l Envt'l. L. Rev. 1.

> exercise any kind of jurisdiction over foreign vessels upon them.[21]

Since no state has authority over the high seas, vessels on that territory would be without control and this could give rise to a chaotic situation. Flag state jurisdiction therefore serves a recipe for the preservation of order on the high seas.[22]

Freedom of the high seas, while not necessarily wrong in itself, 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 the 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 jurisprudence[25], although the courts have had cause on a number of occasions to give

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[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 of piracy (LOSC, art. 105), unauthorized broadcasting (LOSC, art. 109) and the right of hot pursuit (LOSC, art. 111).

[22]D. 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" (1991) 10 U. Tasmania. L. Rev. 269 at 270.

[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).

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 derives the legitimacy to exercise jurisdiction in respect of 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]

(i) 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 favouring 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

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[26]In *Scharrenberg* v. *Dollar Steamship Co.*, 245 U.S. 122 (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." Ibid. at 127. Footnote omitted. See also *Chenng Chi Cheung* v. *R.* [1939] A.C. 160 where Lord Atkin rejected the floating island theory.

[27]Supra, note 21.

[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]Brownlie, supra note 2 at 303. Footnote omitted.

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

[31]OILPOL, art. VI (1).

being the state in which a vessel is registered or whose nationality is possessed by an unregistered ship.[32]

MARPOL 73/78[33] follows in the footsteps of its predecessor and provides, among others, 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 Convention[36] 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]

(ii) Flag state jurisdiction problems

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] The report of a study published in 1989 showed that of three hundred referrals by North Sea states, flag states had taken action on only 17 per

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[32]Ibid. art. II (1).

[33]Supra, note 9.

[34]Ibid. art. 6 (3).

[35]Ibid. art. 6 (4).

[36]LOSC, supra note 21.

[37]Ibid. art. 92.

[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, supra note 4. "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." Ibid. at 642.

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 offences 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 a number of 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 may not visit ports located in its flag state if such ports do not fall in 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 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 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]

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[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* (1992) at 31, cited in Fowler, infra note 222.

[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" (1984) 6 NW. J. Int'l L. & Bus. 459 at 526.

[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" (1980) 10 Denv. J. Int'l L. & Pol'y 37 at 63.

[45]Dempsey, supra note 43 at 557.

The following subsection will discuss this controversial subject.

(iii) Nationality of Ships, Ships Registration 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] I will discuss the issue under three main sections namely, 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 nationality[47], 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. Secondly, a grant of nationality

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[46]George Kasoulides, "The 1986 United Nations Convention on the Conditions for the Registration of Vessels and the Question of Open Registry" (1989) 20 Ocean Dev. & Int'l L. 543.

[47]David Matlin, "Re-Evaluating the Status of Flags of Convenience Under International Law" (1991) 23 Vand. J. TransNat'l L. 1017 at 1021.

[48]Marjorie M. Whiteman, *Digest of International Law*, **vol.9** (Washington DC: Dept. of State, 1968) at 21.

[49]*Geneva Convention on the High Seas*, 450 U.N.T.S. 82 art. 5 (1). See also, Rachel Roat, "Promulgation and Enforcement of Minimum Standards for Foreign Flag Ships" (1980) 6 Brooklyn J. Int'l L.54.

[50]Julie Mertus, "The Nationality of Ships and International Responsibility: The Reflagging of the Kuwaiti Oil Tankers" (1988) 17 Denv. J. Int'l L. & Pol'y 207.

will be invalid if there is reasonable ground for suspicion that the ship 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 stateless vessel.[52] A stateless vessel enjoys no protection under national and international law.[53] In *United States* v. *Marino-Garcia*, it was stated thus: "Vessels without nationality are international pariahs. They have no internationally recognized 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. Ships Registration

The usual administrative mechanism through which vessel nationality is acquired is registration. Ship registration policies of states could be conveniently classified into three types namely, 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. Under this category falls the United States, 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 nationality to register their ships with them and sail under their

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[51]See ibid. at 212.

[52]LOSC, supra note 21 art. 92.

[53]*Naim-Molvan* v. *Attorney-General for Palestine* (1948) A.C. 351.

[54]679 F. 2d 1373 at 1382 (1985).

[55]*Lauritzen* v. *Larsen*, 345 U.S. 571 at 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" (1996) 21 Tul. Mar. L.J. 139 at 151.

flags. Manning and crewing requirements are also relaxed, among other flexible standards.[57] Vessels registered in these states are commonly referred to as "flags of convenience" ships.[58] In a 1984 report, the United Nations Conference 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 course 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 unequivocal[62] 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 sovereignty of states.[64] The problem with this is that it tends to elevate FOC states to sovereign positions depicted in Lord Ellenborough's

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[57]Open registries are discussed more fully in the next section.

[58]Open Registry(OR) and Flags of Convenience(FOC) will be used interchangeably here. The abbreviations in bracket will also be generously used in this place to refer to the above terms as appropriate.

[59]See Kasoulides, supra note 46 at 547.

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

[61]Ibid. at 258.

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

[63]B.A. Boczek, *Flags of Convenience: An International Legal Study*, (Cambridge Mass.: Harvard University Press,1962) at 94, 102-103.

[64]See ibid. at 104.

rhetorical question: "Can the Island of Tobago pass a law to bind the rights of the whole world?"[65]

c. Flags of Convenience

(i) Preliminary matters.

Although open registries enjoy a rich history, it will not be necessary for the purposes of this work 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]

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 B. 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] But it would be totally objectionable to classify the U. S. as a flag of convenience (FOC) state.

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[65]L.F.E. Goldie, "Environmental Catastrophes and Flags of Convenience - Does the Present Law Pose Special Liability Issues?" (1991) 3 Pace Y.B. Int'l L. 63 at 68-69. Footnote omitted.

[66]For an excellent historical account on the evolution of flags of convenience, see Rodney Carlisle, *Sovereignty for Sale: The origins and evolution of the Panamanian and Liberian Flags of Convenience*, (Annapolis, MD.: Naval Institute Press, 1981).

[67]Ebere Osieke, "Flags of Convenience Vessels: Recent Developments" (1979) 73 A.J.I.L. 604 n1.

[68]Supra note 63.

[69]Ibid. at 2.

[70]See Margaret Wachenfeld, "ReFlagging Kuwaiti Tankers: A U.S. Response in the Persian Gulf" [1988] Duke L.J. 174.

A descriptive approach to the concept is preferable. The Rochdale Committee[71] defined such flags by a 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 on 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 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]

(ii) Reasons for the open registry practice

The past 40 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 maximisation of profit.[75] Edward Stettinus, a former United States Secretary of State, and a group of leading U. S. entrepreneurs and multinational corporations masterminded the creation of the Liberian

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

[72]Kasoulides, supra note 46 at 545.

[73]Ibid.

[74]R.T. Epstein, "Should the Fair Labor Standards Act Enjoy Extraterritorial Application?: A Look at the Unique Case of Flags of Convenience" (1993) 13 U. Pa. J. Int'l Bus. L. 653.

[75]Richard Payne, "Flags of Convenience and Oil Pollution: A Threat to National Security" (1980) 3 Houston J. Int'l L. 67 at 69.

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 are availed the opportunity of registering their ships under extremely liberal laws[78] and without necessarily going to the state. For instance, the Liberian registry is administered through International Registries Inc. of Reston Virginia, and has its headquarters 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]

Open registries are also favoured because they assure a better return on investment by minimizing operating costs.[82] By registering their ships in such registries, ship owners are not saddled with requirements of employment of 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

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[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, in 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 to 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" (1979) 14 Tex. Int'l L.J. 115 at 121.

[79]Anderson, supra note 56 at 155.

[80]See Vincent Hubbard, "Registation of Vessels Under Vanuatu Law" (1982) 13 J. Marit. L. & Comm. 235. "The Republic of Vanuatu levies no income taxes of any kind on either business or personal income. . . ." Ibid. at 241.

[81]See Rochdale Committee, supra note 71.

[82]Kasoulides, supra note 46 at 565.

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 scale. 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 would want to earn a precarious living.[85]

Furthermore, shipowners have been attracted to these registries by operating on the joint assumptions that the existence of antipollution conventions ties the hands of the maritime nations that honour 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 is 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

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[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 n471.

[85]Goldie, supra note 65 at 89.

[86]Ibid. at 90. "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." Ibid.

[87]See UNCTAD, *Action on the Question of Open Registries*, U.N. Doc. No. TD/B/C.4/220 at 11.

and inspections in compliance with international conventions.[88] Shipowners' preference for open registries is more probably a function of freedom from control which FOC states provide.[89] Modern business philosophy favours less state intervention and control over business activities as illustrated by the current campaign for the introduction of a multilateral agreement on investment (MAI).[90]

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] To them therefore, the practice exists as a means of keeping their sagging economies alive.

Secondly, 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 follows therefore 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]

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

[89]McConnell, ibid.

[90]See Peter C. Newman, "MAI: a time bomb with a very short fuse" Maclean's (2 March 1998) 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 1930-1986.

[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" (1987) 27 Nat. Resources J. 157.

(iii) Flags of Convenience and Environmental Issues

In some quarters, vessels sailing under flags of convenience have almost become synonymous with environmental hazards. While the battle against open registries was earlier fought by organized labour,[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 hardly sign on to marine safety and environmental treaties and have also been said to be apathetic toward enforcement of international law[95] and, by so doing, weaken the effectiveness of international regulatory efforts. It becomes a seemingly unwise business practice for a shipowner 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 the good ones when external restraints are nonexistent 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 the attendant benefits. As UNCTAD rightly observed, the enforcement of standards and the operation of a registry with

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

[94]Ibid. at 67.

[95]See Ademuni-Odeke, supra note 88.

[96]L.F.E. Goldie, "Recognition and Dual Nationality - A Problem of Flags of Convenience" (1963) 39 Brit. Y.B. Int'l L. 220 at 221 n1.

the sole aim of making a profit are incompatible with each other.[97] Moreover, OR states generally lack the resources to enforce the antipollution provisions against their vessels.[98]

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

> 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 though, 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]

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[97]UNCTAD, supra note 87.

[98]"The Channel: Playing Canute with Pollution" Economist (10 April 1971) 77.

[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 n42. See also Anderson, supra note 56 at 163; "New ship safety code targets human element in an effort to prevent maritime accidents" (1998) 33 Petroleum Gazette 20 at 21.

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 the 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 maximisation, 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]

(iv) Control of Open Registries

In view of the perceived pitfalls of FOC shipping, various measures have been embarked on to deal with the practice. They include the imposition of a "genuine link,"[104] confrontation from organized labour,[105] and increasing port state control under international arrangements.[106] I will skip the labour approach, which in my opinion was not environmentally motivated but concerned with workers' welfare, and concentrate on the other two.

The concept 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 earlier been used 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

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[102]D.W. Abecassis and R.L. Jarashow, *Oil Pollution From Ships*, 2nd ed. (London: Stevens & Sons. 1985) at 7.

[103]UNCTAD, supra note 87.

[104]See McConnell, supra note 88 at 366.

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

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

[107]*Nottebohm Case* (Leichtenstein v. Guatamela) [1955] I.C.J. Rep. 4.

> 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 genuine link concept as applied to ships has been severely criticised.[109] However the efforts at rationalizing or criticising the application amounts to a dissipation of energy, since with the absence of a clear definition in an international instrument, it amounts to an ineffective tool at controlling FOC shipping. Any state can manipulate its open-ended nature and claim to be abiding by it. In realization of this, it was desired to define the concept more than two decades after. 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 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] 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 mandates a flag state to make provisions in its laws regarding the ownership of ships flying its flag.[113] Such laws shall include appropriate provisions for

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[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 H.F. van Panhuys,"'The Genuine Link Doctrine" and Flags of Convenience' (1968) 62 A.J.I.L. 942; Myres McDougal and William Burke, "A Footnote" (1968) 62 A.J.I.L. 943; Simon Tache, "The Nationality of Ships: The Definitional Controversy and Enforcement of the Genuine Link" (1982) 16 Int'l L. 301; Moira McConnell, supra note 88.

[110]UNCTAD Information Unit, Press Release, U.N. Doc. No. TAD/INF/1770 (7 February 1986).

[111]*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).

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 could establish its genuine link through ownership as indicated above, it could also do that 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 of the management of ship owning companies and ships is covered in article 10. There is a duty on the flag state to ensure that shipowners seeking entry into its register are established or have a principal place of business in its territory.[118] In the alternative, the shipowner shall be required to appoint a representative or management person who shall be a national of the flag state or be domiciled in that state.[119] The flag state is directed to also 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]

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[114]Ibid. art. 8 (2).

[115]Ibid. art. 7.

[116]Ibid. art. 9 (1).

[117]S.G. Sturmey, "The United Nations Convention on Conditions for Registration of Ships" [1987] LMCLQ 97 at 101.

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

[119]Ibid. art. 10 (2). This could be a natural or juridical person.

[120]Ibid. art. 10 (3). This covers insurance, maritime lien and worker-interest protection measures.

The above provision is weakened by the use of hortatory language. Sturmey 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 from 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 where it was. "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 states and FOC states who accepted previous Conventions' position on genuine link [125] suggests, at least, that they recognize that UNCCORS makes an inroad into their sphere of authority, a legal authority they are not yet ready to surrender.

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[121]Sturmey, supra note 117 at 106.

[122]George Kasoulides, *Port State Control and Jurisdiction* (Dordrecht: Martinus Nijhoff Publishers, 1993) at 75.

[123]Moira McConnell, ' "Business as Usual": An Evaluation of the 1986 United Nations Convention on Conditions for Registration of Ships" (1987) 18 J. Marit. L. & Comm. 435 at 449. Footnote omitted.

[124]See Kasoulides, supra note 46 at 566 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 1 march 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 the endangering of the safety of life at sea are matters which stand condemned at all times. Operation of a registry that facilitates these evils is therefore totally abhorrent. In that connection, any measure aimed at eradicating FOC shipping could easily be embraced with both arms. It is my considered opinion, however, that whatever is done in that regard, and considering the circumstances that surround open registries, the problem would only be best solved by an approach that does not ignore the economics and equity of the situation.

A pertinent question may be whether some FOC states can lay any legitimate claim to equity since they might not have come with clean hands. Yet the fact remains that most OR states are poor countries who are involved in the practice mainly to make ends meet. Where are the fairness and the fraternal bond in an international community that is interested in extinguishing some countries' source of sustenance, without assisting in fashioning an alternative economic base 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 wellbeing 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 the environmental implications instead of putting in place a system that makes them legally, socially responsible to humanity and the environment?

After all, if manifest justice is done in this area, it will go a long way at repairing past damage, safeguarding the present and securing the future of the marine environment for the benefit of present generation and generations yet unborn. I will return to examine these issues of equity and economics in more detail later in this work. Before doing so however, there are two other types of jurisdiction that require discussion, namely, coastal state and port state jurisdiction.

B. Coastal State Jurisdiction

The approach of international law toward coastal state jurisdiction is to define it in terms of distinct zones of the oceans namely, internal waters,[126] the territorial sea,[127] the contiguous zone[128] 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 port 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

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[126]These are waters landward of the coastal state's baseline and includes bays, river mouths, estuaries and ports. 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, art. 2. LOSC establishes a maximum breadth of 12 miles for the territorial sea. Ibid. 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, art. 33. It comprises a breadth of 24 miles measured from the baselines of the territorial sea. Ibid.

[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, 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* (Oxford: Clarendon Press, 1987) at 44.

[130]Bodansky, supra note 3 at 745.

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

[132]Ibid. art. 6.

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

vessels in the territorial sea, as there is no requirement of 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, where 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" though they may be "wilful."[137] The second limitation is the 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]

On 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

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[134]See ibid. art 211(4).

[135]Ibid. arts 24 and 211(4).

[136]Ibid. art. 19 (2) (h).

[137]A.E. Boyle, "Marine Pollution Under the Law of the Sea Convention" (1985) 79 A.J.I.L. 347 at 359.

[138]LOSC, art. 21 (2).

[139]Ibid. art. 33.

[140]See Y. Dinstein, "Oil Pollution by Ships and Freedom of the High Seas" (1972) 3 J. Marit. L. & Comm. 363. "[W]ith some stretch of the imagination, [oil pollution] may be considered as falling within the ambit of the sanitary clause." Ibid. at 367. Footnote omitted.

[141]LOSC, art. 220 (2).

limited jurisdiction to enforce EEZ pollution standards.[142] They can only enforce when a vessel has committed a discharge violation of such a nature that results in or threatens substantial 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 the appropriate action. A coastal state can act also in the event of maritime casualties.[144]

The coastal state's powers are further restricted by the requirement on the coastal state to release vessels on bond[145] and generally limiting the 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 in such a way as to be a major tool. The preference of the international community has been the concentration of powers on the flag state or division between the flag and port states. The rationale is that enhanced coastal state powers would pose a threat to navigation.[147]

C. Port State Jurisdiction

As the name implies, this 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

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[142]Ibid. art. 220 (3).

[143]Ibid. art. 220 (5) and (6).

[144]Ibid. art. 221.

[145]Ibid. art. 226 (1) (b).

[146]Ibid. art. 230 (1).

[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.": 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.

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.

(i) International legal provisions on port state jurisdiction.

The Law of the Sea Convention 1982 vests port states, for the first time, with authority over pollution incidents occurring on the high seas or in another state's coastal waters.[151] The port state may conduct inspections and institute proceedings against vessels that had 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 at the request of the flag state, the coastal state or any injured state.[153] Port

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[150]Ibid. at 739. Moreover, the port state also provides facilities for investigation and collection of evidence. Boyle, supra note 137 at 364.

[151]LOSC, supra note 21 art. 218.

[152]Ibid. art. 218 (1).

[153]Ibid. art. 218 (2).

state jurisdiction is however subject to flag state preemption for pollution offences occurring on the high seas.[154]

A raging controversy borders on the scope of the jurisdictional competence conferred on port states by LOSC. Sally A. Meese[155] 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.[156] McDorman adopts a similar line of reasoning, maintaining that port states have prescriptive jurisdiction on the high seas.[157]

Bodansky seriously questions this, arguing that article 218 is in section 6 of Part XII, which is devoted to enforcement jurisdiction, rather than section 5, which deals with prescriptive jurisdiction.[158] 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."[159] Support for this view can be found in Cheng-Pang Wang's assertion, in respect of 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."[160]

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[154]Ibid. art. 228.

[155]Sally A. Meese, "When Jurisdictional Interests Collide: International, Domestic and State Efforts to Prevent Vessel Source Oil Pollution" (1982) 12 Ocean Dev. & Int'l L. 71 at 92.

[156]Bodansky, supra note 3 at 762.

[157]Ted McDorman, "Port State Enforcement: A Comment on Article 218 of the 1982 Law of the Sea Convention" (1997) 28 J. Marit. L. & Comm. 305 at 315.

[158]Bodansky, supra note 3 at 762.

[159]Ibid. at 740.

[160]C. Wang, supra note 4 at 309.

This latter view, that is, that a port state's powers for high seas offences is limited to enforcement, appears more correct. The problem is that it could lead to difficulties. For instance, if a ship that has been apprehended by the port 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 the 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).[161] 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.

(ii) Regional efforts at port state control.

The regional efforts will be considered from the perspective of West Africa since it is pivotal to the central theme of this thesis, that is, fashioning an effective maritime law that would boost the environment of Nigeria's coastline. As will be seen later in this work, the cooperation of Nigeria's neighbours is highly essential.

Regional efforts at port state control do not currently exist in West Africa, notwithstanding the existence of a legal framework for such a cooperative venture.[162] The Abidjan Convention drafted under the auspices of the United Nations Environment Programme's Regional Seas Programme makes provisions enjoining countries covered by

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[161]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>.

[162]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 [Hereinater, the Abidjan Convention]. The Abidjan Convention "has 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.": David Dzidzornu, "Marine Pollution Control in the West and Central African Region" (1995) 20 Queen's L.J. 439 at 477.

it to embark 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."[163]

They are also required to cooperate with international, regional, and subregional organizations to adopt standards and practices that would enable them to accomplish these goals.[164] The responsibility of the parties to work toward preventing, reducing, combatting and controlling pollution arising from incidents related to shipping, is also underscored.[165]

A number of factors, mainly political and economic, account for the slow pace of translating these provisions into reality in West Africa. The region for the past ten years has been in various forms of commotion and civil disturbances as well as guerilla warfare in Liberia, Serra Leone and, currently, Guinea Bissau.[166] In such an atmosphere, it is mere wishful thinking to expect much to be accomplished in any area.

Financial constraints also impede cooperative efforts. A study has been 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, but is now under suspension partly because of the failure of the member states to pay their assessments to a Trust Fund for that purpose.[167]

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 scholar observes:

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[163]Abidjan Convention, ibid. art. 4 (1). See also art. 4 (3).

[164]Ibid. art. 4 (4).

[165]Ibid. art. 5.

[166]See "Jackson Urges Liberians to Bury The Hatchet" AfricaNews Online (February 12, 1998). <http://www.africanews.org/usafrica/stories/19980212_feat4.html>.

[167]See Dzidzornu, supra note 162 at 479 n119 and accompanying text.

> 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.[168]

There is the need for policy reformulation in West African countries. It is utterly dangerous for developing countries to be obsessed with economic development to the exclusion of environmental protection.[169] Moreover, the trend in the global community is an understanding that economic development and environmental protection are not mutually exclusive as encapsulated in the concept of sustainable development.[170]

Besides, developed countries are not necessarily far more concerned about the environment, nor less concerned with economic growth, than developing countries,[171] yet some of them have been able to fashion a functional regional arrangement on port state control.[172] What is required therefore is a "comprehensive process of resource management, informed by ecosystemic knowledge and progressively integrated with economic development planning."[173]

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[168]Ibid. at 464.

[169]See A. Ekpu, "Environmental Impact of Oil on Water: A Comparative Overview of the Law and Policy in the United States and Nigeria"(1995) 24 Denv. J. Int'l L. & Pol'y 55 at 105-106.

[170] 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" (1996) 27 J. Marit. L.& Comm. 281 at 287.

[171]See D. Westbrook,"Environmental Policy in the European Community: Observations in the European Environment Agency" (1991) 15 Harv. Envt'l L. Rev. 257; O. Lomas, "Environmental Protection, Economic Conflict and the European Community" (1988) 33 McGill L. J. 506 at 508-510.

[172]Paris Memorandum of Understanding, infra note 180 and accompanying text.

[173]Jaro Mayda, "Environmental Legislation in Developing Countries: Some Parameters and Constraints" (1985) 12 Ecology L.Q. 997.

The advantages of a regional arrangement are many. 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.[174] 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.[175] Thus it is at high risk of pollution arising from tanker collision and grounding, loading and unloading, and offshore oil and gas production accidents.[176]

A coordinated system of port state inspection would also go a long way both in minimizing financial costs incurred by individual state efforts and in addressing with greater impact the problem of substandard vessels.[177] West Africa is also a marine-resource-rich zone that should be interested in their conservation and revenue from them through concerted pollution control and prevention measures.[178] In view of the fact that 1991 - 2000 has been declared as the Decade for marine and coastal environmental protection,[179] this is an auspicious time to introduce a regional port state regime. A useful model is the Paris Memorandum of Understanding[180] discussed below.

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[174]Fall, supra note 170 at 283.

[175]Dzidzornu, supra note 162 at 469-470.

[176]Ibid. at 470.

[177]See Kasoulides, supra note 122 at 149.

[178]See Fall, supra note 170 at 285.Tuna can be found in abundance here. See also Dzidzornu, supra note 170 at 465 stating that the West and Central African region contains fifty-five per cent of all of Africa's fish potential.

[179]Declared by the African Ministerial Conference on the Environment. See Fall, ibid. at 287.

[180]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>.

The Paris MOU provides a legal foundation for the cooperative efforts of a number of European countries concerning port state control.[181] Under it, certain categories of ships are targeted for inspection purposes. They include ships which may present a special hazard, for example, oil tankers and gas and chemical carriers as well as ships with several recent deficiencies.[182] 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 it has clear grounds for inspection.[183] The value of this is that avoids duplication of inspection exercises with the attendant costs on state revenue and maritime transport.

Where an inspection reveals deficiencies which are "clearly hazardous to safety, health or the environment," the maritime authority is to ensure that the ship does not proceed to sea and "for this purpose will take appropriate action, which may include detention."[184] 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, with a view to ensuring that the ship can so proceed without unreasonable danger to safety, health or the environment.[185] The MOU also obliges members to cooperate in the detection of operational discharge violations.[186]

The MOU is supplemented by the 1995 Council Directive of the European Union, which came into force on July 1, 1996.[187] The Directive contains even more stringent port

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

[182]Paris MOU, supra note 180 s. 3 (3).

[183]Ibid. s. 3 (4).

[184]Ibid. s. 3 (7). Undue detentions may however give rise to a claim for compensation. Kasoulides, supra note 122 at 158.

[185]Ibid, s. 3 (8). Notification should also be given to the next port of call in the region, the flag state and other interested authorities. Ibid.

[186]Ibid. s. 5.

[187]Anderson, supra note 56 at 168.

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.[188] 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 at open registries aimed at eroding this advantage that it confers.[189]

This regional port state regime has come under attack from the International Shipowners Association (INSA) which considered the inspections embarked under it as an illegal means of delaying vessels and a detriment to shipping interests.[190] 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.[191] Notwithstanding the criticisms, it cannot be denied in good faith, however, that an arrangement of this nature is of considerable value in effectuating and enforcing international rules and is worth replicating.[192] 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 inviting governments to form regional initiatives for port state control in cooperation with IMO.[193]

(iii) Assessment

Port state control obviously has some advantages as an enforcement tool and some of them have already received attention here. 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

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[188]Ibid.

[189]Ibid.

[190]L. Buchingham, "INSA sees Inspections as Means of Illegal Delay" Lloyd's List, (25 October 1982), cited in Kasoulides, supra note 122 at 175.

[191]Kasoulides, ibid. at 162.

[192]Ibid. at 176 - 177.

[193]Hare, supra note 1 at 578 n22.

port in the vessel's scheduled voyage. It also reduces the burden on coastal states to police their adjacent waters, which burden in the case of developing states with wide economic zones may be severe, since coastal states can now be assisted by port states. Furthermore, it amounts to an increase in 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 clamour by coastal states for extensive zones of enforcement jurisdiction.[194]

It is usual to come across accolades 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."[195] 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 contactual 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.[196]

While the merits of port state control are acknowledged, they should not prevent us from noticing its pitfalls, a number of which have also been earlier addressed. Indeed it would be naive to place a premium on port state control as a complete panacea to oil

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[194]A.V. Lowe, supra note 4 at 642-643.

[195]Hare, supra note 1. Footnote omitted.

[196]Quoted in Clarke, supra note 148 at 204.

pollution problems. Port states are more likely to protect the environment by proceeding against polluters where there are incentives to so act. Therefore, except for pollution incidents that are directly harmful to it, a port state, as in the case of flag states, would be reluctant to take enforcement measures concerning pollution on the high seas or in another state's coastal waters.[197]

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 boycott of such states. 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.[198] 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."[199] The need for concerted efforts toward meeting this contingency cannot be overemphasized and until it is met, any attempt at imbuing the port state regime with a toga of phenomenal success would be misleading.

MARPOL 73/78 in recognizing the peculiar problems of developing states and the importance of reception facilities to the Convention's success, included the construction of reception facilities on the list of technical assistance projects that it urged developed

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[197]See Sonja Boehmer-Christiansen, "Marine Pollution Control: UNCLOS III as the Partial Codification of International Practice" (1981) 7 Envtl Pol'y & L. 71 at 73.

[198]R. M'Gonigle & A. Zacher, *Pollution, Politics and International Law* (Berkeley: University of California Press, 1979) at 338 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."

[199]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 (17 January 1989); MEPC 27/5/4 (15 February 1989); MEPC 32/10 (15 August 1991); "IMO, Tanker Owners Urge Increase in Facilities Accepting Oily Wastes" *International Environment Reporter*,(8March 1989), 130; "Tanker Orders Contribute to Pollution" International Environment Reporter (10 October 1990), 428.

countries to assist in financing.[200] A 1992 working group of the United Nations Conference on Environment and Development (UNCED) estimated that the cost of installing oily waste reception facilities in developing countries would be US$560 million for the period 1993-2000.[201] This is definitely beyond such countries' means as they are also saddled with other responsibilities and debt obligations. A centralised funding mechanism designed to offer such assistance would certainly help. As has been rightly pointed out,

> 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.[202]

In considering the importance to be placed on port state control, we should also 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."[203] Where there are no flag state measures to complement, the efforts of port states will therefore 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 the problems associated with it. Until we devise a system that dissuades flag states from indulging in activities inimical to the environment and encourages them to be actively involved in this fight to save the ocean environment and the resources, the battle may take longer than anticipated to win. That is, if it is won at all.

Thus, in the remaining part of this thesis, I will examine other areas that could be explored to fine-tune and strengthen the port state regime and to help induce flag state cooperation. In that connection, Part III below will briefly examine an alternative approach.

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[200]MARPOL 73/78 supra note 9 art. 17.

[201]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).

[202]Mitchell, supra note 8 at 208.

[203]See I.M. Sinan, "UNCTAD and Flags of Convenience" (1984) 18 J. World Trade L. 95 at 103.

The next chapter, that is, Chapter 4 will address the options of motivation and capacity-building, considered pivotal to the success of any international oil pollution regime.

IV. 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 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.

In this part, I propose to discuss the activities of the business community considered inimical to the international efforts and how a change in industry behaviour 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 is divided into two sections. Section A will discuss the role of the corporate sector while section B will examine the concept of corporate social responsibility and its applicability in international law.

A. Role of Oil and Shipping Companies

There is no doubt that the industry has made some positive contribution toward the control of oil pollution. For instance, they have 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.[204]

In general, however, the activities of the industry have been geared toward favouring 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

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[204]Mitchell, supra note 8 at 129.

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.[205] This is accentuated by the fact that oil and shipping interests have been quite visible in coordinating domestic-level lobbying to influence the positions that governments bring to international oil pollution negotiations.[206]

It is also this quest for safeguarding their economic interests at the expense of every other thing 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 spokesperson[207] 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 of international efforts, acting only when it would suit them. In their seminal work, *Pollution, Politics, and International Law*, R.M. M'Gonigle and M. 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

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[205]Ibid. at 110.

[206]Ibid. at 111.

[207]D. Abecassis, *Oil Pollution from Ships*, (London: Butterworths, 1978) at 42.

> rebut the more expensive proposal for the retrofitting of segregated ballast tanks.[208]

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."[209] This practice, as already shown in the earlier part of this chapter, is a significant contributor to environmental degradation through international oil transactions as well as the low level of compliance with international rules by some states.[210]

In view of the foregoing, I am 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 dust bins of history. It is with that in mind that I make a case in the next section for a binding international norm of corporate social responsibility.

B. Multinational Corporate Social Responsibility

The concept of social responsibility demands that the interest of the society be taken into consideration in a company's decisions, actions and operations.[211] This imports a duty to incorporate ethical values in business and to contribute positively toward the welfare of

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[208]Supra, note 198 at 262.

[209]Kasoulides, supra note 46 at 565.

[210]See Part II, section A above, especially pages 14, 19 - 21.

[211]Sita C. Amba-Rao, "Multinational Corporate Social Responsibility, Ethics, Intentions and Third World Governments: An Agenda for the 1990s" (1993) J. Bus. Ethics 553. at 554.

the general public.[212] It refers to "the assumption of responsibilities by companies, whether voluntarily or by virtue of statute, in discharging socioeconomic obligations in society."[213]

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.[214] It is thought that through profit maximization, a company makes its optimal contributions to the society's welfare.[215]

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 the society, it would be wrong to shy away from that simply because its function has been compartmentalized in to profit maximization only. When every member of the society does that which he or she is capable of doing, the society receives optimal benefits.[216] Moreover, times change and corporate law is not immune from the winds of change. The fact that companies were originally created for profit maximisation does not impeach the point that their role could be restructured to accommodate social objectives.

Furthermore, in the normal routine of business, the 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 the society. Schumacher notes that "large amounts of public funds have been and are being spent on what

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[212]Moses L. Pava, "The Talmudic Concept of "Beyond the Letter of the Law": Relevance to Business Social Responsibilities" (1996) 15 J. Bus. Ethics 941.

[213]Saleem Sheikh, *Corporate Social Responsibilities: Law and Practice*, (London: Cavendish Publishing, 1996) at 1.

[214]See generally, Milton Friedman, *Capitalism and Freedom*, 2nd ed (Chicago: University of Chicago Press, 1982) at 133 et seq..

[215]This is captured in Friedman's often quoted statement: 'The Social Responsibility of Business is to Increase Profits'. New York Times [Magazine] (13 September 1970) 32.

[216]Lee Preston and James Post, Private Management and Public Policy, (Englewood Cliffs, N.J.: Prentice Hall,1975) at 31.

is generally called the 'infrastructure', and the benefits go largely to private enterprise free of charge."[217]

The growing consensus at the moment appears to be that corporations, in their economic transactions, should act ethically and assume some responsibility for social welfare.[218] This is not only important but inevitable. If companies fail to assume non-profit obligations, people will be disenchanted with them[219] and the whole concept of free market economics upon which unrestricted profit maximization is founded.[220] Writing from the industry, Alfred Farha asserts:

> 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.[221]

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 U.S. and Canadian Chemical

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[217]E.F. Schumacher, *Small is Beautiful:Economics as if People Mattered*, (New York: Harper and Row, 1973) at 257.

[218]Amba-Rao, supra note 211.

[219]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" (1982) 1 J. Bus. Ethics 139 at 144.

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

[221]Alfred S. Farha, "The Corporate Conscience and Environmental Issues: Responsibility of the Multinational Corporation" (1989) 10 NW. J. Int'l L. & Bus. 379 at 381.

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 (Kiedomren) *Global Environmental Charter*.[222]

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."[223] Thus, notwithstanding the improvements they have brought to the attitude of multinational companies to the environment, "it is an enormous act of faith to trust almost entirely in self-regulation . . ."[224] A legal formulation to back the above policies is therefore necessary.[225]

At the moment, such a legal framework exists at the domestic level in some countries.[226] Because of the nature and structure of multinational corporations, it will be more appropriate to bring them under international control.[227] This is premised on the "economic power of multinationals, the international character of multinational corporations, and the

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[222]See Robert J. Fowler, "International Environmental Standards for Transnational Corporations" (1995) 25 Envtl L. 1 at 29.

[223]Ibid.

[224]Ibid.

[225]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 there was a legal requirement on them to do so, notwithatanding that 12 of the companies are members of the Chemical Manufacturers Association, which requires its members to subscribe tc 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" (1992) 22 Ga. J. Int'l & Comp. L. 701.

[226]At least 27 states in the U.S. including Connecticut, Indiana and Delaware, have legislation along those lines. See David Millon, "Redefining Corporate Law" (1991) 24 Ind. L. Rev. 223.

[227]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$234 billion. By 1992, the stock of FDI had gotten to US$ 2 trillion. Parent multinationals have generated some 170,000 foreign affiliates. Fowler, supra note 222.

limited ability of Third World countries to regulate the activities of multinationals."[228] This species of companies has grown beyond the control of most national governments and operates in a legal and moral vacuum where individualism is the cardinal rule.[229]

The situation is even worse in the case of developing countries who in their quest and scramble for the economic investments of multinational companies are too enfeebled to regulate or control multinationals. Indeed the companies are more likely to show a preference for those countries with lax regulations over multinational business activity.[230] 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. [231]

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 binding code of conduct for multinational corporations met with persistent failure until it was abandoned in 1993.[232] 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

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[228]Matthew Lippman, "Transnational Corporations and repressive regimes: The Ethical Dilemma" (1985) 15 Cal. W. Int'l L.J. 542 at 544. The writer argues for direct regulation of multinationals by international law.

[229]See Fowler, supra note 222 at 2

[230]Lippman, supra note 228 at 545.

[231]Ibid.

[232]Fowler, supra note 222 at 3.

> where damaged to rehabilitate it and should make efforts to develop and apply adequate technologies for this purpose.[233]

The danger with provisions couched in a language such as this is that they could represent mere moral adjurations honoured 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."[234] Writing about Europe, Dr Sheikh contends that, for corporate social responsibility to be effective in the 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.[235]

Instituting a clearly defined, binding norm of corporate social responsibility would go a long way toward ordering corporate behaviour that would facilitate company's compliance with international regulations and reduce the burden on the states to enforce them. It will also harmonize the different individual efforts of corporations to contribute to the welfare of the 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 interest of their corporations. On

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[233]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).

[234]Daniel J. Morissey, "Toward a New/Old Theory of Corporate Social Responsibility" (1989) 40 Syracuse L.Rev. 1005 at 1030.

[235]Sheikh, supra note 213 at 210.

the issue of enforceability, it raises the question of whether states who 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 be an international court for the environment.[236] Such court will be able to "judge" not merely "mediate"[237] 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 is premised on the point that states, themselves perpetrators of environmental abuses, cannot be entrusted with the sole responsibility and privilege of enforcing environmental rights.[238] 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 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 Organisations (NGOs) to actively involve themselves and undertake prosecutions on behalf of needy individuals.

For the effective discharge of its functions, the court will be granted powers to prevent and remedy damages 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.[239]

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

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[236]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.

[237]Amedeo Postiglione, "A More Efficient International Law on the Environment and Setting Up an International Court for the Environment within the United Nations" (1990) 20 Envtl L. 321 at 325.

[238]Eaton, supra note 236 at 305.

[239]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" (1993) 23 Ga. J. Int'l & Comp. L. 409 at 415 n27.

damages to an injured party, whether by default or by adjudication, should be enforceable in the domestic courts.[240] This 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 have been a huge waste and an empty rigmarole.

One other way of enforcing the decisions would be through the idea of international police force. Nevertheless, this faces 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,"[241] the idea is yet to gain the concurrence and acceptance of policy makers. With states' obsession with the notion of sovereignty, it does not appear that they would embrace the idea soon.

This leaves us with the option of considering the enforcement of the international norm of corporate social responsibility through the 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 unpalatable experiences in the few instances they have mustered enough courage to bring actions against the multinational corporations in the domestic courts of some states.[242] For instance, corporations are in the habit of employing

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[240]Eaton, supra note 236 at 305.

[241]Roger Fisher, *Improving Compliance With International Law*, (Charlottesville: University Press of Virginia, 1981) at 13.

[242]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 M.A. Ajomo & O. Adewale, eds., *Environmental Law and Sustainable Development in Nigeria*, (Lagos: N.I.A.L.S., 1994) 11 at 22. 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.

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.

Furthermore, 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 mouth 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 deferred to. 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."[243]

Because of this nature and structure of the international system, states choose treaty obligations which they assume.[244] 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 earlier seen, of FOC states who are in business basically because they have lower standards and fewer restrictions which are attractive to the corporate world.

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.[245]

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[243]Joseph Frankel, *International Relations in a Changing World*, **4th ed** (1988) at 23; quoted in Gary L. Scott and Craig L. Carr, "Multilateral Treaties and the Formation of Customary International Law" (1996) 25 Denv.J. Int'l L. & Pol'y 71.

[244]See G.M. Danilenko, *Law-Making in the International Community*, (Dordrecht: Martinus Nijhoff, 1993) at 67.

[245]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

The port state regime represents a step in that direction, but that does not foreclose a further consideration of a reduction in flag states' influence and, accordingly, sovereignty. Mitchell comments:

> Removing 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.[246]

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 of the international community conferred enormous rights and virtually no responsibility.[247] In the light of that understanding, sovereign rights of states have been encroached on when it is thought that the states involved have lost the ability or inclination to address actions for which they are ordinarily responsible, and which impact the global community. This informs the current scenario in international war crimes[248] and high seas fishing.

The *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[249] 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.

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effectively controlled."

[246]Mitchell, supra note 8 at 323.

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

[248]Ibid. at 442 - 443. Despite the objections of the U.S. 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 (18 July 1998) A4.

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

It "constitutes the global legal basis for permitting the inspecting state to bring a suspected vessel to a port for further investigation in case there are reasonable grounds for believing that it has committed a "serious violation," as defined in the agreement."[250]

The idea behind the above model should be extended to oil pollution matters as it would help deemphasize 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 favourably disposed toward introducing it to oil pollution control.

In the first place, states have greater incentive to protect their fish stocks since it is a revenue generator 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 inter-mixed, an example of which is the involvement of states in anti-pollution measures in their territorial sea to protect money yielding ventures including fishing.[251]

The wide powers conferred by the Agreement on non-flag states and reduced powers of flag states are quite feasible in fisheries, because in fishing, cessation of the violation would, in most cases, remove the need for 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.[252]

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[250]Hayashi, supra note 20 at 27.

[251]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 favouring port state enforcement. See Dempsey, supra note 42 at 499-502.

[252]See Lowe, supra note 4 at 642 n87.

Furthermore, high seas fishery is unique in the sense that it is an area where there has been a great deal of regional cooperation in place, including agreement on the enforcement of regionally adopted measures.[253] Moreover, it enjoys the full blessings of the Law of the Sea Convention which encourages and even obligates such cooperation and further strengthening, especially as touching the conservation and management of straddling stocks and highly migratory stocks. It was this interplay between regional and global agreements that provided an essential basis for the new enforcement mechanism.[254] As regional efforts intensify in maritime oil pollution matters, the prospects of a similar arrangement get 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 rising. 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 writes:

> 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.[255]

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[253]Hayashi, supra note 20 at 27.

[254]Ibid.

[255]Jutta, Brunnee, "A Conceptual Framework for an International Forests Convention: Customary Law and Emerging Principles" in Canadian Council on International Law, ed., *Global Forests and International Environmental Law*, (London: Kluwer, 1996) 41 at 55-56.

The bottom line is that the global community is getting progressively compacted[256] 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.[257] In such circumstances, it is clear that state sovereignty in its old fashion is now moribund.

It is therefore with great expectations that I propose the enforcement of the envisaged international norm of corporate social responsibility through the mechanism of domestic courts, by any person, in states where the ship's operations extend.

V. CONCLUSION

Compliance and enforcement of international regulations have, for some time now, presented a real obstacle to realizing the fruits of the often long deliberations from which international regulations emerge. International law has devised various means of surmounting the problems including the traditional approaches of flag, coastal, and port states' jurisdiction. These measures have been associated with a level of effectiveness, though some loopholes are equally noticeable. In recent times, modern mechanisms of influencing states' and corporate behaviour have also emerged. While they may not present a total panacea to these multifaceted problems, they are likely to contribute substantially to an improved state of affairs, especially if merged with the traditional methods.

Nevertheless, the problem of rational beings being inclined to act in their own interest remains a big challenge to improving behaviour. Thus states exhibit an inclination to cooperate, in a good number of cases, only with regimes that are in their favour. A system that takes this into consideration before the formulation of legal rules is therefore essential. The next chapter will address these issues with a view to locating a place for economic

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[256]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.

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

motivation and capacity - building in improving compliance with and enforcement of international oil pollution agreements.

CHAPTER 4

INTERNATIONAL RELATIONS AND ECONOMICS: SYNTHESIS OF THEORY AND PRACTICE

I. INTRODUCTION

It is believed that states generally comply with the provisions of international agreements to which they are parties.[1] But the existing state of affairs tends to present a somewhat different picture,[2] suggesting that implementation of and compliance with international accords are imperfect and often inadequate.[3] A recent study by the United States General Accounting Office, which focused on compliance of governments with international environmental treaties concludes that compliance has been low.[4] More particularly, in international oil pollution cases, it has been observed that the bane of the legal framework on ship-source oil pollution control has not been the content, but enforcement.[5]

International scholars and observers of international affairs appear to be united in the belief that "[w]hat is needed now is less the adoption of new instruments than more effective

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[1]Louis Henkin, *How nations Behave: Law and Foreign Policy*, 2nd ed.(New York:Columbia University Press, 1979). "In less dramatic contexts it is relevant that, despite the continuing temptations in daily intercourse, unnumbered principles of customary law and thousands of treaties are regularly observed." Ibid. at 48. See also Hans Morgenthau, *Politics among Nations: The Struggle for Power and Peace*, brief ed., revised by Kenneth Thompson (New York: McGraw-Hill Inc., 1993) at 267: "The great majority of rules of international law are generally observed by all nations."

[2]See Martti Koskeniemi, "Breach of Treaty or Non-Compliance?: Reflections on the Enforcement of the Montreal Protocol" (1992) 3 Yb. Int'l Env. L. 123. "States often seem to ignore not only their political pledges but also the treaties to which they are parties."

[3]Harold K. Jacobson and Edith Brown Weiss, "Strenghtening Compliance with International Environmental Accords" in Paul F. Diehl ed., *The Politics of Global Governance*, (Boulder, Colorado: Lynne Rienner Publishers, Inc., 1997) 305 at 306-307.

[4]U.S. General Accounting Office, *International Environment: International Agreements Are Not Well - Monitored*, GAO/RCED 92-43 (Washington DC: GPO, 1992).

[5]The Donaldson Inquiry into the Prevention of Pollution from Merchant Shipping, constituted by the Government of the United Kingdom, in its report "was of the opinion that the measures currently in force would greatly reduce marine pollution if correctly implemented." Mark Wallace, ' "Safer ships, cleaner seas": The report of the Donaldson Inquiry into the prevention of pollution from merchant shipping.' [1995] LMCLQ 404 at 406 - 407.

implementation of existing ones."[6] The problems of implementation, compliance and enforcement are linked to the extant system which needs to take into cognizance some relevant matters that will facilitate treaty implementation and compliance.[7] This chapter examines modalities for improving the effectiveness of international agreements relating to marine environmental protection and intentional oil pollution by ships. This encompasses not only how parties to the treaties can, and could be made to, work toward improved compliance, but also considers ways of enhancing states' assent to these treaties.

This chapter's objectives will be realized by drawing from the thinking of scholars in other disciplines, notably international relations and economics. The object of the excursion to international relations is to examine the impact of national interest on international behaviour. Discussions on international relations will however, be restricted to the postulations of the realist school and regime theory. Thereafter, some of the economic issues raised by international oil trade and shipping will be discussed. This will lay the foundation for the argument for capacity building for developing countries which would facilitate bringing them into compliance with, and helping them secure the implementation of, international law. The discussion seeks to show that international oil pollution control will assume a brighter posture with an understanding of the position of developing countries and the incorporation of their interests in policy formulation in this area.

The chapter will be divided into two major parts. The first part will examine international relations theories especially in relation to ship-source oil pollution control. In the second part, I will discuss the economic dimension. In particular, I will examine the relevance of a fee paying arrangement for the use of the oceans, basically as a source of revenue for the execution of projects connected to the preservation and protection of the marine environment. I will also examine ideas for an international financial mechanism as

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[6]Koskenniemi, supra note 2 at 123.

[7]See Steven M. Anderson, "Reforming International Institutions to Improve Global Environmental Relations, Agreement, and Treaty Enforcement" (1995) 18 Hastings Int'l & Comp. L. Rev. 771. "Today the great problems burdening international environmental law and its institutions revolve around deficiencies relating to ratification, implementation, coordination, enforcement, and monitoring" of international agreements. Ibid. at 772.

an appropriate means of influencing states' behaviour in this area. The Global Environment Facility, currently being administered by three international institutions will be discussed.

Thereafter, general conclusions will be drawn, essentially suggesting that an effective way of securing the crucial cooperation of developing countries in the maritime oil pollution crusade is the introduction of a measure of economic motivation for such cooperative ventures.

II. INTERNATIONAL RELATIONS

A. Realism

Realism, which developed after the second world war,[8] thrives on a rational-actor conception of compliance premised on a Machiavellian perspective[9]: "A wise ruler, therefore, cannot and should not keep his word when such an observance of faith would be to his disadvantage and when the reasons which made him promise are removed."[10] The realist's position therefore, is that states will only keep their bargains when it is in their interest.[11] Thus, notwithstanding their domestic colours, everything a state does in the international arena revolves around the promotion of its own national interest.[12]

A major contention of the realist school is that the structure of the international sphere is "anarchic" and that international behaviour is principally a function of the pursuit

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[8]Ronald Mitchell, *Intentional Oil Pollution: Environmental Policy and Treaty Compliance*, (Cambridge Mass.: MIT Press, 1994) at 28.

[9]Abram Chayes and Antonia Handler Chayes, *The New Sovereignty: Compliance with Regulatory Agreements*, (Cambridge, Mass.: Harvard University Press, 1995) at 3.

[10]Niccolo Machiavelli, *The Prince*, Peter Bondanella ed., (Oxford: Oxford University Press, 1984) at 58-59. See also Abram Chayes and Antonia Handler Chayes, "Compliance without Enforcement: State Behaviour Under Regulatory Regimes" (1991) 7 Negotiation J. 311. "The still prevailing realist assumption is that a nation will honor its treaties only so long as they are convenient and, if it has the power, will disregard them when they no longer serve immediate needs." Ibid. at 312.

[11]Hans J. Morgenthau, *Politics among Nations: The Struggle for Power and Peace*, 6th ed (New York: Alfred A. Knopf, 1985) at 593, citing Sir Winston Churchill's speech to the British House of Commons on January 23, 1948.

[12]Anne-Marie Slaughter Burley, "International Law and International Relations Theory: A Dual Agenda" (1993) 87 A.J.I.L. 205 at 207.

and use of power by states.[13] Under this proposition, international law does not influence states' behaviour, and if it does at all, the influence is infinitesimal. "Considerations of power rather than of law determine compliance" in every significant area.[14] Power of course, is a manifestation of self-interest.[15] International rules embodied in treaties serve essentially as instruments in the hands of (powerful) states to accomplish their objective. Identifying one of the major conclusions of this instrumentalist optic, Professor Keohane writes: "States use the rules of international law as instruments to attain their objectives."[16] Treaty-making therefore affords a good opportunity for states in the promotion of their national interests and the evasion of legal obligations that might be harmful to them.[17]

A look at a possible scenario in the maritime oil pollution area appears to lend credence to the realist postulations, both in the negotiation of treaties and in compliance with treaty provision.

One writer makes the following observation:

> A government, recognizing its interest in avoiding oil pollution of the sea, may desire a rule prohibiting it and may believe it to be in its interest to have general compliance with the rule. On the other hand, the same government might permit its ships, when on the far side of the globe, to flush their tanks in violation of the rule when it would save money to do so. The kind of direct self-interest here being considered would tend to cause compliance with the antipollution rule

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[13]Mitchell, supra note 8 at 28.

[14]Morgenthau, supra note 1 at 268.

[15]Michael Byers, "Custom, Power, and the Power of Rules" (1995) 17 Mich. J. Int'l L. 109. "[S]tates act in largely self-intersted ways, and one, if not the primary, way in which they promote their self-interest is the application of power." Ibid. at 112 - 113. Citation omitted.

[16]Robert Keohane, "International Relations and International Law: Two Optics" (1997) 38 Harv. Int'l L.J. 487.

[17]Morgenthau, supra note 1 at 259.

only when a country's ship was anchored off its own public beaches.[18]

The realist position does not seem so realistic however. It is unlikely that a state would conduct its international affairs solely on short-sighted self-interest. Such an attitude would cost the state a loss of reputation and honour which are vital in international dealings. Other states would find it increasingly difficult to enter into bargains, bilaterally or multilaterally, with a state which routinely disregards the principle of *pacta sunt servanda*, in order to protect its short term interests. Whatever a state had gained by such an approach to international relations might eventually turn into a loss in the long run thus amounting to a mere pyrrhic victory.[19]

Furthermore, the realist assertion that national interest is the ultimate motivator and that international law does not play any significant role in influencing state behaviour may not represent a correct picture of the dynamics of the international arrangement. Opponents argue that there are some fundamental, structural principles of international law which tend to constrain or qualify the self-interested application of power by states.[20]

A state's self-interest may propel it to act in a certain manner. At the same time, its ultimate action is taken after a consideration of the probable chain of events that such a move may trigger within the international community. Thus, under the principle of reciprocity, it would only act if it is willing to accord other states the right to act in a similar manner. On the other hand, it might refrain from a particular course of action, expecting that in the future other states will reciprocate its gesture.[21] The principle of reciprocity, albeit a general concept

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[18]Roger Fisher, *Improving Compliance With International Law*, (Charlottesville: University of Virginia Press, 1981) at 128.

[19]The kind of victory that propelled Pyrrhus to say: "One more such victory over the Romans, and we are utterly undone." Quoted in ibid at 347.

[20]Byers, supra note 15 at 179.

[21]See Stephen D.Krasner, "Structural Causes and regime consequences: regimes as intervening variables" in Stephen D. Krasner, ed., *International Regimes*, (Ithaca, NY: Cornell University Press, 1983) 1 at 3.

in social relations, "also finds expression in a structural principle of international law, whereby in the context of general customary international law any state claiming a *right* under that law has to accord all other states the same right."[22]

Contrary to realist conceptualizations therefore, the above principle of international law influences state behaviour, notwithstanding the state's self-interest and position of power. Byers puts it thus:

> Reciprocity also operates as an important constraint on the behaviour of states with respect to existing, emerging or potential rules of customary international law. For instance, when a state behaves in support of an emerging or potential rule of customary international law, as the United States did in 1945 when it issued the Truman Proclamation on the Continental Shelf, it does so knowing that any rule which results must apply and be available equally to all other states . . . . [W]ith respect to existing customary rules . . . support for a rule constitutes acceptance of its general applicability. A state will therefore only behave in support of an existing, emerging, or potential customary rule if it is prepared to accept the generalization of that rule.[23]

This is not restricted to customary international law. It is also evident in treaties. Thus, it has been observed that the behaviour of states in entering into treaties suggests that they believe that in so doing, they are accepting significant constraints on their freedom to act in the future and they expect to adhere to that over a broad range of circumstances.[24] That explains why the business of treaty negotiation and assent are not handled by states lightly nor are they assigned to junior officials of state.[25]

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[22]Byers, supra note 15 at 162.

[23]Ibid. at 162-3. Citations omitted.

[24]Chayes and Chayes, supra note 10 at 311.

[25]One point that revealed that European member countries of the 1982 Paris Memorandum on Port State Control, 26 January 1982 *reprinted in* 21 I.L.M.1 did not intend it to be binding on them was the fact that it was concluded among the maritime authorities of the various nations and not by the state governments. See George Kasoulides, *Port State Control and Jurisdiction*, (Dordrecht: Matinus Nijhoff Publishers, 1993) at 151.

International law not only constrains state behaviour, it also influences positive action by states. Ship-source oil pollution control presents a clear refutation of the mainstream realist contention that treaty rules do not induce compliance. At the Tanker Safety and Pollution Prevention (TSPP) Conference in 1978, discussions on segregated ballast tanks (SBTs) initially introduced in the 1973 *International Convention for the Prevention of Pollution from Ships*,[26] resurfaced.[27] During the Conference, the United States proposed that new and existing tankers over 20,000 tons should be built with SBTs as against the prevailing position which only applied to tankers over 70,000 tons, but most states considered SBT to be highly expensive and proposed crude oil washing (COW) "as an environmentally equivalent but cheaper alternative."[28] A compromise arrangement emerged in which new tankers over 20,000 tons were required to instal both SBT and COW, while existing tankers over 40,000 tons had the option of installing either SBT or COW.[29]

Data from a study on tanker fleet at the end of 1991 show that compliance with the above equipment requirements has been impressive. Some 94 percent of tankers built in 1979 or earlier have installed SBT or COW, 98 percent of those built between 1980 and 1982 have installed SBT, and 98 percent of those built after June 1982 have installed both.[30] This almost universal adoption has been linked to the influence of MARPOL: "The evidence presented unequivocally demonstrates that governments and private corporations have undertaken a

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[26]I.M.C.O. Doc. MP/CONF/WP.35 (2 November 1973) *reprinted in* 12 I.L.M. 1319, Annex 1, Regulation 13.

[27]See generally R. M'Gonigle and M. Zacher, *Pollution, Politics and International Law*, (Berkeley: University of California Press, 1979) at 107 - 142.

[28]Mitchell, supra note 8 at 259. Citation omitted.

[29]See *Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships*, I.M.C.O. Doc. TSPP/CONF/11 (17 February 1978) *reprinted in* 17 I.L.M. 546, Annex 1, Regulation 13. It replaced the existing Annex 13 in the 1973 Convention and both conventions are jointly referred to as MARPOL 73/78 in this place. New tankers are those for which building contracts were drawn up by 1 June 1979, whose keels were laid after 1 January 1980, or whose delivery occured after 1 June 1982. See Protocol, ibid. Annex 1, Regulation 1, para. 26.

[30]Mitchell, supra note 8 at 269-70.

variety of actions involving compliance, monitoring, and enforcement that they would not have taken in the absence of relevant treaty provisions."[31]

The above level of compliance was achieved notwithstanding that the SBT requirement imposed huge expenses on tanker owners and was of no economic benefit to them. Moreover it happened at a period of decreasing oil prices which increased pressures to cut costs. The fact that the majority of tankers exempt from the requirement have not installed SBT also tends to accentuate the point that only the treaty rules could have induced the compliance.[32] It is also remarkable to note that though many tankers were registered in states that initially opposed the introduction of the SBT requirements and had strong incentives not to comply, all those required to comply did so.[33]

The realist theory therefore, fails to adequately explain the behaviour of states. It may be pointed out however, that when it relates to assenting to a treaty, the theory may well prove valuable. Thus while states realize the value of reputation and recognize the "normativity" of international law and conduct themselves accordingly, causing them to do or refrain from doing certain things, a state is unlikely to assume obligations under a treaty when it will be inimical to its interests. That apparently explains for instance, the present position of the 1986 *United Nations Convention on the Conditions for Registration of Ships*.[34] The Convention was concluded as a response to the practice of "flags of convenience" shipping through which some states allowed substandard and inadequately manned ships to put to sea, thus endangering the marine environment.[35] Over ten years after

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[31]Ibid. at 299.

[32]Ibid.

[33]Ibid. at 299 - 300.

[34]*Reprinted in* 26 I.L.M. 1229 (1987).

[35]See S.G. Sturmey "The United Nations Convention on Conditions for Registration of Ships" [1987] LMCLQ 97.

its conclusion, no major maritime power or flags of convenience state has become a party to it, creating the impression that the treaty negatively impacts their interests.[36]

Furthermore, while short-term interest may not dictate a state's general conduct in international circles, it may resort to it where it is inevitable to act otherwise. While a state may lose face for reneging on its obligations, it is a well-known fact that a state may be in noncompliance by reason of incapacity[37] to abide by its treaty obligations. In such a case the issue of reputation does not arise and even if it does, a state will certainly express a preference for self-preservation at the expense of reputation. It stands to reason therefore that developing states by reason of their sagging economies, may be comfortable with noncompliance with international oil pollution agreements.[38]

B. Regime theory

Regime theoretic analysis proceeds from an apparent realization that there are difficulties in an attempt at explaining all relations among states solely from the angle of relative power and short-term calculations of self-interest.[39] A reevaluation of realist thinking became inevitable when some of its basic assumptions started faltering. Thus, while realists had argued that international institutions had no life of their own but existed as a corollary of dominant United States power, this argument could not be sustained in an era

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[36]See treaty status information on the convention, last updated as of 1 March 1997. <http://sedac.ciesin.org/prod/charlotte.> A similar scenario played itself out with respect to the 1982 Law of the Sea Convention. The United States strenuouosly objected to the Convention's provisions in Part XI dealing with deep-sea bed mining, arguing that the provisions were inimical to the interests of its corporate citizens, and as a result refused to ratify the Convention. The Convention was eventually modified in that regard through an "implementation Agreement" signed in 1994. See Bernard H. Oxman, "Law of the Sea Forum: The 1994 Agreement on Implementation of the Seabed Provisions of the Convention on the Law of the Sea" (1994) 88 A.J.I.L. 687.

[37]The subject of capacity will be revisited in Part II, section A, below.

[38]See Oran Young, "The effectiveness of International Institutions: Hard Cases and Critical Variables" in James N. Rosenau and Ernst-Otto Czempiel, eds., *Governance without Government: Order and Change in World Politics*, (Cambridge: Cambridge University Press, 1992) 160 at 183. The writer opines that lack of capacity inhibits or restricts abidance to treaty provisions, especially for developing countries.

[39]Byers, supra note 15 at 129.

that has marked the relative strength of institutions like the General Agreement on Tariffs and Trade and the International Monetary Fund at a period of perceived decline of American hegemony.[40] The impossible task before realists therefore, was to either deny that American power was declining or assert that these institutions "were suddenly tottering."[41]

A new line of thinking or a reformulated theory[42] was therefore born as a child of necessity in international relations theory and centres around regimes which are "sets of implicit or explicit principles, norms, rules, and decision-making procedures around which actors' expectations converge in a given area of international relations."[43]

Central to the regime theory is the fact that the international system is structured in such a way that makes for the existence of certain principles, explicit and implicit norms, and written and unwritten rules which actors in international relations hold in reverence and recognize as governing their behaviour.[44] Accordingly, regimes have a constraining force on the behaviour of states and regularizes the same.[45]

Regimes are also believed to enhance compliance with international agreements through a variety of ways including the reduction of incentives to cheat and promotion of the value of reputation.[46] Discussing the *raison d'etre* and value of regimes, Keohane asserts:

> They enhance the likelihood of cooperation by reducing the costs of making transactions that are consistent with the principles of the regime. They create the conditions for

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[40]Burley, supra note 12 at 218.

[41]Ibid.

[42]Robert Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy,* (Princeton, NJ: Princeton University Press, 1984). "Realism should not be discarded, since its insights are fundamental to an understanding of world politics . . . but it does need to be reformulated to reflect the impact of information-providing institutions on state behaviour, even when rational egoism persists." Ibid. at 245 -246.

[43]Krasner, supra note 21 at 2.

[44]Donald J. Puchala and Raymond F. Hopkins, "International regimes: lessons from inductive analysis" in Krasner, ed., supra note 21, 61 at 86.

[45]Ibid. at 62.

[46]Burley, supra note 11 at 219.

> orderly multilateral negotiations, legitimate and delegitimate different types of state action, and facilitate linkages among issues within regimes and between regimes. They increase the symmetry and improve the quality of the information that governments receive. By clustering issues together in the same forums over a long period of time, they help to bring governments into continuing interaction with one another, reducing incentives to cheat and enhancing the value of reputation. By establishing legitimate standards of behavior for states to follow and by providing ways to monitor compliance, they create the basis for decentralized enforcement founded on the principle of reciprocity.[47]

Regime theory appears fascinating and interesting, but it has not escaped criticisms. To the critics, regimes are a formula for obfuscating and obscuring the power relationships that are not only, in their assumption, the ultimate, but also the proximate cause of behaviour in the international sphere.[48] According to Susan Strange, "[a]ll those international arrangements dignified by the label regime are only too easily upset when either the balance of bargaining power or the perception of national interest (or both together) change among those who negotiate them."[49]

Regime theory has metamorphosed into neo-liberal institutionalism,[50] which is a more general rubric.[51] Keohane perceives the scope of institutions as larger than that of regimes and incorporates all "persistent and connected sets of rules (formal and informal) that prescribe behavioural roles, constrain activity and shape expectations."[52] Institutions,

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[47]Keohane, supra note 42 at 244-245.

[48]See Krasner, supra note 21 at 7.

[49]Susan Strange, "Cave! Hic Dragones: A Critique of Regime Analysis" in Paul F. Diehl ed., *The Politics of Global Governance*, (Boulder, Colorado: Lynne Rienner Publishers, 1997) 41 at 48.

[50]Byers, supra note 15 at 132.

[51]Burley, supra note 12 at 206.

[52]Robert Keohane, "Neo-Liberal Institutionalism" in *International Institutions and State Power*, (Boulder: Westview Press, 1989) at 3.

according to Keohane, can be divided into three groups, based on their levels of organization or formality. The first category encompasses "formal intergovernmental or cross-national nongovernmental organizations" while the second group contains international regimes defined as "institutions with explicit rules, agreed upon by governments, that pertain to particular sets of issues in international relations." The third class incorporates conventions defined as "informal institutions, with implicit rules and understandings, that shape the expectations of actors."[53]

To some scholars it is an incontrovertible fact that institutions influence states' behaviour, even independent of power calculations and self-interest. Oran Young opines that institutions play a crucial role in enhancing compliance, arguing that while members of the international system enjoy a latitude in making choices concerning compliance, the actions of institutions such as the United Nations certainly feature in shaping the choices they make with regard to compliance.[54] A perplexing question however, has centred on whether this should be taken as an article of faith or demonstrated empirically. According to Young:

> the ultimate justification for devoting substantial time and energy to the study of regimes must be the proposition that we can account for a good deal of the variance in collective outcomes at the international level in terms of the impact of institutional arrangements. For the most part, however, this proposition is relegated to the realm of assumptions rather than brought to the forefront as a focus for analytical and empirical investigation.[55]

As noted previously, ship design and construction standards represent one area in which it has been empirically and analytically shown that institutions induce or enhance compliance with international law.[56] Regime theory, in particular, and institutionalism in general,

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[53]Ibid. at 3-4.

[54]Oran Young, "Compliance in the International System" in Richard Falk et al. eds., *International Law: A Contemporary Perspective*, (Boulder: Westview Press, 1985) 99 at 106.

[55]Oran Young, *International Cooperation: Building Regimes for Natural Resources and the Environment*, (Ithaca: Cornell University Press,1989) at 206-207.

[56]See Section A above, pages 123-125.

therefore appear to more clearly represent what obtains in international politics, and on that score seems to be steps ahead of the realist school.

It is pertinent to point out, however, that both theories seem to share some common ground when it comes to the notion of self - interest. To some institutionalists, self-interest is pivotal to the existence of regimes. States are believed to build those structures essentially as a means of protecting their interests.[57] This is elaborately conveyed by Stein who posits that:

> the same forces of autonomously calculated self-interest that lie at the root of the anarchic international system also lay the foundation for international regimes as a form of international order. . . . [T]here are times when rational self-interested calculation leads actors to abandon independent decision making in favor of joint decision making.[58]

To these institutionalists therefore, both notions, that is, self-interest and institutions, are compatible and jointly influence international behaviour. This is one of its major points of divergence with the realist school since unlike the latter theory which harbours a disdain for international law and challenges international lawyers to establish the relevance of international law,[59] institutionalism shares some similarities with international law in that it recognizes the place of principles and rules in shaping behaviour.[60] Thus, one writer was prompted to comment: "The similarities between institutionalism and international law are apparent. . . ."[61]

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[57]See Krasner, supra note 21 at 11. "The prevailing explanation for the existence of international regimes is egoistic self-interest."

[58]Arthur Stein, "Coordination and colloboration:regimes in an anarchic world" in Krasner, ed., *International Regimes,* supra note 21, 115 at 132.

[59]See Burley, supra note 12 at 208.

[60]Chayes and Chayes, *The New Sovereignty,* supra note 9 at 303 n3. "Regime theorists find it hard to say the "L-word," but principles, norms, rules, and decision-making procedures" are what international law is all about."

[61]Michael Byers, 'Response: Taking the Law out of International Law: A Critique of the Iterative Perspective" (1997) 38 Harv. Int'l L. J. 201. Burley, supra note 12 at 220 sees the work of the early regime theorists as a reinvention of "international law in rational choice language."

A close look at one institutional arrangement utilized in oil pollution control matters (namely reporting requirements) brings out clearly the role of such arrangements in influencing states' conduct and the place of self-interest in the whole scheme. The requirement to report has been seen as one way of improving treaty effectiveness and at the beginning of the decade, the Siena Forum on International Law of the Environment suggested that the problem of non-compliance should be addressed through the use of "reporting requirements, special non-compliance procedures and measures, liability provisions and dispute settlement procedures."[62]

The importance of reporting to the effectiveness of an international regulatory arrangement cannot be overemphasized. "Reporting on compliance, enforcement, and other activities related to environmental treaties is often described as essential to treaty success."[63] It is believed that reporting requirements provide a vehicle for increasing transparency[64] and transparency is viewed as the key to compliance.[65] It provides an opportunity to identify states who are or are not living up to their obligations, evaluating the rate of compliance, and possibly improving the same. Articulating the virtues of reporting, Abram Chayes and Antonia Handler Chayes assert:

> The stated purpose of reporting is to generate information about the policies and activities of the parties to the treaty that involve treaty compliance and regime efficacy. Thus the transparency of the regime as a whole is crucially dependent on the nature and scope of the reporting requirements and the quality of the response to them. More broadly, reporting is the point at which the national bureaucracies are first engaged by the treaty regime. It is there that domestic officialdom begins to translate the treaty into the daily work of administration and to define the level of commitment to it. Reporting thus

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[62]Conclusions of the Siena Forum on International Law of the Environment, Siena, Italy, 21 April 1990, para. 12 (a); text in (1990) 1 YbIEL. 704.

[63]Mitchell, supra note 8 at 123.

[64]See Oran Young, supra note 38 at 176 - 178.

[65]Chayes and Chayes, *The New Sovereignty*, supra note 9 at 154.

> can be a kind of early warning system for substantive compliance problems. It identifies parties that have deficits in domestic capability and similar barriers to compliance. It turns up problems of ambiguity and interpretation.[66]

Reporting requirements have come to characterize a number of international regulatory regimes including those on environmental protection.[67] International agreements on intentional oil pollution have all incorporated some form of reporting requirements.[68] The 1954 *International Convention for the Prevention of Pollution of the Sea by Oil*[69] required states to provide periodic information to the treaty secretariat on the installation of adequate reception facilities.[70] The requirement of periodic reporting was deleted at the 1962 conference which passed a non-binding resolution mandating the newly established Intergovernmental Maritime Consultative Organization (IMCO) to obtain and publish information annually on the progress being made in providing tanker reception facilities.[71] However, the 1954 self-reporting requirement on available reception facilities was reintroduced by the 1973 MARPOL.[72]

Reporting requirements have also involved external reporting by which other states report on the non-availability of reception facilities in other countries. This was introduced in oil pollution control at the 1962 conference following a U.S. proposal in that regard, with the object of shaming "nations into providing facilities by establishing a system for tanker captains, through their governments to inform IMCO and other governments of absent or

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[66]Ibid. at 154 - 155.

[67]Chayes and Chayes, supra note 10 at 323.

[68]Mitchell, supra note 8 at 123.

[69]327 U.N.T.S. 3 [hereinafter OILPOL].

[70]Ibid. art. VIII.

[71]Resolution 6, IMCO, *Resolutions Adopted by the International Conference on Prevention of Pollution of the Sea by Oil,* 1962 (London: IMCO, 1962).

[72]MARPOL, supra note 26 art 11 (d).

inadequate facilities" in those states that were in non-compliance.[73] This was replicated in MARPOL.[74]

States are not only required to report on the availability or otherwise of reception facilities for oily wastes, there is also a requirement on flag states to report on actions taken with respect to alleged violations referred to them by coastal states. [75] Reports, if any, produced in connection with treaty compliance and enforcement were also to be provided by all states.[76] Under MARPOL parties are also required to provide an annual statistical report, in a form standardized by the international maritime organization (IMO)[77], concerning penalties actually imposed for infringement of the Convention.[78]

Reporting requirements have also featured in the regional arrangement for marine environmental protection and oil pollution control in Europe - the Paris Memorandum of Understanding. Under the Memorandum, member states are to inspect 25 percent of the foreign ships entering their ports and relay the information regarding these inspections to a centralized computer base, preferably, on a daily basis through direct computerized input.[79]

The level of compliance with the reporting requirements has not matched the above elaborate provisions. With the exception of the Paris MOU system which "has elicited regular, high-quality reporting by all the states involved,"[80] compliance with the requirements of the international agreements has been less than satisfactory. As a matter of

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[73]Mitchell, supra note 8 at 128.

[74]MARPOL, supra note 26 Annex 1, Regulation 12 (5).

[75]OILPOL, supra note 69 art. X(2) .

[76]Ibid. art. XII.

[77]Formerly the Intergovernmental Consultative Maritime Organization(IMCO).

[78]MARPOL, supra note 26 art. 11(1)(f).

[79]Paris MOU, supra note 25 section 4 and Annex 4(2).

[80]Mitchell, supra note 8 at 137.

fact, reports have consistently been fewer than twenty per year.[81] A Friends of the Earth Study in 1992 found that only six contracting parties had submitted reports for each year since the entry into force of MARPOL and more than thirty contracting parties had never submitted a report to IMO. The other contracting parties had submitted reports (which are often incomplete) for one or a few years only.[82]

At least one major reason for this is easily decipherable. The process of reporting - information gathering and dissemination - involves financial costs and adequately trained personnel which are hardly available in developing countries.[83] Accordingly, developing countries have not been living up to their obligations and this has affected the general performance record. Mitchell observes:

> A country's level of development dramatically influences the likelihood that it will report. As [the available evidence] show, developed states are far more likely both numerically and proportionally to report than are developing states. On both available reception facilities and enforcement, developed states have reported to IMO at rates two or three times those of developing states. The consistent disparity supports evidence from treaties on other issues that developing states often have inadequate financial and administrative capacities and domestic concern to report.[84]

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[81]Ibid.

[82]Gerard Peet, *Operational Discharges from Ships: An Evaluation of the Application of the Discharge Provisions of the Marpol Convention by Its Contracting Parties*, (Amsterdam: AIDEnvironment, 1992) at 5-6.

[83]This does not rule out other contributing factors such as IMO Secretariat's ineffectiveness in facilitating reporting. See Chayes and Chayes, *The New Sovereignty*, supra note 9 at 156 - 157.

[84]Mitchell, supra note 8 at 137. Citation omitted. The absence of domestic concern in developing countries is traceable to the sorry state of environmental and human rights groups who would serve as a watchdog and thus galvanise the governments into action. This, in turn, is symptomatic of the species of governance found in many parts of the developed world - a situation where governments are chronically intolerant of opposition. Environmental activists have had experiences ranging from the unpalatable to the fatal. See Paul Lewis, "Nigerian Rulers Back Hanging of 9 Members of Opposition" New York Times (9 November 1995) A9; Howard French, "Nigeria Executes Critic of Regime: Nations Protest" New York Times (11 November 1995) 1. These reports were in respect of a well-known environmental crusader, leader of the Ogoni people of Nigeria, and Nobel Prize nominee, Ken Saro-Wiwa, who was executed in 1995 sequel to a trial considered less than satisfactory by civilised standards. The focus here however, will not be on the problems occasioned by the absence of domestic concern, but the implication of the lack of financial and

This underscores the fact that states are unlikely to perform their treaty obligations when the capacity to do so is nonexistent.[85] In such a case a state would be prepared to place its national interest at the forefront regardless of whatever consequences that might entail. That many developing countries will continue to lag behind in compliance and enforcement is self-evident in the absence of support. "Relatively few states have bureaucratic establishments large and sophisticated enough to perform [the] functions" of information collection, processing and assimilation.[86] It is therefore imperative for treaty effectiveness and success to seriously consider extensive assistance to developing countries in these areas.

Recent trends in treaty-making indicate a realization of the fact that the process of getting states to implement treaty provisions may involve some form of assistance to facilate their action in the desired way. A salient example is what has come to be known as "non-compliance procedures." Non-compliance procedures (NCP) which are instituted as a mechanism for facilitating compliance in a manner that is essentially unconventional were first introduced as an aspect of the 1987 *Montreal Protocol on Substances that Deplete the Ozone Layer*[87] and has since been replicated in other international accords.[88]

The objective of this procedure is "to bring about full compliance."[89] It is more interested in how to achieve compliance than on being combative as is typical of a traditional

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administrative capacities in relation to implementation and compliance.

[85]Unfortunately, international policy makers seem not to have grasped this point yet. "The incidence of reporting requirements is so high that they seem to be included almost proforma in many agreements, with little concern about cost or implementing capacity." - Chayes and Chayes, *The New Sovereignty,* supra note 9 at 154.

[86]Chayes and Chayes, supra note 10 at 324.

[87]*Reprinted in* 26 I.L.M. 1550. The procedure was adopted at the Fourth Meeting of the Parties to the Montreal Protocol in November 1992. See Decision IV/5. Non-Compliance Procedure, in *Report of the Fourth Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer,* U.N. Doc. UNEP/OZL. Pro. 4/15 (25 November 1992).

[88]Gunther Handl, "Compliance Control Mechanisms and International Environmental Obligations" (1997) 5 Tul. J. Int'l & Comp. L. 29 at 32 - 33.

[89]Non-Compliance Procedure, supra note 87 para. 9.

dispute settlement procedure,[90] or in merely identifying the wrong done and punishing the party responsible. Professor Handl observes:

> Typically, the NCP aims less at branding a state party as "defaulting on its obligations," and at imposing sanctions or providing remedies for past infractions, than at helping the incriminated party come into compliance and protecting the future integrity of the regime against would-be defectors. The NCP is hence forward - rather than backward - looking. It embodies a quintessentially collective approach, rather than being steeped in the traditional paradigm of bilateralism - the relationship between the non-complying state and the directly injured other state or states.[91]

One of the NCP's strong points is that it realizes that non-compliance might be as much a function of a state's lack of capacity as it might be rooted in a deliberate or negligent disregard of its obligations.[92] Thus, a state would be more comfortable with this than with a procedure that castigates it and "takes it to court" for infractions without considering that it could well have desired to perform its obligations but was hamstrung in doing so as a result of some cogent reason. Moreover the knowledge that the cost of compliance is not placed entirely on its shoulders but that other states would be willing to assist is no doubt a refreshing tonic to any state and a strong attraction. In that connection therefore, NCP is a recipe for eliciting states' assent to treaties.

With respect to compliance, NCP can also facilitate it since it creates a congenial atmosphere and an environment that foster cooperation and respect, as opposed to belligerency and superior mentality. In such an atmosphere states can continue to cooperate in ensuring that the treaty regime works instead of abandoning negotiation (and resorting to

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[90]Handl, supra note 88 at 34. Traditional Dispute Settlement procedures are indeed not a realistic option, legally or politically, in dealing with some issues of non-implementation and non-compliance. Ibid. However, NCP does not preclude resort to formal dispute resolution.

[91]Ibid. at 33.

[92]See e.g. A. Handler Chayes et al., "Active Compliance Management in Environmental Treaties" in *Sustainable Development and International Law*, W. Lang ed., (1995) 75 at 80; cited in Handl, supra note 88 at 48.

less-friendly means) at the conclusion of the convention. As Chayes opines, "negotiation does not end with the conclusion of the treaty, but is a continuous aspect of living under the agreement."[93] NCP presents a veritable opportunity for that. It "epitomizes an effort at continuous consensus building which may reflect either the (relative) normative weakness of the obligation(s) in issue or the existence of different levels of normativity within the regime. In some respects, therefore, NCPs represent a process that straddles traditional law-making and law-enforcement functions."[94]

Without necessarily suggesting the replication of the *structure* of this institutional arrangement *per se*, I strongly recommend NCP's *spirit* of cooperation, non-belligerence and assistance to less capable parties for the international policy framework on the protection of the marine environment and prevention and control of operational discharges by ships.

Building from our observation so far that the notion of national interest is ubiquitous, regardless of what optics of international relations it is viewed from, I will proceed, in the next part, to discuss the prevailing economic issues. The idea is that what affects a state's economy obviously raises the issue of its national interest and accordingly will play a significant part in its attitude toward a particular international arrangement.

II. ECONOMIC ISSUES

Economists tend to perceive and portray environmental pollution as an economic problem:[95] "We are going to make little real progress in solving the problem of pollution until we recognize it for what, primarily, it is: an economic problem, which must be understood in economic terms."[96] In this part I will examine the contribution that the discipline of economics can make in solving the problems of pollution and inefficient

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[93]Chayes and Chayes, supra note 10 at 313.

[94]Gunther Handl, "Controlling Implementation of and Compliance with International Environmental Commitments: The Rocky Road from Rio" (1994) 5 Colo. J. Int'l Env. L. & Pol'y 301 at 329. Citation omitted.

[95]Larry E. Ruff, "The Economic Common Sense of Pollution" in Edwin Mansfield, ed., *Microeconomics: Selected Readings*, **3rd ed**(New York: Norton, 1979).

[96]Ibid.

management of the oceans. My intention however, is not to promote economic models as an alternative to the extant regulatory scheme in international law. It is my firm belief that the law as it currently stands can serve as a useful tool in oil pollution control. What is needed, as I have constantly and consistently emphasized, is for states to live up to their obligations under the law, and for states who are not yet parties to be brought into the arrangement. This may not be accomplished, however, unless states have an economic motivation to participate or to jettison whatever benefits they are enjoying under the present scheme in order to embrace the requirements of a new arrangement.

There is no doubt, however, that the subject still raises a number of important economic issues. To require states to be involved in the implementation of international laws in relation to pollution by oil tankers is to ask them to make an economic decision. This involves a choice between environmental protection and economic development. In the same vein to demand that states forego revenue generating practices which are, however, inimical to the environmental wellbeing of the rest of humanity raises the issue of opportunity cost. A price is being exacted by reason of that demand and the responsibility for its payment has to be attached to someone.

Furthermore, if the states that are involved in the foregoing scenario are not interested in paying the price, other states may be enjoined or compelled to do so. In these days of global economic downturn, it is an important economic decision that should not be lightly considered. In view of the foregoing, it is not my intention to undetake an economic analysis of the subject as an alternative to the current regulatory framework. Instead, my desire is to elicit the assistance of economics in fashioning a system that incorporates the cost of treaty implementation and compliance by states who are unable to do so. I propose to do this under two subsections namely, international economic cooperation and funding.

A. International Economic Cooperation

In virtually every consensual arrangement, which international conventional law clearly represents,[97] it is almost invariably the case that any rational being would hesitate to be involved in that which yields no benefit or which brings harm. States would therefore continue to have an incentive not to obey the rules of international law or to refrain from bringing themselves under the control of any such arrangement. The typical argument of developing countries in a number of environmental issues of international significance is that they would not be willing to endanger their economies for the common good by refraining from activities which other nations embraced to develop their own economies.[98] Narrowing it down to oil pollution by tankers, it is difficult to expect developing countries to be at the forefront of installing facilities that would promote cleaner seas as well as undertake inspection of ships to ensure maritime safety and environmental protection, totally at their own expense or to their detriment. They would rather prefer to channel such funds toward their own developmental projects and revisit the issue of environmental protection decades later, after they have stabilised their economic position. This does not call for any condemnation though, as a similar posture had been adopted by the developed world at one time or the other. A clear example is the reaction that greeted the initial provision on reception facilities in the 1954 OILPOL Convention, as captured in the following observation:

> Even with the very weak language finally adopted, the United States reserved on it during ratification because the government did not want to assume "any financial responsibility" for building and operating such facilities. The British even proposed deleting the reception facility requirement altogether because its inclusion was the basis of threats by several states not to sign.[99]

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[97]Case of the S.S. "Lotus" (France v. Turkey), 1927 P.C.I.J. (Ser.A) No. 10 at 25.

[98]Jay D. Hair, **"Foreword"** in the Editors of the Harvard Law Review, *Trends in International Environmental Law*, (American Bar Association, 1992)1 at 3.

[99]Mitchell, supra note 8 at 191. See also 12 U.S.T. 3024 (1961), cited in Charles Okidi, *Regional Control of Ocean Pollution:Legal and Institutional Problems and Prospects*, (Alphen aan den Rijn, The

It is submitted that the same argument is available to developing countries today.

Another example can be found in the case of flags of convenience states. The current international legal posture is to make open registries less attractive.[100] This will invariably rob flags of convenience states of much needed revenue. To expect them to join in such efforts is to urge them to self-destruct. They would insist on utilizing the practice as a tool for economic development. An acceptable regime should therefore embrace their concerns. The solution therefore is international economic cooperation between the countries of the Northern and Southern hemisphere. Developed countries should asume the responsibility for assisting their developing counterparts technically and financially in order to elicit their cooperation in the crusade against pollution from oil tankers. It would be naive however, to assume that developed states would jump at this option without any justification for it. Nevertheless, a good basis for the suggestion exists.

The first flank of that basis is equity. International oil trade is not a new development but one which has been a longstanding catalyst for the industrialization of the countries of the Northern hemisphere.[101] The oil and shipping industries are also controlled by the nationals of these countries who invariably contribute to their national economic development. However, the price the whole world has had to pay for such development is the degradation of the marine and coastal environment and detruction of the resources of the commons. Interstingly, the North is currently at the forefront of the crusade to stem the environmental impact of the international oil business.

The crusade is not necessarly bad. The pertinent question is whether the battle should be pursued and won at the expense of the economic development of the countries on the other side of the world divide - the South. It hovers around the equity of the North which

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Netherlands: Sijthoff and Noordhoff, 1978) at 33; Sonia Zaide Pritchard, *Oil Pollution Control.* (London: Croom Helm, 1987) at 128.

[100]H. Edwin Anderson, III, "The Nationality of Ships and Flags of Convenience: Economics, Politics, and Alternatives" (1996) 21 Tul. Mar. L.J. 139 at 168.

[101]See Bill Shaw et al., "The Global Environment: A Proposal to Eliminate Marine Oil Pollution" (1987) 27 Nat. Resources J. 157.

fuelled its economies with oil, dictating to the South not only to refrain from doing that which the North has done and benefited from, but also at the cost of their economic stagnation. The interest of the South at this stage is to get to the level of development which the North has attained. This may necessarily imply a sidetracking of environmental concerns, including the international measures on oil pollution from ships. If the North insists that the environment should be accorded priority or that Southern economic development should embrace environmental concerns - a view which the present writer also shares - equity demands that the North should bear much of the expense of that requirement. As one commentator has rightly pointed out:

> the debate on the environment has been turned around to try and restrain developing countries, in the name of the common good, from now doing all those things which the developed countries did with such abandon in the past in their efforts to attain their present levels of production and consumption. It is as if a referee has suddenly appeared and decided that all countries should be deemed to be starting from the scratch in the race to save the environment, no allowance being made for the head start that some countries had enjoyed and the distance they had already covered . . . The logic therefore . . . is that there is hardly room for newcomers and that the poor must remain poor in order to save the planet![102]

It is also in consonance with equity that those who are responsible for a damage to an object undertake to remedy it. The other side of the coin is that it offends every notion of fairness to impose a duty on others to redress that which your efforts have caused. This coalesces with the "fault principle" which requires that those whose fault created the current state of the environment should bear the responsibility for the damage caused by their activities.[103] The fact that international oil trade has been undertaken for years mainly by, and

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[102]Nassau A. Adams, *Worlds Apart: The North-South Divide and the International System*, (Atlantic Highlands, N.J: Zed Books, 1993) at 204-205.

[103]See Phillip Saunders, "Development Cooperation and Compliance with International Environmental Law: Past Experience and Future Prospects" in Thomas J. Schoenbaum et al. eds., *Trilateral Perspectives in International Legal Issues: From Theory into Practice*, (Ardsley, N.Y.: Transnational Publishers, 1998) 89 at 97.

for, developed countries, means that the environmental fallouts are attributable to them.[104] It stands to reason therefore that they should be prepared to pay an extra cost for ameliorating the state of affairs created by them. It is a time honoured principle of our jurisprudence that the person that takes the benefit should also bear the burden.[105]

Further support for the proposition that the developed cuntries should bear the cost of measures expected of developing countries in respect of marine pollution control, can be found in the right to compensation in law. Active participation in international measures to control or prevent pollution from oil tankers will no doubt affect the development aspirations of developing countries as they would be required to channel much needed funds to these measures and restrict or restructure their policies to align with the stipulations of international law. It follows, therefore, that developing countries "could make a plausible argument for the right to be compensated to the extent that they incur opportunity costs by foregoing development options to preserve environmental resources that are of special interest to the world at large."[106] The oceans and the resources in them are, doubtless, resources which are of special interest to the world community.

A major objection to the above points however is the apparent advantage it tends to confer on developing countries. Some observers contend that these countries simply raise these issues as a smokescreen or cloak to extort money from the developed countries for the performance of that which they ordinarily ought to be doing.[107] While the critics are entittled to their opinion, I must say that this is an unfair attack. In any case their contention is suspect as it represents a one-sided observation which questions the entitlement of developing countries to receive financial assistance without addressing the broader issue of the need for those who created a wrong to remedy same. It also fails to consider the fact that there is no

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[104]This is the case in many environmental issues. See Gunther Handl, "Environmental Protection and Development in Third World Countries: Common Destiny - Common Responsibility" (1988) 20 N.Y.U. J. Int'l L. & Pol. 603 at 627.

[105]This is encapsulated in Latin maxim "*qui sentit commodum sentire debet et onus et e contra.*"

[106]Handl, supra note 104 at 608.

[107]See Saunders, supra note 103 at 97.

moral authority behind any call on others to abstain from that which you wilfully participated in and gained from, without providing them with an alternative course of action.[108] It will do us greater good to build an international system founded on notions of equity and fairness.[109]

The question of capacity also makes it imperative for developed countries to assist their developing counterparts if we are to expect any meaningful progress in treaty implementation. It cannot be gainsaid that in the absence of capacity, there is practically little that a country can do vis-a-vis international treaty requirements. As has been shown in part 1 above, developed countries have not been alive to their responsibilities when it comes to installing reception facilities or meeting reporting requirements mainly because they lack the capacity. The failure of the richer nations to realize this and address them will continue to plague any effort aimed at promoting safer ships and cleaner seas.[110] Some scholars have observed as follows:

> In both developing and industrialized nations, any strategy designed to address global environmental concerns must at the same time confront the issues of poverty and economic development which often seem to make environmental protection a luxury that most nations cannot afford. Until recently, these tandem concerns have been compartmentalized and considered separately by agencies and institutions charged with one mission or the other. There is an emerging consensus that recognition of the global nature of the problems necessarily entails recognition of the global nature of the problems of poverty and development. The challenge

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[108]See the *Diversion of Water from the Meuse Case* (Netherlands v. Belgium) 1937 P.C.I.J. (Ser. A/B) No. 70 at 25, where the Permanent Court of International Justice, said: "[T]he Court finds it difficult to admit that the Netherlands are now warranted in complaining of the construction and operation of a lock of which they themselves set an example in the past."

[109]On the role of equity in international law, see Thomas M. Franck and Dennis M. Sughrue, "The International Role of Equity - as - Fairness" (1993) 81 Geo. L.J. 563.

[110]W.J. Davis, "The Need for a New Global Ocean Governance System" in J.M. Van Dyke et al. eds., *Freedom for the Seas in the 21st Century,* (Washington DC: Island Press, 1993) 147 at 166. The writer shares the view that one of the factors an effective ocean governance regime should incorporate is a massive allocation of resources (in a period of increasing scarcity) which will inevitably transfer wealth and therefore power, from the rich countries to the poor ones. He enters a caveat however, stressing that such transfer has never taken place peacefully in history.

> for international cooperative efforts is to put this recognition into practice.[111]

It is submitted that there can be no better way of "putting the recognition into practice" in international oil pollution control than for developed countries to assume binding obligations to assist the developing world and thereby facilitate their accession to and implementation of the numerous international accords on the issue.

Finally, developed countries should bear the cost of bringing developing countries into compliance and realization of the objectives of international agreements because it is in their mutual interest to do so. The case for the projection of mutual interest in global environmental issues has been emphatically and elegantly made in the following words:

> The international awakening to the needs of the global environment corresponds to the welcomed closing of a different era. As if by some cross-generational dynamic of survival, a night of ideological conflict is ending at the same moment that the threats to the global environment are becoming clear. The challenge is to move into a new day of international relations with the recognition that security is no longer defined by the standoff of mutually assured destruction. The future lies in securing mutual self-interest to sustain the planet's environmental integrity.[112]

No matter how vigorously marine environmental protection measures are pursued by some countries, their efforts will not amount to much in the absence of the cooperation of the majority of the countries of the globe. For instance, there is a consensus of opinion that it is difiicult to have a successful and effective oil pollution regime without the provision of adequate reception facilities in ports.[113] In the absence of these facilities, some tankers will

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[111]C. O'Neill and C. Sunstein, "Economics and the Environment: Trading Debt and Technology for Nature" (1992) 17 Colum. J. Envt'l L. 93 at 95. Citations omitted.

[112]Hair, supra note 98 at 4.

[113]In January 1996, the IMO Facilitation Committee adopted a circular that gives recognition to the fact that pollution of the marine environment from illegal discharges could be a function of the high cost or unavailability of reception facilities. The circular also points out that there are inadequate or totally lacking reception facilities in the ports of amny states who are parties to MARPOL, and further requests IMO member

continue to discharge oil into the seas thereby thwarting the efforts of those countries that have taken the laudable step of providing such facilities at their ports. Since oil is ambulatory, these discharges may eventually get to those countries, mainly in the developed world, who bear no responsibility for that. To protect their own interest therefore, there is the need to assist other countries install such facilities for the benefit of all.

Another example is presented by the case of flags of convenience shipping. As has been shown in chapter 3, flags of convenience shipping presents serious environmental problems. In order to safeguard their environment, some developed countries notably Canada, the United States, and the Paris MOU states have in place an effective port state control regime which is aimed at preventing the entrance of substandard ships into their territory. Since open registry states, the vast majority of which are in the developing world, are in the habit of registering some of these substandard ships, it is expected that this will make the practice less attractive as well as phase out the operation of these ships.

The logic behind the above proposition is however flawed since ships disallowed into the developed world can continue sailing and trading with other countries with less stringent requirements.[114] The problem which is assumed to have been transferred to such states could have a way of resurfacing. In the event of maritime casualty involving such ships, the effects would necessarily affect states even far removed from the accident since the polluting agent itself - oil - can spread quickly over a large area. Fish poisoned as a result can be eaten by anybody and at any place. Other marine resources and areas of international significance could also be damaged. Only recently the Global Environmental Facility identified some of those areas in West Africa, a region that is still prone to tanker pollution, especially from

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governments to submit information on financing mechanisms for the establishment and operation of these facilities, which would be useful in developingguidance on financing options. See Lindy S. Johnson, **Report**, "Vessel Source Pollution" (1996) 7 YbIEL 150 at 151 - 152.

[114]See Anderson, supra note 100. "If [a] vessel owner does not want to correct an infraction and is barred from a port state, it is likely that he may still trade amongst the developing countries which have fewer resources to conduct port state inspections." Ibid. at 168. Footnote omitted.

substandard vessels.[115] A real life incident that happened recently and captured in the "Lloyd's List African Weekly" depicts the picture accurately.[116] The Paper reports on a vessel (*MV Neamt)* which sailed to South Africa from West Africa taking 48 days:

> With no compass, the crew found their way to Cape Town by asking passing vessels on their VHF radios where they were. On the way, the vessel's engines caught fire seven times, as the pistons have no rings and blowbacks caused small fires throughout the voyage. Of her three generators, only one worked sporadically. The Chief Engineer reported that all the carbon dioxide fire-fighting cylinders were empty and the engine's cooling systems were completely broken down, as water supply pipes had rusted through from the inside. Inside the vessel is constantly dark because all the light bulbs have blown, and there are no spares. The vessel's crew have not been paid for four months, and there is no food on board. The refrigerators are not working . . .[117]

One can draw a parallel on this issue with crime control. It has been argued in that area that the solution to criminal activities does not necessarily reside in building more jails or the rich taking extra precautionary measures for their protection, but in addressing the root of the problem, including "poverty, unemployment [and] lack of opportunity."[118] It is therefore preferable to nip the problem in the bud by dissuading open registries from registering such vessels in the first place.

It is expected that open registry states will respond kindly to any measure that offsets the loss of revenue accruing from the registration of such vessels, especially if it is one that gives their economies a better footing. After all, the current practice benefits open registries

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[115]See Clara Nwachukwu, "Nigeria to benefit from Global Environment Project" Post Express (11 February 1998) <http://www.postexpresswired.com>.

[116]May 9 1997.

[117]John Hare, "Port State Control: Strong Medicine to Cure a Sick Industry" (1997) 26 Ga.J. Int'l & Comp. L. 571 at 589 n60.

[118]Jim McNulty, "Attacking Crime's root causes pays biggest dividends" Edmonton Journal (17 May 1998) A15.

less as the overall receipts from ships registration has not been shown to impact their economies to a significant extent. Instead, the big corporations that engineer the practice are the major beneficiaries. As Anderson observes, "the overall effect of open registries on the economies of developing countries is negative. Developing countries are unable to compete effectively and cultivate their own shipping industries, and vessel owners take advantage of the cheaper labour available in those countries."[119] The implications of this are certainly enormous, from an economic standpoint. There is no doubt that "[t]he dependence for carriage of national trade in foreign flags involve[s] not only a drain on the foreign exchange resources of the country, but vitally affect[s] its ability to compete in trade freely with all nations of the world, the terms of trade and the costs of the country's imports and exports."[120] It is inconceivable that a state will insist on staying in such an economic state instead of cooperating in any other arrangement that has a better likelihood of favouring it. In the next subsection I will discuss other ways of raising funds for improving compliance with and implementation of international obligations.

B. Fundraising and Management

The subject of economics also comes into relevance in the area of raising funds for the facilitation of measures aimed at treaty effectiveness, as well as the management of such funds. With the application of sound economic principles on resource management, the

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[119]Anderson, supra note 100 at 161. Citations omitted. See also I.M. Sinan, "UNCTAD and Flags of Convenience" (1984) 18 J. World Trade L. 95 at 107.

[120]Nagendra Singh, *Maritime Flag and International Law*, (1978), cited in Anderson, ibid. at 161 n145. But see Gunnar K. Sletmo and Susanne Holste, "Shipping at the Competitive Advantage of Nations: The Role of International Ship Registers" (1993) 20 Mar. Pol'y Mgmt 243 at 244:

> The *New International Economic Order* was intended to integrate the economies of developing nations through transfers of technology and investments. UNCTAD included in its targets for the second development decade a 10% share in world shipping for developing countries by the end of the 1970s. For a while, it was believed that the achievement of this goal would be thwarted by the flagging out of OECD shipowners to the so-called flags of convenience (FOCs). Flagging out, however, accelerated the internationalization of shipping and combined the capital from OECD countries with labour from developing countries . . . . . Gradually, a transfer of product and marketing know-how took place facilitating the entry of entrepreneurs from developing countries . . . .

oceans and the resources embedded in them can be harnessed to provide the needed funds. One option that comes to mind is the idea of charging some fees for the use of facilities, otherwise known as a 'user pays' system. I intend to discuss that briefly in the following subsection.

(i) User Fees.

The oceans and the resources in them are enjoyed by a plethora of enterprises without any charge on them. A useful economic device for remedying this state of affairs is the "user pays" principle (UPP). The user pays principle, also known as resource pricing, is a well-known and well-accepted economic principle of long standing.[121] The UPP aims at ensuring that the polluter pays for the full cost of the resource and its related services.[122] "The idea behind [the UPP] is to internalize the economic costs of the external effects of production, consumption and disposal."[123]

In advocating a user fee for oceans use, the intention here is not to present it as a pollution control device which could be applied in place of the existing regulatory scheme, but to utilise it as a tool for revenue generation. A user pays system is particularly attractive because it is grounded in equity since "it is only fair that those who benefit from a good or service should pay for that benefit."[124] It is no wonder therefore that the idea of paying for the use of common resources is gaining in popularity. Dr Aukerman notes thus:

> In more recent years, fewer contend that all services and facilities should be free. The concern has narrowed to the types of services and facilities fees that should be levied for,

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[121]Ferenc Juhasz, "Guiding Principles of Sustainable Development in the Developing Countries" in E. Dommen ed., *Fair Principles for Sustainable Development*, (Aldershot: Edward Elgar Publishing, 1993) 33 at 39.

[122]Gonzalo Biggs, "Application of the Polluter-Pays Principle in Latin America" in Dommen ed., supra note 121, 93 at 107 n3.

[123]Kirit S. Parikh, "The Polluter Pays and User-Pays Principles for Developing Countries: Merits, Drawbacks and Feasibility" in Dommen ed., supra note 121 at 81.

[124]Edward Dommen, "The Four Principles for Environmental Policy and Sustainable Development: an Overview" in Dommen ed., supra note 121, 7 at 31.

> and how much can be fairly charged. The guiding philosophy emerging in the arena of public services is that users should pay more than non-users for the services or facilities that they enjoy.[125]

Users may be categorized into consumptive and amenity users. Consumptive users are further grouped under quantity and quality users. Amenity users may be active or passive.[126]

Consumptive users may either consume a certain quantity of a resource or reduce its quality by using its absorption capacity for the disposal of waste and by-products, e.g., by discharging effluents into a river. Amenity users, on the other hand, do not physically consume nor do they necessarily pollute the resource. For instance, active amenity users of a lake may swim or sail in it while passive users may simply admire its beauty.[127]

The primary focus here is on the consumptive users of the oceans and the resources contained in them. They include, among others, commercial fishermen, offshore oil explorers, and companies involved in international trade who use it as an avenue for transportation. Considering the utility of the oceans to this group and the fact that their activities affect the oceans one way or the other, it is suggested that they be made to pay a "user fee," for their use of the oceans. The fee should be "on fish caught, oil extracted, minerals produced, goods and persons shipped, water desalinated, recreation enjoyed, waste dumped, pipelines laid, and installations built."[128] Noncommercial uses such as subsistence fishing and marine scientific research are however, not included.[129]

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[125]Robert Aukerman, *User Pays for Recreation Resources*, (Colorado: Colorado State University Research Services, 1987) at 31.

[126]Dommen, supra note 124 at 24.

[127]Ibid. at 24-25.

[128]Elisabeth Mann Borgese, *Ocean Governance and the United Nations*, 2nd revised edition (Halifax, N.S.: Centre for Foreign Policy Studies, 1996) at 90 - 91.

[129]Ibid.

It is amazing what could be realized from a levy on a small percentage of the profits of the enterprises utilizing the oceans without any charge at the moment. The following figures present a clearer picture:

> Two hundred billion pounds of fish are harvested annually. An ocean use tax of only one-half of 1 percent of the value would raise $250 million. The same token rate on offshore oil and gas would yield $375. There is another dirtier use of the oceans: as sewer . . . Officially reported ocean dumpings, almost certainly understated, amount to more than 200 million metric tons of sewage sludge, industrial waste, and dredged material yearly. Much of this takes place in traditionally territorial waters rather than on the high seas commons as such. But the repercussions are inevitably oceanwide. A tax of only $1 per ton would raise another $200 million . . . [There are also] many potential levies for several nonpolluting uses of common heritage assets, akin to fishing and oil. Consider royalties for the minerals that will someday be taken from the seabed and fees for the uses of space: Why should a needy global community give away to the first grabber, rather than sell or lease at auction, limited resources such as positions for geosynchronous and earth-orbiting satellites and frequencies on the radio spectrum? The current practice is a multibillion-dollar giveaway.[130]

The idea of a charge for the use of the oceans has been on the drawing board for years. In 1971, the International Ocean Institute proposed an ocean development tax, a proposal which was favourably received.[131] Ambassador Castaneda of Mexico who later became that country's Foreign Minister saw it as "an extremely important, interesting suggestion, and perhaps a very promising proposal" and added that if "we act intelligently, it has a fair chance of becoming a reality in the near future."[132] Commenting also, Alan Beesley of Canada said: "Lawyers feel they must solve the problems they are facing now.

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[130]Christopher D. Stone, "Mending the Seas through a Global Commons Trust Fund" in Jon Van Dyke, et al. eds., supra note 110, 171 at 176.

[131]Borgese, supra note 128 at 90, 91.

[132]Quoted in Ibid. at 91.

We must . . . try to solve problems we are going to face in the future. And if we think of the problems of the future, this very radical and revolutionary idea of an ocean development tax is not nearly as futuristic and academic as it now might seem to be."[133] Silviu Brucan of Romania viewed it as "one of those new daring proposals that is bound to gain ground in international life because it is based on the progressive forces at work in world politics and rides the wave of the future."[134]

With all these favourable comments, one would have thought that an ocean tax would be in place by now. The truth is that it is not everybody that is favourably disposed toward it and this for a variety of reasons. Proposals by Greece and France in 1962 for an international tax on oil imports were rejected.[135] Some other attempts, not necessarily limited to ocean matters, have also met with cold reception and have outrightly failed.

In 1970, the then United States President, Richard Nixon, while proposing an extension of coastal state's administration with respect to their adjacent seabeds, from the 200-meter isobath to the edge of the continental slope, also attached a suggestion for a wealth redistribution fund as part of the package. The import was that from the wealth generated from the extension, a percentage would be set aside for the benefit of developing countries.[136] This was based on considerations of fairness and as a means of quietening objections by landlocked states.[137]

In 1989, the late Indian Prime Minister, Rajiv Gandhi proposed a Planet Protection Fund into which each nation would contribute one-one thousandth of its Gross National Product. The proceeds calculated at US $18 billion per year would be channeled toward helping developing countries adopt and develop environmentally friendly technologies at no

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[133]Ibid.

[134]Ibid.

[135]Pritchard, supra note 99 at 129.

[136]See Announcement by President Nixon on United States Ocean Policy, May 23, 1970 *reprinted in* 9 I.L.M. 807 at 808.

[137]Stone, supra note 130 at 179.

cost to them.[138] This proposal was considered at the Commonwealth Summit in Malaysia in October 1989 but was opposed by Britain. In its stead, a resolution was passed at the meeting calling for the strengthening of existing institutions.[139]

The fee proposed here and the fund in which the proceeds will go, however present a somewhat different arrangement from some of these failed efforts. It differs from Nixon's proposal in that "it would look to the commons both as the principal source and the principal beneficiary of funds."[140] Unlike Gandhi's proposal, it does not call for the taxing of states *per se* but only those *actually* using the oceans, whether private persons, corporate entities or public establishments. Besides, even though it considers the developing countries as a beneficiary, it is only in the sense of promoting the well being of the commons and the general marine environment. It is also different from the Greek and French proposals because it seeks to universalize the tax instead of restricting it to oil imports.In such a case, the oil importing states would not consider it a discriminatory measure but one that is applied to all for the benefit of all. Above all it does not suffer the fate of the others in the sense that they came before their time.

It will be foolhardy however to underestimate the degree of opposition that a user fee may elicit especially from countries that substantially benefit from the current practice of free use of ocean resources. The opposition that greeted a similar idea in respect of deep sea mining, especially from states that had the technology for mining polymetallic nodules of the deep sea-bed and who were not willing to share that with anyone nor utilize the resources for the common good, is still fresh in our memory.[141] While acknowledging the objections that trailed the failed "common heritage of humanity" idea leading to the adoption of an

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[138]See "Ghandi Calls for $18 Billion Fund to Fight Pollution of Atmosphere" L.A. Times (6 September 1989) pt. 1, at 8.

[139]See "Britain Stands Pat Against Sanctions" Chicago Tribune (22 October 1989) at 27.

[140]Stone, supra note 130 at 179.

[141]On that, see generally Said Mahmoudi, *The Law of Deep Sea-Bed Mining,* (Stockholm: Almquist & Wiksell International, 1987) at 119 et seq. See also Jonathan I. Charney, "U.S. Provisional Application of the 1994 Deep Seabed Agreement" (1994) 88 A.J.I.L. 705.

Implementation Agreement by the General Assembly on 29 July 1994,[142] it should be pointed out however, that we cannot continue to countenance such brazen display of egoism by some states.

It should also be noted that the common heritage idea in Part XI of the Law of the Sea Convention 1982 created a landmark in that it "sets a precedent in international law for the imposition of international taxation."[143] This fact has not been changed by the Agreement of 1994 - only the terms were varied - thus establishing the point that the world is not entirely averse to the idea of international taxation on the use of common resources (for the benefit of all especially less endowed countries). We can reflect that in more tangible and more refined terms now.

The value of the idea of an ocean use fee at the current state of the global economy cannot be overemphasized. With nations complaining of the scarcity of funds and the strain on existing institutions to meet the myriad of needs confronting the international society, it is imperative that we look at alternative sources of funding. According to Dr Borgese, if "sustainable development is not to remain a chimera, new sources of funding must be mobilized . . . One of the obvious candidates is international taxation."[144] Professor Stone's sentiments reverberates: "Why should a needy global community give away to the first grabber, rather than sell or lease at auction, limited resources . . . The current practice is a multibillion-dollar give away."[145] It is only wise that we use what we have to get what we want and to preserve what we have.

The user fee proposed here will be based on well defined terms including the tonnage and value of goods transported, or fish and other resources removed, and sewage and other materials dumped. The proceeds will be channeled into an international fund. The fund will

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[142]See Louis B. Sohn, "International Law Implications of the 1994 Agreement" (1994) 88 A.J.I.L. 696.

[143]Borgese, supra note 128 at 170.

[144]Ibid. at 90.

[145]Stone, supra note 130 at 176.

underwrite such things as building and improving ocean services such as navigational aids, scientific infrastructure, environmental monitoring, search and rescue, and disaster relief.[146] The fund would also finance such other measures as global environmental patrol force, with the capability to respond quickly to environmental disasters such as major oil spills, promoting improved enforcement of treaties, and drafting and lobbying for new international agreements.[147] It will also assume responsibility for underwriting marine research, support forceful monitoring of ocean dumping and generally combat pollution on the high seas.[148]

Furthermore, the fund should "also defer the costs of compliance with international regulations designed to remedy the ills of the commons."[149] In that connection, the fund will arrange development assistance to developing countries to enable them to contribute their quota toward the global efforts on safer ships and cleaner seas.It is important to stress at this juncture, however, that some of the activities of the Fund would overlap with measures being undertaken at the moment by other international institutions such as the International Maritime Organisation. This would not call for conflict as all that is needed is a harmonization of functions so that there would be no duplication of efforts in certain areas while some other areas remain untouched.

The user pays system has been successfully utilized as a management and economic tool in the domestic system with respect to some common resources that were initiially freely enjoyed, a striking example of which is the park.[150] There is no cogent reason why this success cannot be replicated in the international system. In the next section, I will discuss the nature and structure of mangement of the proceeds of the fee.

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[146]Borgese, supra note 128 at 91.

[147]Stone, supra note 130 at 175.

[148]Ibid.

[149]Ibid.

[150]Dr Aukerman conducted an extensive study on the success of this idea in some countries notably, the United States and Canada. The author also observes on its use in Western European countries and recommends it for New Zealand. See Aukerman, supra note 125.

(ii) Funds Mangement

One of the approaches to dealing with the situation of developing countries in relation to international environmental obligations is the creation of financial mechanisms.[151] Financial mechanisms are created "to oversee and facilitate the flow of funds related to implementation of an agreement."[152] Under the Montreal Protocol,[153] a financial mechanism, including a Multilateral Fund, was established to provide financial and technical cooperation, and to meet all agreed incremental costs of developing country parties.[154] Permanent Financial mechanisms also are provided for in the Biological Diversity[155] and Climate Change Conventions.[156] Under the latter two conventions, an institutional arrangement - the Global Environment Facility - is designated as an interim mechanism for the realization of the objectives of the conventions.[157] It is suggested that the assistance to developing countries for oil pollution control also take the form of a financial mechanism under the Global Environment Facility (GEF).

The Global Environment Facility came into being in 1991 originally as a pilot project by the World Bank.[158] Its operation is now governed by an arrangement involving the World Bank, the United Nations Environment Programme (UNEP) and the United Nations

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[151]Other methods include common, but differentiated, obligations and international cooperation measures concentrated on the areas of technology transfer, scientific research and development and access to benefits of biotechnology research. See Saunders, supra note 103 at 98 - 100.

[152]Ibid. at 99. Citation omitted.

[153]Supra note 87.

[154]See Jason M. Patlis, "The Multilateral Fund of the Montreal Protocol: A Prototype for Financial Mechanisms in Protecting the Environment" (1992) 25 Cornell Int'l L.J. 181.

[155]*United Nations Convention on Biological Diversity*, June 5 1992 *reprinted in* 31 I.L.M. 818.

[156]*United Nations Framework Convention on Climate Change*, May 5 1992, *reprinted in* 31 I.L.M. 849.

[157]Biological Diversity Convention, supra note 155 art. 39, and Climate Change Convention, supra note 156 art 21.

[158]Saunders, supra note 103 at 100 n45.

Development Programme (UNDP).[159] The tripartite structure was necessitated by the fact that "no single international agency command all the skills and experience needed to carry out [all GEF] functions."[160] Under this new arrangement, which was agreed on by representatives from 73 countries at a meeting in Geneva on March 14-16 1994, GEF was transformed, from an experimental program, into a permanent financial mechanism for the provision of grants and concessional funds to developing countries for projects and other activities that protect the global environment.[161]

The GEF has a mandate that covers four focal areas namely, climate change, biological diversity, international waters, and ozone depletion.[162] Its aim is to assist in the protection of the global environment and promote thereby environmentally sound and sustainable economic development.[163] With regard to the oceans and international river systems, the Facility is designed to establish programs aimed at the protection of both marine and freshwater environment, study and improve deballasting techniques, and clean up toxic waste pollution and upgrade contingency planning for oil spills, as a continuation of the efforts of the signatories to MARPOL 73/78.[164]

GEF is administered through a division of powers between the component institutions. In particular, the World Bank assumes responsibility for administration, trusteeship and primary implementation of investment projects. It also serves as a repository of the Global Environment Facility Trust Fund. The World Bank's headquarters at

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[159]Ibid.

[160]World Bank: *Documents Concerning the Establishment of the Global Environment Facility, reprinted in* 30 I.L.M. 1739 at 1741.

[161]Nicholas Van Praag, "Introductory Note" (1994) 31 I.L.M. 1273.

[162]See Instrument for the Establishment of the Restructured Global Environment Facility (Report of the GEF Participants Meeting, Geneva, Mar. 14-16, 1994), *reprinted in* 33 I.L.M. 1273.

[163]Ibid. Ist Preambular paragraph.

[164]Charles E. Dileva, *The World Bank and Environmental Law: A Post-Rio Summary of Activities,* (February 17 1994) cited in Anderson, supra note 7 at 784.

Washington DC houses the GEF Secretariat which is in charge of the administration of the Facility's day to day operations.[165]

Funding for GEF is provided by its member states in the form of grants and co-financing arrangements, though by the Articles of Agreement, GEF expresses a preference for grant funding.[166] GEF funds are primarily employed for incremental costs which are the difference between the 'domestic costs' a country would have to pay to achieve a global environmental benefit and the 'domestic benefit' it would receive as a result of that.[167] GEF therefore does not normally give financial support to projects which the host nations are capable of funding unless compelling reasons can be given to show that (1) the particular operation would not proceed without the involvement of GEF (2) the regular development aid financing mechanisms were not available, or (3) that GEF funding could provide for additional global environmental benefits which could not be achieved with existing national funding.[168]

Under the restructured GEF, funding is also expected from the private sector. It is submitted that a fee for the use of the facility provided by the oceans and the resources contained in them will be a useful way of sourcing funds and ensuring private sector participation in the global march for environmental security. The proceeds will be channelled into a special fund in GEF and be particularly designated for the projects listed above.

GEF is particularly attractive for this assignment because of its strong points which go beyond the problems militating against implementation and compliance with international law. First, GEF obviates the need for the creation of new institutions. It is obvious that members of the international community are not favourably disposed toward the creation of new institutions and bureaucracies, seen as money-guzzling and an encroachment on sovereign powers. Indeed this was the basis of extensive discussions that saw the

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[165]Anderson, supra note 7 at 785.

[166]World Bank, supra note 160 at 1750.

[167]Anderson, supra note 7 at 787.

[168]World Bank, supra note 160 at 1742-43.

restructuring of GEF: "The lengthy negotiations on restructuring illustrate the determination of governments to avoid the creation of a new bureaucracy."[169] Secondly, GEF is not just an existing institution, it is one equipped with the necessary experience and expertise to undertake the task without the need for additional restructuring or any other form of input. Thirdly, GEF is capable of discharging its responsibilities effectively without any major conflict with the notion of national sovereignty that has stood as an albatross to the proper implementation of international rules. Thus, without impinging on the sovereignty of states, it nevertheless presents an international oversight mechanism to monitor compliance with environmental treaties, which unfortunately, is one of the major pitfalls of the present structure.[170]

Fourth, it is an enforcement mechanism in itself since the World Bank is involved and states would want to keep their obligations under the facility in order not to foreclose opportunities for future assistance by the Bank, a near inevitability in today's world.[171] In other words, the concept of enlightened self-interest will at least compel states to discharge their obligations and act in an environmentally desirable way. Fifth, and perhaps most significantly GEF has a forward-loking posture. It has been observed that:

> the permanent GEF is intended to be more than a channel for project financing. It will also help support global environmental security by integrating the global environment into national development, encouraging the transfer of environmentally sound technology and knowledge, and, crucially, strengthening the capacity of developing countries to play their full part in protecting the global environment. Indeed, making the GEF permanent sends a modest but important signal about the international community's determination to follow a path to a more secure and

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[169]Praag, supra note 161 at 1273.

[170]Andrew W. Samaan, "Enforcement of International Environment Treaties: An Analysis" (1993) 5 Fordham Envtl. L. J. 261 at 267.

[171]Ibrahim Shihata, "Implementation, Enforcement, and Compliance with International Environmental Agreements - Practical Suggestions in Light of World Bank's Experience" (1996) 9 Geo. Int'l Envtl. L. Rev. 37 at 48 - 50.

> sustainable way of life on Earth. The revised institutional framework represents a change from old style assistance to new style cooperation.[172]

In furtherance of its objectives, GEF recently identified some projects in West Africa as areas of international significance and undertook to finance the preservation of their environmental quality.[173] It is therefore worth reemphasizing that the marine and coastal environment and resources will be better off with a system that comprises a fusion of legal rules backed by an ocean user fee, the proceeds from which is managed by the Global Environment Facility, among others, for building of capacity in developing countries to play their part in global environmental protection measures.

The responsibility for collecting the fees should also be assumed by the GEF. However, problems are envisaged because of the vastness of the oceans and the volume of business carried on. To ensure that those that would want to cheat on the system do not capitalize on this and avoid payment, GEF should align with the various interest groups that exist in the business. For instance, an arrangement could be entered into with the oil companies that operate shipping lines as well as the independent tanker owners through their groupings - such as the International Shippers Association (INSA) and the International Tanker Owners Association (INTERTANKO) - for the collection of the fees from their members at the same time that they pay their annual dues to their respective organisations. GEF should also enter into liaison with the major maritime states to explore the possibility of collecting the fees at the time of ship registration, renewal of licensing fees or payment of "tax". Leading port states visited by ships may also be utilised. Generally, GEF should consider setting up offices in a number of places outside its secretariat to facilitate revenue collection and some of its other activities.

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[172]Praag, supra note 161 at 1275.

[173]See Nwachukwu, supra note 115.

III. CONCLUSION

This chapter has proceeded on the conviction that treaty implementation and compliance have not taken the shape that we desire. Accordingly this militates against the effectiveness of international agreements in relation to oil pollution from ships. The notion of national interest is believed to be at the root of this state of affairs. Exploitation of this notion is therefore a *sine qua non* for the resolution of the problem.

The thesis here goes beyond the extant international policy and legal framework, including the latest of the efforts,i.e., port state control - in some respects enumerated below:

(1) It realizes that the oceans, as a global commons, can only be maximally protected if the behaviour of the people (especially governments and corporations) change.[174] This change may not be effected authoritatively through regulations only but will also identify the reasons behind the behaviour in the first place and address them. In essence, it tackles the problem from the root with a view to preventing the occurrence of pollution or reducing it to the barest minimum.

(2) It addresses the basic reason identified for the behaviour, that is, deference to national interest, through capacity-building for cases of financially incapacitated countries and introduction of alternatives to environmentally destructive activities, in the others. It thus subscribes to the view that "[e]ffective protection of global commons . . . is most likely to develop if capacities for substitution of the polluting activity exist."[175] In that connection, it strengthens the regulatory structure by promoting the participation of states that otherwise would be outside the system by encouraging capacity building which is a prerequisite for such participation.

(3) It promotes the concepts of global partnership, international ccoperation and symbiosis in international relations with the interest of every side of the world divide catered for as opposed to a system that is partitioned into winners and losers.

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[174]See Volker von Prittwitz, "Several Approaches to the Analysis of International Environmental Policy" in Nordal Akerman, ed., *Maintaining a Satisfactory Environment: An Agenda for International Environmental Policy*, (Boulder: Westview Press, 1990) 1 at 23.

[175] Ibid. at 22.

(4) It makes a case for the productive use of resources commonly owned by the international community for the benefit of all.

(5) It addresses the additional issue of the protection of the oceans and their resources and for remedial actions with regard to damage done to them. In that light, it assumes the place of a voice for the oceans and marine environmment; speaking for them and not just concentrating on pollution prevention and control for the benefit of states only.

(6) It makes the corporate sector responsible for their actions and demands that they play a more active and supportive role in international environmental protection efforts.

(7) It is in line with recents trends in eliciting or enhancing compliance with international law where some states essentially assume an obligation to reward for what they expect from other states, especially when the former are responsible for the state of affairs or where the latter are not in a financial position to be part of the international arrangement, as exemplified by the Ozone Depleting Substances and Climate Change Conventions.

CHAPTER 5

RECOMMENDATIONS

The Nigerian federal government has indicated its intention to promulgate a new maritime decree to boost local shipping companies and protect the environment of Nigeria's coastlines. This implicitly recognizes that Nigeria's environment has been adversely affected by the activities of foreign ships. This should not come as a surprise as Nigeria is a major oil producing country. A substantial portion of oil produced in the country is however, exported to other parts of the world. Nigeria has also lately become a major importer of refined petroleum products. All of these necessitate transportation of the energy resource by sea through oceangoing vessels. Moreover, Nigeria is a coastal state and therefore very close to marine movement of oil, regardless of the origin or destination of the journey. The environmental implications of this on Nigeria are quite enormous. A maritime decree to address the problems is therefore in order.

However, the nature of maritime oil pollution makes it quite difficult to control it from one place. Accordingly, environmental regulation of oil trade and shipping has been principally undertaken from the international plane. A number of rules therefore exist in international law to deal with the problem. The international rules, though properly crafted and drafted, have not been optimally effective because of the problems of implementation, compliance and enforcement. It is imperative therefore to have an effective international system for the control of oil pollution, because it forms the basis for the success of any state action such as the type embarked upon by Nigeria through the proposed maritime decree.

The following recommendations, divided into international, regional, and national, are considered as a modest contribution toward the improvement of the existing state of affairs.

I. INTERNATIONAL COMMUNITY

The environmental issues that arise from international oil trade are such that they require concerted efforts by all and sundry. The cooperation of every segment of the international community is needed as the eradication of the problem in one area can be a mere mirage if other areas are still prone to oil pollution, whose effects can extend even to

the secure areas. It is imperative therefore that the members of the international community embrace an attitude of cooperation and a recognition of the concept of a global family in the formulation of policy and conduct of international affairs, instead of an atmosphere that fosters indifference and engenders strife.

The realization of the above point should also galvanize the international community into shifting its emphasis, in the area of marine environmental protection, from treaty-making to treaty implementation. This fundamental shift in focus, which exists in a certain measure at present, will enable key players in the international scene to dedicate considerable energy and resources to ways of making the existing law more effective.

In order to make the existing legal framework more effective, international policy should be streamlined to enable states who are willing, but unable, to participate in global efforts at oil pollution control to come on board. Accordingly, adequate resources should be made available to developing port states to undertake pollution prevention and control measures such as the installation of port reception facilities, monitoring equipment, inspection services, and manpower training and development.

It is doubtful that the international legal framework will achieve its full potential if the practice of flags of convenience shipping continues to thrive. While some states continue to enjoy the economic benefits it brings, the environment continues to suffer. The flags of convenience states who depend on proceeds from ship registration should be assisted in exchange for their refusing to register substandard vessels and foregoing the revenue accruing therefrom. The assistance may take the form of grants, loan facilities, development projects and joint investment partnerships with developed countries, since some of the foregone revenue would ordinarily be channelled into some of these areas. Accordingly, open registries should not necessarily be abolished but their services would have to be restricted to seaworthy vessels, whose owners are interested in operating in an atmosphere free from state control.

Funding the cost of compliance by developing states and 'buying out' open registry states imports a huge financial commitment. To raise the needed funds to be used in the above assistance projects, the international community should impose a user fee for the use

of its common resources in the oceans, including ocean transportation, dumping and fishing. The fee will be paid by every enterprise involved in such use including private corporations and government agencies.

Additional funding or resources should come from developed countries. These countries should undertake a greater responsibility in resisting further damage to the marine environment, not only through stringent measures such as port state control, but also through financial contribution in reparation for the negative impact of their activities (through international oil trade) on the environment. It is also imperative for them to dedicate financial resources to fund marine environmental projects, including those to be undertaken by the developing countries, as a form of compensation to the developing world for foregoing the activities their developed counterparts partook of in developing their economies.

Funds raised from the above measures should be managed by the Global Environment Facility (GEF) which is already entrusted with such issues. However, a special fund should be opened under the GEF umbrella solely dedicated to ocean and marine issues.

The unethical practices of the business community founded upon an inordinate desire for profit maximisation is at the root of the compliance problem. States are propelled to bow to the wishes of the corporations in their disposition toward treaty negotiation, accession, and implementation, because of their deference to the wishes of the corporations. The industry also ensures the sustenance of open registries, a practice engineered by it, regardless of the environmental implications. Corporations involved in international operations, especially oil transactions, therefore, should be made to embrace ethical business practices in their dealings. They should also be required to commit a certain percentage of their annual profits as charitable gifts for the enhancement of the environment. These would be done through the creation of a binding norm of corporate social responsibility in international law. With this in place, the burden on states to enforce international rules will be lessened as the corporate sector would have to behave responsibly.

The structure of the international system itself has stood as an albatross on the effectiveness of international law. Because of the principle of state sovereignty, a flag state's jurisdiction over its ships is viewed as of utmost importance. But flag states have not been

alive to their responsibilities and this hamstrings international efforts. It is therefore recommended that flag state jurisdiction should be redefined or de-emphasized. Thus, actions for violation of international rules (including those on the proposed norm of corporate social responsibility)should be allowed against vessels and corporations in states other than the states of the ships' registry, especially in countries where the operations of the corporations and vessels extend.

Port state control has been immensely important in preventing and controlling oil pollution. Its effectiveness has been most evident through regional arrangements. The International Maritime Organization (IMO) and other relevant agencies should intensify efforts toward the extension of the existing port state regime to involve the rest of the world. This should be done along regional lines following closely the footsteps of the Paris Memorandum of Understanding. The rationale is that the problem requires a universal attack as the avoidance of European states by substandard vessels will not eradicate marine oil pollution. Such vessels are still at liberty to trade with states with lower port standards, with the attendant danger to the high seas, for instance, remaining untouched.

It would also address the issue of "ports of convenience," that is, a situation where ship owners redirect their operations to ports with less stringent requirements, and remove the advantage other states' ports currently enjoy over the ports of states like Canada, the United States, Japan, and European (Paris MOU) countries, through the diversion of business.

II. REGIONAL (WEST AFRICA)

The West African region is an oil tanker route as well as an offshore oil exploration area. However, the countries in the area have not been able to jointly work against the oil pollution problems that may arise from these facilities. It is recommended that the existing legal structure on marine pollution control for West and Central Africa under the auspices of the United Nations Environment Programme (UNEP) should be harnessed and maximised. West African countries should pay more serious attention to marine environmental issues as they currently lack the resources to deal with a huge oil casualty from ships that transit

through their territory. Moreover, a number of the countries depend on the rich marine resources in the area and it would be in their own interest to ensure that they are protected. The UNEP should not relent in its efforts to ensure that pollution in West Africa is kept under control.

In particular, a regional port state control measure should be established without further delay. Nigeria should use its leadership position in the region and its current chairmanship of the Economic Community of West African States to spearhead that. This regional arrangement will avoid the incidence of "ports of convenience" and also save costs through a centralization and coordination of information and other services. The costs of repeat inspection on ships that had recently been inspected by a neighbouring country will also be avoided. This will also curtail or obviate any opposition that numerous inspections may generate from the maritime industry who might retaliate by avoiding West African ports, a situation the region can ill afford at the moment.

III. NIGERIA

The Nigerian government cannot be said to have done much in the area of environmental protection. The area of the marine environment as it relates to shipping operations presents an even more pathetic picture. The government has been simply lackadaisical in that regard. The envisaged maritime decree presents a golden opportunity for Nigeria to internally adopt the relevant international conventions such as the Law of the Sea, the Civil Liability and the Fund Conventions. Furthermore, Nigeria should ratify MARPOL 73/78 convention and its amendments and reflect them in the proposed maritime decree.

A clear proof of the government's attitude to date is the fact that the leading legislation on oil pollution from ships - the *Oil in Navigable Waters Act* 1968 - is simply obsolete. The Act should be repealed. The new maritime decree should reflect changing circumstances and modern realities.

The major environmental protection agency in Nigeria, the Federal Environmental Protection Agency (FEPA), is structured in such a way that it has its hands full with a lot of

responsibilities. It will be necessary to restrict FEPA's activities to some particular areas for maximum output. Thus, the jurisdiction of the Agency with respect to offshore waters, should be removed. The activities of FEPA in relation to water pollution should be restricted to inland waters. In this way FEPA, instead of being a jack of all trades and master of none, should be able to concentrate and devote its activities to improving the quality of water available to Nigerians, since many Nigerians depend on surface water from the rivers, lakes, and so on, for drinking purposes in the absence of pipe borne water.

In view of the foregoing, a Marine Environmental Protection Agency should be established under the proposed Decree and vested with jurisdiction to deal with activities on Nigeria's territorial waters and exclusive economic zone, and generally all those marine environmental issues pertaining to the nation, but which have an international dimension or implications.

The said Marine Environmental Protection Agency should operate with a Council composed of eminently qualified persons and scholars with a bias for international affairs and conversant with global environmental trends. The day to day administration of the Agency will be the responsibility of a Director who, preferably, should be an international lawyer.

In order to achieve the best protection for the country's environment, the emphasis of national policy should shift from response and liability and focus should be placed on oil pollution prevention, especially near the country's coastlines. The Federal Government should also deploy resources toward the training of personnel in maritime issues and the environment, including monitoring and enforcement. The acquisition of basic working equipment for maritime and naval personnel should also be accorded priority.

Marine pollution control in all of its ramification always has a financial dimension. The new Maritime Decree should create a Ship-Source Oil Pollution Fund similar to that under the Canada Shipping Act. The Fund will address the issue of compensation for victims of ship-source oil pollution especially the coastal communities whose major means of livelihood, that is, fishing, has been virtually destroyed by the scourge of marine pollution. The restoration of the aesthetic qualities of affected Nigerian beaches should also feature in

the Fund's assignment. Initial funding should be undertaken by the Federal Government with a grant of amount substantial enough to tackle the problems posed. In that regard, it is suggested that an initial sum of 500 Million Naira(approximately 10 Million Dollars) be mapped out for that.

The government should also embark on a fundraising drive to shore up the contents of the Fund. In particular, as obtains in Canada, marine movements of oil should be taxed and the proceeds paid into the above Fund. Fines imposed by the courts in marine pollution offences should also be paid into it.

It is my firm belief that the country cannot afford to commit much of its scarce resources to fighting the problem of pollution. Accordingly, the cost of pollution prevention and control, including inspection and marine patrol services, should be borne by the oil and shipping industries involved in oil trade with Nigeria. A separate fee, different from existing duties and fees at the ports, should be introduced and an account maintained solely for that purpose.

The vogue internationally is sustainable development. An efficient environmental regime today is one that takes this concept into consideration. The posture of the Nigerian government in the control of pollution has been heavily weighted in favour of the economy with little consideration for the environment. The government should adopt a policy on oil pollution from ships that maintains a balance between environmental protection and economic development, to avoid the enormous costs in human and material terms, of emphasizing one at the expense of the other. Thus, while it is desirable that Nigeria emphasizes environmental quality, it cannot conceivably do so at the cost of economic stagnation. Conversely the policies of the government which are currently weighted in favour of economic development from oil and shipping industry activities, cannot continue to stand in its discrimination against the preservation of the environment.

It is inconceivable that a country can act as it wishes in marine environmental matters if it has no viable shipping fleet of its own or a thriving indigenous shipping industry. The government should encourage the growth and development of an indigenous shipping industry through public financing in the form of a shipping development fund from which

long term loans could be obtained by persons with a demonstrable interest in that sector. By so doing, the country would be availed of the services of the industry, especially for oil export, and be able to withstand any backlash from foreign owned shipping fleets, whenever the government decides to enforce stringent standards against ships visiting Nigerian ports.

While the desirability of a regional port state scheme for West Africa cannot be overemphasized, the country cannot afford to jeopardize its interests in the interim. Pending the introduction of the regional arrangement, Nigeria should enter into bilateral and multilateral arrangements with neighbouring port states like Benin and Togo to ensure the application of uniform standards and obviate any loss of businesses that these measures will occasion.

IV. CONCLUSION

Oil has played a dominant role in Nigeria's economy for some decades now. The country is also a coastal and port state occasioning the movement of oil around its territory in the course of international trade. The ramifications of the above for the environment are quite obvious. That explains why this work has sought to examine its role in marine environmental degradation in the light of the Nigerian government's intention to promulgate a maritime decree to boost local shipping and protect the security and environment of the country's coastlines.

I have examined the relevance of the envisaged legislative action by the government in the context of the inadequacy of the existing legal framework which makes such a venture not only welcome, but also imperative. I have also discussed the prevailing international rules on the subject on the understanding that in the absence of a strong and effective international legal framework, any attempt at controlling oil pollution nationally will be fraught with problems and may come to nought. In that connection, I have suggested ways of making the existing international law work better.

It is expected that this thesis will accomplish three major objectives. First, it is hoped to encourage and galvanize the federal government of Nigeria in its bid to eventually address the environmental problems faced in Nigeria's coastal areas. Secondly, it is designed to assist

in producing a workable instrument which is up to date and in tune with modern realities without jeopardising Nigeria's economy nor conflicting with its international obligations. Thirdly, the ideas are put forward to facilitate the implementation, compliance, and enforcement of international oil pollution conventions, and enhance their effectiveness by promoting an all-hands-on-deck approach involving the developed and developing countries, flags of convenience states, and the multinational corporations involved in international oil transactions.

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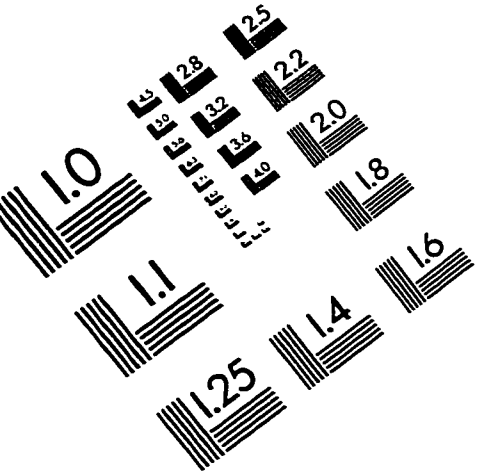

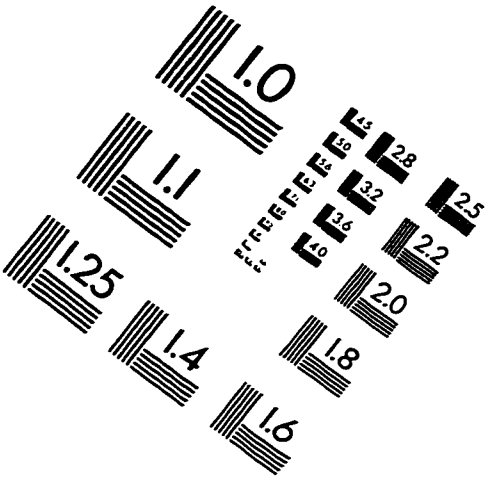

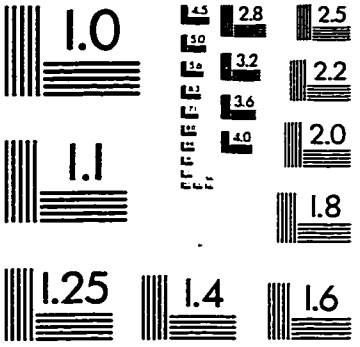

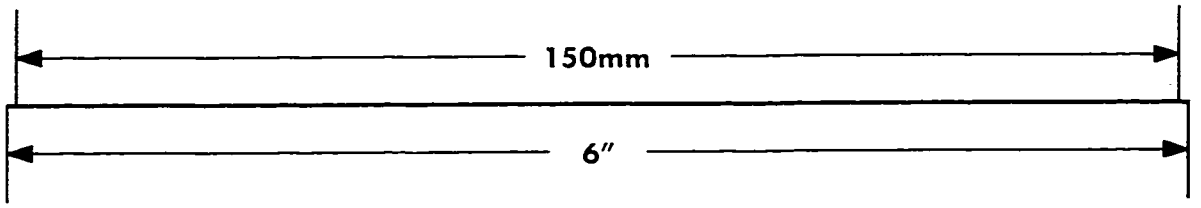

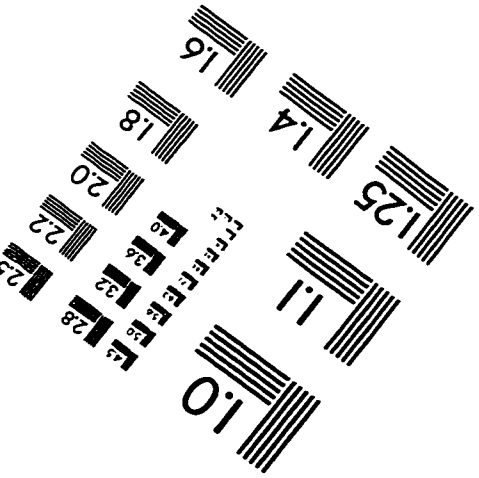

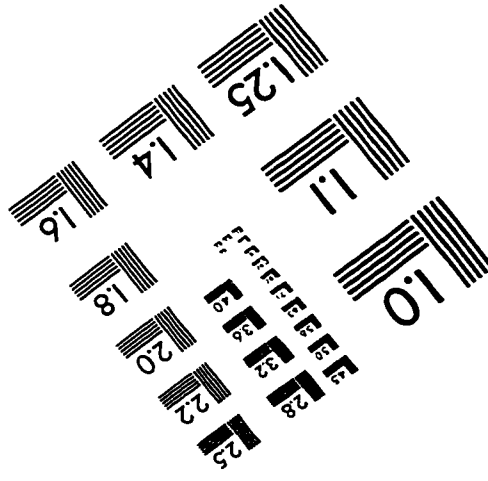

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