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International Law and Business Practice : Corporate Accountability and Compliance Issues in the Petroleum Industry

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INTERNATIONAL LAW AND BUSINESS PRACTICE: CORPORATE ACCOUNTABILITY AND COMPLIANCE ISSUES IN THE PETROLEUM INDUSTRY

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DEDICATION

This dissertation is lovingly dedicated to all those who work for peace and goodwill on earth.

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ABSTRACT

This DISSERTATION seeks to strengthen international law by incorporating and integrating multinational corporations more fully into the international legal system. It argues that the undeniable role of multinational corporations as primary players in the global economy and international politics necessitates or demands adequate acknowledgement in the international legal structure. Accordingly, due recognition should be accorded the rights and privileges of multinationals. Concomitant to that, corresponding duties and responsibilities should be attached to these corporate entities in international law.

Many far-reaching advantages will flow from such development. The corporations will enjoy *de jure* protection, which would enhance their business operations across countries. Their integration into the international scheme of things will also ensure that contrary to what obtains within the extant legal landscape, corporations are held accountable for their actions that have huge social, economic and environmental impact on the communities in which they operate and the globe as a whole. Finally, the triple problems of implementation, compliance and enforcement that have hung on the neck of international law as an albatross will be brought under control, as multinational corporations which contribute to the present unpalatable scenario in some form or the other, would be placed in a position that is antithetical to the current state of affairs.

Thus, this work, using the oil industry and existing international agreements and domestic instruments in that area, takes the innovative track of linking the compliance problem in international law with the corporate accountability question. Addressing the latter is tantamount to removing some of the obstacles that impede the achievement of the former, making imperative an approach that considers this linkage as an important issue.

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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]

Multinational corporations[2] are major actors and important players in the international field today, occupying a key role as the leading drivers of international trade and investment.[3] Of particular significance is the position of multinational corporations in the oil and gas sector. Big oil corporations are conspicuous in the list of the world's leading multinationals. According to the United Nations Conference on Trade and Development (UNCTAD) in its World Investment Report, 2002, Exxon Mobil (the world's largest oil company), Royal/Dutch Shell, BP, Chevron Texaco and

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[1] PETER R. ODELL, OIL AND WORLD POWER (7th ed) 11 (1983).

[2] The term multinational corporation is used interchangeably here with such other terms as transnational corporations and multinational enterprises. Different definitions have been provided in respect of these corporations. E.g., Peter Muchlinski defines a multinational corporation as an entity that "owns (in whole or in part), controls and manages income generating assets in more than one country." See PETER MUCHLINSKI, MULTINATIONAL ENTERPRISES AND THE LAW 12 (1995); Phillip I. Blumberg, views these corporations as affiliated corporations that are incorporated in different jurisdictions but which are conducting a common enterprise under common control. See PHILLIP I. BLUMBERG, THE MULTINATIONAL CHALLENGE TO CORPORATION LAW: THE SEARCH FOR A NEW CORPORATE PERSONALITY (1993). However, there is no universally accepted definition. See William Meade Fletcher, Fletcher Cyclopedia of the Law of Private Corporations, Chapter 67. Foreign Corporations I. Definition, Nature and Status; General Considerations, § 8296.10. MULTINATIONAL CORPORATIONS. Database updated July 2002. Suffice it to say that the term is used here for a large corporation having business operations in one or two countries besides the country of its incorporation either directly or through subsidiaries and affiliates.

[3] MICHELLE LEIGHTON, ET AL, BEYOND GOOD DEEDS 2-3 (2002).

Total Fina SA are among the world's top 25 multinational corporations in terms of foreign assets.[4]

The significance of petroleum in today's society and the global economy cannot be overemphasized.[5] Oil is currently the primary energy source in the world. It comprises more than 40 per cent of the total energy consumption globally.[6] Existing projections indicate a continued increase in the demand for oil, growing from 65 million barrels per day to 90 million barrels per day in less than twenty years.[7]

The world holds significant oil reserves, which are expected to meet this rise in demand in the foreseeable future, or at least for the next few decades.[8] Enormous oil reserves exist in the Middle East. Saudi Arabia is believed to have up to 262 billion barrels of oil in reserve.[9] Iraq's reserves amount to about 112.5 billion barrels of oil.[10] United Arab Emirates, Kuwait and Iran each hold more than 90 billion barrels of oil in reserve.[11] Oil reserves in North America, Africa and China are estimated to be about 55, 53, and 34 billion barrels respectively.[12] The Caspian

[4] Actually, the oil corporations mentioned above fall within the top 20. See UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, WORLD INVESTMENT REPORT 2002: TRANSNATIONAL CORPORATIONS AND EXPORT COMPETITIVENESS, Table 2.

[5] See Daniel Yergin, *Oil Supplies Key to World Economy*, USA TODAY Op/Ed. September 17, 2002; available at http://www.usatoday.com/news/opinion/editorials/2002-09-17-oplede_x.htm. Last visited September 18, 2002 (stating that "[o]il is the commodity that makes the world go round.")

[6] United Nations Report on Energy and Transport, E/CN. 17/2001/PC20, UN Economic and Social Council (2001), at 2.

[7] See Leighton, *supra* note 3, at 25.
[8] See *Id.*, at 26. Production at the current rate without new discoveries would still provide enough oil to meet demands for forty more years.
[9] Ken Moritsugu, *Saddam-less Iraq could be key player in oil market*, Knight Ridder Newspapers, September 15, 2002.
[10] *Id.* See also US Energy Information Administration, March 2002 Report, available at www.eia.doe.gov/emeu/cabs/iraq.html. Last visited October 24, 2002.
[11] Moritsugu, *supra* note 9.
[12] US Energy Information Administration, June 2000 Report.

region, a newer entrant into the oil arena, is also believed to hold huge prospects, with some estimates putting potential reserves at about 250 billion barrels.[13]

The prominence, prevalence and importance of oil in the global socio-economic sphere are underscored by the fact that the 20th century was labelled "the age of oil."[14] It is quite within the realm of possibility that a combination of factors in the future (including resource limits, ecological constraints and better conservation) could reduce the consumption of oil in the years ahead.[15] However, until a transition is made to renewable sources of energy, oil will continue to affect our lives in a great measure and therefore deserves considerable attention.

World oil development, for decades now, has been dominated by multinational oil corporations and government owned oil enterprises.[16] Almost since the inception of commercial oil production in 1859 in the United States, through the period after the two world wars, and even up to the present times, the overarching role of multinational corporations in this area has been consistently characterized by its ubiquity.[17]

[13] Leighton, *supra* note 3, at 26.

[14] See Christopher Flavin & Seth Dunn, *A New Energy Paradigm for the 21st Century*, 53:1 J. Int'l Aff. 167 (1999).
[15] *Id.*, at 169, 170.

[16] Leighton, *supra* note 3, at 26.
[17] *Id.*, at 26-28 (detailing the role of Standard Oil before its dissolution in 1911, the strategic partnerships negotiated by the governments of France, UK and US to gain access to Middle East oil reserves, the post-World War II dominance of the "Seven Sisters" (Exxon, Mobil, Standard Oil of California, Texaco, Gulf, British Petroleum and Royal/Dutch Shell), the formation of the Organization of the Petroleum Exporting Countries (OPEC), and the emergence of smaller and independent oil companies operating in different parts of the world.)

The petroleum industry is broadly divided into two subheads namely the upstream and downstream sectors.[18] Exploration and production are part of the upstream sector, while refining, marketing and distribution belong to the downstream sector.[19] Virtually each of these sub-sectors has a tremendous capacity to inflict social, economic and environmental costs on humanity. A number of oil producing countries are in "profound economic and political crisis" despite their enormous resources, a fact that is quite puzzling.[20] Human rights abuses and environmental disasters have become increasingly associated with the oil industry. There is no gainsaying the fact that:

> Oil development has contributed to problems of pollution, biodiversity, and habitat loss, rising poverty and disease, human and labor rights violations, and, more recently, escalation of conflict and violence in oil-producing regions. Many of these problems are most evident in developing countries, but human health and environmental justice issues are also significant in the [developed world].[21]

The international community has not completely turned a blind eye to some of these social, economic and environmental concerns. A large body of rules exists in international law to address the environmental consequences of oil trade and transportation.[22] This is a clear recognition of the impact of international oil trade.

[18] For a discussion of the structure of the oil industry, see PAUL FRANKEL, THE ESSENTIALS OF PETROLEUM: A KEY TO OIL ECONOMICS (1969).

[19] Edward L. Morse, *A NewPolitical Economy of Oil?* 53:1 J.Int'l Aff. 1, 2 (1999).
[20] Terry Lynn Karl, *The Perils of the Petro-State: Reflections on the Paradox of Plenty*, 53 J. Int'l Aff. 31, 32-33 (1999).
[21] Leighton, *supra* note 3, at 23.
[22] 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 [jointly referred to as MARPOL 73/78] and the Law of the Sea Convention, 1982.

There is no doubt that 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.[23] It is projected that the volume of this trade will increase in the future[24] as a result of growing demand for this resource by the industrialized world.[25]

This development, however, has phenomenal implications and ramifications for the environment and economy 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 worldwide basis.[26]

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

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

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

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

[24] Current figures indicate that 3,000 tankers over 10,000 dwt pass through the oceans everyday, carrying 15,549,000,000 barrels or 653,058,000,000 representing an increase on previous numbers. (Email communication with Erik Ranheim, Manager, Research and Project Section, INTERTANKO, Oslo, Norway, October 29, 2002.)
[25] See *id.* See also *U.S. oil imports rise to 57% of demand in May*, Oil and Gas Journal, June 22, 1998, at 29.

(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.[27]

The main attention of this dissertation, as touching international regulations, will be on marine oil pollution arising from the activities of ships.[28] Operational discharges of oil and accidental spills that have almost become inevitable in the course of maritime transportation have tremendous impact on all.[29] For coastal communities, this translates to a negative impact on coastal resort areas including beaches and other places of tourist attraction.[30] Considering the revenue loss that this occasions, oil pollution, to these communities, is therefore something to be dreaded.

[26] D. BRUBAKER, MARINE POLLUTION AND INTERNATIONAL LAW 119 (1993).
[27] E. Gold, Pollution of the Sea and International Law: A Canadian Perspective, 3 J. Marit. L. & Comm. 13, 15 (1972).

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

[29] The recent incident involving the Bahamian-flagged oil tanker, Prestige, sank off the coast of Spain. It had a cargo of about 20 million gallons of fuel oil, which could potentially lead to the worst oil spill disaster in history. See Emma Daly & Andrew Revkin, *Oil Tanker Splits Apart Off Spain, Threatening Coast*, New York Times, November 20, 2002 , at A6; Bhushan Bahree, Carlta Vitzthun and Erik Portanger, *Clash of Politics, Economics Sealed A Tanker's Fate*, WALL STREET JOURNAL, November 25, 2002, at A1.
[30] David Iyalomhe, Environmental Regulation of the Oil and Gas Industry in Nigeria: Lessons from Alberta's Experience 42 (Unpublished LL.M. Thesis, 1998) (On file with the University of Alberta Library)

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.[31] Shellfish, fish and large marine mammals have also suffered a similar fate.[32] 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.[33] 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. 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.[34] 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."[35]

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

[32] *Id.*, at 46.
[33] 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 CANADIAN OCEAN LAW AND POLICY 317, 333 (D. VanderZwaag, ed., 1992).

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

[35] W. Jackson Davis, *The Need for a New Global Oceans Governance System*, *in* FREEDOM FOR THE SEAS IN THE 21ST CENTURY 147, 148, (Jon Dyke, et al. eds. 1992).

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,[36] 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.[37] 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. 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.[38]

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

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

[37] Davis, *supra* note 35, at 149.

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

discharges of oil consequent to the international commerce in the commodity have elicited the reaction of States, primarily through domestic legislation.

However, 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.

It is in the light of these facts that the environmental dangers posed by international oil trade has (as earlier stated) attracted international attention culminating in the conclusion of a number of treaties on the subject.[39] However, dealing with the pollution problems caused by spills is further complicated by the jurisdictional issues inherent in the international law on the subject. 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 just at the conclusion of more treaties, but the implementation of existing ones. One of the central questions that this work intends to address centers on 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, a salient 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 that 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 States-centric, focusing attention on the efforts of States to control international oil

[39] See note 8, *supra*

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. The humble contention of 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 maximization that defines their current attitude.

It is instructive to note that while there has been an elaboration of international rules on the environmental aspects of international oil trade and shipping, the same cannot be said of the social, economic and environmental costs of the other aspects of the petroleum industry.[40] In areas such as exploration and extraction, which international law has essentially left under the domain of national governments, corporate activities that are inimical to the environment or have enormous social and economic costs on the society have not received adequate attention.[41] It is not the intendment of this study to undervalue or ignore the positive aspects of multinational corporate activity such as job creation[42] and introduction of

[40] See Leighton, et al., *supra* note 3, at 47.
[41] *Id.*
[42] Job creation internationally has added to the power and influence of MNCs. See Scott Greathead, *The Multinationals and the "New Stakeholder": Examining the Business Case for Human Rights*, 35 Vand. J. Transnat'l L. 719, 722 (2002) arguing that the leaders of the People's Republic of China are more likely to place a higher premium on the opinion of the CEOs of multinational corporations who have tens of thousands of Chinese workers in their employ, than the views of the President of the United States, from whom they may not expect much both from political and practical standpoints.

new technologies.[43] At the same time, one would be remiss to discount the concern that has continued to mount regarding the negative consequences of economic globalization. Multinational corporations operating in countries other than their home countries have been implicated in, or associated with human rights violations,[44] environmental pollution and degradation,[45] escalation of poverty conditions,[46] and an increase in social vices in their host communities.[47]

The international legal system has made some effort to address a number of these issues. However, a lot still needs to be done to address some of these cases of corporate misbehavior. Taking human rights abuses as an example, it is true that the Universal Declaration of Human Rights enjoins not only States, but also "every individual and every organ of society" to participate in the promotion and protection

[43] Thomas Donaldson, *Can Multinationals Stage a Universal Morality Play?* 29 Bus. & Soc. Rev. 51, 52 (1992). "Third World representatives increasingly acknowledge the role multinationals play as a conduit of technological know-how to host cultures, and most have accepted a promultinational position . . . ."

[44] HUMAN RIGHTS AND THE OIL INDUSTRY (Asbjørn Eide, Helge Ole Bergesen and Pia Rudolfson Goyer eds, 2000). See also Terry Collingsworth, *The Key Human Rights Challenge: Developing Enforcement Mechanisms*, 15 Harv. Hum. Rts. J. 183 (2002).

[45] See for instance, JUDITH KIMERLING, AMAZON CRUDE (1991).

[46] See Emeka Duruigbo, Oil Development in Nigeria: A Critical Investigation of Chevron Corporation's Performance in the Niger River Delta (Natural Heritage Institute, 2001). According to surveys conducted by Nigeria's Federal office of Statistics, while 28% of Nigerians lived in poverty in 1980, the number has risen astronomically over the years, with 66% of Nigerians living in poverty, subsisting on less than $1.40 a day in 1996. See UN Office for the Coordination of Humanitarian Affairs, Integrated Regional information Network, *Nigeria: Focus on the Scourge of Poverty*, June 11, 2002; *available at* http://www.irinnews.org/report.asp?ReportID=28258. Last visited September 18, 2002. This is pathetic, considering that between 1970 and 1999, Nigeria's earnings from crude oil exports were estimated to be $320 billion. *Id.*

[47] Such vices include prostitution and criminal activities by unemployed youths. See Henry Clark, et al., Oil For Nothing: Multinational Corporations, Environmental Destruction, Death and Impunity in the Niger Delta, January 25, 2000, *available at* **http://www.essentialaction.org/shell/report/**. Last visited September 12, 2002.

of human rights.[48] However, while this has been widely interpreted to include corporations, the fact still remains that "a company is not legally obliged under international law to comply with these standards"[49] and thus can conduct its business operations negatively without inviting international legal sanctions.

International law seems to depend on States to address these concerns domestically,[50] while the evidence on the ground abundantly shows that many States are incapable of handling some of these unsavory effects of international business.[51]

In the absence of clear international regulations, and with weak national standards in many countries to guide corporate behavior and direct industry performance vis-à-vis the detrimental effects of international business operations on the society, corporations have chosen to embrace self-regulation. Consequently, the past few years have witnessed a proliferation of corporate codes and voluntary initiatives to regulate corporate conduct.[52] Corporate self-regulation, however, has not proven to be a very adequate tool, leaving countless victims of corporate abuses without sufficient remedies in either domestic or international law.

To ensure that some of these problems are addressed and resulting injuries redressed is the second major assignment that this dissertation undertakes. Thus, this work is intended to accomplish a number of objectives:

[48] Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., Supp. No. 3, at 71, U.N. Doc. A/810 (1948).

[49] AMNESTY INTERNATIONAL & THE PRINCE OF WALES BUSINESS LEADERS FORUM, HUMAN RIGHTS: IS IT ANY OF YOUR BUSINESS? 23 (2000).

[50] See Michelle Leighton Schwarz, *International Legal Protection for Victims of Environmental Abuse*, 18 Yale. J. Int'l L. (1995).

[51] See Okechukwu Ibeanu, *Oiling the Friction: Environmental Conflict Management in the Niger Delta, Nigeria*, 6: ENVIRONMENAL CHANGE & SECURITY PROJECT REPORT 19, 32 (2000) (stating that oil companies operating in Nigeria have evaded accountability.)

[52] Prominent among these are the OECD Guidelines, the Sullivan Principles, the US-UK Agreement on Security Principles and myriad internal codes of conduct designed by multinational corporations.

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

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

(3) 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 sound business practices as opposed to considerations only of profit maximization.

In addressing the demands placed by this task, this work has undertaken, in the following chapters, to identify, analyze, organize and synthesize international conventions and protocols, statutes, judicial decisions and commentary as well as domestic legislation on the subjects traversed herein. 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 environmental problems resulting from international oil trade and shipping 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.

(e) Undertaking a review of voluntary initiatives from non-governmental, governmental and inter-governmental quarters to control the activities of multinational corporations.

(f) evaluating the import and impact of corporate self-regulation in the promotion of corporate accountability.

(g) examining the current activities of the United Nations and its component parts in fashioning new initiatives and rules to control or curtail the negative consequences of international business transactions.

Chapter 1 discusses international regulations relating to the environmental aspects of oil trade and shipping. It involves an exposition of the international law on the subject, the basis for it, and its impact in addressing the problems posed.

In Chapter 2, the concepts of implementation, compliance, and enforcement of international law are defined. This chapter also includes a discussion of the practical approaches adopted by the international system in ensuring that those involved in international oil transactions abide by international requirements relating to the environment. Since the primary players here are oil and shipping companies, this thesis considers the possibility of an alternative approach in the form of a binding international norm on corporate behavior.

In chapter 3, the work 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 duties or refrain from assuming obligations if they lack the capacity to

do so or face circumstances inimical to their interest. Suggestions are made herein for 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. This will generally take the form of financial and technical assistance organized under the auspices of an international fund.

Chapter 4 (zeroes in on) corporate abuses and self-regulation in relation to multinational corporations. In view of the fact that international rules are largely non-existent regarding some of the activities of multinational corporations that hold enormous social, economic and environmental costs on the society, the place of self-regulation cannot be over-emphasized. Thus, various voluntary initiatives in the form of corporate codes of conduct are examined and the adequacy or otherwise discussed.

In Chapter 5, the premise is that voluntary initiatives are inadequate and that what is needed is the elaboration and introduction of rules under the auspices of the United Nations. In that connection, a look at the current efforts of the United Nations is warranted. This entails a discussion of the Secretary General's Global Compact Initiative and the on-going work of the UN Commission on Human Rights. Not entirely satisfied with the above, unless there is a binding mechanism incorporated into them, this chapter also draws attention to the use of domestic judicial systems in a number of countries to promote accountability, and recommends a similar approach to international policy makers.

Chapter 6 considers one major obstacle to a direct or quasi-direct regulation of multinational corporations in international law, that is, the never-ending dispute about the subjects of international law. For corporations to be repositories of rights and

duties in the international legal system, the question of their legal status must be considered and clarified. Thus, in discussing international legal personality relating to the multinational corporation, this chapter seeks to lay the foundation for far-reaching policy changes in this area.

Chapter 7 consists of recommendations and conclusions that logically follow from the foregoing. While the recommendations and the ideas explored in this work essentially focus on corporate accountability in the petroleum industry and improving implementation, compliance and enforcement of international rules in respect of environmental regulations pertaining to oil trade and shipping, it is expected that the ideas will be useful in, and could be applied to, virtually every aspect of international law.

DIVISION I

INTERNATIONAL OIL TRADE AND SHIPPING

CHAPTER 1

ENVIRONMENTAL REGULATION OF OIL TRADE AND SHIPPING

I. INTRODUCTION

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

The second part of this chapter goes on to 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. The third part is devoted to a discussion of the regulatory instruments currently in place in international law to combat the scourge of ship-source oil pollution. An assessment of how far these 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) is undertaken in the fourth part. The fifth part concludes on a note of optimism, sincerely believing that all is not lost yet, if only everyone concerned 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 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 absence of their legal validity -- 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 because the scope and implications of marine pollution in general,[2] and ship-source oil pollution in particular, are wide and transcend national boundaries

[1] The furor 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 60th parallel of north latitude. This action 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 plan, stating that international law provided no basis for the proposed unilateral extension of jurisdiction on the high seas, and that it would neither accept nor acquiesce in the assertion of such jurisdiction. In justification of its action, the Canadian Government responded that it was based on, among others, the international right of self-defense, arguing that a danger to the environment of a State constitutes a threat to its security. See further Beesley, *Rights and Responsibilities of Arctic Coastal States: The Canadian View*, 3 J. Mar. L. & Com. 1 (1972); Gold, *Pollution of the Sea and International Law: A Canadian Perspective*, 3 J. Mar. L. & Com. 13 (1972); Neuman, *Oil in Troubled Waters: The International Control of Marine Pollution*, 2 J. Mar. L. & Com. 349 (1971).

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, a spill may rapidly disperse over an enormous area, 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

[2] The international character and implications of marine pollution has been given judicial imprimatur by the Supreme Court of Canada. See R. v. Crown Zellerbach Canada Ltd., [1988] 1 S.C.R. 401.
[3] See Linda Reif, *International Environmental Law*, *in* Environmental Law and Business in Canada 71 (G. Thompson et al. eds. 1993).
[4] Neuman, supra note 1, at 351.
[5] Id. at 351-52.
[6] 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?* 25 J. Mar. L. & Com. 55 (1994).

> the shipping business creates such diversity of interests, with potential conflicts of law and jurisdiction.[7]

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, as can be seen from cases of oil tankers sinking and affecting a number of countries who ordinarily would be insulted from such ships.[8] At the same time, a single ship visiting ports in various countries over the course of a year would be hard pressed to comply 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

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

[8] Alcock, *"Ecology Tankers" and the Oil Pollution Act of 1990: A History of Efforts to Require Double Hulls on Oil Tankers*, 19 Ecology L.Q. 97, 126 (1992). This point is underscored by the recent case of the Bahamian-flagged tanker, Prestige, which sank off the coast of Spain, with the oil spilling from the ship most likely to affect neighboring countries. Besides, Spain had tried to protect itself, to little avail. See Juliette Jowit, *Spain 'could have saved tanker,'* Financial Times (London), November 20, 2002, at 12.

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

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

[11] Gold, supra note 1, at 44.

development of international arrangements for the protection of the marine environment and the continued march toward the elaboration of an international order that will protect and preserve the planet Earth for the better use and greater enjoyment of all.

III: INTERNATIONAL LAW AND OIL POLLUTION FROM SHIPS

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 part of the dissertation, 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 motivation and divergence of interests.[15] Starting in 1926, when the first attempt was made to internationally regulate maritime oil pollution, [16] up to recent times, the regulation of this area has come a long way, thereby making it one of the most highly regulated areas at the international

[12] See A. KISS & D. SHELTON, INTERNATIONAL ENVIRONMENTAL LAW 109 (1991).
[13] See art. 38 of the Statute of the International Court of Justice, 59 Stat. 1055, T.S. No. 993 (1945).
[14] The use of the word "civilized" has been condemned by developing states who regard it as offensive and exclusive. See Christian Okeke, *International Law in the Nigerian Legal System*, 27 Cal. W. Int'l L.J. 311, 315 (1997). The term is now considered obsolete. See Reif, supra note 3, at 73.
[15] Bodansky, Protecting the Marine Environment from Vessel-Source Pollution: UNCLOS III and Beyond, 18 Ecology L.Q. 719, 726 (1991).
[16] Preliminary Conference on Oil Pollution of Navigable Waters, T.S. No. 736-A (1926). The effort was not a success. See further C. COLOMBOS, THE INTERNATIONAL LAW OF THE SEA 430-31 (6th ed. 1967), and Sweeney, supra note 7, at 187-89.

level.[17] This thesis, however, will 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 (OILPOL),[18] the 1973 International Convention for the Prevention of Pollution from Ships,[19] and its 1978 Protocol (collectively known as MARPOL 73/78),[20] and the 1982 United Nations Convention of the Law of the Sea (LOSC).[21]

A.OILPOL

This Convention, which came into effect in 1958 for a small number of States,[22] was a product of a conference held in London in 1954. Proceeding from the premise that prohibiting all discharges of oily waste was impossible, it created room for the discharge of oil without restriction in an area outside a prohibited zone of 50 miles from the coasts of States parties to the treaty. Within the prohibited zone, however, only discharges with an oil content of less than 100 parts per million (ppm) were permitted.[23] Any contravention was declared an offense punishable under the laws of the territory in which the ship was registered.[24]

OILPOL also included provisions requiring (within three years of the coming into force of the Convention) ships registered in the territory of contracting States to be fitted with certain pollution prevention facilities and the

[17] D. BRUBAKER, MARINE POLLUTION AND INTERNATIONAL LAW 119 (1993).
[18] 12 U.S.T. 2989, T.I.A.S. No. 4900, 327 U.N.T.S. 3 (1954).
[19] IMCO Doc. MP/CONF/WP 35, Nov. 2, 1973, reprinted at 12 I.L.M. 1319 (1973).
[20] The Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, IMCO Doc. TSPP/CONF/11, Feb. 16, 1978, reprinted at 17 I.L.M. 546 (1978).
[21] U.N. Doc. A/CONF.62/122, Oct. 7, 1982, reprinted at 21 I.L.M. 1261 (1982).
[22] Gold, supra note 1, at 19.
[23] See art. III.
[24] See art. III(3).

main ports of contracting States to install facilities for the disposal of oily substances. It also ordered ships to carry an oil record book, in which entries had to be made concerning the details of oily discharges, and which authorities of a contracting State could inspect within that state's ports.

OILPOL attracted severe criticisms from scholars, who described it as possessing very few real "teeth"[25] and being inadequate[26] and unenforceable in practice.[27] Most significantly, the 100 ppm rule was fraught with detection problems. Because it was possible to leave a visible film behind a ship even though the oil content of the effluent was well below 100 ppm, breaches could not be proved through observation.[28]

Although OILPOL provided a not-too-effective tool[29] for pollution prevention and control, sight should not be lost of the fact that it was the first real attempt to address a multi-pronged problem. Thus, like any other first effort, it could not help but exhibit its own share of naiveté and rough edges.

[25] Gold, supra note 1, at 19.
[26] R. M'GONIGLE & M. ZACHER, POLLUTION, POLITICS, AND INTERNATIONAL LAW: TANKERS AT SEA 219 (1979). See also Bilder, *The Canadian Arctic Waters Pollution Prevention Act: New Stresses on the Law of the Sea*, 69 Mich. L. Rev. 1, 34 (1970) (arguing that OILPOL adopted a method that has been proven to be "ineffective").
[27] Wulf, *Contiguous Zones for Pollution Control*, 3 J. Mar. L. & Com. 537, 541 (1972). 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.
[28] Kirby, The Clean Seas Code: A Practical Cure of Operational Pollution *in* International Conference on Oil Pollution of the Sea, held in Rome on Oct. 7-9, 1968, at 201, 209.
[29] Especially by concentrating enforcement powers in 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 -- affording protection to coastal states with one hand and withdrawing it with the other.

Subsequent efforts [30] to strengthen OILPOL resulted in a series of amendments in 1962.[31] Unfortunately, these did not have much effect.[32] Further amendments were therefore made in 1969 and 1971. A salient feature of the 1969 amendment was the adoption and legitimization of the load-on-top (LOT) system.[33] 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.MARPOL 73/78

Arguably influenced by the 1972 United Nations Conference on the Human Environment, MARPOL 73/78 is without a doubt the main convention on vessel-source pollution today.[35] MARPOL contains far-reaching provisions lodged within five annexes, the first two of which became compulsory with the ratification of the convention.[36]

Annex I[37] is concerned with the regulation of oil pollution, while Annex II[38] deals with noxious liquid substances.[39] Under Annex I, operational discharges

[30] This was an aftermath of the formation in 1958 of the Inter-Governmental Maritime Consultative Organization (which later metamorphosed into the International Maritime Organization (IMO)).
[31] 600 U.N.T.S. 332 (1962).
[32] M'Gonigle & Zacher, supra note 26, at 222.
[33] In the LOT system, a special tank in the vessel is used to collect the oily mixture that ordinarily would have been discharged. This material 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.
[34] Pritchard, *Load on Top -- From the Sublime to the Absurd*, 9 J. Mar. L. & Com. 185, 187 (1978).
[35] Brubaker, supra note 17, at 122.
[36] Within these provisions, MARPOL prescribes rules, technical standards and specific requirements whose objectives are the reduction and eradication of marine pollution arising from shipping activities. Franz Xaver Perrez, *The Efficiency of Cooperation: A Functional Analysis of Sovereignty*, 15 Ariz. J. Int'l & Comp. L. 515, at 534 n.97 (1998).
[37] IMCO Doc. MP/CONF/WP.21 of Oct. 31, 1973.
[38] IMCO Doc. MP/CONF/WP.21/Add.1 of Oct. 31, 1973.

of oil are permitted outside the special areas[40] or beyond 50 nautical miles from land.[41] Outside the special areas, certain standards are specified for tankers[42] that share some similarities with those contained in the 1969 and 1971 amendments to OILPOL. However, differences exist in that new[43] tankers must not discharge more than 1/30,000th of their cargo-carrying capacity, while all other tankers need only adhere to a 1/15,000th 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 (as required by Regulation 15). Furthermore, MARPOL defines oil to include non-persistent oil -- a step up from previous conventions, which dealt with only persistent oils.[44] Annex I also requires that all new tank vessels of more than 70,000 deadweight tons (DWT) have segregated ballast tanks (SBT).

With respect to enforcement, MARPOL makes three innovations:[45] 1) it introduces International Oil Pollution Prevention Certificates, which State parties issue to ships that satisfy the structure, equipment, fittings, arrangements, and materials requirements of the Convention,[46] and which are accepted by other State

[39] Annex III (IMCO Doc. MP/CONF/WP.21/Add.2 of Oct. 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 (IMCO Doc. MP/CONF/WP.21/Add.3 of Oct. 31, 1973) controls sewage. Annex V (IMCO Doc. MP/CONF/WP.21/Add.4 of Oct. 31, 1973) applies to garbage. Both the compulsory Annex II and the optional Annexes III-V are beyond the scope of this work.
[40] These include the whole of the Mediterranean sea, the Baltic, Black, and Red seas, and the Persian Gulf. See Regulation 10.
[41] Regulation 9(1)(a)(ii).
[42] Regulation 9(1)(a)(iii)-(vi).
[43] Essentially those ordered after Dec. 31, 1975; see Regulation 1(6).
[44] Regulation I and Appendix I; see generally D. ABECASSIS & R. JARASHOW, OIL POLLUTION FROM SHIPS 29-30 (2d. ed. 1985).
[45] Id. at 73-74.
[46] Regulations 4-6.

parties as possessing the same validity as the ones issued by themselves;[47] 2) it obligates State parties to cooperate in the detection of violations;[48] and, 3) it requires ships to carry an oil discharge and monitoring control system, fitted with a recording device to provide a continuous record of discharges in liters per nautical mile and total quantity discharged.[49]

Despite its good intentions, 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 1978 Protocol Relating to the International Convention for the Prevention of Pollution from Ships.[50] The Protocol made some procedural and substantive changes to MARPOL 73, ostensibly to facilitate its ratification. It also stated that the Protocol and MARPOL 73 were to be read and interpreted as one instrument (hence the name MARPOL 73/78).[51] A basic feature of the 1978 Protocol was new Regulation 13, which now requires that all new oil tankers of 20,000 DWT, and new product tankers of 30,000 DWT, be equipped with SBT and use crude oil washing as a cargo tank

[47] Art. 5(1).
[48] Art. 6; see also Regulations 9(3) and 10(6).
[49] See Regulations 15-16. It was thought that such a requirement would help strengthen the evidence of violations and obviate the perceived pitfalls in the LOT system, which placed heavy reliance on the human element in the implementation of discharge standards. At the time of the conclusion of the Convention, however, there were no commercially-viable monitoring systems available. See Curtis, Vessel-Source Oil Pollution and MARPOL 73/78: An International Success Story? 15 Envtl. L. 679, 695 (1985).
[50] See supra note 20.
[51] The Protocol entered into force in October 1983 following the October 1982 ratification by Greece and Italy, thus fulfilling the requirements of Art. V, which stated that the Protocol was to enter into force 12 months after the date on which not less than 15 states, the combined merchant fleets of which constituted not less than 50% of the gross tonnage of the world's merchant shipping, had become parties. See 5 Current Reports, Int'l Env't Rep. (BNA), Oct. 13, 1982, at 432.

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.[52]

MARPOL 73/78 specifies the scope of responsibilities attaching to flag and port States.[53] For instance, while a duty resides in the flag State to initiate proceedings for an alleged violation of a provision wherever it occurs,[54] it is incumbent upon a port State to take proceedings for violations occurring within its jurisdiction[55] or to furnish information as regards evidence of a violation to the flag State.[56] A port State may inspect a ship that enters a port or offshore terminal under its jurisdiction if there is enough evidence to establish a violation.[57] It does not permit the port State, however, to take any action in cases in which the violation occurs 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 can stop it from sailing pending such time that it can proceed without constituting an "unreasonable threat of harm to the marine environment."[58] The Convention, however, also requires States to take every possible measure to avoid undue detention of ships and a breach can result in compensation for damages

[52] Regulation 13(b)(3).
[53] For discussions of MARPOL 73/78, see generally, Richard G. Hildreth, et al., *Evaluation of the New Carissa Incident for Improvements to State, Federal and International Law*, 16 J. Envtl. L. & Litig. 81, 101 – 106 (2001); Sean Poltrack, *The Maritime Industry and Our Environment: The Delicate Balance of Economic and Environmental Concerns, Globally, Nationally and Within the Port of Baltimore*, 8 U. Balt. J. Envtl. L. 51, 71 – 73 (2000).
[54] Art. 4(1).
[55] Art. 4(2)(a).
[56] Art. 4(2)(b).
[57] Art. 6(5).
[58] Art. 5(2).

suffered.[59] 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.[60]

MARPOL underwent major amendments in 1992 regarding the design and construction of both new and existing tankers.[61] These amendments, which came into force in July 1993,[62] 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 (because the outer hull is separated from the cargo tanks by a large space that can absorb low speed impacts). This requirement has met with a cold reception from shipowners, who question the choice and effectiveness of the double hull design and argue that there are other, less costly, solutions which should have been favorably considered.[63]

One of the principal weaknesses of MARPOL 73/78 is its failure to provide a satisfactory regime for port and coastal States.[64] It happened that "while 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."[65] This is unfortunate considering the fact that a clear

[59] Art. 7.
[60] Art. 8 and Protocol 1.
[61] See *MARPOL 73/78 Amended for New and Existing Tankers*, [1992] 2 IMO News 3.
[62] Griffin, *MARPOL 73/78 and Vessel Pollution: A Glass Half Full or Half Empty?*, 1 Ind. J. Global Legal Stud. 489, 490 (1994).
[63] Id.
[64] See Brubaker, supra note 17, at 253 (calling for an upgrading of port state inspection and detainment procedures for ships showing substantial non-compliance with MARPOL 73/78 standards).
[65] RONALD MITCHELL, INTENTIONAL OIL POLLUTION AT SEA 99 (1994). See also M'Gonigle & Zacher, supra note 26, at 231-34. 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 hoped to get at the third United Nations Conference on the Law of the Sea.

revelation of the 1978 Conference was that 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.[66]

Mention must 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 (an exception is granted to discharges from SBT). This requirement, while more comprehensive than that under OILPOL, suffers from the same failing because compliance is dependent upon the conscientiousness of the operators.[67]

These criticisms notwithstanding, some scholars have opined that the rules in MARPOL 73/78 are sufficient for dealing with ship-source pollution, stating that what is needed is compliance[68] 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 is ensured is itself an

[66] Mitchell, supra note 63, at 103.
[67] Brubaker, supra note 17, at 141 n.44.
[68] Indeed, like earlier conventions, MARPOL 73/78 suffers from lax state enforcement practices and a lack of compliance by member states in providing reception facilities for vessels carrying their discharges from port to port. Id. at 249.

inadequacy and thus a shortcoming of the Convention.[69] 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:

> [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.[70]

This article proceeds on the foregoing premise (i.e., that there should be a radical departure from the current international legal approach to ship-source oil pollution prevention and control). As has been observed, much of the problem 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 will motivate States to comply.

C.LOSC

[69] 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.
[70] Curtis, supra note 48, at 705.

LOSC was concluded in 1982 after nine years of deliberations and negotiations and came into force after an even longer period,[71] 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."[72] One model that presents itself as an attractive alternative is the new notion of soft law. Its attractiveness lies especially in the fact of its characteristic speed.[73] Another option may be found in jettisoning the "all-inclusive treaty" idea represented by LOSC in favor of conventions that address specific subjects, also known as the framework convention-protocol approach.[74] This latter technique averts the kind of problem that dogged the entry into force of the rest of the LOSC due to disagreements over Part XI (dealing with deep seabed mining).[75]

LOSC dedicates a whole part (more than 40 articles)[76] to the marine environment, attempting to create a balance between marine environmental

[71] The Convention came into force in November 1994 (i.e., one year after the deposit of the 60th instrument of ratification). See P. BIRNIE & A. BOYLE, BASIC DOCUMENTS IN INTERNATIONAL LAW AND THE ENVIRONMENT 153 (1995).
[72] Chinkin, Remarks, 82 Proc. Am. Soc. Int'l L. 371, 389 (1988).
[73] See 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* Trilateral Perspectives on International Legal Issues: Relevance to Domestic Law and Policy 73, 78 (M. Young & Y. Iwasawa eds. 1996). A contrary 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 lengthy as that for the negotiation of a treaty." Chinkin, *The Challenge of Soft Law: Development and Change in International Law*, 38 Int'l Comp. L.Q. 850, 860 (1989).
[74] Magraw, *International Law and Pollution*, *in* International Law and Pollution 3, 11 (D. Magraw ed. 1991).
[75] On how Part XI affected the reception and ratification of the Law of the Sea Convention, see, e.g., S. MAHMOUDI, THE LAW OF DEEP SEA BED MINING (1987), and Charney, *U.S. Provisional Application of the 1994 Deep Seabed Agreement*, 88 Am. J. Int'l L. 705 (1994).
[76] See Part XII, consisting of arts. 192-237.

protection from ship-source pollution and the rights of navigation.[77] 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.[78] However, the only obligations LOSC imposes to prevent, reduce, and control ship-source pollution are placed on flag States; coastal and port States have limited jurisdiction to prescribe and enforce environmental standards, but they are not required to do so.[79]

On the high seas, LOSC favors the exclusivity of flag State prescriptive jurisdiction and the primacy of flag State enforcement jurisdiction.[80] In the Exclusive Economic Zone (EEZ),[81] although coastal States recorded 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.[82] Nevertheless, within their territorial seas, coastal States continue to enjoy the power to adopt national, rather than, international rules. This is,

[77] Meese, supra note 9, at 89.
[78] Arts. 192, 194.
[79] Bodansky, supra note 15, at 741.
[80] Arts. 211 and 217; but see McDorman, *Port State Enforcement: A Comment on Article 218 of the 1982 Law of the Sea Convention*, 28 J. Mar. L. & Com. 305, 322 (1997) (arguing that port States are not estopped from exercising prescriptive jurisdiction on the high seas).
[81] The EEZ, an area of 200 nautical miles from the continental baselines, was created by the LOSC. Before the Convention came into force, however, the EEZ had become a rule of customary international law, having satisfied the two requirements for such, 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 which distinguishes common practices motivated by a legal obligation from common practices done out of expediency or convenience). See EDITORS OF THE HARVARD LAW REVIEW, TRENDS IN INTERNATIONAL ENVIRONMENTAL LAW 28 N.73 (1992).

however, subject to certain limitations, including the obligation not to hamper, deny, or impair the right of innocent passage.[83]

One innovation of LOSC is that it grants coastal States, 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.[84] Here, therefore, the otherwise applicable "innocent passage regime" is superseded by the Arctic exception regime according to the canon *lex specialis generalis derogat.*[85] This provision was obviously included in recognition of Canada's interests in the Arctic Ocean,[86] but its limited application does not seriously affect the general conclusion that for vessel pollution in the EEZ, LOSC favors the application of international, rather than national, rules and standards.[87]

On the issue of enforcement, the Convention proceeded with a basic understanding that there had been a generally abysmal record of enforcement and compliance with marine pollution regulations internationally.[88] It is therefore to LOSC's credit that it imposes a duty on states to enforce regulations on vessel-source pollution.[89] It incorporates, in stronger terms than ever before, the flag state's obligation to ensure that its vessels comply with applicable pollution standards, encompassing such matters as the prohibition of the sailing of

[82] Art. 211(6)(c).
[83] Arts. 24 and 211(4).
[84] Art. 234.
[85] Wang, *A Review of the Enforcement Regime for Vessel-Source Oil Pollution Control*, 16 Ocean Dev. & Int'l L. 305, 326 (1986).
[86] M'Gonigle & Zacher, supra note 26, at 246-47.
[87] Boyle, *Marine Pollution Under the Law of the Sea Convention*, 79 Am. J. Int'l L. 347, 362 (1985).
[88] Id. at 362-63.
[89] Art. 217.

substandard vessels[90] and the investigation and prosecution of alleged violations 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 violations of pollution laws.[91] This is, however, limited by the right of innocent passage. The coastal State is also empowered to arrest and prosecute for pollution which occurs in the EEZ and which causes or threatens major damage to the coastal State,[92] and to inspect the vessel before there is a substantial discharge which causes or threatens significant pollution.[93] The phrases "major damage," "substantial discharge," and "significant pollution" used here are shrouded in uncertainty, and this confusion could constitute a fertile ground for potential conflicts.[94] A clear definition of these terms is therefore 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.[95]

Port States now possess an enhanced jurisdiction not only, as was previously the case, to investigate and prosecute any violation of applicable rules

[90] Art. 217(2).
[91] Art. 220(2).
[92] Art. 220(6).
[93] Art. 220(5).
[94] They demonstrate, however, the imprecision with which provisions in international agreements are sometimes couched to elicit widespread acceptance where it is perceived that States do not want to commit themselves to clearly defined and workable obligations.

[95] Art. 220 (3).

in their own territorial seas[96] or EEZs, but also to investigate and prosecute discharge violations on the high seas or within the jurisdictional zones of other States.[97] 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 concerned coastal State or flag State.[98] Commenting on Article 218, one legal scholar has noted:

> 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 could usurp port State jurisdiction.[99]

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 does not affect it at all[100] and flag States, in a bid to favor or protect the interest of their vessels, may be unwilling to allow the port State to exercise its jurisdiction.

Under Article 228(1), the flag State has a 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

[96] Art. 220(1).
[97] Art. 218.
[98] Art. 218(2). For those occurring on the high seas, no such limitation exists.
[99] McDorman, supra note 78, at 322.
[100] See Boehmer-Christiansen, *Marine Pollution Control: UNCLOS III as the Partial Codification of International Practice*, 7 Envtl. Pol'y & L. 71, 73 (1981).

port State and coastal State enforcement."[101] 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.[102] It should be further noted that the right of preemption does not apply to coastal State proceedings for territorial sea offenses or port State proceedings for offenses in its own territorial sea or EEZ.

States can continue to intervene beyond the territorial sea in cases of maritime casualties.[103] LOSC even permits intervention where there is merely "threatened damage" to the coastline, suggesting the possibility of earlier action than might be permissible under the 1969 Intervention Convention.[104] Complementing the above right is a requirement that flag States 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.[105] Where there is the likelihood that a State will be affected by pollution and another State becomes aware of this fact, the State with such knowledge is also required to inform the former State.[106] The Convention also affirms the concept of State responsibility for environmental damage caused

[101] Bernhardt, *A Schematic Analysis of Vessel-Source Pollution: Prescriptive and Enforcement Regimes in the Law of the Sea Conference*, 20 Va. J. Int'l L. 265, 307-08 (1980).
[102] Art. 228(1).
[103] Art. 221.
[104] Boyle, supra note 85, 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, reprinted at 9 I.L.M. 25 (1970)), 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 the Intervention Convention, see Yoram Dinstein, *Oil Pollution by Ships and Freedom of the High Seas*, 3 J. Mar. L. & Com. 363 (1972).
[105] Art. 211(7). The right to notification applies to all pollution incidents.
[106] Art. 198.

by marine pollution,[107] but it lacks concrete standards and the means of implementation.[108]

LOSC has made some remarkable inroads toward the achievement of cleaner and safer seas. Nevertheless, a pertinent question is whether it has gone far enough, especially when considered in the light of the immensity of the investment made into it (including time and material resources). "From an ideal perspective," the Convention is "woefully inadequate."[109] Nevertheless, one cannot help 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."[110]

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, have nonetheless brought a measure of sanity to ocean governance and the improvement of the marine environment.[111] In other

[107] Art. 235.
[108] Kiss & Shelton, supra note 12, at 159.
[109] M'Gonigle & Zacher, supra note 26, at 241-51.
[110] Boyle, supra note 85, at 370.
[111] See Safer Ships, Cleaner Seas: Report of Lord Donaldson's Inquiry into the Prevention of Pollution from Merchant Shipping P3.4 (1994), wherein the Committee, relying on data from the 50th Report of the Joint Group of Experts on Scientific Aspects of Marine Pollution, sought to illustrate the decline of quantities of oil reaching the sea since more stringent regulations were introduced. Friends of the Earth International, an environmental group, objected to this conclusion on the ground that the Committee had used inconsistent figures. See Wallace, *"Safer Ships, Cleaner Seas": The Report of the Donaldson Inquiry into the Prevention of Pollution from Merchant Shipping*, [1995] LLOYD'S MAR. & COM. L.Q 404, 405.

words, their presence has been justified to an extent and their absence would have entailed a far worse scenario. Whatever achievements have been 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 hung like an albatross around the neck of international law generally.[112] It is a trite fact that international law is chronically weak on enforcement.[113] Speaking in 1924, James Brierly made the following observation that reverberates eight decades later and still has relevance: "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."[114]

Environmental agreements often share in this common problem, lacking the basic mechanisms to ensure their full effectiveness.[115] 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 a doubt, the greatest problem of controlling oil pollution is that of enforcement,[116] as it is one thing to

[112] Ibrahim Shihata, *Implementation, Enforcement and Compliance with International Environmental Agreements -- Practical Suggestions in Light of the World Bank's Experience*, 9 Geo. Int'l Envtl. L. Rev. 37 (1997).
[113] Elli Louka, *Cutting the Gordian Knot: Why International Environmental Law is Not Only About the Protection of the Environment*, 10 Temp. Int'l & Comp. L.J. 79 (1996).
[114] Brierly, *The Shortcomings of International Law*, *in* The Basis of Obligation in International Law and Other Papers 68 (H. Lauterpacht & E. Waldock eds. 1958), cited in Dempsey, *Compliance and Enforcement in International Law -- Oil Pollution of the Marine Environment by Ocean Vessels*, 6 Nw. J. Int'l L. & Bus. 459, 526 (1984).
[115] Shihata, supra note 110.
[116] Sir Colin Goad, former IMCO Secretary General, quoted in M'Gonigle & Zacher, supra note 26, at 327.

establish a ban on specified discharges of oil, but an entirely different thing to ensure that offenders will be detected, identified, and sanctioned.[117] Yet an "essential virtue of any worthwhile legislation is the possibility of enforcement."[118] Indeed, enforcement, to a reasonable extent, is the crucible of the law.[119]

A vivid illustration of the contention that compliance and enforcement are the bane of this area of the law is presented by the zeal surrounding the foundations of MARPOL 73 and the optimism that prevailed at its conclusion. Despite its description by the IMO as "the most ambitious international treaty covering maritime pollution ever adopted,"[120] 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,"[121] the reality 30 years later is a far cry from the envisaged achievement of the objectives, having failed to elicit States' compliance as desired.[122]

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

[117] E. BROWN, THE LEGAL REGIME OF HYDROSPACE 138 (1971).
[118] Holdsworth, *Convention on Oil Pollution Amended*, 1 Marine Pollution Bull. 168 (Nov. 1970).
[119] Reisman, *Sanctions and Enforcement*, *in* 3 Conflict Management: The Future of the International Legal Order 273, 275 (C. Black & R. Falk eds. 1971).
[120] [1982] 4 IMO News 10.
[121] Mensah, supra note 10, at 117 (quoting the International Convention for the Prevention of Pollution from Ships, fourth preambular paragraph).

for the interest of others. The protection of the marine environment has been apathetically and appallingly viewed essentially as a "no man's business." The rationale appears to be anchored in the belief that "the economic 'property of all' [should] be the environmental responsibility of none."[123] This is surely a classic reflection of the tragedy of the commons,[124] where, as in a Greek drama, an unfolding catastrophe is being revealed and, though aware of the consequences, everybody watches while the potential ruin of all unfolds.[125]

As such, 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. This work shares the views of the Editors of the *Harvard Law Review* that "future environmental regimes can succeed only by advancing a common locus of states' interests. The challenge for global environmental

[122] Lord Donaldson's report, supra note 109.
[123] Kindt, *The Effect of Claims by Developing Countries on LOS International Marine Pollution Negotiations*, 20 Va. J. Int'l L. 313, 315 (1980).
[124] Hardin, *The Tragedy of the Commons*, 162 Sci. 1243 (1968). Professor Hardin's thesis, using the example of a common grazing ground, is that there is a tendency for every herdsman to keep on adding to his herd to maximize 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.

Id. at 1244.

[125] Saunders, *The Economic Approach, in* Environmental Law and Policy 363, 373 (2d ed) (E. Hughes et al. eds. 1998).

management rests in identifying these interests and constructing a system based on them."[126]

The task that this dissertation undertakes is to construct such a system, realizing the importance of the compliance equation to the success of any international arrangement. While the job appears daunting, it is not necessarily impossible. This work does 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."[127]

V: CONCLUSION

The measures designed by the international community to combat the problems occasioned by the international commerce in oil, though remarkable, have not been very successful in attacking the core problem. This has largely been due to the difficulties in getting States to implement, comply with, and enforce the standards contained in the various conventions. States have been reluctant to live up to their obligations as the cost of compliance seems to far outweigh the benefits of noncompliance. Because of the structure of the world community, international law lacks the necessary mechanisms to assure respect for its rules. A system structured on the basis of States' interests and increased responsibility for the corporate sector would go a long way in facilitating compliance and effectuating the intention of the existing regulatory framework. The result will be the

[126] Editors of the Harvard Law Review, supra note 79, at 17.
[127] ROGER FISHER, IMPROVING COMPLIANCE WITH INTERNATIONAL LAW 350 (1981).

coexistence of a qualitative marine environment and a thriving international trade in crude oil and petroleum products in a mutually beneficial atmosphere.

CHAPTER 2

IMPLEMENTATION, COMPLIANCE AND ENFORCEMENT

I. INTRODUCTION

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

Jurisdiction, whether exercised by the flag, coastal or port State, is of different dimensions. It could involve the power to make decisions or rules, known as prescriptive or legislative jurisdiction. There is also the power to take executive action in pursuance of, or consequent on, the making of decisions or rules, referred to as enforcement or prerogative jurisdiction.[2] A third category has been identified as adjudicative jurisdiction and involves the power of a court or administrative tribunal

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

[2]IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW, 301 (5th ed. 1998).

to hear a case against a vessel or a person,[3] but it appears that this third class is encompassed in enforcement jurisdiction.[4]

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

To do justice to the important issues discussed here, this chapter will be divided into three major parts. The first part defines the terms "compliance" and "enforcement" as they are used in this work. The second part contains an exposition of the traditional methods of compliance and enforcement, including their bases, scope, strengths and pitfalls. This part is divided into three sections, each

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

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

concentrating on a single method. The third part discusses an alternative approach of a norm of corporate behavior, emphasizing that ethical principles should be given legal teeth in international business and be integrated into the corpus of international law.

The conclusion reached is that a concerted and disinterested application of a combination of traditional approaches with the proposed alternative approach will go a long way toward improving compliance and enforcement of international regulations.

II. COMPLIANCE AND ENFORCEMENT: CONCEPTUAL ISSUES

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

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

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

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

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

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

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

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

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

the part of an actor to conform to a rule of his or her own accord, according to whatever calculus he or she might employ."[13]

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

An eclectic perspective embracing the two opposing views presents a clearer picture of the existence and resolution of the compliance-enforcement problem. As Oran Young observes, "Enforcement is no doubt a sufficient condition for the achievement of compliance in many situations, but [there is] no reason to regard it as a necessary condition in most realms of human activity."[16] International oil pollution control has involved a number of negotiations accommodating different interests with a view toward ensuring compliance.[17] There is no noticeable harm in exploring the

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

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

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

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

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

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 fail in their duty. Describing the extant system, Wang states as follows:

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

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

III. TRADITIONAL APPROACHES TO COMPLIANCE AND ENFORCEMENT

A. Flag State Jurisdiction

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

[18]The subject of enforcement against States and inducing State compliance is discussed in Chapter 3. The present chapter will concentrate on enforcement against ships or in the actual sense, the corporations that own these 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*, 9 GEO. INT'L ENVT'L. L. REV. 1 (1996).

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

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

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

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

The preference for the flag State in control of its ships is premised basically on "territoriality" or "nationality." The territoriality principle posits that a flag State is entitled to exercise its jurisdiction over its ships because a ship is an extension of the

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

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

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

State's territory, a floating island.[24] The territoriality principle has received attention in Anglo-American jurisprudence[25], although courts have had cause on a number of occasions to give cognizance to its perceived limitations.[26] The principle received an international judicial imprimatur in the *Lotus Case* [27] where the court held that "what occurs on board a vessel on the high seas must be regarded as if it occurred on the territory of the State whose flag the ship flies."

According to the nationality principle, states have jurisdiction over their nationals even in the case of extraterritorial acts because the national owes allegiance to his or her own country. Therefore, the flag state derives the legitimacy to exercise jurisdiction over its ships because they are its nationals.[28] It should be noted, however, that "since the territorial and nationality principles and the incidence of dual nationality create parallel jurisdiction and possible double jeopardy, many states place limitations on the nationality principle."[29]

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

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

[26]In *Scharrenberg* v. *Dollar Steamship Co*., 245 U.S. 122, 127 (1917) the court said: "It is, of course, true that for purposes of jurisdiction a ship, even on the high seas, is often said to be part of the territory of the nation whose flag it flies: But in the physical sense this expression is obviously figurative, and to expand the doctrine to the extent of treating seamen employed on such a ship as working in the country of its registry is quite impossible." *Id.* at 127. (footnote omitted.) *See also 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 306 (footnote omitted).

1. Application of Flag State Jurisdiction

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

MARPOL 73/78[33] follows in the footsteps of its predecessor and provides, among other things, that any party shall furnish to the flag State evidence, if any, that a ship has discharged harmful substances in violation of the provisions of the regulation.[34] The flag State, in turn, shall investigate the matter and if satisfied that sufficient evidence is available, shall commence proceedings in accordance with its law as soon as possible.[35]

The 1982 Law of the Sea Convention[36] ("LOSC") is also emphatic on flag State jurisdiction. It provides that unless in exceptional cases provided in international

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

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

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

[33]*Supra* note 9.

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

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

[36]LOSC, *supra* note 22.

treaties or in LOSC itself, ships shall be subject to the exclusive jurisdiction of the flag State on the high seas.[37]

2. Problems with Flag State Jurisdiction

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

[37]*Id.* 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]Lowe, *supra* note 4, at 624. (noting that: "Flag States are sometimes unable to institute proceedings against their vessels which may not visit their ports for many months, and some states appear unwilling to do so even when the opportunity arises."

[40]Marie-Jose Stoop, Olieverontreiniging door Schepen op der Noordzee over de Periode 1982 - 1987: Opsporing en Vervolging, (Amsterdam, The Netherlands: Werkgroep Noordzee, July 1989); *cited in* Mitchell, *supra* note 8, at 163.

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

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

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

Some flag States are also involved in "flags of convenience" shipping and this has been linked to the pitfalls of flag State jurisdiction. According to Professor Dempsey, "[t]he legal fiction of flags of convenience, as well as overriding economic considerations, inhibit the effectiveness of a regime of flag state enforcement over violations in the "commons" of the high seas."[45]

The following subsection will discuss this controversial subject.

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

One of the fallouts of flag State jurisdiction is the sailing of ships under what has come to be known as flags of convenience.[46] This issue will be discussed under

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

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

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

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

three separate sections: nationality of ships, registration of ships, and flags of convenience practice.

a. Nationality of Ships

The notion is fundamental in international law that all ships must possess a 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. Second, a grant of nationality will be invalid if there

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

[48] MARJORIE M. WHITEMAN, DIGEST OF INTERNATIONAL LAW, 21 (1968).

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

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

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

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

b. Registration of Ships

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

[51]*Id.* at 212.

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

[53]*Naim-Molvan* v. *Attorney-General for Palestine* (1948) A.C. 351. *See*, however, ships flying the flag of the United Nations and its specialized agencies. *See also* LOSC, *supra* note 21, art. 93.

[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).

category, and is described as having "the most stringent registration requirements of any maritime nation."[56]

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

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

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

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

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

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

[61]*Id.* at 258.

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 State sovereignty.[64] The problem is that it tends to elevate FOC States to sovereign positions depicted in Lord Ellenborough's rhetorical question: "Can the Island of Tobago pass a law to bind the rights of the whole world?"[65]

c. Flags of Convenience Practice

i. Preliminary Matters

Although open registries enjoy a rich history, it will not be necessary for the purposes of this study 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 that defies easy definition.[67] Nevertheless, in his epic work on the subject, *Flags of*

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

[63]BOLESLAW ADAM BOCZEK, FLAGS OF CONVENIENCE: AN INTERNATIONAL LEGAL STUDY 94, 102-103 (1962).

[64]*Id.* at 104.

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

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

[67]Ebere Osieke, *Flags of Convenience Vessels: Recent Developments*, 73 AM. J. INT'L L. 604 n1 (1979).

Convenience: An International Legal Study,[68] Dr. Boleslaw Boczek defines it as "the flag of any country allowing the registration of foreign owned and foreign controlled vessels under conditions which for whatever the reasons, are convenient and opportune for the persons who are registering the vessels."[69] A strict interpretation of this definition would reveal some defects. In the 1980s, the United States registry was made available for Kuwaiti-owned and Kuwaiti-controlled vessels for reasons convenient and opportune for the persons involved, among which was the facilitation of commerce during the Iran - Iraq war.[70] Yet, it would be totally objectionable to classify the United States as a flag of convenience ("FOC") state.

A descriptive approach to the concept is preferable. The Rochdale Committee[71] defined such flags by recourse to their salient characteristics including: ownership by non-nationals, easy access to the registry, taxes that are low and levied abroad, participation mainly by small powers to whom receipts from the business might make a difference to national income and balance of payments, manning of the ships by non-nationals, and lack of the power and administrative machinery to impose regulations or the inclination or capability to control the companies themselves.

[68]BOCZEK, *supra* note 63.

[69]*Id.*

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

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

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

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

[73]*Id.*

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

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

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

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

One such benefit is easy access to registration. Non-nationals of OR States have the opportunity to register 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., which is headquartered in the United States.[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 favored because they assure a better return on investment by minimizing operating costs.[82] By registering their ships in such registries, shipowners are not saddled with the requirements of employing highly qualified personnel for manning and crewing purposes, thus reducing their salary budgets. The absence of social security requirements, and strong unions constantly agitating for worker rights and improvement in working conditions, are also some of the "blessings: of an open registry.[83] According to Exxon Oil Corporation (now

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

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

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

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

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

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

Exxon Mobil), a tanker with a 28-man crew costing US $560,000 to run if registered in the Philippines would cost US $2.5million to run if registered in the United States.[84]

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

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

Some of the above reasons may have been overemphasized as determinants of the decision to patronise an OR. Ship owners would probably insist on FOC shipping in the absence of some of these factors or even if some corresponding benefit were offered by non-FOC States.[87] According to McConnell, many OR fleets are

[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]Id., at 90 (noting that: "In such a context, of course, a flag-of-convenience state can become a party to violation of an anti-pollution convention. It is merely anticipated to fail, conspicuously and consistently, if not conscientiously, in performing its treaty obligation to police effectively the contaminating proclivities of ships privileged to fly its flag.")

[87]*See* UNCTAD, ACTION ON THE QUESTION OF OPEN REGISTRIES 11 (U.N. DOC. NO. TD/B/C.4/220).

composed of modern, well-maintained vessels and many of the OR States have commenced enforcing safety standards and inspections in compliance with international conventions.[88] Ship owners' preference for open registries is more likely traceable to the freedom from control which FOC States provide.[89] Modern business philosophy favors less State intervention and control over business activities, as illustrated by the growing significance of the World Trade Organization ("WTO") and the current campaign for introduction of a multilateral agreement on investment ("MAI"),[90] which (seek to) reduce the influence of individual States over business activities taking place in their territories.

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

Further, the growing importance of petroleum as an energy resource and a tool for industrialization has contributed in no small measure to the fuelling of this

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

[89]McConnell, *Id.* at 368.

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

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

practice. Since much of the oil needed in the industrialized world is produced elsewhere, open registries will subsist to "supply" vessels for oil transportation. It therefore follows that oil producing and consuming countries building their economies through commerce in oil share in the blame for the genesis and continuance of this practice.[92]

iii. Flags of Convenience and Environmental Issues

In some quarters, vessels sailing under flags of convenience have become nearly synonymous with environmental hazards. While the battle against open registries was earlier fought by organized labor,[93] more recently "[e]nvironmental and conservation groups, which, in the context of domestic industrial activities, have not been known to have interests sympathetic with those of the maritime trade unions are the new opponents."[94]

Open registries do not sign on to marine safety and environmental treaties and have also been said to be apathetic toward enforcement of international law[95] and, by so doing, weaken the effectiveness of international regulatory efforts. It becomes a seemingly unwise business practice for a ship owner to allow him- or herself to be

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

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

[94]*Id.* at 67.

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

placed at a competitive disadvantage by a colleague who does not bear the cost of complying with international standards. Avoiding the standards wherever the opportunity arises becomes almost inevitable, fostering in maritime environmental matters, a "Gresham's Law" scenario where, as in precious metal currencies, bad practices tend to drive out good ones when external restraints are 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 attendant benefits. As UNCTAD rightly observed, the enforcement of standards and the operation of a registry with the sole aim of making a profit are incompatible.[97] Moreover, OR states generally lack the resources to enforce anti-pollution provisions against their vessels.[98]

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

> 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]

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

[97]UNCTAD, *supra* note 87.

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

The above point is forceful, but still faces formidable opposition. While it is undisputed that many of the tanker accidents in the past have involved FOC vessels including the *Torrey Canyon*(1968), *Argo Merchant* (1976), and *Amoco Cadiz* (1978), it is also on record that the most extensive oil spill so far in terms of destruction and costs was that caused by the MV *Exxon Valdez*, a ship registered in the United States, which grounded off the coast of Alaska in 1989.[100]

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

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

The above argument should not be taken too far, however, since it is more consistent with the character of a shipowner who, because of the lure of profit

[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*, 33 PETROLEUM GAZETTE 20, 21 (1998).

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

maximization, is involved in FOC shipping, to consider reducing operational expenses by indulging in illegal discharges. The anonymity of open registries also offers an incentive to take such risks and escape punishment.[103] The recent incident involving the oil tanker Prestige, which was registered in a FOC State (Liberia) and flew the flag of another FOC State (Bahamas) will certainly re-ignite the debate about the need to police open registries and their fleets and more adequately enforce international rules.[104]

[103]UNCTAD, *supra* note 87.

[104] David Osler, *Analysis Oil Shipping: A Saga Of Single Hulls, Double Standards And Too Many Flags Of Convenience; Sinking Of The Prestige Off The Spanish Coast Reveals Dangers Of Elderly Ships Of Antiquated Design Ferrying Oil Around The World*, The Independent (London), November 20, 2002, at 18.

iv. Control of Open Registries

In view of the pitfalls of FOC shipping, various measures have been taken to deal with this practice. These include the imposition of a "genuine link,"[105]confrontation from organized labor,[106] and increasing port state control under international arrangements.[107] In view of the fact that this portion of the dissertation concentrates on international regulations relating to the environmental aspects of oil trade and shipping, this section will not address the labor approach, which in the author's opinion was not environmentally motivated, but was concerned with workers' welfare. The concept of "genuine link" and increasing port state control are discussed below.

The notion of "genuine link" was made applicable to ships for the first time by Article 5 of the *Geneva Convention on the High Seas*, although it had been used earlier in a case involving the nationality of persons.[108] The article provides as follows:

> Each State shall fix the conditions for the grant of nationality to ships for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship; in particular, the State must effectively

[105]*See* McConnell, *supra* note 88, at 366.

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

[107]Anderson, *supra* note 56, at 167. Port State control will be discussed in section C below.

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

> exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.[109]

The genuine link concept as applied to ships has been severely criticized.[110] However, efforts to rationalize or criticize this application are a dissipation of energy, since without a clear definition in an international instrument, it is an ineffective tool for controlling FOC shipping. Any State can manipulate its open-ended nature and claim to be abiding by it. Thus, the concept required definition. In 1986, it was proclaimed: "For the first time an international instrument now exists which defines the elements of the "genuine link" that should exist between a ship and the state whose flag it flies."[111] This was in reference to the 1986 *United Nations Convention on the Conditions for the Registration of Ships,*[112] ("UNCCORS") also described as introducing "new standards of responsibility and accountability for the world shipping industry."[113]

The principal provisions of UNCCORS relating to genuine link are contained in articles 8, 9 and 10. Article 8 requires a flag State to make provisions in its laws regarding the ownership of ships flying its flag.[114] Such laws must include

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

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

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

[112]*Reprinted* in 26 I.L.M. 1229 (1987) [Hereinafter UNCCORS].

[113]UNCTAD information Unit, *supra* note 111.

[114]UNCCORS, *supra* note 112, art 8 (1).

appropriate provisions for participation by the flag State or its nationals in the ownership of ships flying its flag and "should be sufficient to permit the flag state to exercise effectively its jurisdiction and control over [those] ships. . . ."[115] Although a State can establish its genuine link through ownership, as indicated above, it can also do so through manning.[116] 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.[117]

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.[118]

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

[115]*Id.* art. 8 (2).

[116]*Id.* art. 7.

[117]*Id.* art. 9 (1).

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

[119]UNCCORS, *supra* note 112, art. 10 (1).

State.[120] The flag State is also directed to ensure that persons accountable for the management and operation of a ship flying its flag are in a position to meet the financial obligations that may arise from the operation of such a ship.[121]

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 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."[122]

It would seem that UNCCORS virtually left the problem unsolved. "It is obvious that the 1986 UNCCORS reaffirmed the flag state's supremacy and institutionalized the *status quo*, leaving the concept of "genuine link" still nebulous and controversial."[123] 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 . . . ." [124] It may be worthwhile to note, however, that while UNCCORS did not go far enough, it surely was an improvement on the existing scheme.[125] The fact

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

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

[122]Sturmey, *supra* note 118, at 106.

[123]GEORGE KASOULIDES, PORT STATE CONTROL AND JURISDICTION 75 (1993).

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

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

that it has not been ratified by some traditional maritime and FOC States who accepted previous Conventions' position on genuine link [126] suggests, at least, their recognition that UNCCORS makes inroads into their sphere of authority, a legal authority they are not yet ready to surrender.

d. Observations

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

A pertinent question may be whether some FOC states can lay legitimate claim to equity since they might not come with clean hands. Yet the fact remains that most OR states are poor countries involved in the practice mainly to make ends meet. Where are the fairness and fraternal bond in an international community interested in extinguishing some countries' source of sustenance without assisting in fashioning alternative economic bases for them? Where is the equity in targeting OR States without requiring oil producing and consuming nations to be accountable for their actions, since their inordinate desire for economic development at the expense of

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

environmental well-being has substantially led to the creation and sustenance of open registries? Where is the justice in allowing oil and shipping companies to go scot-free, and be free to continue promoting sharp business practices regardless of environmental and safety implications, rather than implementing a system that makes them legally and socially responsible, and accountable to humanity and the environment?

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

The issues of corporate responsibility and accountability as well as the obligation of those that profited from the existing state of affairs will be revisited in the course of this work.[127] At the moment, the discussion will continue with an examination of the remaining traditional approaches to compliance, commencing with coastal States' jurisdiction.

B. Coastal State Jurisdiction

The approach of international law toward coastal State jurisdiction, another type of jurisdiction mentioned earlier, is to define it in terms of distinct zones of the oceans namely, internal waters,[128] the territorial sea,[129] the contiguous zone[130], and the exclusive economic zone (EEZ).[131]

[127] Corporations will be discussed in Part IV, *infra*, while States are discussed in Chapter 3.

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

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

Coastal States have plenary prescriptive and enforcement powers in their internal waters, subject only to restrictions accepted by treaty.[132] Under MARPOL 73/78, a coastal State may inspect a vessel in its internal waters or ports to ensure compliance with international standards on vessel construction and design,[133] or to ascertain any violation of international discharge standards.[134]

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.[135] A coastal State is free to adopt its own pollution discharge rules for foreign vessels in the territorial sea, as there is no requirement for conformity of these rules with international law.[136]

The above prescriptive jurisdiction is, however, limited by the obligation not to hamper, deny, or impair the right of innocent passage.[137] Passage is not innocent,

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

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

[132]Bodansky, *supra* note 3, at 745.

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

[134]MARPOL 73/78, *supra* note 9, art. 6.

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

[136]*See* LOSC, *supra* note 21, art 211(4).

[137]LOSC, *supra* note 21, arts 24 and 211(4).

however, when a vessel engages in an act of wilful and serious pollution.[138] The fact that the pollution must be "wilful and serious" before the right of innocent passage is extinguished may likely exclude most typical operational discharges of oil since they are rarely "serious," although they may be "wilful."[139] 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.[140]

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."[141] It is doubtful that this encompasses measures to prevent or control pollution.[142]

With regard to enforcement, coastal States are empowered to investigate, arrest, and prosecute vessels in the territorial sea for contravention of pollution laws.[143] Coastal States also have limited jurisdiction to enforce EEZ pollution standards.[144] They can only do so when a vessel has committed a discharge violation

[138]LOSC, *supra* note 21, art. 19 (2) (h).

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

[140]LOSC, *supra* note 21, art. 21 (2).

[141]LOSC, *supra* note 21, art. 33.

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

[143]LOSC, *supra* note 21, art. 220 (2).

[144]LOSC, *supra* note 21, art. 220 (3).

of such a nature that results in or threatens major damage to the coastal State.[145] Otherwise, a coastal State can only require information about the identity of the ship and its next port of call and relay the information to the vessel's flag State or next port of call, so that either of these States can take appropriate action. A coastal State can act also in the event of maritime casualties with actual or potential harmful consequences.[146]

The coastal State's powers are further restricted by the requirement that it release vessels on bond[147] which generally limits available sanctions to monetary penalties.[148] The foregoing indicates very clearly that coastal State jurisdiction as a mechanism for ensuring compliance with international law is not structured to be a major tool. The preference of the international community has been the concentration of powers in the flag State or a division of powers between the flag and port States. The rationale is that enhanced coastal State powers would pose a threat to navigation.[149]

[145]LOSC, *supra* note 21, art. 220 (5) and (6).

[146]LOSC, *supra* note 21, art. 221.

[147]LOSC, *supra* note 21, art. 226 (1) (b).

[148]LOSC, *supra* note 21, art. 230 (1).

[149]Boyle, *supra* note 139, at 364.

C. Port State Jurisdiction

As the name implies, port State jurisdiction is jurisdiction and control over ships by a port State.[150] It is jurisdiction based solely on a ship's presence in port.[151] Otherwise, a port State whose coastal waters have been affected by a ship's polluting activities can exercise jurisdiction as a coastal state. The basis of the policy entrenching port state jurisdiction has been well articulated by Professor Bodansky as follows:

> From a policy standpoint, port state enforcement represents a compromise between coastal and flag state enforcement. On the one hand, port states may be more inclined than flag states to enforce environmental norms, since port states are themselves coastal states and, as such, are at risk from substandard and delinquent vessels. Port state jurisdiction therefore serves as a useful corrective to inadequate flag state enforcement. On the other hand, port state enforcement is preferable to coastal state enforcement since it interferes much less with freedom of navigation and can generally be performed more safely. Stopping and boarding a vessel in transit at sea for inspection purposes directly interferes with the vessel's movement and can be hazardous, depending on the weather and location. In contrast, inspecting a vessel while in port imposes little if any burden on navigation and can be performed safely.[152]

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

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

[151]Bodansky, *supra* note 3, at 738.

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

1. International Legal Provisions on Port State Jurisdiction

The Law of the Sea Convention of 1982 vested port States, for the first time, with authority over pollution incidents occurring on the high seas or in another State's coastal waters.[153] The port State may conduct inspections and institute proceedings against vessels that have violated "applicable international rules and standards."[154] It may also conduct inspections for discharge violations in another State's coastal waters, and may prosecute for such discharges , however, subject to flag State preemption for pollution offenses occurring on the high seas.[155]

Controversy rages as to the scope of jurisdictional competence conferred on port States by LOSC. Sally A. Meese[156] 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.[157] McDorman adopts a similar line of reasoning, maintaining that port States have prescriptive jurisdiction on the high seas.[158]

Bodansky seriously questions this reasoning, arguing that article 218 is in section 6 of Part XII, which is devoted to enforcement jurisdiction, rather than in

[153]LOSC, *supra* note 21, art. 218.

[154]LOSC, *supra* note 21, art. 218 (1).

[155]LOSC, *supra* note 21, art. 228.

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

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

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

section 5, which deals with prescriptive jurisdiction.[159] 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."[160] Support for this view can be found in Cheng-Pang Wang's assertion, with respect to article 218, that "[t]he port state has been thereby recognized as having the competence to apprehend a foreign ship, which is voluntarily within the port . . . of that state, for a discharge of oil pollution as defined by another State."[161]

This latter view that a port State's powers for high seas offenses is limited to enforcement, certainly has merit. However, it also brings to the fore the difficulties that would arise if the position of port States is so limited. For instance, if a ship that has been apprehended by the port State for high seas discharge violations is from a flag State that either is not a signatory to the relevant international conventions or has not implemented the "applicable international standards" in local legislation, the port State will be unable to proceed against that ship.

Other international measures on port State control also exist, an example of which is the consolidated port State control measures of the International Maritime Organization ("IMO").[162] The consolidated resolution and its annexures outline and

[159]Bodansky, *supra* note 3, at 762.

[160]Bodansky, *supra* note 3, at 740.

[161]Wang, *supra* note 4, at 309.

[162]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>.

stipulate the procedures for port State control. Inspections fall into two broad categories: initial port State inspections and more detailed inspections. There are also guidelines for detention and reporting procedures.

2. Regional Port State Control Efforts

Regional efforts relating to port State control are in place in different parts of the world, with the West and Central African Region adopting them most recently. Until the latter part of 1999, regional measures on port State control did not exist in West Africa, notwithstanding the lengthy existence of a legal framework for such a cooperative venture.[163] The Abidjan Convention, drafted under the auspices of the United Nations Environment Programme's Regional Seas Programme, makes provisions which enjoin covered countries 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."[164]

These countries must also cooperate with international, regional, and subregional organizations to adopt standards and practices that would enable them to accomplish these goals.[165] Parties' responsibilities to work toward preventing,

[163]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/1G.22/7 (March 31, 1981) *reprinted in* 20 I.L.M. 746 [Hereinater, the Abidjan Convention]. A few years ago, one African scholar wrote that the Abidjan Convention had "yet to elicit even a basic level of political commitment in the form of majority ratification or accession, the equipping of national institutions to carry out its requirements, or financial support for its implementation." *See* David Dzidzornu, *Marine Pollution Control in the West and Central African Region*, 20 QUEEN'S L.J. 439, 477 (1995).

[164]Abidjan Convention, *Id.* art. 4 (1). *See also* art. 4 (3).

[165]*Id.* art. 4 (4).

reducing, combating, and controlling pollution arising from incidents related to shipping are also underscored.[166]

A number of factors, mainly political and economic, accounted for the slow pace of translating these provisions into reality in West Africa. For the past fifteen years, that region has had various forms of commotion and civil disturbance, including guerrilla warfare in Liberia, Sierra Leone, and Guinea-Bissau.[167] In such an atmosphere, it is wishful thinking to expect much to be accomplished.

Financial constraints also impede cooperative efforts. A study conducted by the United Nations Environment Programme on a West African sub-regional arrangement for marine oil pollution control covering Nigeria, Cameroon, Equatorial Guinea, and Sao Tome and Principe, was suspended partly due to failure of the member States to pay their assessments to a Trust Fund for that purpose.[168]

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 has observed:

> Indeed, foundational to the success of marine regionalism for purposes of pollution control is the character of the national economic policies of each participating State, especially of the coastal States . . . African States favour economic development over ecological preservation.[169]

[166]*Id.* art. 5.

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

[168]*See* Dzidzornu, *supra* note 163, at 479 n119 and accompanying text.

[169]*Id.* at 464.

Policy reformulation is necessary in West African countries. It is dangerous for developing countries to be obsessed with economic development to the exclusion of environmental protection.[170] Moreover, the trend in the global community is toward an understanding that economic development and environmental protection are not mutually exclusive, as encapsulated in the concept of sustainable development, which emphasizes that "environment and development are not only interrelated but inseparable."[171]

Moreover, developed countries are not necessarily more concerned about the environment, nor less concerned with economic growth, than developing countries,[172] yet some of them were able to fashion a functional regional arrangement on port State control long before now.[173] What is required, therefore, is a "comprehensive process of resource management, informed by ecosystemic knowledge and progressively integrated with economic development planning."[174]

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

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

[172]*See* D. Westbrook, *Environmental Policy in the European Community: Observations in the European Environment Agency,* 15 HARV. ENVT'L L. REV. 257 (1991); O. Lomas, *Environmental Protection, Economic Conflict and the European Community,* 33 MCGILL L. J. 506, 508-510 (1988).

[173]Paris Memorandum of Understanding, *infra* note 179 and accompanying text.

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

The advantages of a regional arrangement are legion. In the first place, it emphasizes a preventive approach to oil pollution, which suits African States since they lack the technical resources and equipment to deal with any major maritime casualty.[175] The importance of this cannot be overemphasized, considering that West Africa is a major tanker route and tanker-handling port facilities are located in all but six countries in the region.[176] Thus, the region is at high risk of pollution arising from tanker collision, grounding, loading and unloading, and offshore oil and gas production accidents.[177]

A coordinated system of port State inspection would also go a long way toward minimizing financial costs incurred by individual State efforts and addressing the problem of substandard vessels.[178] West Africa is a marine-resource-rich zone that should be interested in their conservation and revenue through concerted pollution control and prevention measures.[179] The fact that the years between 1991 and 2000 have been declared the decade for marine and coastal environmental protection,[180] made this period an auspicious time to introduce a regional port State regime. This

[175]Fall, *supra* note 171, at 283.

[176]Dzidzornu, *supra* note 163, at 469-470.

[177]*Id.* at 470.

[178]*See* Kasoulides, *supra* note 123, at 149.

[179]*See* Fall, *supra* note 171, at 285. Tuna can be found in abundance here. *See also* Dzidzornu, *supra* note 169 at 465 stating that the West and Central African region contains fifty-five per cent of all of Africa's fish potential.

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

newly-introduced scheme, like those in other parts of the world, follows in the footsteps of the Paris Memorandum of Understanding[181] ("MOU"), discussed below.

The Paris MOU provides a legal foundation for the cooperative efforts of a number of European countries concerning port State control.[182] Under it, certain categories of ships are targeted for inspection purposes. These include ships that may present a special hazard, for example, oil tankers and gas and chemical carriers as well as ships with recent deficiencies.[183] A maritime authority is enjoined to avoid inspecting ships which have been inspected by the maritime authority of another State within the preceding six months, unless there are clear grounds for inspection.[184] This avoids duplication of inspection exercises with the attendant costs on State revenue and maritime transport.

When an inspection reveals deficiencies which are "clearly hazardous to safety, health or the environment," the maritime authority must ensure that the ship does not proceed to sea and "for this purpose will take appropriate action, which may

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

[182]The MOU format adopted here is ostensibly a reflection of the intention of States involved to avoid binding obligations. This is accentuated by the fact that it was concluded among maritime authorities and not State governments. *See* Kasoulides, *supra* note 123, at 151.

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

[184]*Id.* s. 3 (4).

include detention."[185] 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 toward ensuring that the ship can proceed without unreasonable danger to safety, health, or the environment.[186] The MOU also obliges members to cooperate in the detection of operational discharge violations.[187]

The MOU is supplemented by the 1995 Council Directive of the European Union, which went into effect on July 1, 1996.[188] The Directive contains even more stringent port State inspection requirements and promotes detailed inspections of vessels from countries with an above average detention rate in the MOU database housed in Saint Malo, France.[189] The Directive also requires that the ownership of detained vessels or vessels that fail inspection be published in its quarterly publication. Since one of the major reasons for "flagging under an open registry is the ability to conceal ownership," this is a direct attack on open registries aimed at eroding the advantage it confers.[190]

This regional port State regime has come under attack from the International Shipowners Association ("INSA") which considered the inspections embarked upon

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

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

[187]*Id.* s. 5.

[188]Anderson, *supra* note 56, at 168.

[189]*Id.*

[190]*Id.*

as an illegal means of delaying vessels and a detriment to shipping interests.[191] 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.[192] Notwithstanding the criticisms, it cannot be denied in good faith that an arrangement of this nature is of considerable value in effectuating and enforcing international rules and is worth replicating.[193] To substantiate this, it may be noted that it was the effectiveness of the Paris MOU that led IMO to pass Resolution A. 682 (17) on "Regional Co-operation in the Control of Ships and Discharges" and to invite governments to form regional initiatives for port State control in cooperation with IMO.[194]

3. Assessments

Port State control obviously has advantages as an enforcement tool, some of which have been discussed in preceding paragraphs. In summary, port State control minimizes the need to detain ships in transit for arrest or inspection, as such actions may take place at any port in the vessel's scheduled voyage. It also reduces the burden on coastal States to police their adjacent waters, which in the case of

[191]L. Buchingham, *INSA Sees Inspections as Means of Illegal Delay*, Lloyd's List, October 25, 1982, *cited in* Kasoulides, *supra* note 123, at 175.

[192]Kasoulides, *supra* note 123, at 162.

[193]*Id.* at 176 - 177.

[194]Hare, *supra* note 1, at 578 n22. *See also Shipping Safety in a Changing World*, address of the IMO Secretary-General, Mr. William A. O'Neill, to the Hong Kong Shipowners Association Luncheon, March 27, 2000. In that address, the secretary-general looked at the rationale for the introduction of the port State control regime and its importance. He added: "IMO has encouraged the development of regional port State control systems as a means of ensuring that ships do in fact comply with the internationally agreed upon rules." *Id*; http://www.imo.org/imo/speech-1/hongkong.htm (Last visited August 20, 2000).

developing States with wide economic zones may be severe, since coastal States can now be assisted by port States. Furthermore, this increases the number of potential prosecutors and could thus facilitate pollution control and circumvent the problems created by those flag States which are unwilling or unable to effectively exercise jurisdiction over their ships. Moreover, by offering increased control over polluters, it addresses the basis for the clamor by coastal States for extensive zones of enforcement jurisdiction.[195]

Accolades have been heaped on this mechanism, especially in contradistinction to the previous regime of exclusive flag State jurisdiction. For instance, one writer refers to it as "the most effective cure of the malaise of the maritime industry."[196] In a similar vein, in June 1993, Roger Nixon, formerly Chairman of the Joint Hull Committee of the Institute of London Underwriters, said:

> Flag states are just a laugh. You tighten up one flag state and another one starts. It is just ludicrous. You never get a lasso on all those different flag states. Most of the flag states are not serious players, they are just in it for the money. But port states have a serious interest in the quality of the ships coming in because of their local environment and because they do not want ships screwing up port facilities. I believe port state control is the best answer because ports have no axes to grind, no contractual liabilities or contractual obligations to the owner. If the port authority does not like [a] ship, they should have no problem about making it pretty damned public.[197]

[195] Lowe, *supra* note 4, at 642-643.

[196] Hare, *supra* note 1. Footnote omitted.

[197] *Quoted in* Clarke, *supra* note 150, at 204.

While the merits of port State control are acknowledged, they should not prevent anyone from noticing its pitfalls, a number of which have been addressed earlier in this article. Indeed it would be naive to place a premium on port State control as a complete panacea to oil pollution problems. Port States are more likely to protect the environment by proceeding against polluters when there are incentives to act. Therefore, except for pollution incidents that are directly harmful to it, a port State or a flag State would be reluctant to take enforcement measures concerning pollution on the high seas or in another State's coastal waters.[198]

Developing States obviously lack an incentive to vigorously participate in port State enforcement measures since their fragile economies cannot sustain a backlash from shipowners by way of a boycott. While a boycott would obviously mean lost revenue from shipping, it could actually amount to economic stagnation in the case of port States who do not have large shipping fleets and are virtually dependent on foreign ships for their exports.[199] For a country with a mono-cultural economy dependent on oil production and export (an example of which is Nigeria), 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

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

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

facilities in ports."[200] The need for concerted efforts toward meeting this contingency cannot be overemphasized, and until it is met, calling the port state regime a phenomenal success would be misleading.

In recognizing the peculiar problems of developing states and the importance of reception facilities to the Convention's success, MARPOL 73/78 included the construction of reception facilities on the list of technical assistance projects that it urged developed countries to assist in financing.[201] 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 between 1993 and 2000.[202] This is definitely beyond such countries' means, as they are also saddled with other responsibilities and debt obligations. A centralized funding mechanism designed to offer such assistance would certainly help. It has rightly been pointed out that "whether noncompliance [with the requirements on provision of reception facilities] arose from an absence of capacity or of incentives, financial mechanisms could have overcome the problem,

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

[201]MARPOL 73/78 *supra* note 9, art. 17.

[202]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).

but IMO has never established a program to finance facility costs for developing countries."[203]

In considering the importance to be placed on port State control, one should not lose sight of the fact, as IMO has also observed, that measures by port States "should be regarded as complementary to national measures taken by the flag States."[204] Where there are no flag State measures to complement, the efforts of port States will amount to nothing. Thus, effective port State control is dependent on strong flag State cooperation. This takes us back to the flag State issue and its associated problems. Until the world community devises a system that dissuades flag States from indulging in activities inimical to the environment and encourages them to be actively involved in the fight to save the ocean environment and resources, the battle may take longer than anticipated to win, if it is won at all.

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

[203]MITCHELL, *supra* note 8, at 208.

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

IV. AN ALTERNATIVE APPROACH TO COMPLIANCE AND ENFORCEMENT

The primary players in international oil trade are oil and shipping companies involved in the transportation of the resource. The existing rules require States to enforce the law against them when they fail to meet the law's demands. However, if the companies take it upon themselves to act appropriately, we will not only have better laws, but the need for enforcement will be greatly reduced.

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

A. The Role of Oil and Shipping Companies

There is no doubt that the industry has made some positive contributions toward the control of oil pollution. For instance, it has been at the forefront of supplying IMO with information on adequate reception facilities in States. In 1983, 1985, and 1990, the International Chamber of Shipping ("ICS") carried out a survey on ship masters and summarized captains' complaints regarding ports where

reception facilities were absent, had limited capacity, were costly to use, or required long delays; an undertaking that was successful.[205]

In general, however, the activities of the industry have been geared toward favoring its own cause, even when its course of action might place the overall interest of humanity in jeopardy. The activities of the business community founded upon profit maximization manifests as an inordinate desire to amass wealth at the expense of the health and well being of humanity. To the industry, resistance to any regulation that would increase costs is a virtue.[206] This is accentuated by the fact that oil and shipping interests have been quite visible in coordinating domestic-level lobbying to influence positions that governments bring to international oil pollution negotiations.[207]

It is also this quest for safeguarding their economic interests at the expense of everything else that informed the reluctance of the industry to apply adequate technologies that would best address the problem of pollution from ships. Contrary to the views of an industry spokesperson[208] 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. Michael M'Gonigle and Mark Zacher presented the grim picture in the following words:

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[205] MITCHELL, *supra* note 8, at 129.

[206] *Id.* at 110.

[207] *Id.* at 111.

[208] DAVID ABECASSIS, OIL POLLUTION FROM SHIPS 42 (1978).

> The entire process of technical standards since 1954 reflects the constraints imposed by a dependence on technologies which have been developed and made public by the shipping and oil industries. The 1954 and 1962 discharge regulations for non-tankers were, in effect, emasculated because the necessary technologies were supposedly unavailable. Meanwhile, the industry kept its own "load-on-top" system for tankers under wraps until it - and not governments or IMCO - decided to unveil it. This was also to an extent the case with crude-oil-washing, a system which had been considered as early as 1967 but was rejected as "uneconomical." Only when its use became profitable after the OPEC price rise was the system touted for its environmental advantages. Even then the oil industry supported it as a mandatory requirement only as a way to rebut the more expensive proposal for the retrofitting of segregated ballast tanks.[209]

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."[210] This practice, as already shown in the earlier part of this section, is a significant contributor to environmental degradation through international oil transactions as well as to the low level of compliance with international rules by some states.[211]

In view of the foregoing, this author is of the opinion that if corporations are made to readjust their practices and behave in an environmentally desirable way, the

[209]M'GONIGLE & ZACHER *supra* note 199, at 262.

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

problems of ocean pollution and enforcement of laws will belong to the dustbins of history. It is with that in mind that a case is stated in the next section for a binding international norm of corporate behavior.

B. Changes in Multinational Corporate Behavior

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

The concept of social responsibility demands that the interest of society be taken into consideration in a company's decisions, actions and operations.[212] This implies a duty to incorporate ethical values in business and to contribute positively toward the welfare of the general public.[213] It refers to "the assumption of responsibilities by companies, whether voluntarily or by virtue of statute, in discharging socioeconomic obligations in society."[214]

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.[215] It is thought that

[211]*See* Part II, section A above, especially pages 60, 65 - 68.

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

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

[214]SALEEM SHEIKH, CORPORATE SOCIAL RESPONSIBILITIES: LAW AND PRACTICE 1 (1996).

[215]*See generally*, MILTON FRIEDMAN, CAPITALISM AND FREEDOM 133 et seq., (2nd ed 1982).

through profit maximization, a company makes its optimal contributions to society's welfare.[216]

This "fundamentalist" approach to the role of the corporation is flawed. It emphasizes roles and functions instead of capabilities. If a corporation is able to assume other roles in society, it would be wrong to shy away from that simply because its function has been compartmentalized into maximizing profits only. When every member of society does that which he or she is capable of doing, society receives optimal benefits.[217] Moreover, times change and corporate law is not immune from the winds of change. The fact that companies were originally created for maximizing profits does not impugn the point that their role could be restructured to accommodate social objectives.

Furthermore, in the normal routine of business, a company benefits from certain facilities and public goods for which it does not pay, even though they enhance its profit-making ability. Examples include good roads, oceans for transportation, a stable and peaceful society, and educational institutions funded or supported by other segments of society. Schumacher notes that "large amounts of public funds have been and are being spent on what is generally called the "infrastructure," and the benefits go largely to private enterprise free of charge."[218]

The growing consensus at the moment appears to be that in their economic transactions, corporations should act ethically and assume some responsibility for

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

[217]LEE PRESTON AND JAMES POST, PRIVATE MANAGEMENT AND PUBLIC POLICY 31 (1975).

[218]E.F. SCHUMACHER, SMALL IS BEAUTIFUL: ECONOMICS AS IF PEOPLE MATTERED 257 (1973).

social welfare.[219] This is not only important but inevitable. If companies fail to assume non-profit obligations, people will be disenchanted with them[220] and the whole concept of free market economics upon which unrestricted profit maximization is founded.[221] Writing for the industry, Alfred Farha asserts that a "corporation certainly is in business to earn profits for its owners or shareholders in accordance with the precepts of the free enterprise system: At the same time, though, a corporation can be a responsible and productive member of the society it serves. The fact is that a company cannot continue to exist without being profitable, and without exercising its responsibilities to society".[222]

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 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

[219]Amba-Rao, *supra* note 212.

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

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

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

Council (Keidanren) *Global Environmental Charter*.[223] Numerous internal codes formulated by individual companies also exist.

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."[224] Thus, notwithstanding the improvements they have brought to the attitude of multinational companies toward the environment, "it is an enormous act of faith to trust almost entirely in self-regulation . . ."[225] A legal formulation to back the above policies is therefore necessary.[226]

At the moment, such a legal framework exists in some measure at the domestic level in some countries.[227] Because of the nature and structure of multinational corporations, it would be more appropriate to bring them under international control.[228] This notion is premised on the "economic power of

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

[224]*Id.*

[225]*Id.*

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

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

[228]At present, there are about 65,000 multinational corporations , with about 850,000 foreign affiliates around the world. While in 1990, foreign affiliates accounted for about 24 million employees, that number rose dramatically to 54 million in 2001. They also recorded sales amounting to $19 trillion which was more than twice as high as world exports in 2001; in 1990, both were roughly equal.

multinationals, the international character of multinational corporations, and the limited ability of Third World countries to regulate the activities of multinationals."[229] These types of companies have grown beyond the control of most national governments and operates in a legal and moral vacuum where individualism is the cardinal rule.[230]

The situation is even worse in the case of developing countries which, in their quest and scramble for economic investments of multinational companies, are too enfeebled to regulate or control the multinationals. Indeed, the companies are more likely to show a preference for those countries with lax regulations over multinational business activity.[231] 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. [232]

The closest international law has come to imposing duties akin to social responsibility on multinational corporations was through a series of draft codes. Efforts by members of the United Nations to agree on a non-binding code of conduct

Further, over the same period, the stock of outward foreign direct investment increased from $1.7 trillion to $6.6 trillion. Foreign affiliates of MNCs currently account for one-tenth of world GDP and one-third of world exports. UNCTAD, WORLD INVESTMENT REPORT 2002: TRANSNATIONAL CORPORATIONS AND EXPORT COMPETITIVENESS, Overview, at 1.

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

[230]*See* Fowler, *supra* note 223, at 2

[231]Lippman, *supra* note 229, at 545.

[232]*Id.*

for multinational corporations met with persistent failure until they were abandoned in 1993.[233] The 1988 Draft Code contains the most recent provision relating to environmental protection. It provides:

> Transnational corporations shall carry out their activities in accordance with national laws, regulations, established administrative practices and policies relating to the preservation of the environment of the countries in which they operate and with due regard to relevant international standards. Transnational corporations should, in performing their activities, take steps to protect the environment and where damaged to rehabilitate it and should make efforts to develop and apply adequate technologies for this purpose.[234]

The danger with provisions couched in such language is that they could represent mere moral adjurations honored more in the breach than in the observance. One writer has pointed out that the problem with hortatory provisions is that they do not "compel business leaders to address the larger problems of our society which corporations have either helped to create through their irresponsible conduct or failed to ameliorate by any meaningful philanthropic activity."[235] 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.[236]

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[233]Fowler, *supra* note 223, at 3.

[234]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).

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

[236]SHEIKH, *supra* note 212, at 210.

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

Two major problems confront this alternative: enforceability and acceptance by states, especially those keenly interested in protecting the interests of their corporations. On the issue of enforceability, the question arises whether states that were less willing or generally ineffective in enforcing international rules would suddenly wake up to embrace this idea and enforce it. A possible solution may be found in the establishment of an international judicial forum vested with jurisdiction to enforce such norms. This forum could serve as an international court for the environment.[237] Such a court would be able to "judge," not merely "mediate,"[238] 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

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[237]Joshua P. Eaton, *The Nigerian Tragedy, Environmental Regulation of Transnational Corporations and the Human Right to a Healthy Environment* 15 B.U. INT'L L.J. 261, at 303 (1997).

sued. This idea is premised on the point that States, perpetrators of environmental abuses themselves, cannot be entrusted with the sole responsibility and privilege of enforcing environmental rights.[239]

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 could be for public interest law firms and Non-Governmental Organizations ("NGOs") to involve themselves actively and undertake prosecutions on behalf of needy individuals.

For the effective discharge of its functions, the court would be granted powers to prevent and remedy injuries through injunction and compensation. A comparable standard is that under the Inter-American Commission on Human Rights, which has the power to grant injunctive relief to obviate irreparable damage to individuals.[240]

The major problem with this option is the question of the enforcement of the court's decisions. In that regard, it has been suggested that the judgments of the court which award damages to an injured party, whether by default or by adjudication, should be enforceable in domestic courts.[241] This idea is merely academic,

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

[239]Eaton, *supra* note 237, at 305.

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

[241]Eaton, *supra* note 237, at 305.

considering that one of the factors that makes the international court concept attractive is the inefficiency of domestic courts in some places. If judgments still have to pass through this ineffective system, then the whole process and expense of going to the international court would be a huge waste and an empty rigmarole.

Another way of enforcing decisions would be through an international police force. Nevertheless, this idea raises a number of hurdles for, notwithstanding that "most reformers in the field of international law have accepted the notion that the basic way of enforcing law is by a policeman, and that the way to improve compliance with international law is to establish an international police force strong enough to impose the law on any country,"[242] the idea is yet to gain the concurrence and acceptance of policy makers. Considering states' obsessions with the notion of sovereignty, it does not appear that they would embrace the idea any time soon.

This leaves us with the option of considering enforcement of the proposed international norm through domestic courts. This in turn has its own problems. As earlier stated, the existence of an efficient judicial system is foreign to some states. Moreover, litigants have had unpalatable experiences in the few instances they have mustered enough courage to bring actions against multinational corporations in domestic courts of some States.[243] For instance, corporations are in the habit of

[242]ROGER FISHER, IMPROVING COMPLIANCE WITH INTERNATIONAL LAW 13 (1981).

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

employing the services of expert witnesses whose evidence cannot be contradicted by the often poor litigants who cannot afford the services of their own expert witnesses.

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

The international system is structured in such a way that State sovereignty is viewed with deference. It is a major paradox of our times that "[i]nternational law is based upon two apparently contradictory assumptions: first, that the states, being sovereign, are basically not subject to any legal restraint; second, that international law does pose such restraints."[244]

Because of the nature and structure of the international system, States choose treaty obligations which they assume.[245] A State interested in protecting the interests of its ships would be less inclined to accede to a treaty that imposes high obligations on the shipping industry. This is particularly true, as we have seen earlier, of FOC

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

[245]*See* G.M. DANILENKO, LAW MAKING IN THE INTERNATIONAL COMMUNITY 67 (1993).

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.[246] The port State regime represents a step in that direction, but that does not foreclose further consideration of a reduction in flag States' influence and, accordingly, sovereignty. Mitchell comments that "[r]emoving these legal barriers often requires negotiating redefinitions of the boundaries and definitions of sovereignty. The new right of port states to inspect and detain tankers decreased the sovereign rights of flag states. Without fundamentally threatening the structure of the international system or current core notions of sovereignty, minor modifications can significantly improve enforcement in a given issue area."[247]

It appears that the consensus in the international system at the moment is that the era is fast receding when it was thought that membership in the international community conferred enormous rights and virtually no responsibility.[248] In the light of that understanding, sovereign rights of states have been encroached on when it was thought that the States involved had lost the ability or inclination to address actions for which they were ordinarily responsible and which impact the global community.

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

[247]MITCHELL, *supra* note 8, at 323.

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

This provides an explanation for the current scenario in international war crimes[249] and high seas fishing.

The Osaka *Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks,* concluded in 1995,[250] broke new ground as the first global instrument to establish a framework procedure allowing non-flag States to board and inspect fishing vessels of another State on the high seas. It "constitutes the global legal basis for permitting the inspecting state to bring a suspected vessel to a port for further investigation in case there are reasonable grounds for believing that it has committed a "serious violation," as defined in the agreement."[251]

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

[249]*Id.* at 442-443. Despite the objections of the United States and others on the ground of sovereignty, an international criminal court treaty was concluded recently in Rome, Italy. *See* Mike Trickey, *U.S. Balks as World Court Wins Approval*, EDMONTON JOURNAL, July 18, 1998, at A4. The U.S. later signed on to the treaty, but did not ratify it. See *Clinton's Words: 'The Right Action,'* New York Times, January 1, 2001; http://archives.nytimes.com. Last visited February 26, 2001. The Bush administration unsigned the treaty, thus leaving the United States out of the treaty regime. See William Orme, *U.S. Quits Treaty on Global Court*, L.A. Times, May 7, 2002, at 3.

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

[251]Hayashi, *supra* note 20, at 27.

high seas fishing would automatically mean that states would be favorably disposed toward introducing it to oil pollution control.

In the first place, States have greater incentive to protect their fish stocks since they are revenue generators, and would consider it to their benefit to interfere with illegal fishing. The same cannot be said of pollution, which does not yield any direct financial returns, but instead costs money to fight. Nevertheless, the issues can be intermingled, an example of which is the involvement of States in anti-pollution measures in their territorial seas to protect money-yielding ventures including fishing.[252]

The wide powers conferred by the Agreement on non-flag States and the reduced powers of flag States are quite feasible with regard to fishing because with fishing, cessation of the violation would, in most cases, remove the need for the fishing vessel to remain in the area. On the other hand, violations of pollution regulations are incidental to the principal purpose of maritime transport, and such exercise of authority on the high seas is therefore far less likely to be tolerated by maritime States.[253]

From another perspective, high seas fishing is unique in the sense that it is an area in which there has been a great deal of regional cooperation, including agreement on the enforcement of regionally adopted measures.[254] Moreover, it enjoys the full

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

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

[254]Hayashi, *supra* note 20, at 27.

blessings of the Law of the Sea Convention, which encourages and even obligates such cooperation, especially with regard to the conservation and management of straddling stocks and highly migratory stocks. It was this interplay between regional and global agreements that provided an essential basis for the new enforcement mechanism.[255] As regional efforts intensify in maritime oil pollution matters, the prospects of a similar arrangement seem brighter.

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

> The notion describes threats to the well-being of the international community as a whole. One might argue that, as a result, all states have a legal interest in such issues and, in certain situations, an obligation to contribute to their solution. Seen in this manner, "common concerns" would limit state sovereignty in the interest of the international community - ultimately even where the cause of the "common concern" is located within the jurisdiction of a given state.[256]

The bottom line is that the global community is becoming progressively compacted[257], and the idea of a global village is becoming increasingly realistic. It is

[255] *Id.*

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

[257] 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.

even expected that the global village concept will soon give way to a new idea - the global family.[258] In such circumstances, it is clear that the old concept of State sovereignty is now moribund.

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

V. CONCLUSION

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

Nevertheless, the problem of rational beings' inclination to act in their own interests remains a major challenge to improving such behavior. Thus, in many cases States exhibit an inclination to cooperate only with regimes favorable to them. A

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

realistic approach that considers this inclination while formulating legal rules is essential. The next chapter looks into that aspect of life in the global community.

CHAPTER 3

INTERNATIONAL ECONOMIC COOPERATION

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 study done in the early part of the last decade by the United States General Accounting Office, which focused on compliance of governments with international environmental treaties, concluded that compliance is poor.[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 of the applicable law, but enforcement of

1. LOUIS HENKIN, HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY 48-49 (2d ed. 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." *Id.* at 48; *see also* HANS J. MORGENTHAU, POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE 271 (Hans J. Morgenthau & Kenneth W. Thompson eds., 2d ed. 1951). "The great majority of the rules of international law are generally observed by all nations." *Id.*

2. *See generally* Martti Koskenniemi, *Breach of Treaty or Non-Compliance? Reflections on the Enforcement of the Montreal Protocol*, 3 Y.B. INT'L ENVTL. L. 123 (1992). "States often seem to ignore not only their political pledges but also the treaties to which they are parties." *Id.; see also* William Tetley, *Uniformity of International Private Maritime Law—The Pros, Cons, and Alternatives to International Conventions—How to Adopt an International Convention*, 24 TUL. MAR. L.J. 775 (2000). "The major defect of international law is not only that nations fail to ratify conventions, protocols, and technical amendments, but also that when they do so, they may not conform to, and comply with, the law." *Id.* at 819-20.

3. *See, e.g.*, ENGAGING COUNTRIES: STRENGTHENING COMPLIANCE WITH INTERNATIONAL ENVIRONMENTAL ACCORDS, (Edith Brown Weiss & Harold K. Jacobson, eds., 1998); *see also* Jennifer L. Ulrich, Note, *Confronting Gender-Based Violence with International Instruments: Is A Solution to the Pandemic Within Reach?*, 7 IND. J. GLOBAL LEGAL STUD. 629 (2000). "Although countries routinely adhere to traditional international law even in the absence of a positivist enforcement scheme, non-compliance continues to be a frequent occurrence." *Id.* at 637.

4. U.S. GENERAL ACCOUNTING OFFICE, International Environment: International Agreements Are Not Well-Monitored, GAO/RCED 92-43 (1992).

the law.[5] At the moment, the most rigorous effort mounted in the area of enforcement of the provisions of marine pollution conventions is through port State control.[6] However, regardless of whatever modest gains are made through the port State scheme, the problems in implementation, compliance, and enforcement will linger for a long while, unless efforts are directed at the core of the problem.

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 implementation of existing ones."[7] The problems of implementation, compliance, and enforcement are linked to the extant system that needs to take into consideration relevant matters that will facilitate treaty implementation and compliance.[8] 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 ideas of scholars in other disciplines, notably international relations and economics. The purpose of considering international relations is to examine the impact of national interest on international behavior. Discussions on international relations will, however, be restricted to the postulates of the realist school and regime theory. While the realist school contends that the self-interest of nation-states propel their behavior in the international arena, regime theory argues that there are certain structures in the international system which play a key role in how states conduct their international affairs. Thereafter, some of the economic issues raised by international oil trade and shipping will be discussed. This will lay the foundation for the argument in favor of capacity building for developing countries. This entails empowering and equipping developing countries with the needed resources, which would facilitate bringing them into compliance with, and helping them participate in the implementation of, international law. The discussion seeks to show that international oil pollution control will possess a brighter position if the position of developing countries, as well as the incorporation of their interests in policy formulation in this area, are taken into consideration.

This chapter is divided into two major parts. Part II examines international relations theories, especially in relation to ship-source oil pollution control. Part III involves a discussion of the economic dimension of treaty implementation. In particular, the relevance of a fee paying arrangement for use of oceans will be examined, basically as a source of revenue for the execution of projects connected to the preservation and protection of the marine environment. There will also be an exploration of ideas for an international financial mechanism as an appropriate means

5. *See* Mark W. Wallace, *"Safer Ships, Cleaner Seas": The Report of the Donaldson Inquiry into the Prevent of Pollution from Merchant Shipping*, 1995 LLOYD'S MAR. & COM. L.Q. 404. The Donaldson Inquiry into Prevention of Pollution from Merchant Shipping, constituted by the Government of the United Kingdom, in its rep "was of the opinion that the measures currently in force would greatly reduce marine pollution if corre implemented." *Id.* at 406-07.

6. *See generally* Ted L. McDorman, *Regional Port State Control Agreements: Some Issues of International L* 5 OCEAN & COASTAL L.J. 207 (2000). *See also* Secretary General of the International Maritime Organizat William A. O'Neill, Address at the Hong Kong Shipowners Association Luncheon (Mar. 27, 2000), *reprinted* http://www.imo.org/ imo/speech-1/hongkong.htm. Looking at the rationale for introducing the new regime on p state control and explaining its importance, O'Neill stated: "IMO has encouraged the development of regional p State control systems as a means of ensuring that ships do in fact comply with the internationally agreed upon rul *Id.*

7. Koskenniemi, *supra* note 2, at 123.

8. Steven M. Anderson, *Reforming International Institutions to Improve Global Environmental Relati Agreement, and Treaty Enforcement*, 18 HASTINGS INT'L & COMP. L. REV. 771 (1995) [hereinafter Ander *Reforming International Institutions*]. "Today the great problems burdening international environmental law ar institutions revolve around deficiencies relating to ratification, implementation, coordination, enforcement, and monitoring of [international] agreements." *Id.* at 772.

of influencing States' behavior in this area. The Global Environment Facility, currently being administered by three international institutions, will be discussed.[9] Thereafter, general conclusions will be drawn, essentially suggesting that an effective way of securing the crucial co-operation of developing countries in the maritime oil pollution crusade is the introduction of a measure of economic motivation for such co-operative ventures. It should be noted that while this discussion is carried on in the context of marine oil pollution, the ideas expressed in this work can go beyond this focal area and can be replicated in, and applied to, virtually any aspect of international law.

II. INTERNATIONAL RELATIONS

A. Realism

Realism, which developed after the second World War,[10] thrives on a "rational-actor conception of compliance" premised on a Machiavellian perspective:[11] "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."[12] The realist's position, therefore, is that States will only keep their bargains when it is in their own individual interest.[13] Thus, "[r]egardless of their domestic colors, states in the international realm [are] champions only of their own national interest."[14]

A major contention of the realist school of thought is that the international sphere is "anarchic" and that, combined with "the pursuit and use of power . . . are the primary determinants of international behavior."[15] Under this proposition, international law does not influence States' behavior but if it does at all, the influence is infinitesimal. "[C]onsiderations of power rather than of law determine compliance" in every significant area.[16] Power, of course, is a manifestation of self-interest.[17] 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 view, political science professor Robert O. Keohane writes: "States use the rules of international law as instruments to attain their interests."[18] Treaty making therefore affords a good opportunity for States to promote their own national interests to evade legal obligations that might be harmful to them.[19]

9. The institutions that constitute the tripartite institutional arrangement of the Global Environment Facility a the World Bank, United Nations Environment Programme (UNEP), and the United Nations Developm Programme (UNDP). David Reed, *The Global Environment Facility and Non-Governmental Organizations*, 9 A U.J. INT'L L. & POL'Y 191, 193 (1993).

10. *See* RONALD B. MITCHELL, INTENTIONAL OIL POLLUTION AT SEA: ENVIRONMENTAL POLICY AND TREA COMPLIANCE 28 (Nazli Choucri ed., 1994).

11. ABRAM CHAYES & ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY: COMPLIANCE WI INTERNATIONAL REGULATORY AGREEMENTS 3 (1995) [hereinafter CHAYES & CHAYES, THE NEW SOVEREIGNTY].

12. NICCOLO MACHIAVELLI, THE PRINCE 58-59 (Peter Bondanella ed., Peter Bondanella & Mark Musa tra Oxford Univ., Press 1984) (1532); *see also* Abram Chayes & Antonia Handler Chayes, *Compliance Witho Enforcement: State Behavior Under Regulatory Treaties*, 7 NEGOTIATION J. 311 (1991) [hereinafter Chayes Chayes, *Compliance Without Enforcement*]. "The still-prevailing realist assumption is that a nation will honor treaties only so long as they are convenient and, if it has the power, will disregard them when they no longer se immediate needs." *Id.* at 312.

13. *See* MORGENTHAU, *supra* note 1, at 535 (citing Sir Winston Churchill's speech to the British House of Commons on the likelihood of a war with the Soviet Union on Jan. 23, 1948).

14. Anne-Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda*, 87 AM. J. INT'L L. 205, 207 (1993).

15. MITCHELL, *supra* note 10, at 28.

16. MORGENTHAU, *supra* note 1, at 272.

17. Michael Byers, *Custom, Power, and the Power of Rules—Customary International Law From an Interdisciplinary Perspective*, 17 MICH. J. INT'L L. 109 (1995) [hereinafter Byers, *Custom, Power, and the Power of Rules*]. "[S]tates act in largely self-interested ways, and that one, if not the primary, way in which they promote their self-interest is the application of power." *Id.* at 112-13 (citation omitted).

18. Robert Keohane, *International Relations and International Law: Two Optics*, 38 HARV. INT'L L.J. 487, 488 (1997).

19. *See* MORGENTHAU, *supra* note 1, at 262-64.

A look at a possible scenario in the maritime oil pollution area appears to lend credence to the realist theories, both in the negotiation of treaties and in compliance with treaty provisions. 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 only when a country's ship was anchored off its own public beaches.[20]

The realist position, however, does not accurately describe reality. 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 honor, which are vital in international affairs. Other States would find it increasingly difficult to enter into bargains, bilaterally or multilaterally, with a State that routinely disregards the principle *pacta sunt servanda*, which states that States are bound to keep promises they make, in order to protect its short term interests.[21] 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 pyrrhic victory.[22]

20. ROGER FISHER, IMPROVING COMPLIANCE WITH INTERNATIONAL LAW 128 (1981).

21. *Pacta sunt servanda* is considered a fundamental principle of international law. *See* Abram Chayes Antonia Handler Chayes, *On Compliance*, 47 INT'L ORG. 175, 185 (1993). The principle is incorporated in article of the Vienna Convention on the Law of Treaties. *See* Vienna Convention on the Law of Treaties, May 23, 1969, U.N.T.S. 331.

22. "As with Pyrrhus (who is supposed to have said: 'One more such victory over the Romans, and we utterly undone'), the costs incurred in gaining a desired decision will in some instances outweigh any benefits derived from that decision." FISHER, *supra* note 20. For more on Pyrrhus of Epirus (319-272 B.C.), king of ancient country in northwest Greece, see Robert Bartley, *Andersen; A Pyrrhic Victory?* WALL STR JOURNAL, June 24, 2002, at A17. Pyrrhus name has become synonymous with victory at too great a cost. *Id.*

Furthermore, the realist assertion that national interest is the ultimate motivator and that international law does not play any significant role in influencing state behavior may not represent an accurate depiction 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.[23]

A State's self-interest may propel it to act in a certain manner. At the same time, its ultimate action is usually taken after considering the probable chain of events that such a move may trigger within the international community. Thus, under the principle of reciprocity, a State would only act if willing to accord other States the right to act in a similar manner. On the other hand, a State might refrain from a particular course of action, expecting that in the future other States will reciprocate.[24] The principle of reciprocity, albeit a general concept 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."[25]

Contrary to realist theories, therefore, the principle of reciprocity in social relations and international law discussed above seems to influence State behavior, notwithstanding the state's self-interest and position of power. A clear illustration of this idea in customary international law is the Truman Proclamation in the 1940s on the Continental Shelf.[26] In 1945, "the United States proclaimed its continental shelf,

23. Byers, *Custom, Power, and the Power of Rules*, *supra* note 17, at 179.

24. *See* Stephen D. Krasner, *Structural Causes and Regime Consequences: Regimes as Intervening Variables*, *in* INTERNATIONAL REGIMES 1, 3 (Stephen D. Krasner ed. 1983).

25. Byers, *Custom, Power, and the Power of Rules*, *supra* note 17, at 162 (emphasis added).

26. Proclamation No. 2667, Policy of the United States with Respect to the Natural Resources of the Subsoil and

which in the case of the eastern seaboard extended to as far as 250 [nautical miles], exclusive for its exploration and exploitation and subject to its jurisdiction and control."[27] By so proclaiming, the United States placed itself in a position in which it was also bound to recognize the rights of other states to avail themselves of the same rule.[28] In essence, a "[S]tate 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."[29]

This scenario is not restricted to customary international law; it is also evident in treaties. When States enter into treaties, it suggests they believe they are accepting significant constraints on their freedom to act in the future and they intend to comply with those constraints over a broad range of circumstances.[30] This explains why treaty negotiation and assent is not handled lightly by States nor is the responsibility assigned to junior officials of the State.[31]

International law not only constrains State behavior, it also influences positive action by States. Ship-source oil pollution control presents a clear refutation of the

Sea Bed of the Continental Shelf, 10 Fed. Reg. 12,303 (1945), 3 C.F.R. 67 (1943-1948), *reprinted in* 40 AM. J. INT'
L. SUPP. 45 (1946); *see also* Byers, *Custom, Power, and the Power of Rules*, *supra* note 17, at 162.

27. Mafaniso Hara, *Southern African Marine Exclusive Zones: Burdens and Opportunities*, Monograph No.
DIPLOMATS AND DEFENDERS (Feb. 1997), *available*
http://www.iss.co.za/Pubs/MONOGRAPHS/NO%209/Hara.html.

28. Byers, *Custom, Power, and the Power of Rules*, *supra* note 17, at 162.

29. *Id.* at 162-63.

30. Chayes & Chayes, *Compliance Without Enforcement*, *supra* note 12, at 311.

31. *See, e.g.*, GEORGE C. KASOULIDES, PORT STATE CONTROL AND JURISDICTION: EVOLUTION OF PORT STA
REGIME 151 (1993) [hereinafter KASOULIDES, PORT STATE CONTROL].

> The [particular form of] designation of the Paris MOU . . . and the fact that it was concluded among marit
> authorities and not states indicates the willingness of the co-operating states to participate in a harmoniz
> system of PSC [(Port State Control)] and exchange information but not to enter into new contractual a
> binding obligations.

Id. This revealed that European member countries of the 1982 Paris Memorandum on Port State Control did n
intend it to be binding on them. *See generally* Memorandum of Understanding on Port State Control in Implementi
Agreements on Maritime Safety and Protections of the Marine Environment, Jan. 26, 1982, 21 I.L.M. 1 [hereinaf
Paris Port State Control MOU].

mainstream realist contention that treaty rules do not induce compliance.[32] At the Tanker Safety and Pollution Prevention Conference in 1978 (TSPP),[33] discussions on segregated ballast tanks (SBTs) initially introduced in the 1973 International Convention for the Prevention of Pollution from Ships (MARPOL)[34] resurfaced.[35] During the Conference, the United States proposed that new and existing tankers weighing in excess of 20,000 tons should be built with SBTs, contrary to the prevailing position that only applied to tankers weighing in excess of 70,000 tons, but "[m]ost States saw SBT as hugely expensive [and instead] proposed crude oil washing (COW) as an environmentally equivalent but cheaper alternative."[36] A compromise arrangement emerged in which new tankers weighing over 20,000 tons were required to install both SBT and COW, while existing tankers weighing over 40,000 tons had the option of installing either SBT or COW.[37]

Data from a study on tanker fleets world wide at the end of 1991 show that compliance with the above-mentioned equipment requirements had been impressive.[38] "[Approximately] 94 percent of tankers built in 1979 or earlier [had]

32. *See* MITCHELL, *supra* note 10, at 28. "[R]ealism encourages a bias against assuming that treaties cause behavior to change, and provides an essential set of alternative explanations of why nations might take actions that conform to treaty provisions." *Id.*

33. The slow pace of ratification of the 1973 Convention Marine Pollution Convention incited correction through this convention. *See generally* Sonia Z. Pritchard, *Load on Top—From the Sublime to the Absurd*, 9 J. MAR. L. & COM. 185 (1978). *See also* Jeff B. Curtis, Comment, *Vessel-Source Oil Pollution and MARPOL 73/78: An International Success Story?*, 15 ENVTL. L. 679 (1985), David Ashley Bagwell, *Products Liability in Admiralty: Hazardous and Noxious Substances*, 62 TUL. L. REV. 433, 462 (1988).

34. International Conference on Marine Pollution: International Convention for the Prevention of Pollution from Ships, Nov. 2, 1973, 12 I.L.M. 1319 [hereinafter MARPOL].

35. *See generally* R. MICHAEL M'GONIGLE & MARK W. ZACHER, POLLUTION, POLITICS, AND INTERNATIONAL LAW: TANKERS AT SEA 107-142 (Ernst B. Haas & John Gerard Ruggie eds., 1979).

36. MITCHELL, *supra* note 10, at 259 (footnote omitted).

37. Inter-Governmental Maritime Organization, Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, Annex 1, Reg. 13, I.M.C.O. Doc. TSPP/CONF/11 (Feb. 16, 1978), *reprinted in* 17 I.L.M. 546. It replaced the existing Annex 1, Reg. 13 in the 1973 Convention. MARPOL, *supra* note 34. The International Maritime Organization replaced IMCO on Mar. 6, 1948. *See infra*, note 99. "New tankers" means an oil tanker "for which the building contract is [drawn up] after 1 June 1979 . . . or, in the absence of a building contract, the keel of which is laid . . . after 1 January 1980 . . . or the delivery of which is after 1 June 1982." *Id.*, Annex 1, Reg. 1, ¶ 26. Both conventions are jointly referred to as MARPOL 73/78.

38. *See* MITCHELL, *supra* note 10, at 269-70.

installed SBT or COW, 98 percent of those built between 1980 and 1982 [had] installed SBT, and 98 percent of those built after June 1982 [had] installed both."[39] This nearly universal adoption has been linked to the influence of MARPOL. "The evidence presented unequivocally demonstrates that governments and private corporations have undertaken a variety of actions involving compliance, monitoring, and enforcement that they would not have taken in the absence of relevant treaty provisions."[40]

The levels of compliance were achieved notwithstanding the fact that the SBT requirement imposed huge expenses on tanker owners and was of no economic benefit to them.[41] Moreover, it happened at a period of decreasing oil prices which increased pressures to cut costs.[42] The fact that "the majority of tankers exempt from the equipment requirement have not installed SBT . . . affirm[s] the conclusion that the installations represented treaty-induced compliance."[43] It is also remarkable that, "[a]lthough many tankers were registered in states that [initially] opposed the adoption of the SBT requirements and had strong incentives not to comply, all [states] required to comply did so."[44]

The realist theory, therefore, fails to adequately explain States' behavior. It may be pointed out, however, that when regarding assent to a treaty, the realist theory may well prove valuable. Thus, while States may realize the value of reputation and recognize the "normativity" of international law and conduct themselves accordingly, a State is unlikely to assume obligations under a treaty when it will be inimical to its

39. *Id.* at 269.
40. *Id.* at 299.
41. *See id.*
42. *See id.*

interests. That apparently explains, for instance, the present position of the 1986 United Nations Convention on Conditions for Registration of Ships.[45] The Convention occurred in response to the practice of "flags of convenience" shipping, by which some States allow substandard and inadequately manned ships to put to sea, thus endangering the marine environment.[46] Over ten years after 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.

Further, although short-term interest may not dictate a State's general conduct in international circles, a State may resort to short-term interest where it is impossible 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 non-compliance by reason of its incapacity[47] to abide by its treaty obligations.[48] 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 non-compliance with international oil pollution agreements.[49]

43. *Id.*
44. *Id.* at 299-300.
45. United Nations Convention on Conditions for Registration of Ships, Feb. 7, 1986, 26 I.L.M. 1229 (1987).
46. *See* S.G. Sturmey, *The United Nations Convention on Conditions for Registration of Ships*, 1987 LLOYD'S MAR. & COM. L.Q. 97.
47. *See* discussion *infra* Part II.A.
48. Oran Young, *The Effectiveness of International Institutions: Hard Cases and Critical Variables*, *in* GOVERNANCE WITHOUT GOVERNMENT: ORDER AND CHANGE IN WORLD POLITICS 160, 183 (James N. Rosenau & Ernst-Otto Czempiel eds., 1992) [hereinafter Young, *The Effectiveness of International Institutions*]. The writer opines that lack of capacity inhibits or restricts abidance to treaty provisions, especially for developing countries. *See id.*
49. *See id.*

B. Regime Theory

Regime theoretic analysis proceeds from an apparent realization that there are "difficulties involved in attempting to explain all relations among states solely on the basis of relative power and short-term calculations of self-interest."[50] A re-evaluation of realist thinking became inevitable when some of its basic assumptions started faltering.[51] Accordingly, while realists had argued that international institutions had no life of their own but existed only as a corollary of dominant United States power, this argument could not be sustained in an era that marked the relative strength of institutions like the General Agreement on Tariffs and Trade (GATT),[52] which was replaced by the World Trade Organization[53] and the International Monetary Fund (IMF),[54] at a period of perceived decline of American hegemony.[55] As a consequence, the impossible task before realists was to either deny that American power was declining or assert that those institutions "were suddenly tottering."[56]

In international relations, consequently, a new line of thinking or a reformulated theory was born as a child of necessity[57] and centers around regimes, which are "sets of implicit or explicit principles, norms, rules, and decision-making procedures

50. Byers, *Custom, Power, and the Power of Rules*, *supra* note 17, at 129.
51. *See id.* at 218.
52. General Trade Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A3, 55 U.N.T.S. 187.
53. General Agreement on Tariffs and Trade—Multilateral Trade Negotiations (the Uruguay Round): Final A Embodying the Results of the Uruguay Round of Trade Negotiations, Apr. 15, 1994, *substantially reprinted in* I.L.M. 1 (1994), *reprinted in* LAW AND PRACTICE OF THE WORLD TRADE ORGANIZATION (Joseph F. Dennin 1996). The WTO embodies and expands upon the rules of GATT. *See* Chris Wold, *Multilateral Environmen Agreements and the GATT: Conflict and Resolution?*, 26 ENVTL. L. 841, 842 (1996).
54. Articles of Agreement of the International Monetary Fund, Dec. 27, 1945, 60 Stat. 1401, 2 U.N.T.S. amended May 31, 1968, 20 U.S.T. 2775, 726 U.N.T.S. 266, amended Apr. 30, 1976, 29 U.S.T. 2203, amended Ju 28, 1990, 31 I.L.M. 1307, *available at* http://www.imf.org/external/pubs/ft/aa/index.htm (last visited April 15, 200
55. *See* Burley, *supra* note 14, at 218.
56. *Id.*
57. *See* ROBERT KEOHANE, AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITI ECONOMY 245 (1984) [hereinafter KEOHANE, AFTER HEGEMONY]. "Realism should not be discarded, since insights are fundamental to an understanding of world politics, but it does need to be reformulated to reflect impact of information-providing institutions on state behavior, even when rational egoism persists." *Id.* at 245

around which actors' expectations converge in a given area of international relations."[58]

Central to the regime theory is the fact that the international system is structured in such a way that it creates certain "principles, explicit and implicit norms, and written and unwritten rules," which actors in international relations hold in reverence and recognize as governing their behavior.[59] Viewed from that perspective, regimes both constrain and regulate the behavior of States.[60]

Regimes are also believed to "enhance compliance with international agreements in a variety of ways, [including] reducing incentives to cheat and enhancing the value of reputation."[61] Discussing the value and *raison d'etre* 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 orderly multilateral negotiations, legitimate and delegitimate different types of [S]tate 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.[62]

(citation omitted).
58. Krasner, *supra* note 24, at 2.
59. Donald J. Puchala & Raymond F. Hopkins, *International Regimes: Lessons From Inductive Analysis*, *in* INTERNATIONAL REGIMES, *supra* note 24, at 61, 86.
60. *See id.* at 62-63.
61. Burley, *supra* note 14, at 219.
62. KEOHANE, AFTER HEGEMONY, *supra* note 57, at 244-45.

Regime theory appears fascinating and interesting, but it has not escaped criticism. Critics comment that regimes are merely a formula for obfuscating and obscuring the power relationships that are, in their assumption, not only the ultimate, but also the proximate, cause of behavior in the international sphere.[63] According to Susan Strange, an international relations scholar, "[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 states who negotiate them."[64]

Regime theory has metamorphosed into neo-liberal institutionalism,[65] which is a more general rubric.[66] 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 behavioral roles, constrain activity, and shape expectations."[67] Institutions, according to Keohane, can be divided into three groups, based on their levels of organization or formality.[68] The first category encompasses "*[f]ormal 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."[69] The third class incorporates "*conventions*" defined as

63. Krasner, *supra* note 24, at 7.
64. Susan Strange, Cave! Hic Dragones: *A Critique of Regime Analysis*, *in* THE POLITICS OF GLO GOVERNANCE 41, 48 (Paul F. Diehl ed. 1997).
65. Byers, *Custom, Power, and the Power of Rules*, *supra* note 17, at 132.
66. *See* Burley, *supra* note 14, at 206.
67. Robert Keohane, *Neo-Liberal Institutionalism*, *in* INTERNATIONAL INSTITUTIONS AND STATE POWER (1989).
68. *Id.* at 3-4.
69. *Id.* at 4.

"informal institutions, with implicit rules and understandings, that shape the expectations of actors."[70]

To some scholars, it is an incontrovertible fact that institutions influence States' behavior, even independent of power calculations and self-interest. Scholars state that institutions play an important 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 contribute to the choices they make with regard to compliance.[71] A perplexing question, however, has centered on whether this should be taken as an article of faith or demonstrated empirically.[72] 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.[73] Regime theory in particular, and institutionalism in general, therefore, appear to represent more clearly what occurs in international politics, and seems to be steps ahead of the realist school of thought.

It is pertinent to point out, however, that both theories tend to share some common ground when it comes to the notion of self-interest. To some

70. *Id.*
71. Oran Young, *Compliance in the International System*, *in* INTERNATIONAL LAW: A CONTEMPORARY PERSPECTIVE 99, 106 (Richard Falk et al. eds., 1985).
72. Oran Young states:

> [t]he 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.

ORAN YOUNG, INTERNATIONAL COOPERATION: BUILDING REGIMES FOR NATURAL RESOURCES AND THE ENVIRONMENT 206-07 (Peter J. Katzenstein ed., 1989).
73. *See* discussion *supra* Part I.A.

institutionalists, self-interest is pivotal to the existence of regimes.[74] States are believed to build those structures essentially as a means of protecting their interests.[75] This is elaborately conveyed by political science scholar Arthur A. 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."[76] Accordingly, "there are times when rational self-interested calculation leads actors to abandon independent decision making in favor of joint decision making."[77]

To these institutionalists, both self-interest and institutions are compatible and jointly influence international behavior. This is one of its major points of divergence with the realist school because, unlike the latter theory which harbors a disdain for international law and "[challenges international lawyers] to establish the 'relevance' of international law,"[78] institutionalism shares some similarities with international law in that it recognizes the place of principles and rules in shaping behavior.[79] Indeed, one writer was prompted to observe that "[t]he similarities between institutionalism and international law are apparent."[80]

Close inspection of one institutional arrangement utilized in oil pollution control matters (namely, reporting requirements) clearly demonstrates the role of such

74. Krasner, *supra* note 24, at 11.
75. *Id.* "The prevailing explanation for the existence of international regimes is egoistic self-interest." *Id.*
76. Arthur A. Stein, *Coordination and Collaboration: Regimes in an Anarchic World*, *in* INTERNATIO REGIMES, *supra* note 24, at 115, 132.
77. *Id.*
78. Burley, *supra* note 14, at 208; *see also* William J. Aceves, *Institutionalist Theory and International L Scholarship*, 12 AM. U.J. INT'L L. & POL'Y 227 (1997); John K. Setear, *An Iterative Perspective on Treaties Synthesis of International Relations Theory and International Law*, 37 HARV. INT'L L.J. 139 (1996).
79. CHAYES & CHAYES, THE NEW SOVEREIGNTY, *supra* note 11, at 2 n.3. "Regime theorists find it hard to the 'L-word,' but 'principles, norms, rules, and decision-making procedures' are what international law is all abo *Id.*
80. Michael Byers, *Response: Taking the Law Out of International Law: A Critique of the "Iter Perspective,"* 38 HARV. INT'L L. J. 201, 201 (1997). Burley, *supra* note 14, at 220, sees the work of the early reg

arrangements in influencing States' conduct and the place of self-interest in the whole scheme. The reporting requirement has been seen as one way of improving treaty effectiveness and at the beginning of the past decade, the Siena Forum on International Law of the Environment farsightedly 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."[81]

The importance of reporting requirements 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."[82] Reporting requirements are believed to provide a vehicle for increasing transparency[83] and transparency or openness is viewed as the "key to compliance."[84] It provides a means for identifying States who are or are not fulfilling their obligations, evaluating the rate of compliance, and possibly improving the same.[85]

Reporting requirements have come to characterize a number of international regulatory regimes including those on environmental protection.[86] International agreements on intentional oil pollution have all incorporated some form of reporting requirements.[87] The 1954 International Convention for the Prevention of Pollution of

theorists as a reinvention of "international law in rational-choice language."
81. Conclusions of the Siena Forum on International Law of the Environment, Siena, Italy, Apr. 21 1990, ¶ 12(a), *reprinted in* 1 Y.B. INT'L ENVTL. L. 704, 707 (1990).
82. MITCHELL, *supra* note 10, at 123.
83. Young, *The Effectiveness of International Institutions*, *supra* note 48, at 176-78.
84. CHAYES & CHAYES, THE NEW SOVEREIGNTY, *supra* note 11, at 154.
85. *Id.* at 154-55.
86. Chayes & Chayes, *Compliance Without Enforcement, supra* note 12, at 323.
87. MITCHELL, *supra* note 10, at 123.

the Sea by Oil[88] required states to provide periodic information to the treaty secretariat on the installation of adequate reception facilities.[89] The 1962 OILPOL convention did away with the periodic reporting requirement and then approved "a non-binding resolution mandating that the newly established Intergovernmental Maritime Consultative Organization (IMCO) should obtain and publish information 'annually on the progress being made in providing [tanker reception] facilities.'"[90] However, the 1954 self-reporting requirement regarding available reception facilities was reintroduced by the 1973 MARPOL.[91]

Reporting requirements have also involved external reporting by which other States report on the non-availability of reception facilities in other countries.[92] This was introduced in oil pollution control regulations at the 1962 conference following a U.S. proposal.[93] The object of the proposal was to shame countries into providing the needed facilities.[94] This was to be accomplished "by establishing a system for tanker captains, through their governments, to inform IMCO and other governments of absent or inadequate facilities non-compliant nations."[95] This was replicated in MARPOL.[96]

States are required not only to report on the availability of reception facilities for oily wastes, but in the case of flag States, to report on actions taken with respect to

88. 1954 International Convention for the Prevention of Pollution of the Sea by Oil, 327 U.N.T.S. 3 [hereinafter OILPOL].
89. *Id.* art. VIII.
90. MITCHELL, *supra* note 10, at 125 (citing Resolution 6, Inter-governmental Maritime Consultative Organization, *Resolutions Adopted by the International Conference on Prevention of Pollution of the Sea by Oil 1962* (London: IMCO, 1962)).
91. MARPOL, *supra* note 34, art. 11(d).
92. OILPOL 54/62, *supra* note 88, art. VIII.
93. MITCHELL, *supra* note 10, at 128.
94. *Id.*
95. *Id.* (footnote omitted).
96. MARPOL, *supra* note 34, Annex 1, ch. II, Reg. 12(5).

alleged violations referred to them by coastal States.[97] All States were to provide reports produced in connection with treaty compliance and enforcement.[98] Under MARPOL, parties are also required to provide an annual statistical report in concordance with requirements of the International Maritime Organization (IMO)[99] concerning penalties actually imposed for infringement of the Convention.[100]

Reporting requirements have also been instituted in regional arrangements for marine environmental protection and oil pollution control starting with the Paris Memorandum of Understanding adopted by some European countries in 1982.[101] Under the Memorandum, member States are to inspect twenty-five percent of the foreign ships entering their ports and relay the information regarding these inspections to a centralized computer base on a daily basis through direct computerized input.[102]

The level of compliance with all of these reporting requirements has not met the elaborate provisions mentioned thus far. With the exception of the Paris MOU system, which has enjoyed a considerable measure of co-operation by the members as reflected in "regular, high-quality reporting by all the states involved,"[103] compliance with the requirements of the international agreements has been less than satisfactory. This is evidenced by the fact that the number of national reports totals less than

97. International Convention (with annexes) for the Prevention of Pollution of the Sea by Oil, 1954, May 12, 1954, 1959 U.N.T.S. 3. *supra* note 69, art. X(2).
98. *Id.* art. XII. (icppso)
99. The IMO replaced the Inter-governmental Consultative Maritime Organization (IMCO) on Mar. 6, 1948. *See* http://www.imo.org/imo/50ann/index.htm (visited April 15, 2001).
100. MARPOL, *supra* note 34, art. 11(1)(f).
101. Paris Port State Control MOU, *supra* note 31. *See generally* KASOULIDES, PORT STATE CONTROL, *supra* note 31, 142-82.
102. Paris Port State Control MOU, *supra* note 31, § 4.
103. MITCHELL, *supra* note 10, at 137.

twenty per year.[104] A Friends of the Earth (FOE) Study in 1992 found that only six contracting parties had submitted reports for each year since MARPOL took effect, and more than thirty contracting parties had never submitted a report to IMO.[105] The other contracting parties had submitted reports, which were often incomplete, for one or a few years only.[106]

One can easily identify at least one major reason for this state of affairs. The process of reporting (information gathering and dissemination) involves financial costs and adequately trained personnel hardly available in developing countries.[107] As a result, developing countries have not been living up to their obligations and this has affected the overall performance record. Based on available evidence, there is a nexus between a country's level of development and the likelihood that it will report.[108] It is believed that the "consistent disparity" between the rate of reporting, both numerically and proportionally found among developed countries *vis-a-vis* their developing counterparts, supports evidence from treaties on other issues that developing States often lack adequate financial and administrative capacities and domestic concern to report.[109]

104. *Id.*
105. *Id.* at 134.
106. *Id.*
107. CHAYES & CHAYES, THE NEW SOVEREIGNTY, *supra* note 11, at 154-57. This does not rule out ot contributing factors such as IMO Secretariat's ineffectiveness in facilitating reporting. *Id.* at 155-57.
108. MITCHELL, *supra* note 10, at 137.
109. *Id.* (citing Abram Chayes & Antonia Handler Chayes, *On Compliance*, *supra* note 21). The absence domestic concern in developing countries is traceable to the sorry state of environmental and human rights gro who would serve as a watchdog and thus galvanise the governments into action. This, in turn, is symptomatic of species of governance found in many parts of the developing world—a situation where governments are chronic intolerant of opposition. Environmental activists have had experiences ranging from the unpalatable to the fatal. *e.g.*, Paul Lewis, *Nigerian Rulers Back Hanging of 9 Members of Opposition*, N.Y. TIMES, Nov. 9, 1995, at Howard W. French, *Nigeria Executes Critic of Regime; Nations Protest*, N.Y. TIMES, Nov. 11, 1995, at 1. T articles discussed a well-known environmental crusader, leader of the Ogoni people of Nigeria, and Nobel P nominee, Ken Saro-Wiwa, who was executed in 1995 following a trial, which was hardly satisfactory by civil standards. *Id.* The focus here however, will not be on the problems occasioned by the absence of domestic conc but the implication of the lack of financial and administrative capacities in relation to implementation compliance.

This underscores the point that States are unlikely to perform their treaty obligations when the capacity to do so is nonexistent.[110] In such a case, a State would be prepared to place its national interest at the forefront, regardless of the consequences that such action might entail. It is self-evident that in the absence of support, many developing countries will continue to lag behind in compliance and enforcement. Only a few States have large and sophisticated bureaucratic establishments sufficiently equipped to perform the functions of information collection, processing, and assimilation.[111] In view of that, it is imperative for treaty effectiveness and success to seriously consider providing 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 facilitate 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 Protocol on Substances that Deplete the Ozone Layer,[112] done at Montreal, and has since been replicated in other international accords.[113]

110. 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 pro forma in many agreements, with little concern about cost or implementing capacity." CHAYES & CHAYES, THE NEW SOVEREIGNTY, *supra* note 11, at 154.
111. Chayes & Chayes, *Compliance Without Enforcement*, *supra* note 12, at 324.
112. Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, 26 I.L.M. 1541, 1550. The procedure was adopted at the 4th Meeting of the Parties to the Montreal Protocol in Copenhagen, Denmark, November 23-25, 1992. *See* Decision IV/5, Non-Compliance Procedure, in *Report of the 4th Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer*, U.N. Environment Programme, Dec. IV/5, U.N. Doc. UNEP/OzL.Pro.4/15 (1992), U.N. Doc. UNEP/OZL. Pro. 4/15 (25 November 1992), *available at* http:www/upep.ch/ozone/ 4mop_cph.shtml (last visited April 15, 2001) [hereinafter Non-Compliance Procedure].
113. *See* Gunther Handl, *Compliance Control Mechanisms and International Environmental Obligations*, 5 TUL. J. INT'L & COMP. L. 29, at 32-3 (1997) [hereinafter Handl, *Compliance Control Mechanisms*].

The objective of this procedure is to bring about total compliance.[114] The procedure is more interested in how to achieve compliance than being combative, as is typical of a traditional dispute settlement procedure,[115] or in merely identifying the wrong done and punishing the party responsible.[116]

One of the NCP's strong points is that it realizes that non-compliance might be as much a product of a State's lack of capacity as it might be rooted in a deliberate or negligent disregard of its obligations.[117] A State would thus be more comfortable with NCPs than with a procedure that castigates it and "takes it to court" for infractions without considering the possibility that the State may have desired to perform its obligations, but was legitimately unable to do so. 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 to compliance. In that connection, therefore, NCP is a recipe for eliciting States' assent to treaties.

NCP can also facilitate compliance since it creates a congenial atmosphere and an environment that fosters cooperation and respect, as opposed to belligerency and a 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 less-friendly means at the conclusion of the convention. As some scholars opine, "negotiation does not end with the conclusion of the treaty, but is a continuous aspect

114. *See* Non-Compliance Procedure, *supra* note 112, ¶ 9.
115. Handl, *Compliance Control Mechanisms*, *supra* note 113, at 34. Traditional Dispute Settlement procedu are indeed not a realistic option, legally or politically, in dealing with some issues of non-implementation and n compliance. However, NCP does not preclude resort to formal dispute resolution. *Id.*
116. *Id.* at 33-35.
117. *See, e.g. id.* at n.25 (citing Antonia Handler Chayes et al., *Active Compliance Management Environmental Treaties*, *in* SUSTAINABLE DEVELOPMENT AND INTERNATIONAL LAW 75, 80 (W. Lang ed.,1995)).

of living under the agreement."[118] NCP presents a veritable opportunity to ensure successful negotiation. It "epitomize[s] an effort at continued 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."[119]

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

Building on the observation that the notion of national interest is ubiquitous, regardless of the optics of international relations from which it is viewed, the next part of this chapter will discuss the prevailing economic issues. The idea is, that which affects a State's economy obviously raises the issue of its national interest, and will play a significant part in its attitude toward a particular international arrangement accordingly.

II. ECONOMIC ISSUES

Economists tend to perceive and portray environmental pollution as an economic problem: "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

118. Chayes & Chayes, *Compliance Without Enforcement*, *supra* note 12, at 313.
119. Gunther Handl, *Controlling Implementation of and Compliance With International Environmental Commitments: The Rocky Road from Rio*, 5 COLO. J. INT'L ENVTL. L. & POL'Y 305, 329 (1994) (citations omitted).

must be understood in economic terms."[120] This section will examine the contribution that economics can make in solving the problems of pollution and inefficient management of the oceans. It should be reiterated, however, that the intention here is not to promote economic models as alternatives to the extant regulatory scheme in international law. This work proceeds on the firm conviction that the law as it currently stands can serve as a useful tool in oil pollution control. What is needed, as this project has constantly and consistently emphasized, is for States to live up to their obligations under the law, and to include states that are not yet parties. 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 that this subject raises a number of important economic issues. To require States to be involved in the implementation of international regulations 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 that are inimical to the environmental well being 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.

Further, 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

120. Larry E. Ruff, *The Economic Common Sense of Pollution*, *in* MICROECONOMICS: SELECTED READINGS (Edwin Mansfield, ed. 1975).

considered lightly. This work seeks 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. This will be approached under two subsections, namely, international economic cooperation and funding.

A. International Economic Cooperation

In virtually every consensual arrangement, which international conventional law clearly represents,[121] it is almost invariable 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.

With respect to a number of environmental issues of international significance, developing countries insist that they would not be willing to endanger their economies for the common good by refraining from activities which other nations previously embraced to develop their own economies.[122] 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 in addition to undertaking the inspection of their ships to ensure maritime safety and environmental protection at their own expense, or to their detriment. They would no doubt prefer to channel such funds toward their own developmental projects and revisit the issue of environmental protection decades later, after they have stabilized their economic position.

121. *See generally* G.M. DANILENKO, LAW-MAKING IN THE INTERNATIONAL COMMUNITY 67 (1993).
122. Jay D. Hair, *A Foreword*, *in* TRENDS IN INTERNATIONAL ENVIRONMENTAL LAW 1, 3 (1992).

This should not elicit condemnation though, as a similar posture had been adopted by the developed world at some point in time in their development. An illustration is the reaction several countries had to a reception facilities provision proposed at the 1954 OILPOL Convention. During ratification of the Convention, the United States disagreed with the provision "because the government did not want to assume 'any financial responsibility' for building and operating such facilities."[123] Britain ultimately proposed the deletion of the 1954 Article VIII reception facility requirement altogether, as several States were threatening not to sign because of its inclusion.[124] The same position and reasoning illustrated above are arguably available to developing countries today.

Another example can be found in the case of flags-of-convenience States.[125] The current international legal approach is to make open registries less attractive,[126] which 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 embrace their concerns out of necessity. One solution could be international

123. MITCHELL, *supra* note 10, at 191 (citations omitted). In 1961, in the process of ratifying OILPOL 1954, United States entered a reservation stating:

> While it will urge port authorities, oil terminals and private constructors to provide disposal facilities, the United States shall not be obliged to construct, operate, or maintain shore facilities at places on U.S. coasts or waters where such facilities may be deemed inadequate, or to assume any financial obligation to assist in such activities.

CHARLES ODIDI OKIDI, REGIONAL CONTROL OF OCEAN POLLUTION: LEGAL AND INSTITUTIONAL PROBLEMS & PROSPECTS 33 n.119 (Shigeru Oda ed. 1978) (quoting 12 U.S.T. 3024).

124. MITCHELL, *supra* note 10, at 191 (construing SONIA ZAIDE PRITCHARD, OIL POLLUTION CONTROL (1987)).

125. The term "flags of convenience" generally refers to "the flag of any country allowing the registration foreign-owned and foreign-controlled vessels under conditions which, for whatever the reasons, are convenient opportune for the persons who are registering the vessels." BOLESLAW ADAM BOCZEK, FLAGS OF CONVENIENCE: INTERNATIONAL LEGAL STUDY (1962).

126. *See* H. Edwin Anderson, III, *The Nationality of Ships and Flags of Convenience: Economics, Politics, Alternatives*, 21 TUL. MAR. L.J. 139, 168 (1996) [hereinafter Anderson, *The Nationality of Ships*].

economic cooperation measures between the countries of the Northern and Southern hemispheres. Developed countries should assume 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 naïve however, to assume that developed States would jump at this suggestion without any justification for doing so. 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 that has been a longstanding catalyst for the industrialization of the countries of the Northern Hemisphere.[127] The nationals of these countries also control the oil and shipping industries that invariably contribute to their national economic development.[128] The price the whole world has had to pay for such development however, has been the degradation of the marine and coastal environment and destruction of the resources of the commons.[129] Interestingly, the North is currently at the forefront of the crusade to stem the environmental impact of the international oil business.[130]

127. *See generally* Bill Shaw et al., *The Global Environment: A Proposal to Eliminate Marine Oil Pollution*, 27 NAT. RESOURCES J. 157 (1987).

128. "[UNCTAD's] 'Review of Maritime Transport' [(1991)] listed the top three shipowning nations as Greece (81.97 million dwt), Japan (80.3 million dwt) and the United States (55.1 million dwt)." Anderson, *The Nationality of Ships*, *supra* note 126, at 156-57.

> Oil companies, mainly the 'seven majors' based in the United States and the United Kingdom, own almost one-third of all tankers and control even more through subsidiary corporations and long-term chartering arrangements. Independents, based mainly in Norway, Sweden, Denmark, and Greece, own the other two-thirds of the tanker fleet.

MITCHELL, *supra* note 10, at 109. The nationals of the developed countries also control the bulk of the shipping fleets in developing countries. *Id.*

129. David M. Dzidzornu & B. Martin Tsamenyi, *Enhancing International Control of Vessel-Source Oil Pollution Under the Law of the Sea Convention, 1982: A Reassessment*, 10 UNIV. TASMANIA L.R. 269, 270 (1991). The authors state that "uninhibited liberty to transport oil and other goods over the common resource, the oceans," has led to "pollution from ballasting and deballasting, [with] oil spills from collisions and stranding of ships [becoming] a liability to be borne by the international community as a whole." *Id.*

130. *See* MITCHELL, *supra* note 10, at 104-06.

The crusade is not necessarily 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, or, the Southern Hemisphere. It hovers around the equity of the North, which fuels economies with oil, dictating to the South not only to refrain from doing that which the North has done and from which it has benefited, but to do so at the risk of economic stagnation. The interest of the South at this stage is to get to the level of development that the North has already 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, which is logical, equity demands that the North should bear much of the expense for that requirement. As one commentator has correctly pointed out:

> [T]he 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 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![131]

131. NASSAU A. ADAMS, WORLDS APART: THE NORTH-SOUTH DIVIDE AND THE INTERNATIONAL SYSTEM 05 (1993).

It is also consonant with equity that those who are responsible for damage should remedy that damage. The other side of the coin is that it offends every notion of fairness to impose a duty on others to redress that which they did not cause. This parallels the "fault principle," which requires that those who have damaged the environment should bear the responsibility for the damage their activities have caused.[132] International oil trade has been undertaken by, and for, developed countries for many years. This means that environmental disasters are attributable to them.[133] These countries should therefore, logically be prepared to pay an extra cost for correcting the state of affairs. It is a time-honored principle of Anglo-American jurisprudence that the person that takes the benefit should also bear the burden.[134]

Further support for the proposition that the developed countries should bear the cost of measures expected of developing countries regarding marine pollution control can be found in the concept of opportunity cost in economics and the right to compensation in law. Active participation in international measures to control or prevent pollution from oil tankers will no doubt affect developing countries' development aspirations, as they would be required to divert badly needed funds to these measures and restrict or restructure their policies to align with the stipulations of international law.[135] It follows, therefore, that developing countries "could make a

132. Phillip M. Saunders, *Development Cooperation and Compliance with International Environmental Law: Past Experience and Future Prospects*, *in* TRILATERAL PERSPECTIVES ON INTERNATIONAL LEGAL ISSUES: FROM THEORY INTO PRACTICE 89, 97 (Thomas J. Schoenbaum et al. eds.,1998).

133. This is the case in many environmental issues. *See, e.g.,* Gunther Handl, *Environmental Protection and Development in Third World Countries: Common Destiny—Common Responsibility*, 20 N.Y.U. J. INT'L L. & POL. 603, 627 (1988) [hereinafter Handl, *Environmental Protection and Development*].

134. This is encapsulated in the Latin maxim "*qui sentit commodum sentire debet et onus et contra.*"

135. One example is the installation of oily waste reception facilities where it has been estimated that it would have cost $560 million to install such reception facilities in developing countries during 1993-2000. *See generally* United Nations, 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 (1991).

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."[136] The oceans and the resources in them are, doubtless, resources that are of special interest to the world community.[137]

A major objection to the points above is the apparent advantage it tends to confer on developing countries. A number of observers contend that developing countries simply raise these issues as a smokescreen or cloak to force the developed countries to pay for cleanup, which is the responsibility of the developing countries.[138] This is an unfair attack. In any case, their contention is suspect, as it represents a one-sided observation that 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 it. It also fails to consider the fact that there is no moral authority behind any call to others to abstain from that which you wilfully participated in and gained from, without providing them with an alternative course of action.[139] Building an international system founded on notions of equity and fairness is a better solution for humanity overall.[140]

136. Handl, *Environmental Protection and Development*, *supra* note 133, at 608.

137. *See, e.g.,* Stephen A. Silard, *The Global Environment Facility: A New Development in International La and Organization*, 28 GEO. WASH. J. INT'L L. & ECON. 607, 611 (1995).

138. Saunders, *supra* note 132, at 97.

139. The Permanent Court of International Justice, in the Diversion of Water from the Meuse case stated: "[T] Court finds it difficult to admit that the Netherlands are now warranted in complaining of the construction a operation of a lock of which they themselves set an example in the past." (Neth. v. Belg.) 1937 P.C.I.J. (Ser. A/ No. 70, at 25 (June 28). A pertinent principle here is the maxim *exceptio non adimpleti contractus* where one pa can plead in its defense that it is entitled to withhold performance where the other party has not performed its o side of the bargain. In essence, since the person that comes to equity must come with clean hands, the party in brea is estopped from complaining about the other party's refusal to perform.

140. On the role of equity in international law, see Thomas M. Franck & Dennis M. Sughrue, *The Internatio Role of Equity-As-Fairness*, 81 GEO. L.J. 563 (1993).

The question of capacity also makes it imperative for developed countries to assist their developing counterparts in order 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.[141] As discussed in part I, developed countries have not complied with their responsibility to install reception facilities or to meet reporting requirements primarily due to their lack of capacity.[142] The failure of the richer nations to realize this and address it will continue to plague any efforts aimed at promoting safer ships and cleaner seas.[143] Scholars have observed it would be futile to design a strategy to address global environmental concerns that do not simultaneously "confront the issues of poverty and economic development, which often seem to make environmental protection a luxury that most nations cannot afford."[144] While, "[u]ntil recently, these tandem concerns have been compartmentalized and considered separately by agencies and institutions," the emerging consensus is that the "recognition of the global nature of environmental problems necessarily entails recognition of the global nature of the problems of poverty and development."[145] Consequently, a formidable challenge confronting international cooperative efforts is to put this recognition into practice.[146] There can be no better way of "putting the recognition into practice" in international oil pollution control than for developed

141. Young, *The Effectiveness of International Institutions*, *supra* note 48, at 183.

142. CHAYES & CHAYES, THE NEW SOVEREIGNTY, *supra* note 11, at 156-57.

143. *See* W. Jackson Davis, *The Need for a New Global Ocean Governance System, in* FREEDOM FOR THE SEAS IN THE 21ST CENTURY 147 (Jon Van Dyke et. al. eds., 1993). The writer shares the view that one of the factors an effective ocean governance regime should incorporate is a "massive allocation of resources during a period of increasing scarcity . . . which will inevitably transfer wealth (and therefore power) from the rich countries to the poor [ones]." *Id.* at 166. Historically, however, "such a transfer has never taken place peacefully." *Id.*

144. Catherine A. O'Neill & Cass R. Sunstein, *Economics and the Environment: Trading Debt and Technology for Nature*, 17 COLUM. J. ENVT'L L. 93, 95 (1992).

145. *Id.* at 95-96.

countries to assume binding obligations to assist the developing world and thereby facilitate their accession to and implementation of the numerous international oil pollution control accords.

Developed countries should bear the cost of bringing developing countries into compliance with the objectives of international agreements, as it is in their mutual interests to do so. Instead of expecting further profits in future sales of pollution control equipment, the focus should be on how to handle this issue symbiotically, even when it means reduced financial benefit to the developed world. The challenge before the global community in emphasizing mutual interests in support of global environmental issues at this time is to recognize the need for a paradigmatic shift. In order to move into a new day of international relations, it is essential to recognize that "security is no longer defined by the standoff of mutually assured destruction."[147] Due recognition should be placed on the fact that the future is greatly dependent on "securing mutual self-interest[s in order to protect] the planet's environmental integrity."[148]

No matter how vigorously marine environmental protection measures are pursued by some countries, their efforts will amount to little in the absence of global cooperation. For instance, there is a consensus of opinion that it is difficult to have a successful and effective oil pollution regime without the provision of adequate reception facilities in ports.[149] In the absence of these facilities, some tankers will

146. *Id.*
147. Hair, *supra* note 122, at 4.
148. *Id.*
149. In January [1996], the IMO Facilitation Committee recognized that illegal marine pollution may occu part, because of the high cost or unavailability of reception facilities. Additionally, the committee noted that m MARPOL states have inadequate reception facilities and requests IMO members to provide options for finan and operation of such facilities. *See* Lindy S. Johnson, *Vessel Source Pollution* 7 Y.B. INT'L ENVTL. L. 150, 15 (1996).

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 reach those countries, mainly in the developed world, who bear no responsibility for them. In order to protect their own interest, it behoves them to assist other countries to install such facilities for the benefit of all.

The case of flags-of-convenience shipping that is accompanied by serious environmental problems is another example.[150] To safeguard their environment, some developed countries, notably Canada, the United States, and the Paris MOU States, initiated the practice of entrenching a strong Port State control regime aimed at preventing the entrance of substandard ships into their territory.[151] This practice has spread to other parts of the world.[152] The vast majority of open registry states are in the developing world and are in the habit of registering some of these substandard ships.[153] It is expected that strong Port State control will make open registry less attractive and eventually eliminate the operation of these ships.

The logic behind the above proposition is, however, flawed as ships prohibited in the developed world can continue sailing and trading with other countries with less

150. *See generally* Ademuni Odeke, *Port State Control and UK Law*, 28 J. MAR. L. & COM. 657 (1997); L.F.E. Goldie, *Environmental Catastrophes and Flags of Convenience—Does the Present Law Pose Special Liability Issues?*, 3 PACE Y.B. INT'L L. 63 (1991). *See also* Sturmey, *supra* note 46.
151. KASOULIDES, *supra* note 31, at 151; *see also* Craig H. Allen, *Federalism in the Era of International Standards: Federal and State Government Regulation of Merchant Vessels in the United States (Part III)*, 30 J. MAR. L. & COM. 85, 119-20 (1999).
152. McDorman, *supra* note 6, at 208-09.
153. The United Nations Conference on Trade and Development, in a 1984 report, identified five countries, mainly from the developing world, as having major open registry fleets: the Bahamas, Bermuda, Cyprus, Liberia, and Panama. *See* George C. Kasoulides, *The 1986 United Nations Convention on the Conditions for Registration of Vessels and the Question of Open Registry*, 20 OCEAN DEV. & INT'L L. 543, 547 (1989). The table included in Kasoulides' article provides a list of open registry states from 1930-1986. *Id.* It is easier for substandard ships to be registered in flags of convenience States because they operate under extremely liberal laws. *See also* Edith A. Wittig, *Tanker Fleets and Flags of Convenience: Advantages, Problems, and Dangers*, 14 TEX. INT'L L.J. 115, 119-21 (1979); Goldie, *supra* note 150, at 89. Goldie argues that the registration of ships that might not meet international standards in flags of convenience states "is an inevitable consequence of tanker economics, [because], [a]s ships age

stringent requirements.[154] The problem, assumed to have been transferred to such States, could resurface. In the event of maritime casualty involving such ships, the effects would necessarily extend even to States far removed from the accident since the polluting agent, oil, can quickly spread over a large area. Fish poisoned as a result could be consumed by anyone, anywhere. Other marine resources and areas of international significance could also be damaged. The Global Environmental Facility, for instance, has identified such areas in West Africa, a region that is still prone to tanker pollution, especially from substandard vessels.[155] An actual experience of the MV Neamt, a ship that sailed from West Africa to South Africa for forth-eight days in 1997 accurately depicts the situation:

> With no radar, no navigation lights and a useless 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 . . .[156]

they tend to become the property of less scrupulous owners, who . . . make cuts in their ship's maintenance and s their environmental protection costs." *Id.*

154. Anderson, *The Nationality of Ships*, *supra* note 126, at 168. "If [a] vessel owner does not want to correc infraction and is barred from a port state, it is likely that he may still trade amongst the developing countries w have fewer resources to conduct port state inspections." *Id* (citation omitted).

155. *See generally* Clara Nwachukwu, *Nigeria to benefit from Global Environmental Project,* POST EXPR Feb. 11, 1998, *available* http://www.postexpresswired.com/postexpress.nsf/b378f0445ed319398525691a0076c2c6/43f5636dcfc14c3e852 a70066e7cd?OpenDocument (last visited Sept. 10, 1998).

156. John Hare, *Port State Control: Strong Medicine to Cure A Sick Industry*, 26 GA. J. INT'L & COMP. L. 589 n.60 (1997) (quoting LLOYD'S LIST AFRICA WEEKLY, May 9, 1997).

One could analogize this issue to crime control. The solution to criminal activity is not necessarily more jails, for example, but instead in addressing poverty, unemployment, and lack of opportunity, which arguably are the root of the problem. It is similarly preferable to solve the problem of ship-source pollution 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 secures their economies. After all, although the current practice provides a measure of benefit to open registries, the overall receipts from ship registration has not been shown to significantly impact the economies of open registry States.[157] Instead, the major beneficiaries are the big corporations that engineer the practice.[158] As one writer observes,

> [T]he 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 labor available in those countries.[159]

The implications of this from an economic standpoint are certainly enormous. 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

157. *See generally* I.M. Sinan, *UNCTAD and Flags of Convenience*, 18 J. WORLD TRADE L. 95, 95 (1984). "The relevance of [flags of convenience shipping or] open registry fleets for the developing countries has been only negative." *See id.*

158. Anderson, *The Nationality of Ships*, *supra* note 126, at 159-60.

159. *Id.* at 161 (citations omitted); *see also* Sinan, *supra* note 157, at 107.

terms of trade and the costs of the country's imports and exports.'"[160] It is inconceivable that a State will insist on remaining in such an economic state instead of cooperating in some other arrangement that has a better likelihood of improving the State. The next subsection will discuss other ways of raising funds for improving compliance with and implementation of international obligations.

B. Fundraising and Management

The subject of economics is also relevant to the area of raising and managing funds for implementing measures aimed at treaty effectiveness. By applying sound economic principles of resource management, the oceans and their embedded resources can be harnessed to provide the needed funds. One option of funding is the idea of charging some fees for the use of facilities, otherwise known as a 'user pays' system. This work intends to discuss that briefly in the following subsection.

1. User Fees

The oceans and the resources within them are enjoyed by a plethora of enterprises free of charge. A useful economic device for remedying this state of affairs is the "user pays" principle (UPP).[161] This principle, also known as resource pricing, is "a well-known and well-accepted economic principle."[162] The UPP aims at ensuring that the user or polluter pays for the full cost of the resource and its related services.[163]

160. Anderson, *The Nationality of Ships*, *supra* note 126, at 161 n.145 (quoting NAGENDRA SINGH, MARIT FLAG AND INTERNATIONAL LAW (1978)). *But see* Gunnar K. Sletmo and Susanne Holste, *Shipping and Competitive Advantage of Nations: The Role of International Ship Registers,* 20 MAR. POL'Y MGMT. 243 (1993).
161. Ferenc Juhasz, *Guiding Principles of Sustainable Development in the Developing Countries*, *in* F PRINCIPLES FOR SUSTAINABLE DEVELOPMENT 33, 39 (Edward Dommen ed., 1993).
162. *Id.*
163. Gonzalo Biggs, *Application of the Polluter-Pays Principle in Latin America*, *in* FAIR PRINCIPLES F SUSTAINABLE DEVELOPMENT, *supra* note 161, at 93, 107 n.3.

"The idea behind [the UPP] is to internalize the economic costs of the external effects of production, consumption and disposal."[164]

In advocating a user fee for ocean use, the intent here is not to present it as a pollution control device that could be applied in place of the existing regulatory scheme, but instead to utilize it as a tool for the generation of revenue. A "user pays" system is particularly attractive because it is grounded in equity, as "it is only fair that those who benefit from a good or service should pay for that benefit."[165] It is hardly surprising that in today's world, the idea of paying for the use of common resources is gaining in popularity as fewer people believe that all services and facilities should be free.[166] Where concern exists at all, it has narrowed to the types of services and facilities for which fees should be levied, and what amount of money can be fairly charged.[167] "The guiding philosophy emerging in the arena of public services is that users should pay more than non-users for the services or facilities they enjoy."[168]

Users may be categorized as either consumptive or amenity users.[169] Consumptive users are further differentiated as quantity and quality users.[170] Amenity users may be active or passive.[171]

> [C]onsumptive users may either consume a certain quantity [of water, for example,] or they may reduce its quality by using its absorption capacity to dispose waste and by-products . . . by discharging effluents into a river. [On the other hand,] amenity users neither

164. Kirit S. Parikh, *The Polluter-Pays and User-Pays Principles for Developing Countries: Merits, Drawbacks and Feasibility*, *in* FAIR PRINCIPLES FOR SUSTAINABLE DEVELOPMENT, *supra* note 161, at 81.
165. Edward Dommen, *The Four Principles for Environmental Policy and Sustainable Development: an Overview*, *in* FAIR PRINCIPLES FOR SUSTAINABLE DEVELOPMENT, *supra* note 161, at 7, 31.
166. ROBERT AUKERMAN, USER PAYS FOR RECREATION RESOURCES 31 (1987).
167. *Id.*
168. *Id.*
169. Dommen, *supra* note 165, at 24.
170. *Id.*
171. *Id.*

> consume nor pollute the water. [For instance, a]ctive amenity users of a lake may swim or sail [in it while p]assive users may simply admire its beauty.[172]

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.[173] Considering the utility of the oceans to this group and the fact that their activities affect the oceans in some 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."[174] Non-commercial uses such as subsistence fishing and marine scientific research could be exempt.[175]

What could be realized from a levy on a small percentage of the profits of the enterprises currently utilizing the oceans without any charge is amazing. Available estimates suggest that about two hundred billion pounds of fish are harvested annually.[176] Imposition of a one-half of one percent ocean use tax would raise $250 million.[177] If the same rate were applied to offshore oil and gas, it would produce $375 million.[178] The dumping of more than 200 million metric tons of sewage sludge, industrial waste, and dredged material are officially reported yearly, as the ocean is,

172. *Id.* at 24-25.
173. *See, e.g.,* Andrew Griffin, *MARPOL 73/78 and Vessel Pollution: A Glass Half Full or Half Empty?*, 1 J. GLOBAL LEGAL STUD. 489 (1994); *see also* Christopher D. Stone, *Locale and Legitimacy in International Environmental Law*, 48 STAN. L. REV. 1279, 1284-88 (1996).
174. ELISABETH MANN BORGESE, OCEAN GOVERNANCE AND THE UNITED NATIONS 90-91 (2d rev. ed. 1996).
175. *Id.* at 91.
176. Christopher D. Stone, *Mending the Seas through a Global Commons Trust Fund*, *in* FREEDOM FOR THE SEAS IN THE 21ST CENTURY 171, 176 (Jon M. Van Dyke et al., eds. 1993) [hereinafter Stone, *Mending the Seas*].
177. *Id.*
178. *Id.*

directly and indirectly through the territorial waters, used as the world's sewer.[179] Taxing such use at only $1 per ton would raise another $200 million.[180] Levies could also be imposed for "several non-polluting uses of common heritage assets, akin to fishing and oil."[181] Further, "[c]onsider royalties for the minerals that will someday be taken from the seabed and fees for the uses of space."[182] Instead of continuing with the current practice of allowing the "first grabbers" to utilize free of charge, "limited resources such as positions for geosynchronous and earth-orbiting satellites and frequencies on the radio spectrum," the world community can sell or lease them. Billions of dollars would at least be realized.[183]

The idea of charging for the use of the oceans has existed for years. In 1971, the International Ocean Institute proposed an Ocean Development Tax, a proposal that was favorably received.[184] Ambassador Castaneda of Mexico, who later became Mexico's Foreign Minister, "described it as 'an extremely important, interesting suggestion, and perhaps a very promising proposal [and added that] [i]f we act intelligently, it has a fair chance of becoming a reality in the near future.'"[185] Alan Beesley of Canada said:

> Lawyers feel they must solve the problems they are facing now. 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

179. *Id.*
180. *Id.*
181. *Id.*
182. *Id.*
183. *Id.*
184. BORGESE, *supra* note 174, at 90-91.
185. *Id.* at 91 (footnote omitted).

> nearly as futuristic and academic as it now might seem to be.[186]

Silviu Brucan, who later played a key role in the anti-communist revolution in Romania in the late 1980s 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."[187]

With all of these favorable comments, one would think an ocean tax would already be in place. The truth is that not everybody is favorably disposed toward such a tax, for a variety of reasons. Proposals by Greece and France in 1962 for an international tax on oil imports were rejected.[188] Some other attempts, not necessarily limited to ocean matters, have also met with cold reception and have failed outright.

In 1970, United States President Richard Nixon, while proposing an extension of coastal States' 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.[189] The proposal was that a percentage of the wealth generated from the extension would be set aside for the benefit of developing countries,[190] which was based on considerations of fairness and as a means of quietening objections by landlocked States.[191]

In 1989, the late Indian Prime Minister Rajiv Gandhi, proposed a "Planet Protection Fund." If each nation were to contribute a thousandth of its gross national

186. *Id.*
187. *Id.* (citation omitted).
188. PRITCHARD, *supra* note 124, at 129.
189. Announcement by President Nixon on United States Oceans Policy, May 23, 1970, *reprinted in* 9 I
807, 808 (1970).
190. *Id.*
191. Stone, *Mending the Seas*, *supra* note 176, at 179.

product each year, it would amount to $18 billion U.S. dollars per year.[192] The fund would have been channelled toward helping developing countries adopt and develop environmentally friendly technologies at no cost to them.[193] 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.[194]

The fee proposed here and the fund into which the proceeds would 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."[195] 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. Moreover, even though it considers the developing countries as a beneficiary, it does so 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. More importantly, it does not suffer the fate of the others in the sense that they appear to have come before their time.

It would be risky to underestimate the degree of opposition that a user fee may elicit, especially from countries that substantially benefit from the current practice of

192. *Ghandi Calls for $18-Billion Fund to Fight Pollution of Atmosphere*, L.A. TIMES, Sept. 6, 1989, pt. 1, at 8.
193. *Id.*
194. *Britain Stands Pat Against Sanctions*, CHI. TRIB., Oct. 22, 1989, at 27.
195. Stone, *Mending the Seas*, *supra* note 176, at 179.

free use of ocean resources. A similar and recent proposal, but in deep sea mining, faced opposition as well, especially from States that had the technology for mining polymetallic nodules of the deep sea bed and who were not willing to share that technology with anyone else or utilize the resources for the common good.[196] While acknowledging the objections that followed the failed "common heritage of humanity" idea leading to the adoption of an Implementation Agreement by the General Assembly on 29 July 1994,[197] it should be pointed out that the world cannot continue to countenance such brazen displays of egoism by some States.

Of note is the impact the concept of a common heritage proposed in Part XI of the Law of the Sea Convention 1982 has had. It created a landmark in that it "sets a precedent in international law for the imposition of international taxation."[198] The Agreement of 1994[199] has not changed this, although the terms are varied, thus illustrating 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. The international community can now reflect that in more tangible and more refined terms.

With the current state of the global economy, the value of the idea of an ocean use fee cannot be overemphasized. With nations complaining of the scarcity of funds and the strain on existing institutions to meet the myriad needs confronting the

196. *See generally* SAID MAHMOUDI, THE LAW OF DEEP SEA-BED MINING 119-204 (1987); *see also* Jonathan Charney, *U.S. Provisional Application of the 1994 Deep Seabed Agreement*, 88 AM. J. INT'L L. 705 (1994).
197. Louis B. Sohn, *International Law Implications of the 1994 Agreement*, 88 AM. J. INT'L L. 696 (1994); *also* BORGESE, *supra* note 174, at 170.
198. BORGESE, *supra* note 174, at 170.
199. Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of Sea of 10 December 1982, July 28, 1994, 33 I.L.M. 1309.

international society,[200] it is imperative that we look at alternative sources of funding. According to one commentator, "[i]f sustainable development is not to remain a chimera, new sources of funding must be mobilized . . . One of the obvious candidates is international taxation."[201] Law Professor Christopher D. 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."[202] The global community should continue to use what it has to get what it wants while striving to preserve what it already has.

The user fee this work proposes will be based on well-defined terms, such as the tonnage and value of goods transported, or fish and other resources removed, or sewage and other materials dumped. The proceeds will be channelled into an international fund, which will underwrite such things as "building and improving ocean services, [for example,] navigational aids, scientific infrastructure, environmental monitoring, search and rescue, and disaster relief."[203] The fund would also finance other measures such as a global environmental patrol force, with the capability to respond quickly to environmental disasters like major oil spills, promoting improved enforcement of treaties, and drafting and lobbying for new international agreements.[204] The fund would also assume responsibility for "underwrit[ing] marine research[,] support[ing] forceful monitoring of ocean dumping," and generally combating pollution on the high seas.[205]

200. BORGESE, *supra* note 174, at 90.
201. *Id.*
202. Stone, *Mending the Seas*, *supra* note 176, at 176.
203. BORGESE, *supra* note 174, at 91.
204. Stone, *Mending the Seas*, supra note 176, at 175.
205. *Id.*

Furthermore, the fund should "also defer the costs of compliance with international regulations designed to remedy the ills of the commons."[206] In that connection, the fund will arrange development assistance to developing countries to enable them to participate in the global efforts for 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 currently being undertaken by other international institutions such as the International Maritime Organization. This would not result in conflict, as coordination of functions would eliminate overlapping of efforts in certain areas while ensuring all areas are addressed.

The user pays system has already been successfully utilized as a management and economic tool in domestic systems with respect to some common resources that were initially freely enjoyed. An example is the park.[207] There is no cogent reason why this success cannot be replicated in the international system. The next section will focus on a discussion of the nature and structure of management of the proceeds of the fee.

2. Funds Management

One approach to dealing with the situation of developing countries in relation to international environmental obligations is the creation of financial mechanisms,[208] which are created "to oversee and facilitate the flow of funds related to implementation of an agreement."[209] An example of a financial mechanism is the

206. *Id.*

207. AUKERMAN, *supra* note 166. Dr. Aukerman conducted an extensive study on the success of this ide some countries notably, the United States and Canada. The author also observes on its use in Western Europ countries and recommends it for New Zealand.

208. Other methods include common, but differentiated, obligations and international cooperation measu concentrated on the areas of technology transfer, scientific research and development and access to benefits biotechnology research. *See* Saunders, *supra* note 132, at 98-100.

209. *Id.* at 99 (citation omitted).

Montreal Protocol.[210] The Montreal Protocol includes a Multilateral Fund and was established to provide financial and technical cooperation, and to meet all agreed incremental costs of developing country parties.[211] Permanent financial mechanisms are also present in the Biological Diversity[212] and Climate Change Conventions.[213] 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.[214] Additionally, this dissertation proposes that assistance to developing countries for oil pollution control take the form of a financial mechanism titled the Global Enforcement Fund. The proposed fund will operate under the Global Environment Facility (GEF).[215]

Originally, the GEF was established in 1991 as a pilot project of the World Bank.[216] Its operation is now governed by an arrangement involving the World Bank,[217] the United Nations Environment Programme (UNEP)[218] and the United Nations Development Programme (UNDP).[219] The realization that no single

210. *See* Montreal Protocol on Substances that Deplete the Ozone Layer, *supra* note 112.

211. Jason M. Patlis, *The Multilateral Fund of the Montreal Protocol: A Prototype for Financial Mechanisms in Protecting the Global Environment*, 25 CORNELL INT'L L.J. 181 (1992).

212. United Nations Conference on Environment and Development: Convention on Biological Diversity, June 5, 1992, 31 I.L.M. 818 [hereinafter Convention on Biological Diversity].

213. United Nations Conference on Environment and Development: Framework Convention on Climate Change, May 9, 1992, 31 I.L.M. 849 [hereinafter Convention on Climate Change].

214. Convention on Biological Diversity, *supra* note 212, art. 39; Convention on Climate Change, *supra* note 213, art. 21.

215. Instrument for the Establishment of Global Environment Facility, 33 I.L.M. 1273, 1273 (1994).

216. Saunders, *supra* note 132, at 100 n.45.

217. Articles of Agreement of the International Bank for Reconstruction and Development, Dec. 27, 1949, 60 Stat. 1440, T.I.A.S. No. 1502, 2 U.N.T.S. 134, amended by 16 U.S.T. 1942, T.I.A.S. No. 5929 (Dec. 16, 1965). "The World Bank is the first and largest multilateral financial institution." Charles DiLeva, *International Environmental Law and Development*, 10 GEO. INT'L ENVTL. L. REV. 501, 504 (1998).

218. G.A. Res. 2997, U.N. GAOR, 27th Sess., Supp. No. 30, at 43, U.N. Doc. A/8370 (1972). UNEP is "arguably the world's most important environmental agency." Matthew Heimer, *The UN Environment Programme: Thinking Globally, Retreating Locally,* 1 YALE HUM. RTS. & DEV. L.J. 129, 129 (1998). For discussion regarding UNEP, see Karen Tyler Farr, *A New Global Environmental Organization*, 28 GA. J. INT'L & COMP. L. 493, 496-507 (2000), and Mark Allan Gray, *The United Nations Environment Programme: An Assessment*, 20 ENVTL. L. 291 (1990).

219. The UNDP is the central co-ordinating organization for [United Nations] development activities and the world's largest multilateral source of technical assistance for sustainable human development." Zama Coursen-Neff, *Preventive Measures Pertaining to Unconventional Threats to the Peace Such As Natural and Humanitarian*

international agency commands all the skills and experience necessary to implement all the functions of GEF necessitated the tripartite structure.[220] Under this new arrangement, established by representatives from seventy-three countries at a meeting in Geneva in 1994, GEF was transformed "from an experimental program into a permanent financial mechanism that will provide grants and concessional funds to developing countries for projects and other activities that protect the global environment."[221]

The GEF has a mandate that covers four focal areas, namely climate change, biological diversity, international waters, and ozone depletion.[222] It perseveres "to assist in the protection of the global environment and promote environmentally sound and sustainable economic development."[223] With regard to the oceans and international river systems, the GEF "is designed to establish programs [intended] to protect both marine and freshwater environments, study and improve deballasting techniques, clean up toxic waste pollution and upgrade contingency planning for oil spills."[224] This is intended as a continuation of the efforts of the signatories to MARPOL 73/78.[225]

GEF is administered through a division of powers between the component institutions.[226] In particular, the World Bank assumes responsibility for

Disasters, 30 N.Y.U. J. INT'L L. & POL. 645, 652 (1998).

220. World Bank: Documents Concerning the Establishment of the Global Environment Facility, 30 I.L.M. 1735, 1741, pt. II(10) (1991) [hereinafter World Bank].

221. Nicholas Van Praag, Introductory Note to Instrument Establishing the Global Environment Facility, I.L.M. 1273 (1994).

222. Instrument for the Establishment of Global Environment Facility, *supra* note 215, at 1273.

223. *Id.* at 1281.

224. Anderson, *Reforming International Institutions*, *supra* note 8, at 771 nn.55-56. *See also* Charles E. Di... *The World Bank and Environmental Law: A Post-Rio Summary of Activities*, C883 ALI-ABA 525, 526-28 (Feb. 1994).

225. Anderson, *Reforming International Institutions*, *supra* note 8, n.56.

226. Alan S. Miller, *The Global Environment Facility and the Search for Financial Strategies to Fo... Sustainable Development*, 24 VT. L. REV. 1229, 1234-34 (2000).

administration, trusteeship, and primary implementation of investment projects.[227] It also serves as a repository of the Global Environment Facility Trust Fund (GEF).[228] The World Bank's headquarters in Washington, D.C. houses the GEF Secretariat, which is in charge of the administration of the GEF's day to day operations.[229]

Member States provide the funding for GEF in the form of grants and co-financing arrangements, though by the Articles of Agreement, GEF expresses a preference for grant funding.[230] GEF funds are primarily utilized for "incremental costs." These costs are "defined as '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.'"[231] GEF therefore does not normally give financial support to projects 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.[232]

Under the restructured GEF, funding is also expected from the private sector. It is submitted that a fee for use of the oceans and the resources contained in them will be a useful way of sourcing funds and ensuring private sector participation in the global

227. Royal C. Gardner, *Exporting American Values: Tenth Amendment Principles and International Environmental Assistance*, 22 HARV. ENVTL. L. REV. 1, 42 n.227 (1998). *See also* Silard, *supra* note 137, at 634-35.

228. Silard, *supra* note 137, at 635. *See also* Adam A. Walcoff, *The Restructured Global Environment Facility: A Practical Evaluation for Unleashing the Lending Power of GEF*, 3 WIDENER L. SYMP. J. 485, 488-89 (Fall, 1998).

229. Anderson, *Reforming International Institutions*, supra note 8, at 785.

230. World Bank, *supra* note 220, at 1749-50.

231. Anderson, *Reforming International Institutions*, supra note 8, at 787 (citations omitted).

232. World Bank, *supra* note 220, at 1742-43.

march for environmental security. The proceeds will be channelled into the proposed fund under GEF and be particularly designated for the projects listed above.

GEF is especially attractive for this assignment because it would facilitate implementation and compliance with international law. First, GEF obviates the need for the creation of new institutions or bureaucracies, which members of the international community see as money-guzzling and an encroachment on sovereign powers. Indeed this vision was the basis of extensive discussions for the restructuring of GEF: "The lengthy negotiations on restructuring illustrate the determination of governments to avoid the creation of a new bureaucracy."[233] Second, GEF is not just an existing institution, but is one equipped with the necessary experience and expertise to undertake the task without additional restructuring.[234] Third, 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.[235] 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.[236] Fourth, GEF is an enforcement mechanism in itself because of its involvement with the World Bank. States would want to keep their obligations under the facility to avoid foreclosing opportunities for future assistance by the Bank, a near inevitability in today's world.[237] In other words, the concept of

233. Van Praag, *supra* note 221, at 1273.
234. Silard, *supra* note 137, at 645.
235. *See generally* Paul Stephen Dempsey, *Compliance and Enforcement in International Law—Oil Pollution the Marine Environment by Ocean Vessels*, 6 NW. J. INT'L L. & BUS. 459, 561 (1984).
236. Andrew Watson Samaan, *Enforcement of International Environment Treaties: An Analysis*, 5 FORD ENVTL. L. J. 261, 267 (1993).
237. Ibrahim F. I. Shihata, *Implementation, Enforcement, and Compliance With International Environm*

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-looking posture. The permanent GEF has been described as an institution intended as more than a channel for project financing. It will also play a crucial role in supporting "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."[238] The revised institutional framework signifies a change from the "old style assistance" to "new style cooperation."[239]

In furtherance of its objectives, GEF has identified some projects in West Africa, among other places, as areas of international significance, and undertook to finance the preservation of their environmental quality.[240] It is worth re-emphasizing, therefore, that the marine and coastal resources and environment will be better off under a system comprised of a fusion of legal rules supported by an ocean user fee. The proceeds from such a fee would be managed by the Global Environment Facility. These proceeds would go toward strengthening the capacity of developing countries. Such infusion of energy would in turn enable those States to play their part in global environmental protection measures.

The responsibility for collecting the proposed fees should also be assumed by the GEF. The sheer vastness of the ocean and the volume of activity on the ocean,

Agreements—Practical Suggestions in Light of World Bank's Experience, 9 GEO. INT'L ENVTL. L. REV. 37, 48-50 (1996).
238. Van Praag, *supra* note 221, at 1275.
239. *Id.*
240. Nwachukwu, *supra* note 155.

however, pose problems in application. To ensure against those that will attempt to cheat the system and somehow shirk the responsibility, GEF should align with and seek the support of the various interest groups that exist in the business. Consider, for example, oil companies operating shipping lines (International Shippers Association (INSA)) and independent tanker owner organizations (International Tanker Owners Association (INTERTANKO)); a system could be arranged for the collection of the proposed fees at the same time as any annual membership fees that might be due from members. Additionally, it would behove the GEF to establish a relationship 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." Generally, establishing additional offices outside of its secretariat would also assist GEF. This would facilitate revenue collection as well as any other relevant activities.

III. Conclusion

Implementation and compliance with international agreements have not occurred in a desirable manner, as the members of the world community might prefer. Accordingly, this militates against the effectiveness of international agreements in relation to oil pollution from ships. National interest is believed to be the source of this state of affairs. Exploitation of this notion is therefore a *sine qua non* for the resolution of the problem.

The intent of this chapter was to go beyond the extant international policy and legal framework for solving the problem, including the latest effort of Port State control. Realistically, the oceans, as a global commons, "can only be protected if the behaviour of the people (i.e. the behaviour of firms, governments, consumers . . .)

changes."[241] Authoritative regulations alone will not effect this change, which requires identifying the reasons behind the behavior leading to pollution and tackling the problem at the root.

The basic reason identified for the behavior is deference to national interest. Accordingly, this chapter is meant to advocate capacity-building in cases of financially incapacitated countries, and introduces alternatives to environmentally destructive activities. 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 . . . ."[242] 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.

The concepts of global partnership, international cooperation, and symbiosis in international relations catering to the interests of every side of the world divide must be promoted, as opposed to a system that is partitioned into winners and losers.

This work is intended to suggest an avenue for the productive use of resources commonly owned by the international community for the benefit of all. It also addresses the additional issue of the protection of the oceans and their resources, as well as remedial actions with regard to damage done to them. In that light, this article is intended as a voice for the oceans and marine environment; speaking for them and not just concentrating on pollution prevention and control for the benefit of States only. It does so by holding the corporate sector responsible for their actions and

241. Volker von Prittwitz, *Several Approaches to the Analysis of International Environmental Policy*, *in* Maintaining a Satisfactory Environment: An Agenda for International Environmental Policy 1, 23

demands that they play a more active and supportive role in international environmental protection efforts.

Current with recent trends, this work is meant to elicit and enhance compliance with international law where some States essentially assume an obligation to defray the cost of compliance expected from other States. This is especially true when the former are responsible for the current state of affairs or where the latter are not in a financial position to be part of the international arrangement, as exemplified by the Substances that Deplete the Ozone Layer[243] and Climate Change Conventions.[244] The present state of affairs regarding oil pollution control must change. It is through new international programs as well as reform and enforcement of the current systems that this change can occur.

The past three chapters, which constitute the first division of this dissertation, have discussed the environmental and economic costs associated with a particular segment of the oil industry: international oil trade and shipping. The next three chapters, constituting the second division, focus more on oil corporations engaged in oil exploration and extraction. One common thread that runs through all of the chapters is that the activities of oil corporations are accompanied by environmental and economic costs. The issue of corporate accountability thus features prominently in both divisions. The issues of implementation, compliance and enforcement, also feature in the second division, although they are not as pronounced as they are in the first division. A simple explanation for this is that while there has been an elaboration of international rules regarding the environmental aspects of oil trade and shipping,

(Nordal Akerman ed., 1990).
242. *Id.* at 22.

the same cannot be said of oil exploration and production. The different aspects of the oil industry represented in both divisions also have a tendency to impose social costs on the society, but exploration and production activities are more likely to cause social disequilibrium through such things as human rights abuses. The next three chapters focus on these issues commencing with the existing regulatory system over multinational oil corporations engaged in oil development.

243. *See* Montreal Protocol on Substances that Deplete the Ozone Layer, *supra* note 112.
244. *See* Convention on Climate Change, *supra* note 213.

DIVISION II

OIL EXPLORATION AND PRODUCTION

CHAPTER 4

CORPORATE ABUSES AND REGULATION

I. INTRODUCTION

In the global scheme of things, the influence of the multinational corporation is no longer infinitesimal. This species of corporate entities has steadily grown in size, power and influence.[1] With this phenomenal growth[2] has also come an exponential rise in the social and economic costs of their operations on humanity. Thus while not glossing over the positive aspects of multinational corporate activity such as job creation[3] and introduction of new technologies,[4] concern has continued to mount as to the negative consequences of economic globalization.

The activities of corporate officers that has had a negative impact on employees, stockholders and other segments of the society was brought to the

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[1] MICHELLE LEIGHTON, et al., BEYOND GOOD DEEDS: CASE STUDIES AND A NEW POLICY AGENDA FOR CORPORATE ACCOUNTABILITY (2002), See also, Shira Pridan-Frank, *Human-Genomics: A Challenge to the Rules of the Game of International Law*, 40 Colum. J. Transnat'l L. 619, 661 (2002). "In recent decades, the power and influence of private commercial companies have grown, in light of the expansion of international trade and globalization." Citation omitted.

[2] At present, there are about 65,000 multinational corporations , with about 850,000 foreign affiliates around the world. While in 1990, foreign affiliates accounted for about 24 million employees, that number rose dramatically to 54 million in 2001. They also recorded sales amounting to $19 trillion which was more than twice as high as world exports in 2001; in 1990, both were roughly equal. Further, over the same period, the stock of outward foreign direct investment increased from $1.7 trillion to $6.6 trillion. Foreign affiliates of MNCs currently account for one-tenth of world GDP and one-third of world exports. UNCTAD, WORLD INVESTMENT REPORT 2002: TRANSNATIONAL CORPORATIONS AND EXPORT COMPETITIVENESS, Overview, at 1.

[3] Job creation internationally has added to the power and influence of MNCs. See Scott Greathead, *The Multinationals and the "New Stakeholder": Examining the Business Case for Human Rights*, 35 Vand. J. Transnat'l L. 719, 722 (2002) arguing that the leaders of the People's Republic of China are more likely to place a higher premium on the opinion of the CEOs of multinational corporations who have tens of thousands of Chinese workers in their employ, than the views of the President of the United States, from whom they may not expect much both from a political and practical standpoints.

[4] Thomas Donaldson, *Can Multinationals Stage a Universal Morality Play?* 29 Bus. & Soc. Rev. 51, 52 (1992). "Third World representatives increasingly acknowledge the role multinationals play as a conduit of technological know-how to host cultures, and most have accepted a promultinational position . . . ."

forefront recently at the domestic level. The energy trading company, Enron and some other big commercial enterprises like Worldcom went into bankruptcy[5], leaving a trail of casualties on the way.[6] These events helped to re-ignite the debate on corporate accountability, culminating in the passage of legislation to address corporate abuses.[7]

Corporate accountability is also a disturbing issue at the international level. What is more disturbing is that while it has been relatively easier, at the national level, to introduce policy initiatives and instruments to deal with the operations of the corporate community that are inimical to the interests of the wider society,[8] the international legal system still has a lot to do to ensure that business entities are held accountable for the social, economic and environmental costs of their operations.

Multinational corporations operating in countries other than their home countries have been implicated in, or associated with human rights violations,[9] environmental pollution and degradation,[10] escalation of poverty conditions,[11] and an increase in social vices in their host communities.[12]

[5] See John Clemency & LeGrande Smith, *Corporate Fraud: Where Should the Buck Really Stop?* American Bankruptcy Institute Journal (November 2002). (2002 ABI JNL. LEXIS 172).

[6] See William W. Bratton, *Does Corporate Law Protect the Interests of Shareholders and Other Stakeholders?: Enron and the Dark Side of Shareholder Value*, 76 Tul. L. Rev. 1275 (2002). See also Alex Berenson, *Oversight: The Biggest Casualty of Enron's Collapse: Confidence*, N.Y. Times, Feb. 10, 2002, at 1.

[7] Sarbanes-Oxley Act of 2002, 116 Stat. 745 (Enacted July 30, 2002).

[8] Jennifer Morris, *Foreigners Forced to Play by US Rules*, 33:402 EUROMONEY, October 2002, at 42-45 (stating that the Sarbanes-Oxley Act was hastily drafted and enacted.)

[9] HUMAN RIGHTS AND THE OIL INDUSTRY (Asbjørn Eide, Helge Ole Bergesen and Pia Rudolfson Goyer eds, 2000). See also Terry Collingsworth, *The Key Human Rights Challenge: Developing Enforcement Mechanisms*, 15 Harv. Hum. Rts. J. 183 (2002).

[10] See for instance, JUDITH KIMERLING, AMAZON CRUDE (1991).

[11] See Emeka Duruigbo, Oil Development in Nigeria: A Critical Investigation of Chevron Corporation's Performance in the Niger River Delta (Natural Heritage Institute, 2001).

[12] Such vices include prostitution and criminal activities by youths who could not find gainful employment. See Henry Clark, et al., Oil For Nothing: Multinational Corporations, Environmental

These developments have led to outcry from various segments of the society. The business operations and activities of multinational corporations have come under intense scrutiny, and corporations engaged in oil exploration and production have been under the searchlight more than those in other industries.[13] Victims of corporate abuses and other concerned individuals and groups have seized every important opportunity to highlight the social and economic problems attendant on, or incidental to, the way business is being done, especially in developing countries.[14] Corporations have responded in large measure by deciding to police themselves through corporate codes of conduct and other voluntary initiatives.[15] Policy makers in the national and international arenas have also begun to pay attention. For about three decades now, attempts have been made, nationally and internationally, to increase the accountability of corporations to communities, workers and the environment.[16] International policy makers, in the most part, seem to have bought the argument put

Destruction, Death and Impunity in the Niger Delta, January 25, 2000, *available at* http://www.essentialaction.org/shell/report/. Last visited September 12, 2002.

[13] See Scott Holwick, *Transnational Corporate Behavior and its Disparate and Unjust Effects on the Indigenous Cultures and the Environment of Developing Nations: Jota v. Texaco, A Case Study*, 11 Colo. J. Int'l Envtl. L. & Pol'y 183, 194 (2000).

[14] See *Why Global Codes of Conduct? available at* http://www.multinationalguidelines.org/csr/why_codes_of_conduct.htm Last visited July 23 2002.

[15] See Eileen Rice, **Note**, Doe v. Unocal Corporation: Corporate Liability for International Human Rights Violations, 33 U.S.F.L. Rev. 153 170 (1998) (stating that public concern sparked corporate interest in codes of conduct.) See also Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 Yale L.J. 443 446 (2001) (stating that the government was moved by public concern to endorse and oversee the creation of a voluntary code of conduct.) Today, there are thousands of codes of variations thereof. On the environment, the United Nations Environment Programme (UNEP) published a report in 1998 entitled *Voluntary Industry Codes of Conduct for the Environment*, which lists more than 40 codes covering 12 industry sectors. See International Chamber of Commerce, *Business offers DIY kit for environmental management*, April 22, 1998, *available at* http://www.iccwbo.org/home/news_archives/1998/diy_kit.asp. Last visited September 1, 2002.

[16] See Robin Broad & John Cavanagh, *The Corporate Accountability Movement: Lessons & Opportunities*, 23 Fletcher F. World Aff. 151 (1999).

forth by corporations that self-regulation, especially through codes,[17] is the panacea to the problems highlighted.[18]

This Chapter examines the concept of corporate codes, its historical development, and its effectiveness in promoting responsible business practices. The focus here will be on the use of codes of conduct in international business. While the concept of codes will receive a general discussion, especial attention will be paid to codes that pertain to the petroleum industry. It is also pertinent to mention that the terms "codes," "codes of conduct," and "corporate codes of conduct" will be used interchangeably here and liberally employed to accommodate such other terms as "corporate directives," "administrative practices," "standards of business conduct," "code of best practice,"[19] "corporate compliance programs," "corporate compliance policies,"[20] "guiding principles," "code of worldwide business conduct," "code of ethics and business conduct."[21]

The Chapter is divided into 5 major parts. Part II discusses conceptual issues including definitions and historical trips. Codes of conduct have been with us for a long time, playing a key role in corporate regulation.

[17] "Adopting a code of conduct is tantamount to a commitment to engage in corporate self-regulation." Harvey L. Pitt and Karl A. Groskaufmanis, *Minimizing Corporate Civil and Criminal Liability: A Second Look at Corporate Codes of Conduct,* 78 Geo. L.J. 1559, 1560 (1990).

[18] See Judith Kimerling, *Rio+10: Indigenous Peoples, Transnational Corporations and Sustainable Development in* Amazonia, 27 Colum. J. Envtl. L. 523, 526 (2002). [Hereinafter, Kimerling (2002)] The introduction of such voluntary initiatives as the Global Compact and OECD Guidelines appears to buttress this fact.

[19] Those four terms can be found in the Blackwell Encyclopedic Dictionary of Business Ethics 114 (Patricia H. Werhone & R. Edward Freeman eds. 1997).

[20] See Charles J. Walsh and Alisa Pyrich, *Corporate Compliance Programs as a Defense to Criminal Liability: Can A Corporation Save its Soul?* 47 Rutgers L. Rev. 605, 643 (1995).

[21] Owen E. Herrnstadt, *Voluntary Corporate Codes of Conduct: What's Missing?*, 16 Lab. Law 349 (2001).

Part III looks at the different kinds of codes including external and internal codes, public and private initiatives, and governmental and inter-governmental codes. The contents of specific codes are also examined.

In Part IV, the work dabbles into the long-standing controversy about the validity, utility, and limits of corporate codes and other self-regulatory measures. Examining the strong points and weaknesses will help determine whether these codes are indeed a panacea to the problem of corporate abuse.

Part V suggests an alternative course that takes much of the focus away from corporate codes. The suggestion here is that a move toward regulation in international law would be more beneficial to all. Finally, appropriate conclusions are drawn from the foregoing emphasizing the need to check corporate excesses through meaningful and workable public policies.

II. THE CONCEPT OF CODES OF CONDUCT

Since the earliest days of the corporation, the idea of self-regulation has been in existence.[22] Even before the emergence of the corporation as we know it today, its forerunners – merchant and craft guilds – provided a measure of regulation over the conduct of their members.[23] Some modern corporations such as JC Penney had in

[22] Walsh & Pyrich, *supra* note 20, at 649-650.

[23] See Mark B. Baker, *Private Codes of Corporate Conduct: Should the Fox Guard the Henhouse?* 24 U. Miami Inter-Am. L. Rev. 399, 401 (1993).

place a set of principles to guide their conduct even in the early part of the 20th century.[24]

The modern history of codes of conduct for corporations engaged in international business can be traced to the *Sullivan Principles*[25] that were introduced in the 1970s to tackle the unjust system of apartheid in South Africa.[26] Most recently, the concept of corporate codes has been enlisted in the campaign to address certain issues of global importance, including the protection of human rights and preservation of the environment. The observation has been made that reminiscent of the acceptance of international human rights responsibilities by governments in the course of the past sixty years, "multinational corporations are beginning to accept international human rights responsibilities in the form of self-imposed codes of conduct and other private initiatives."[27]

A corporate code can simply be described as "a statement delineating a company's ethical policies."[28] It could be defined to "include any written statement of ethics, law, or policy (or some combination thereof) delineating the obligations of one or more classes of corporate employees."[29] Another definition sees corporate codes as "sets of principles, ethics statements, credos, and other explicit, written statements

[24] The "Penney Idea" was introduced in 1913. See Patrick E. Murphy, *Corporate Ethics Statements: An Update*, *in* GLOBAL CODES OF CONDUCT: AN IDEA WHOSE TIME HAS COME 295 (Oliver F. Williams, ed., 2000).
[25] *Infra* note 55.
[26] Ariadne K. Sacharoff, *Multinationals in Host Countries: Can They Be Held Liable Under the Alien Tort Claims Act for Human Rights Violations?* 23 Brooklyn J. Int'l L. 927, 935 (1998).
[27] Douglass Cassel, *Corporate Initiatives: A Second Human Rights Revolution?* 19 Fordham Int'l L.J. 1963, 1964 (1996).
[28] John Christopher Anderson, *Respecting Human Rights: Multinational Corporations Strike Out*, 2 U. Pa. J. Lab. & Emp. L. 463, 466 (2000).
[29] Pitt & Groskaufmanis, *supra* note 17, at 1559, n.1.

through which one organization . . . or a group of organizations, specifies the relationship between values and behavior."[30]

For the purposes of this work, a code of conduct is a catalog of principles, which ought to guide a company in its relations with other segments of the community including employees, contractors, stakeholders and the public. It is imperative, in order to meet the minimum requirements for effectiveness, that a corporate code not only proscribe unacceptable behavior, but also prescribe the kind of behavior that is desirable.[31]

Corporate codes can be categorized into public and private codes. Public codes are those concluded under the auspices of governments, nationally or internationally. Private codes are coordinated by non-governmental organizations, individuals or by the corporations themselves. By their very nature, public codes are always external. Private codes could be internal or external. External codes emanate from sources outside the corporation or by a group of corporations. An internal code has its origins in the particular corporation issuing it. Regardless of the source or nature, these codes share some common characteristics, such as voluntariness or non-bindingness. They also have the over-arching and ubiquitous feature of making an effort to set boundaries which a company should not cross and guidelines which they should follow to avoid causing harm to others in the course of business. These include directives to act ethically and to embrace corporate social responsibility.

[30] Robert Kinloch Massie, *Effective Codes of Conduct: Lessons from the Sullivan and CERES Principles*, *in* GLOBAL CODES OF CONDUCT: AN IDEA WHOSE TIME HAS COME 281, 291 n. 1 (2000) (Oliver F. Williams, ed.. 2000).
[31] Walsh & Pyrich, *supra* note 20, at 646.

The past few years have witnessed an explosion in the number of corporate codes concluded within a corporation, by an industry or from some other sources.[32] In a nutshell, codes are "in vogue".[33] Several reasons have been advanced in trying to provide an explanation for this proliferation of codes and other voluntary initiatives. It is said that corporations adopt codes of conduct as a reaction to, or in a bid to prevent, consumer backlash or adverse public opinion.[34] Corporations also introduce codes ostensibly as a means of preempting governmental regulation.[35] The necessity and appeal of codes today can also be traced to the rise or resurgence of capitalism across the globe, the growing power of the multinational corporation, and increasing complexity of the international business arena, the effect of international business transactions on different segments of the society and the limitations of existing institutions and structures to deal with these changes in circumstances.[36] One writer notes:

[32] Judith Kimerling, *Rio + 10: Indigenous Peoples, Transnational Corporations and Sustainable Development in Amazonia*, 27 Colum. J. Envtl. L. 523, 531 (2002); Keith Pezzoli, *Environmental Management Systems (EMSS) and Regulatory Innovation*, 36 Cal. W. L. Rev. 335, 343 (2000); John Wickham, *Toward a Green Multilateral Investment Framework: NAFTA and The Search For Models*, 12 Geo. Int'l. Envtl. L. Rev. 617, 626 (2000); Anderson, *supra* note 28, at 499; Naomi Roht-Arriaza, *Developing Countries, Regional Organizations, and the ISO 14001Environmental Management Standard*, 9 Geo. Int'l. Envtl. L. Rev. 583, 585 (1997).

[33] Herrnstadt, *supra* note 21, at 349.

[34] See Elizabeth Macek, **Note**, *Scratching the Corporate Back: Why Corporations Have No Incentive to Define Human Rights*, 11 Minn. J. Global Trade 101, 110 n.64 (2002) (stating that the formulation of codes is sometimes precipitated by consumer pressure.)

[35] "In the world of politics, voluntary action can deter more onerous forms of regulation. That is an important incentive for industry to design codes of conduct with which member firms can live." James E. Post, *Global Codes of Conduct: Activists, Lawyers, and Managers in Search of a Solution*, *in* GLOBAL CODES OF CONDUCT: AN IDEA WHOSE TIME HAS COME 103, 108 (Oliver F. Williams, ed., 2000).

[36] *Id.*, at 105-108; S. Sethi, *Gaps in Research in the Formulation, Implementation, and Effectiveness Measurement of International Codes of Conduct*, *in* GLOBAL CODES OF CONDUCT, *supra* note 24, at 117-118. See also Heidi S. Bloomfield, **Note**, *"Sweating" the International Garment Industry: A Critique of the Presidential Task Force's Workplace Codes of Conduct and Monitoring System*, 22 Hastings Int'l & Comp. L. Rev. 567, 571 (1999) (stating that the proliferation of codes of conduct in international business operations can be linked to demands on companies to respect human and labor rights.)

> Codes of conduct have risen in popularity as a mechanism of accountability for multinational companies because changes in markets, technology, and social conditions have undermined the older methods of providing meaning and order.[37]

The next part presents a more detailed discussion of codes and how they fare as corporate accountability tools.

III: CONTENT OF CODES OF CONDUCT

As earlier stated, the initiation of codes has involved various sources ranging from individuals to inter-governmental bodies. The discussion here will center on codes initiated by private forces external to the corporation, national governments, international organizations and through the internal processes of individual corporations.

A. INTERNAL CODES

Over the years, many corporations have undertaken the task of formulating business codes and ethical statements for their operations. Oil corporations are not an exception to this trend. A number of these codes incorporate existing international principles on human rights.[38] Not too long ago, one would easily read an advertisement by Shell boldly proclaiming: "At Shell, we are committed to support

[37] Massie, *supra* note 30, at 281.

[38] For instance, BP Amoco, Shell and Statoil incorporate the UN Declaration of Human Rights in their codes of conduct. Karen Jochelson, *The Big Business of Human Rights*, The Independent (London), April 26, 2000, at 2.

fundamental human rights and have made this commitment in our published statement of General Business Principles."[39]

The corporate codes surveyed in the course of this investigation promote a strong desire to be on the side of responsible corporate practices. Chevron's code states that the company will conduct its business in " a socially responsible and ethical manner."[40] It adds that the company is "committed to protecting the safety and health of people and the environment"[41] and states that its "goal is to be the industry leader in safety and health performance and to be recognized worldwide for environmental excellence."[42] ChevronTexaco, through it code, pledges to embark on a continual improvement of its processes for the minimization of pollution and waste.[43] The company would also engage in open communication with the public in relation to possible impact of its business on the public or the environment.[44] In addition, ChevronTexaco declares its commitment to the support of universal human rights, and in particular, the human rights of its employees, the communities where they have operations and parties they do business with.[45]

Occidental Petroleum Corporation's code of conduct announces the company's intention to respect the rights of individuals and different cultures in places that they

[39] The advert appeared in the Economist. See also Marwaan Macan-Markar, *Rights: Big Business Out to Improve its Image*, Inter press Service, October 18, 1999, available at Lexis-Nexis, Curnws File. The Statement of General Business Principles is available at http://www.shell.com. Last visited September 12, 2002.
[40] http://www.chevrontexaco.com/social_responsibility/human_rights/; http://www.chevrontexaco.com/about/chevtex_way/. Last visited September 10, 2002.
[41] *Id.*
[42] *Id.*
[43] *Id.*
[44] *Id.*
[45] *Id.*

do business.[46] The company states that it is "committed to abiding by and maintaining high standards of ethical conduct and pursuing business operations with integrity, dignity and respect for people from many different cultures."[47] In relation to health, environment and safety (HES), the corporate code proclaims:

> Protection of health, environment and safety is one of Occidental's highest priorities and the company strives for continual improvement in HES performance. The HES Policy recognizes [that] human life and health are precious and must be safeguarded; the world's natural resources are finite and should be conserved and developed wisely and environmental protection is good for the community and is good business.[48]

Unocal's Guiding Principles state that the company will "develop natural resources and provide energy in an efficient and environmentally responsible manner."[49] Unocal also declares its support for the Universal Declaration of Human Rights[50], adding that "[a]s a global corporation, we have a responsibility to promote and protect human rights in all our activities."[51] The company not only undertakes to conduct its operations in accordance with "the highest ethical standards"[52] it goes on to say that it will expect the same from the company's partners, contractors and

[46] Code of Business Conduct – Summary, http://www.oxy.com/HTML/socialrespons.html. Last visited September 10, 2002. Full text of Code of Business Conduct is available at http://www.oxy.com/HTML/code.pdf. Last visited September 10, 2002.
[47] *Id.*
[48] Summary of Occidental's Policy on Health, Environment & Safety, http://www.oxy.com/HTML/hes.html. Last visited September 10, 2002.
[49] Unocal Guiding Principles, http://www.unocal.com/responsibility/01cr_report/principles.htm. Last visited September 10, 2002.
[50] Human Rights and Unocal: A Discussion Paper, at http://www.unocal.com/responsibility/humanrights/hr2.htm. Last visited September 10, 2002. The complete paper is at http://www.unocal.com/responsibility/humanrights/index.htm. Last visited September 10, 2002.
[51] Human Rights and Unocal: A Discussion Paper, at http://www.unocal.com/responsibility/humanrights/hr1.htm. Last visited September 10, 2002.
[52] Guiding Principles, *supra* note 49.

suppliers.[53] Unocal, according to its code, is also interested in humanitarian measures aimed at promoting health, education and economic well being in communities where they have operations.[54]

A. EXTERNAL CODES

Arguably, the most prominent ethical statements initiated by the private sector to address social and economic problems arising from international business operations are the Sullivan Principles.[55] The Sullivan Principles introduced in 1977[56] are an exemplar of long-running private external efforts to influence corporate conduct. Its initiator, Rev. Leon Sullivan envisaged a situation in which corporations can use their influence and channel their resources toward eliminating social vices.[57] The apartheid system, which represented a dark spot in human history, had constituted itself into a menace to the rights, liberty and dignity of millions of non-white people in South Africa.[58]

[53] *Id.*
[54] *Id.*
[55] Sullivan Principles For U.S. Corporations Operating in South Africa, Nov. 8, 1984, 24 I.L.M. 1496 [hereinafter Sullivan Principles].
[56] See Maria Gillen, **Note**, *The Apparel Industry Partnership's Free Labor Association: A Solution to the Overseas Sweatshop Problem or the Emperor's New Clothes?* 32 N.Y.U. J. Int'l L. & Pol. 1059, 1077 (2000); Lynn Berat, *Undoing and Redoing Business in South Africa: The Lifting of the Comprehensive Anti-Apartheid Act Of 1986 and the Continuing Validity of State and Local Anti-Apartheid Legislation*, 6 Conn. J. Int'l L. 7, 19 (1990).
[57] See Lucinda Saunders, **Note**, *Rich and rare are the gems they war: holding De Beers accountable for trading conflict diamonds*, 24 Fordham Int'l L.J. 1402, 1469 (2001).
[58] For discussions on apartheid and its evil effects, see Ann Elizabeth Mayer, *A "Benign" Apartheid: How Gender Apartheid As Been Rationalized*, 5. UCLA J. Int'l & Foreign. Aff. 237, 241(2000-2001); Lennox S. Hinds, *The Gross Violations of Human Rights of the Apartheid Regime under International Law*, 1 Rutgers Race & L. Rev. 231 (1999); Ibrahim J. Gassama, Reaffirming Faith in the Dignity of Each Human Being: The United Nations, NGOs, and Apartheid, 19 Fordham Int'l L.J. 1464 (1996).

The Sullivan Principles were designed to encourage American companies doing business in South Africa to become actively involved in the struggle against the notorious and inhumane apartheid system.[59] Corporations that subscribed to the Principles were expected to ensure the absence of discrimination in the workplace.[60] The intent was to provide a catalyst for the dismantling of discriminatory barriers in the larger society.[61] At the peak of the code's popularity, up to 150 corporations had subscribed to it.[62]

B. GOVERNMENT INITIATIVES

In December 2000, both the U.S. State Department and the British Foreign Office announced the conclusion and introduction of an agreement for the protection of human rights and provision of security in the international operations of certain

[59] See Lisa G. Baltazar, *Government Sanctions and Private Initiatives: Striking a Balance for U.S. Enforcement of Internationally-Recognized Workers' Rights*, 29 Colum. Human Rights L. Rev. 687, 716 (1998).
[60] See Elizabeth Glass Geltman & Andrew E. Skroback, *Environmental Activism and the Ethical Investor*, 22. J. Corp. L. 465 (1997); Richard T. De George, *"Sullivan-Type" Principles For U.S. Multinationals In Emerging Economies*, 18 U. Pa. J. Int'l Econ. L. 1193, 1210 (1997).
[61] See David Hess & Thomas W. Dunfee, *Fighting Corruption: A Principled Approach; The C2 Principles (Combating Corruption)*, 33 Cornell Int'l L.J. 593, 616 (2000) (stating that the principles were introduced "to help promote racial equality in South Africa through the influence of large corporations.")
[62] See Elisa Westfield, **Note,** *Globalization, Governance, And Multinational Enterprise Responsibility: Corporate Codes Of Conduct In The 21st Century*, 42 Va. J. Int'l L. 1075, 1092 (2002).

businesses.[63] Entitled the *Voluntary Principles on Security and Human Rights,*[64]the pact was specifically designed for companies in the oil and mining sectors.[65]

The crafting of the agreement involved the active participation of leading oil and mining companies as well as well- known human rights and labor organizations. They include five major oil companies namely Texaco Inc., Chevron Corp., (now jointly known as Chevron-Texaco), BP, Conoco Inc. (which has recently merged with Phillips Petroleum and now known as Conoco Phillips)[66] and Royal Dutch/Shell.[67] The mining companies are New Orleans-based Freeport McMoran Copper and Gold Inc. and Anglo-Australian mining conglomerate Rio Tinto.[68] Representing the human rights angle were Amnesty International, Human Rights Watch, the Lawyers' Committee for Human Rights, and International Alert, while the International Federation of Chemical, Energy, Mine, and General Workers' Unions represented trade unions.[69] Participating business organizations were the Prince of Wales Business Leaders Forum and Business for Social Responsibility.[70]

[63] *Albright Announces Agreement on Principles For Security and Human Rights in Oil and Mining Industries*, WHITE HOUSE BULLETIN, December 20, 2000, available at Lexis-Nexis, Curnws File.
[64]Availablehttp://www.state.gov/www/global/human_rights/001220_fsdrl_principles.html. [Hereinafter Voluntary Principles].
[65] See *Oil Meets Ethics*, Weekly Petroleum Argus, January 15, 2001, at 6; Commission of the European Communities, Green Paper: Promoting a European Framework for Corporate Social Responsibility, Doc. 01/9, July 19, 2001; Testimony of Alan P. Larson, Under Secretary for Economic, Business and Agricultural Affairs, before the House International Relations Committee, June 20, 2002. "These principles are designed to provide practical guidance to strengthen human rights safeguards in company security in the extractive sector."
[66] Conoco merged with Phillips on August 30, 2002, creating the the third largest U.S. oil company (after Exxon Mobil and ChevronTexaco) and the 6th largest oil company in the world. David Ho, *$15.1 Billion Merger of Phillips Petroleum, Conoco Completed*, ASSOCIATED PRESS, August 30, 2002.
[67] *Five Oil Firms Agree to US-UK Human Rights Standard*, OIL & GAS JOURNAL, January 1, 2001, at 22.
[68] Christian Bourge, *Freeport, Rio Tinto Pledge Adherence to Rights Code*, American Metal Market, December 27, 2000, at 6.
[69] *Human Rights Principles for Oil and Mining Companies Welcomed: U.S., U.K. Voluntary Principles "a Positive First Step,"* Human Rights Watch, press release, New York, December 21, 2000; *available at* http://www.hrw.org/press/2000/12/oil1221.htm. Last visited September 7, 2002.
[70] *Id.*

The conclusion of the Voluntary Principles was informed by the problem of human rights abuses linked to those entrusted with the responsibility of providing security to company installations and facilities. In a bid to ensure that the operations of energy and mining companies went with minimum or no hindrance, security personnel were prone to overstepping their bounds as they sought to remove every 'obstacle' on the way. Oil companies like Chevron in the Niger Delta region of Nigeria, Exxon Mobil in Aceh province in Indonesia and BP in Colombia came under incessant attacks for relationships they had forged with security forces, which had resulted in human rights abuses.[71] In Niger Delta and Aceh, the problems stemmed from the use of company equipment by the security forces to perpetrate those abuses. In Colombia, BP hired security forces known for nefarious practices that were contrary or inimical to human rights.[72] Besides, the Nigerian government, without due process, had executed a human rights and environmental campaigner, Ken Saro-Wiwa, and eight others who had been complaining of the practices of Shell Petroleum Development Company, the Nigerian subsidiary of Royal Dutch/Shell.[73] Shell was widely assailed for not using its influence with the Nigerian government to stop the executions.[74]

With all these incidents at the background, the governments of the United States and United Kingdom decided to be more proactive about the issues of security and human rights. This led to a series of meetings in the course of one year,

[71] Bennett Freeman, et al, *A New Approach to Corporate Responsibility: The Voluntary Principles on Security and Human Rights*, 24 Hastings Int'l & Comp. L. Rev. 423, 427 (2001).
[72] *Id.* See also Juliette Benneth, *The Role of the Private Sector in Preventing Funding Conflict*, 35 Vand. J. Transnat'l L. 711, 715 (2002)
[73] See Paul Lewis, *Nigeria Rulers Back Hanging Of 9 Members Of Opposition*, N.Y. Times, Nov. 9, 1995, at A9; Howard W. French, *Nigeria Executes Critic of Regime; Nations Protest*, N.Y. Times, Nov. 11, 1995, at 1.

culminating in the conclusion of the Voluntary Principles.[75] The uniqueness of the Voluntary principles partly lies in the fact that it represents "the first time [that] a critical mass of extractive sector companies based in the United States and in the United Kingdom were willing to address [the] difficult issues [of security and human rights.]"[76]

The Voluntary Principles have a two-sided objective: promoting human rights in the areas where the energy and mining companies operate, and at the same time, providing security for the companies so they can carry on their businesses effectively and in a peaceful environment.[77]Shedding light on the agreement and its intendment, then U.S. Secretary of State, Madeleine Albright said:

> The Principles address many of the hardest challenges facing oil and mining companies as they work to protect the safety and security of their people and operations, and they address as well many of the situations and practices for which companies in the extracting industry, rightly or wrongly, have been exposed to criticism on human rights grounds . . .. The agreement . . . is a landmark for corporate responsibility and not just for U.S. and British companies in this one sector. It demonstrates that the best-run companies realize that they must pay attention not only to the particular needs of their communities, but also to universal standards of human rights, and that in addressing these needs and standards, there is no necessary conflict between profit and principle.[78]

[74] See Paul Lewis, *Rights Groups Say Shell Oil Shares Blame*, N.Y. Times, Nov. 11, 1995, at 6.
[75] Freeman, et al., *supra* note 71 at 428.
[76] *Id.*
[77] According to Harold Koh, then Assistant Secretary of State whose Bureau of Democracy, Labor and Human Rights led U.S. efforts in crafting the agreement, the Principles set out with the objective of providing companies with "practical guidance on how to prevent human rights violations in dangerous environments, while meeting legitimate corporate security requirements." Harold Hongju Koh, *A United States Human Rights Policy for the 21st Century*, 46 St. Louis L.J. 293, 321 (2002). Citation omitted. See also Freeman, et al., *supra* note 71 , at 427.
[78] Special State Department Briefing With Secretary of State Madeleine Albright, Federal News Service, December 20, 2000; available at Lexis-Nexis, Curnws File.

The Voluntary Principles incorporate both existing standards, which the principles build on, and emerging best practices, which they crystallize.[79] Indeed, the preamble to the accord clearly states that the agreement received guidance from the principles set forth in the Universal Declaration of Human Rights and contained in international humanitarian law.[80]

Under the agreement, companies are expected to conduct a study of democratic and human rights conditions as part of their risk assessment.[81] They should also ensure that the security measures they take in protection of their installations are in compliance with international law and not in violation of human rights.[82] The companies should also take the responsibility to monitor human rights violations by state security forces that protect their facilities and installations.[83]

The agreement is an ambitious one that seeks to lay the foundation for global standards on these issues.[84]Subscription to the code is expected to grow beyond the initial participants.[85] As a matter of fact, the government of Netherlands has already signed on to the Voluntary Principles since December 2001.[86] Corporations such as

[79] Freeman, et al., *supra* note 71, at 435.
[80] Voluntary principles, *supra* note 64, Preamble. See also Sean D. Murphy, *Voluntary Human Rights Principles for Extractive and Energy Companies*, 95 Am. J. Int'l L. 626 (2001).
[81] Voluntary Principles, *supra* note 64.
[82] *Id.*
[83] *Id.*
[84] According to Bennett Freeman, former Deputy Assistant Secretary of State who led the initiative to draft the agreement on behalf of the U.S. State Department, since announcing the principles, "agreement has been reached to invite into the process the half-dozen other governments and dozen other companies that have expressed an interest, laying the basis for a global standard." Bennett Freeman, *Drilling for Common Ground*, FOREIGN POLICY, July 1, 2001.
[85] *Id.*
[86] Testimony of Lorne W. Craner, Democracy, Human Rights and Labor Bureau, Department of State, at a Hearing on the "Country Reports on Human Rights Practices for 2001," before the House International Relations Subcommittee on International Operations and Human Rights, March 6, 2002.

Enbridge have also adopted or agreed to adopt the Principles.[87] It should be noted however, that some major oil corporations elected not to participate. Even though it has large operations in one of the countries that are particularly targeted by the code (Colombia),[88] U.S. oil company, Occidental refused to sign on to the accord. Exxon Mobil also decided to stay out of the pact, stating that its standards or practice already met the guidelines contained in the agreement.[89]

C. INTERGOVERNMENTAL CODES

From the 1970s up till early 1990s, the international community spent a considerable length of time and expended enormous resources in trying to develop a "Code of Conduct for Transnational Corporations." The United Nations sought to formulate a set of guidelines for corporate conduct, which, as to be expected, encompassed such issues as human rights and the environment. A resultant code would aim to be "an essential element in the strengthening of international economic and social cooperation"[90] and be an instrument "to maximize the contributions of transnational corporations to economic development and growth and to minimize the negative effects of the activities of these corporations."[91] Unfortunately,

[87] Paul Taylor, *Enbridge adopts rights policy*, Financial Times (London) USA edition, February 27, 2002, at 24. Enbridge, the energy transportation, distribution and retail energy group has operations in Colombia. *Id.*
[88] See Koh, *supra* note 77, at 321, (stating that Colombia is a key country with regard to this initiative.)
[89] *The Discordant Accord: Voluntary Principles on Security and Human Rights Agreement*, 4:2 LatAm Energy, January 17, 2001, at 13.
[90] Baker, *supra* note 23, at 410 (citing *Proposed Text of the Draft Code of Conduct on Transnational Corporations*, U.N.E.C.O.S.O.C., 2d Sess., Annex, at pmbl., U.N. Doc. E/1990/94 (1990)).
[91] *Id.*

notwithstanding the huge investment made into it, the process that commenced in 1977 failed to produce an acceptable code.[92]

Efforts to draft the UN Code were discontinued in 1993.[93] The latest draft code containing provisions relating to environmental protection is the 1988 version.[94] The Draft Code contains a number of general and hortatory provisions relating to the environment, human rights and other issues. On the environment, the Draft Code states:

> Transnational corporations shall carry out their activities in accordance with national laws, regulations, established administrative practices and policies relating to the preservation of the environment of the countries in which they operate and with due regard to relevant international standards. Transnational corporations should, in performing their activities, take steps to protect the environment and where damaged to rehabilitate it and should make efforts to develop and apply adequate technologies for this purpose.[95]

Taking aside the limitations of its generalized and recommendatory nature, it should further be noted that the above provision presupposes the existence of a strong regulatory framework in relation to the environment at both domestic and

[92] Garth Meintjes, *An International Human Rights Perspective on Corporate Codes*, *in* GLOBAL CODES OF CONDUCT, *supra* note 24, at 83, 91. Part of the reason for the failure was because many companies were opposed to the attempt by the UN to conclude a code of conduct for multinational corporations. David M. Schilling, *Making Codes of Conduct Credible: The Role of Independent Monitoring*, *in* GLOBAL CODES OF CONDUCT, *supra* note 24, at 221, 222. The vehement opposition of Western governments also played a critical role in forestalling the adoption of the UN code of conduct. See Pia Z. Thadhani, **Note**, *Regulating Human Rights Abuses: Is Unocal the Answer?* 42 Wm. & Mary L. Rev. 619, 640 (2000).
[93] See Robert J. Fowler, *International Environmental Standards for Transnational Corporations*, 25 Envtl. L. 1, 3 (1995).
[94] See Joshua P. Eaton, *The Nigerian Tragedy, Environmental Regulation Of Transnational Corporations, and The Human Right to a Healthy Environment*, 15 B.U. Int'l L.J. 261, 272 (1997).
[95] 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/1988/39/Add.1, (1988) [hereinafter U.N. Draft Code of Conduct] (emphasis added).

international levels. Where this is not the case, provisions such as this become of doubtful utility and may end up accomplishing nothing.[96]

With regard to human rights, the Draft Code provides:

> Transnational corporations shall respect human rights and fundamental freedoms in the countries in which they operate. In their social and industrial relations, transnational corporations shall not discriminate on the basis of race, colour, sex, language, social, national and ethnic origin or political or other opinion.[97]

It is interesting to note that at the time the UN commenced the draft of the codes of conduct, its goals were primarily to regulate multinational corporations in order to prevent their interference with the internal politics of their host countries, and ensure that the negative impact of multinational corporate activities on national economic objectives were curtailed.[98] Today, the tide has shifted. There is now a growing tendency to view corporations as being in a position to promote social changes in host countries. Thus, they are now expected, or obligated, some would argue, to interfere in the internal affairs of those countries when local political leaders launch an assault on human rights.[99]

Obviously, the relationship between multinational corporations and host countries appeared to be quite cantankerous. Thus, the issue was approached from a

[96] Eaton, *supra* note 94, at 273.
[97] Development and International Economic Cooperation: Transnational Corporations, UN Economic and Social Commission, 2d Sess., Agenda item 7(d), at 1, UN Doc. E/1990/94 (1990).
[98] Barbara A. Frey, *The Legal and Ethical Responsibilities of Transnational Corporations in the Protection of International Human Rights*, 6 Minn. J. Global Trade 153, 158 (1997). See also P.T. MUCHLINSKI, MULTINATIONAL ENTERPRISES AND THE LAW 5 – 11, 457 (1995).
[99] This featured during negotiations on the Voluntary Principles for Security and Human Rights. See Freeman, et al., *supra* note 71, at 437. Also, Shell Petroleum was heavily criticized for not using its leverage with the Nigerian government to prevent the denial of human rights of Ken Saro-Wiwa and 8 other Ogoni leaders, who were eventually convicted alongside Mr. Wiwa and executed.

more adversarial perspective.[100] However, the relationship seems to have gotten friendlier of late, and corporations are now viewed with less suspicion[101] and actually embraced by developing countries, which clamor for, and actively court, foreign investment. That being the case, if the Code of Conduct was being drafted today, there is greater likelihood that a different approach would be adopted. Instead of seeing MNCs and host countries as being in opposing camps, it can now be said that they are in the same camp, with the marginalized and disenfranchised peoples in the developing countries occupying the opposite arena. Those people are the ones that deserve protection and should be the focus of any future initiatives in that regard.

The failure[102] of the UN efforts even at the early stages propelled the Organization for Economic Co-operation and Development (OECD) to introduce a code of conduct known as Guidelines for Multinational Enterprises in 1976.[103] The 1976 Guidelines were revised in 1991[104] have been further revised with the introduction of new guidelines in 2000.[105]

The Guidelines represent the firm expectations that the adhering countries have for the behavior of multinational corporations.[106] The scope of the Guidelines encompasses the various entities of a multinational enterprise, including parent

[100] See Frey *supra* note 98, at 165 – 166.
[101] *Id.*, at 167.
[102] Joy C. Wigwe, Shell in the Niger Delta Region of Nigeria: A Case for Mandatory Codes of Conduct 72 (Unpublished J.S.M. Thesis, 1997) (On file with the Standford University Library).
[103] Declaration on International Investment and Multinational Enterprises, June 21, 1976, Annex on Guidelines for Multinational Enterprises, 15 I.L.M. 969.

[104] See Press Release, http://www1.oecd.org/media/release/nw00-68a.htm. Last visited September 12, 2002.
[105] *Id.*
[106] OECD, Directorate for Financial, Fiscal and Enterprise Affairs, Committee on International Investment and Multinational Enterprises, Working Party on the OECD Guidelines for Multinational Enterprises, THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES: TEXT,

companies, local subsidiaries and intermediary levels of the organization, which are all expected to observe the Guidelines.[107]

Multinational Enterprises are encouraged to "take fully into account established policies in the countries in which they operate, and consider the views of other stakeholders."[108] Corporations should also obey national laws and policies and work toward the achievement of sustainable development by contributing to economic, social and environmental progress.[109] Part V dedicated to the environment enjoins multinational enterprises:

> Within the framework of laws, regulations and administrative practices in the countries in which they operate, and in consideration of relevant international agreements, principles, objectives, and standards, take due account of the need to protect the environment, public health and safety, and generally to conduct their activities in a manner contributing to the wider goal of sustainable development.[110]

While the original Guidelines contained no direct mention of human rights, the current Guidelines specifically and expressly incorporate provisions on human rights.[111] Corporations should also accord respect to the human rights of those that live in areas where they operate. This should be consistent with the host government's obligations and commitments in international law.[112] Supporting and upholding good

COMMENTARY AND CLARIFICATIONS, Oct 31, 2001, at 9, available at http://www.oecd.org/pdf/M000015000/M00015419.pdf. Last visited December 4, 2002.

[107] *Id.*

[108] OECD Guidelines, *supra* note 106.

[109] OECD Guidelines, para. 1.

[110] OECD Guidelines, Part V, preamble.

[111] Glen Kelley, **Note**, *Multilateral Investment Treaties: A Balanced Approach to Multinational Corporations*, 39 Colum. J. Transnat'l L. 483, 517 (2001). The original Guidelines contained, however, provisions addressing worker rights, non-discrimination in employment practices and social policies and development. *Id.*

[112] OECD Guidelines, para. 2.

principles of corporate governance and developing and applying good corporate governance practices are also among the expectations on multinational enterprises.[113]

Disclosure of relevant company information is recommended. Companies are encouraged to communicate information regarding the social, ethical and environmental policies of the enterprise.[114] Corporations may also inform of other codes of conduct that they subscribe to, the date of adoption, the countries and entities that the codes apply to, and their performance in relation to those codes.[115] Information relating to systems for risk management and compliance with laws may also be communicated.[116]

One of the key elements of the new OECD Guidelines is the enhancement of procedures for implementing the code's provisions.[117] Adhering countries are required to set up National Contact Points to undertake the implementation of the provisions of the Guidelines and to further their effectiveness.[118] The National Contact Points shall hold annual meetings to share experiences and report to the Committee on International Investment and Multinational Enterprise (CIME).[119] The CIME is the OECD body charged with the responsibility for overseeing the functioning of the Guidelines.[120]

[113] OECD Guidelines, *supra* note 106.

[114] OECD Guidelines, part III, paras. 4 & 5.

[115] *Id.*, para 5 (a).

[116] *Id.*, para 5 (b).

[117] Press Release, *supra* note 104.

[118] Decision of the OECD Council, June 2000, OECD, *supra* note 106, at 44, para 1 (1). See also OECD, *id.*, at 46.

[119] Para 1 (3).

[120] OECD, *supra* note 106, at 49.

IV: CRITICAL APPRAISAL OF CORPORATE CODES

This part contains a general review of codes of conduct. It discusses both the strong points and the weaknesses of codes. It also makes suggestions in areas where improvements are needed. It concludes however that voluntary codes are not the panacea to the problem of corporate abuse in international business. A coordinated system of rights and responsibilities in international law to govern the activities of multinational corporations would be a better way forward.

A. Utility of Codes

In an atmosphere in which regulation of business is viewed unfavorably or with great suspicion, self-regulation gains much traction. It presents itself as a comfortable middle ground between the two sides of intrusive governmental regulation and an exclusive, *laissez faire* approach that leaves business alone. There is a strong belief that regulation, especially when done excessively, is harmful to business and the economy.[121] On the other hand, an equally strongly-held view claims that allowing businesses a free rein is a recipe for disaster, as it provides a breeding ground for many unscrupulous practices.[122] To avert the harm that could result, or curtail or

[121] For expressions of the conviction that regulation is harmful to business, see Marta Russell, *Backlash, the Political Economy, and Structural Exclusion*, 21 Berkeley J. Emp. & Lab. L. 335 (2000) (noting the objections of the CATO Institute, from the standpoint of free enterprise, that the introduction of a particular piece of legislation, Americans With Disabilities Act, amounted to "a re-regulation of the economy that was harmful to business." *Id*;) Jeff Gimpel, **Note**, *The Risk Assessment and Cost Benefit Act Of 1995: Regulatory Reform and the Legislation of Science*, 23 J. Legis. 61, 72 (1997).

[122] See Michael Evan Stern & Margaret M. Mlynczak Stern, A Critical Overview of the Economic and Environmental Consequences of the Deregulation of the U.S. Electric Power Industry, 4 Envtl. L. 79, 106 (1997).

eliminate it when it has already occured, the argument continues, the watchful eyes and intervention of public agencies are needed.[123]

Self-regulation provides a useful alternative to both viewpoints. Except for extremists on both sides, there is something to be said of corporate self-regulation. At least, it does not impose as much burden on corporations as governmental regulation.[124] Yet, it still gives room for business to be mindful of societal expectations to operate within certain acceptable parameters. This perhaps explains why some public interest groups that favor regulation and business groups that support a hands-free approach have been able to come together to craft some codes of conduct.[125]

There are certain situations where the utility of codes of conduct is apparent. One of such situations is where host country laws facilitate or fail to provide adequate guidance in relation to acts that are legally or morally prohibited in the corporation's

[123] Jeremy Lehrer, *Trading Profits for Change*, 25 Hum. Rts. 21 (1998). "Everyone seems to agree that government-enforced regulations are the best means of preventing industry abuses." *Id.*, at 23.

[124] See Pitt and Groskaufmanis, *supra* note 17.

> [S]elf-regulation is preferable to government regulation, provided that self-regulation is subject to appropriate oversight and is pursued diligently. Unavoidably, government regulation is excessively disruptive to corporate enterprise. Corporate self-regulation does not suffer to the same extent from this disability. Moreover, an effective regime of corporate self-regulation (and a concomitant diminution of government enforcement actions against corporate self-regulators) offers an opportunity to reduce the exorbitant costs currently added to the provision of goods and services . . ..

Id., at 1561 – 62. Citation omitted.

[125] E.g., Voluntary Principles whose crafting involved a broad coalition of human rights and labor groups, large corporations and their home governments. See Bennett Freeman, *Corporate Responsibility and Human Rights*, GLOBAL DIMENSIONS, *available at* http://www.globaldimensions.net/articles/cr/freeman.html. Last visited September 7, 2002.

home country.[126] In such circumstances, codes of conduct would seek to eliminate double standards or discourage corporations from engaging in acts that would be impermissible under the legal and moral standards prevailing in their home countries. In the presence of a weak legal system, codes have a propensity to shine. As the United Nations Centre on Transnational Corporations observed a few years ago: "In some cases, self-regulation may be more effective than national regulations themselves, especially in those countries in which enforcement mechanisms are weak."[127]

Corporate codes also serve a useful purpose in guiding[128] the employees of a company in complying with the various laws that are binding on the company.[129] With the multifarious pieces of legislation and regulations that apply to corporations, a simple articulation of corporate obligations and responsibilities in a single document is a valuable resource. Employees would know the expectations on them, making it more difficult for them to explain away any breach of their legal duties or failure to comply with the requirements of applicable laws.[130]

[126] Philip M. Nichols, *Regulating Transnational Bribery in Times of Globalization and Fragmentation*, 24 Yale J. Int'l L. 257, 284 (1999).
[127] JOSHUA KARLINER, THE CORPORATE PLANET: ECOLOGY AND POLITICS IN THE AGE OF GLOBALIZATION 48 (1997) (quoting UNTCMD, World Investment Report 1992: Transnational Corporations as Engines of Growth 90-91 (1992).
[128] See Michael S. Baram, *Multinational Corporations, Private Codes, and Technology Transfer for Sustainable Development*, 24 Envtl L. 33, 43 (1994) (stating that part of the reason corporations develop codes of conduct is to guide organizational behavior.)
[129] Nichols, *supra* note 126, at 284. See also Pitt and Groskaufmanis, *supra* note 17.
[130] See Cristina Baez, Michele Dearing, Margaret Delatour & Christine Dixon, *Multinational Enterprises and Human Rights*, 8 U. Miami Int'l & Comp. L. Rev. 183, 324 (1999/2000) (stating that codes could serve as a hedge against corporate misconduct. The authors also assert that corporate codes "communicate to management, employees, and the public that the corporation intends to obey both national and international law." *Id.*, at 325.)

It should also be noted that the adoption of a corporate code could inadvertently impose legal constraints on a public company.[131] There is judicial authority for the position that where a company adopts a statement of policy, or an employee manual, it is bound to comply with its provisions.[132] Further, the adoption of a policy statement, without proper implementation or enforcement by the company adopting the code, could open the company to greater liability than it ordinarily would have been exposed to, if it did not adopt any code at all.[133]

The California Supreme Court recently held in *Nike v. Kasky*[134] that a company is liable for untrue statements it puts out to the general public in relation to its workplace conduct.[135] A lawyer for the plaintiff in that case had earlier argued that "when companies create codes of conduct, those are more than words. Those commitments are legally enforceable."[136] While this decision may be viewed as a bonus for corporate accountability, some commentators are of the opinion that it sets a dangerous precedent.[137] It could have the unwanted effect of forcing companies to

[131] Pitt and Groskaufmanis, *supra* note 17, at 1560, n.8.
[132] See *Toussaint v. Blue Cross & Blue Shield of Michigan*, 408 Mich. 579, 614 – 15, 292 N.W. 2d 880, 892 (1980); Pitt and Groskaufmanis, *supra* note 17, at 1560, n.8. But see, *The Quaker oats Company v. Dwayne Jewell*, et al., 27 Fla. Law Weekly D734 (Florida Court of Appeals, March 28, 2002) (holding that in the absence of express language to that effect, an employee handbook does not constitute a binding contract of employment.) see also Haynsworth, Baldwin, Johnson and Greaves LLC, *Handbook Isn't Binding Contract in Florida, But Don't Publish it Unless you mean it!* 14:4 FLORIDA EMPLOYMENT LAW LETTER, June 2002.
[133] See *Reese v. Seaboard Coastline R.R.*, 360 So. 2d 27, 29 (Fla. Dist. Ct. App. 1978; Pitt and Groskaufmanis, *supra* note 17, at 1560 n.8.
[134] 119 Cal.Rptr.2d 296 Cal.,2002.
[135] *Id.*
[136] Margery Gordon, *Advantage Reebok*, CORPORATE COUNSEL, May 2001, at 86 (quoting Albert Meyerhoff, Jr., a partner with Milberg Weiss Bershad Hynes & Lerach, the law firm that represented the plaintiff class in the suit against Nike.)
[137] See Bob Herbert, *Let Nike Stay in The Game,* NY Times May 6, 2002, at A 21.
(condemning the decision as a limitation on constitutional guarantees on free speech.) See also *Free Speech for Nike*, Washington Post, Editorial, August 24, 2002, at B06.

restrict what they say or decide to say nothing at all and be hesitant about disclosing their policies and practices.[138]

Another benefit of corporate codes is that by promoting the fear of negative publicity, it could compel corporations to act right or refrain from doing wrong.[139] While this may not be the case in a huge number of cases, it is hard to deny or ignore the enormous potential that this holds in ensuring responsible corporate behavior.[140]

Codes of conduct have proven themselves of tremendous utility as vehicles for social change[141] in a number of concrete cases. The Sullivan Principles catalyzed the growth of a black trade union movement in South Africa and ultimately led to improved worker well being and major changes in industrial relations in that country.[142] In the course of the seventeen years in which the Sullivan Principles were used, companies that subscribed to the code spent enormous sums of money – over $400 million – to provide support for black entrepreneurship and to improve the health, education and housing sectors.[143] A corporate code of conduct, the MacBride Principles, was instrumental to reducing employment discrimination based on religious grounds and in advancing equitable job opportunities in Northern Ireland.[144]

[138] Mark B. Baker, *Tightening the Toothless Vise: Codes of Conduct and the American Multinational Enterprise*, 20 Wis. Int'l L. J. 89, 118 (2001). Baker argues that the response of multinational corporations could either be to eliminate their codes or make the provisions of those codes to be so general in nature that the possibility of civil liability will practically be extinguished. He adds that since there is no legal requirement on MNCs to adopt corporate codes, lawsuits such as these would further reduce or abrogate any incentive to articulate company policy in relation to human rights, environment and other related social issues.

[139] See Bloomfield, supra note 36, at 590.

[140] See generally, Jorge F. Perez-Lopez, *Promoting International Respect for Worker Rights Through Business Codes of Conduct*, 17 Fordham Int'l L.J. 1, 47 (1993).

[141] Santiago A. Cueto, **Note**, *Oil's Not Well in Latin America: Curing the Shortcomings of the Current International Environmental Law Regime in Dealing with Industrial Oil Pollution in Latin America Through Codes of Conduct*, 11 Fla. J. Int'l L. 585, 608 (1997).

[142] Perez-Lopez, *supra* note 140, at 44. See also Bloomfield, *supra* note 136, at 589.

[143] Sethi, *supra* note 36, at 121.

[144] Perez-Lopez, *supra* note 140, at 44-45. Bloomfield, *supra* note 136, at 590.

Through the introduction of codes of conduct, working conditions for workers at the Mandarin factory in El Salvador were improved.[145] Workers who had lost their jobs were reinstated and were allowed to re-establish their union.[146] Similar results were also obtained at the Kimi garment factory in Honduras, where workers were allowed to unionize.[147] Codes have also ben instrumental in reducing the use of hazardous chemicals and improving ventilation and safety conditions at work places.[148] The part played by codes in contributing to the reduction of child labor has also been acknowledged.[149]

Arguably, the strongest point regarding the utility of corporate codes of conduct is that they could lay the foundation for future public initiatives at domestic and international levels. Where corporations follow the provisions of their code of conduct in foreign countries, not only can it galvanize local companies to improve their own behavior, it could also serve as a catalyst for legislative reform in those countries to improve social and economic conditions.[150] Internationally, codes could provide a basis upon which multinational corporate regulation in international law can be anchored. Thus, they have enormous potential to serve as a building block and a vital link in the whole process.[151] History has shown that is some instances where a social or economic problem had surfaced, corporate regulation was preceded by self-

[145] Rhys Jenkins, *Corporate Codes of Conduct: Self-Regulation in a Global Economy*, *available at* http://www.unsystem.org/ngls/documents/publications.en/develop.dossier/dd.07%20 (csr)/ Last visited December 4, 2002.

[146] *Id.*

[147] See *Id.*

[148] *Id.*

[149] Lena Ayoub, *Nike Just Does It – and why the United States Shouldn't: The United States' International Obligation to Hold MNCs Accountable for their Labor Rights Violations Abroad*, 11 DePaul Bus. L.J. 395, 404 (1999).

[150] See Perez-Lopez, *supra* note 140, at 47.

[151] See Donna Lee Van Cott, *Regional Environmental Law in the Americas: Assessing the Contractual Environment*, 26 U. Miami Inter-Am. L. Rev. 489, 515 (1995).

regulation, which itself was an effort to fend off regulation.[152] As self-regulation failed, the society clamored for public regulation.[153]

It is not far-fetched to think of a replication of this process in international law. If corporate codes continue to fall short in accomplishing their stated objectives, one outcome may be an "overwhelming demand for the promulgation of comprehensive national or international . . . regulation for MNC operations in developing nations."[154] Indeed, doubts about the success of self-regulation by multinational oil companies are already prompting calls for international action.[155]

There are a variety of ways in which codes can be utilized in developing an international regulatory system over the social, economic and environmental costs of international business transactions. One scholar has observed thus:

> Although corporate codes of conduct are ad hoc and arbitrary in nature . . . it is possible to imagine a system of regulation that builds on the lessons of the corporate codes of conduct and yet brings them into the public domain. For example, U.S. common law courts could construe the codes of conduct as contracts and make them enforceable. Some state courts have taken this approach to company handbooks in the past two decades, thereby treating promises of job security contained in company handbooks as enforceable obligations. If this approach were transposed to the multinational arena, companies would be obligated to comply with their own codes, and [those affected by their operations] would have standing to sue in U.S. courts if they did not comply.[156]

This work will develop this idea further in Part IV below. Suffice it to say, at this juncture, that it is clear that codes of conduct serve a useful purpose and should not necessarily be discarded. However, there are a host of limitations inherent in, or associated, with the current crop of codes. The next section looks at those limits and how far they go in undermining the efficacy and thus, utility, of corporate codes.

B: Limits of Codes

The *Commentaries and Clarifications on the OECD Guidelines*[157] state that the Guidelines for Multinational Enterprises contain "non-binding recommendations"[158] and emphatically declare that:

> The Guidelines are recommendations jointly addressed by governments to multinational enterprises. They provide principles and standards of good practice consistent with applicable laws. Observance of the Guidelines by enterprises is voluntary and not legally enforceable.[159]

[152] See Robert J. Liubicic, *Corporate Codes of Conduct and Product Labeling Schemes: The Limits and Possibilities of Promoting International Labor Rights Through Private Initiatives,* 30 Law & Pol'y Int'l Bus. 111, 157 (1998); Lance Compa & Tashia Hinchliffe-Darricarrere, *Enforcing International Labor Rights Through Corporate Codes of Conduct*, 33 Colum. J. Transnat'l L. 663, 687 (1995).

[153] See Steven R. Salbu, *True Codes Versus Voluntary Codes of Ethics in International Markets: Towards the Preservation of Colloquy in Emerging Global Communities*, 15 U. Pa. J. Int'l Bus. L. 327 (1994) for an excellent discussion on the process of voluntary codes metamorphosizing into mandatory codes or legislation.

[154] Liubicic, *supra* note 152, at 157.

[155] See Judith Kimerling, *International Standards In Ecuador's Amazon Oil Fields: ThePrivatization Of Environmental Law*, 26 Colum. J. Envtl. L. 289, 327 (2001): "Ironically, it is the failure of self-regulation by international oil companies in remote areas and the abysmal track record of the oil industry generally that has led to growing agreement about the need for international oil field standards."

[156] Katherine Van Wezel Stone, *To the Yukon and Beyond: Local Laborers In a Global Labor Market*, 3 J. Small & Emerging Bus. L. 93, 127 (1999). Citation omitted.

[157] *Supra* note 106.

[158] Text, *supra* note, 106 Foreword, *available at* http://www.fifoost.org/allgemein/divers/oecd_multinat_corp/index.php. Last visited September 7, 2002.

[159] Text, *supra* note 106 --, *available at* http://www.fifoost.org/allgemein/divers/oecd_multinat_corp/node6.php. Last visited September 12, 2002.

This is an ever-present feature in virtually every code of conduct and for this, codes have been widely excoriated.[160]

Voluntariness and non-bindingness are not inherently bad. A credible argument can be made that norms are more likely to be obeyed when those that are supposed to be subject to them participate in creating[161] the norms and internalize them.[162] It is awfully hard to elicit corporate participation in the codes-creation process if there is a strong prospect that the emergent code would be binding.[163] Corporations would rather lobby hard to see that those codes do not come into being than place their imprimatur on codes that purport to compel them to embrace social objectives. Consequently, initiators of codes are content to make a trade-off between participation and bindingness, in order not to lose out completely.[164]

The problem arises however, as it often does, when participation does not lead to internalization or compliance and recourse cannot be had to non-existent enforcement mechanisms. At that point, a major weakness of voluntary initiatives becomes glaring.

[160] See *infra* notes 179 - 182 and accompanying text. On the bindingness of codes, see Richard Schwartz, *Are the OECD and the UNCTAD Codes Legally Binding?* 11 INT'L LAW. 529 (1977).
[161] See Pitt & Groskaufmanis, *supra* note 17, at 1561, n.10. "[S]ome suggest that meaningful codes must be developed internally."
[162] Harold Hongju Koh, *Why Do Nations Obey International Law?* 106 Yale L.J. 2599, at 2645 – 2658 (1997) (reviewing Abram Chayes & Antonia Handler Chayes, The New Sovereignty: Compliance with International Regulatory Agreements (1995) and Thomas M. Franck, Fairness in International Law and Institutions (1995)). See also Oona A. Hathaway, *Do Human Rights Treaties Make A Difference?* 111 Yale L.J. 1935, at 1961 – 62 (2002).
[163] See Irwin Arieff, *UN: One Year Later Global Compact Has Little to Show*, Reuters, July 27, 2001. (citing the views of U.N. Assistant Secretary-General Michael Doyle, who stated that corporations wre not desirous of accepting binding global corporate governace standards). See also JOHN M. KLINE, INTERNATIONAL CODES AND MULTINATIONAL BUSINESS: SETTING GUIDELINES FOR INTERNATIONAL BUSINESS OPERATIONS 46 (1985). Writing about a particular international code, Kline states that "acceptance of the voluntary mode has been essential to secure participation . . . by most Western governments as well as the acquiescence of many corporations." *Id.*
[164] Freeman et al, *supra* note 71, at 432-433; Freeman, *supra* note 125 (stating that corporations are not eager to negotiate for binding or enforceable codes because of the (perceived or real) risks of litigation.)

It bears repeating that the fact that codes are voluntarily does not necessarily translate to ineffectiveness, and that mandatory codes are not an automatically successful by reason of their obligatoriness.[165] A case can be made that voluntary codes are more likely to be effective. One scholar notes: "Paradoxically, because compliance with voluntary codes is optional, voluntary codes are potentially more powerful than [mandatory] codes."[166] This is so because the "ultimate power of voluntary codes is a result of their encouragement of rigorous debate which ultimately improves the quality of the code."[167] Voluntariness also carries with it a pragmatic advantage[168] in the sense that in order to garner the initial support of those who may otherwise be skeptical about becoming part of the code, "the element of voluntary adherence"[169] may be a necessary condition.[170] Moreover, making codes mandatory, instead of voluntary, could precipitate an economic quagmire, as discouraged foreign investors look to more favorable investment zones.[171] This is a huge price for many developing countries.

However, the facts on the ground suggest that codes of conduct have generally been ineffective, and since most of these codes are voluntary, a correlation between ineffectiveness and voluntariness cannot be ruled out. In fact, it could be argued, instead, that since the voluntary approach has not fared very well, a change of methods is worth considering.

[165] For a discussion on the subtle distinction between effectiveness and success, especially in relation to codes, see Massie, *supra* note 30, at 289 – 290.
[166] Salbu, *supra* note 153,, at 356.
[167] *Id.*
[168] *Id.*, at 357.
[169] Kline, *supra* note 163, at 46.
[170] *Id.*
[171] Wigwe, *supra* note 102, at 108. See also Robert Grosse, *Codes of Conduct for Multinational Enterprises*, J. World Trade L. 429 (1984).

Replacing the current regime of voluntary codes with mandatory codes could make a lot of difference. This is not a mere theoretical postulation. The present position finds substantiation in the fact that some corporations have already indicated their unwillingness to abide by the provisions or legitimate expectations of a code in the absence of a legal obligation to do so.[172]

A mandatory code system also tackles the problem of free riding. At the moment, if a corporation decides to stay out of a particular code, thus taking advantage of some practices, which those who subscribe to the code are prohibited from engaging in, it faces no direct sanction. Perhaps, the greatest punishment it may face is negative reaction from consumers or the mere prospect of such a reaction. But the problem is that sometimes, sanctions of this nature have limitations and so do not always work. In the first place, consumers are not always well informed about what is going on in a particular industry.[173] Also, where choices are limited, negative reactions are likely to cease or recede. People who live in a small town with only one gas station or those about to be stranded because their tanks are nearing empty, are not very likely to avoid filling their tanks at a station owned by a free-riding corporation. Besides, products such as crude oil are not usually sold to individuals who may be more discerning or discriminating,[174] but to big purchasers including

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

[173] Macek, *supra* note 34, at 111, 114.

[174] See Danielle Everett, *New Concern for Transnational Corporations: Potential Liability for Tortious Acts Committed by Foreign Partners*, 35 San Diego L. Rev. 1123, 1150 (1998) (pointing out that oil

governments who may show greater concern for providing for their citizens' fuel needs and avoiding any social upheaval or political backlash that might result from fuel scarcity.

Companies that are not part of the voluntary code arrangement may therefore escape any form of liability. At the same time, they are adequately positioned to enjoy any benefits afforded the industry, due to the responsible behavior of some in that industry.[175] If people viewed fossil fuels negatively and decided to work against them, an effort by the industry to introduce a code to improve its conduct may elicit a change in societal attitude. Deciding to continue to patronize that industry would likely be to the benefit of the entire industry, not just those that signed on to the code. A mandatory code will eliminate this injustice. It will terminate the competitive advantage[176] that non-participating companies may enjoy over those who submit to a code.[177] It is little wonder therefore, that transactions in which the potential for much

and gas companies are not in the same position as retail manufacturers who sell directly to the public and thus bow to public opinion.)

[175] See Sarah M. Hall, *Multinational Corporations' Post-Unocal Liabilities for Violations of International Law*, 34 Geo. Wash. Int'l L. Rev. 401, 428 (2002).

[176] The companies who do not adopt codes are likely to have a competitive advantage over those who do. Su-Ping Lu, *Corporate Codes of Conduct and the FTC: Advancing Human Rights Through Deceptive Advertising* Law, 38 Colum. J. Transnat'l L. 603, 617 (2000) See also Macek, *supra* note --, at 118. "The corporation that adopts a code of conduct will generally find itself at a competitive disadvantage." Citation omitted. See also JOEL MAKOWER, BEYOND THE BOTTOMLINE 30 (1994) (quoting Milton Friedman's argument that "companies that did adopt responsible attitudes would be faced with more binding constraints than companies that did not, rendering them less competitive.") But see DAVID HUNTER, et al., INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 1409 (2d ed. 2002) contending that notwithstanding that codes are not binding on signatory companies, in certain sectors, companies may need to be a part of a code in order to be competitive.

[177] See Anderson, *supra* note 28, at 490 (stating that the absence of uniformity and consistency could lead to a competitive advantage.) The converse argument could be made that that corporations, which decide to stay out of a particular code, may be the ones at a disadvantage, since they may suffer from negative publicity and any other available sanction. Assuming this is true, the fact still remains that if they perceive that they are at a disadvantageous position, they could join the code at any point, even with much fanfare and commendation form watchdog groups. On the other hand, a corporation that subscribed to the code, and later felt that being a part of the code was actually bad for business, may find that opting out of the code would not be so easy and would likely attract negative publicity, and in some cases, opprobrium.

opportunism exists are fertile grounds for the cultivation of binding mechanisms or institutions.[178] In the case of a mandatory code, those who fail to live up to their obligations will attract stiffer sanctions through enforcement, which is not always the case with voluntary codes.

Lack of enforcement is certainly a real impediment to the effectiveness of corporate codes.[179] The abandoned UN Code of Conduct for Transnational Corporations has been adjudged weak by commentators because it does not provide for a formal enforcement process that would ensure compliance with the code's provisions.[180] Because of the absence of a legal enforcement mechanism in virtually every code of conduct, realizing their stated objectives has not met with much success.[181] What the voluntary and unenforceable nature of codes does is to provide a "shelter" for MNCs, enabling them to continue to operate in a system of *de facto*, if not *de jure*, unaccountability.[182]

[178] Jeffrey L. Dunoff & Joel P. Trachtman, *Economic Analysis of International Law*, 24 Yale J. Int'l L. 1, 41 (1999).
[179] Bloomfield, *supra* note 36, at 571. "The most pressing problem with codes of conduct is enforcement." See also Ryan P. Toftoy, *Now Playing: Corporate Codes of Conduct in the Global Theater: Is Nike Just Doing It?* 15 Ariz. J. Int'l & Comp. L. 905, 907 (1998). The prevalence of this criticism is widely acknowledged. See Baker, *supra* note 138, at 139. "Arguably the single-most point of contention concerning MNE internal codes of conduct revolves around the issue of enforcement."
[180] Meintjes, *supra* note 92, at 413.
[181] Ayoub, *supra* note 149, at 405. See also Post, *supra* note 35, at 111. "Enforcement is essential for an effective code of conduct. Failure to create a working enforcement mechanism can doom a code to failure in the world of practice." There is actually a counter argument that enforcement instead of being beneficial would actually be an impediment to a code's success. Some commentators see enforcement as disruptive of the corporate enterprise. See Pitt & Groskaufmanis, *supra* note 11, at 1561, n.10. The argument is that enforcement of a code's requirements could lead to a contentious, adversarial environment. *Id.* If government agencies give enforcement an important place in the implementation of public policies, it is further contended, the resulting "relationship between regulators and regulated is one of mutual suspicion, distrust, and in some cases, open hostility." *Id.* (Citing J. SIGLER AND J. MURPHY, INTERACTIVE CORPORATE COMPLIANCE 116 (1988)).
[182] Sacharoff, *supra* note 26, at 937.

Not only are mechanisms for enforcement absent in many a code, monitoring mechanisms are also sorely missing.[183] Without monitoring, it becomes difficult to benchmark corporate performance and compliance with codes of conduct and national law.[184] Three types of monitoring are best known: internal monitoring, external monitoring, and independent monitoring.[185] The corporation itself conducts internal monitoring.[186] External monitoring involves an outside party hired by the corporation.[187] The external monitor reports to the corporation that hired it.[188] In the case of independent monitoring, monitors are outsiders who enjoy financial independence from the company whose operations are being monitored.[189] Independent monitors report to the company, but report also to consumer communities and other interested parties.[190] Of these three types of monitoring,

[183] Some commentators have noted:

> While some observers call the standards strict, the codes contain significant limitations. First, they usually do not contain mechanisms for enforcement. Further, they generally do not contain any provisions regarding monitoring of business partners. Even when a code requires or recommends such monitoring, the monitoring is almost never conducted by an independent agency. As a result, they are standards without teeth and function primarily as a public relations gesture.

Laura Ho, et al., *(Dis)Assembling Rights of Women Workers Along the Global Assembly Line: Human Rights and the Garment Industry*, 31 Harv. C.R. – C.L. L. Rev. 383, 401 (1996). Citations omitted.
[184] Schilling, *supra* note 92, at 227.
[185] Ruth Rosenbaum, *In Whose Interest? A Global Code of Conduct for Corporations*, *in* GLOBAL CODES OF CONDUCT, *supra* note , 24 at 211, 215.
[186] *Id.*
[187] *Id.*
[188] *Id.*
[189] *Id.*
[190] *Id.* See also Schilling, *supra* note 92. Independent monitoring is also defined in the following words: "An effective process of direct observation and information-gathering by credible and respected institutions and individuals to ensure compliance with corporate codes of conduct and applicable laws to prevent violations, process grievances, and promote humane, harmonious and productive workplace conditions." *Id.*, at 228 (quoting the working definition developed by the Independent Monitoring Working Group.)

independent monitoring is preferred and is considered an important factor in the success and credibility of a code with the members of the public.[191]

However, in many cases where there is a system for monitoring in place, it is internal.[192] A credible contention could be made that a good and thorough internal monitoring process could produce real reforms if companies were willing to make it so. Problem is, however, that self-monitored results are hardly ever made public, therefore the outside world and in fact shareholders also, do not know whether company claims to follow codes are real claims or mere public relation gestures. It is in view of that that internal monitoring is criticized because it "smells of the fox minding the chicken coop, and serious questions arise regarding the extent to which code violations will be disclosed."[193]The validity of internal monitoring is suspect and their most remarkable service may be to provide MNCs with a useful public relations device, enabling them to divert attention from any existing gap between what they say and what they do.[194] External monitoring also has problems. When sports goods manufacturer Nike hired an external monitor, the former U.S. ambassador to the United Nations, Mr. Andrew Young, the mission did not meet with much success and attracted widespread criticism.[195] Independent monitoring also has its limitations. Sullivan Principles that had one of the best systems of monitoring[196] still did not

[191] Schilling, *supra* note 92, at 227.
[192] See Leighton, et al., *supra* note 1, at 50
[193] Sarah Cleveland, *Global Labor Rights and the Alien Tort Claims Act*, 76 Tex. L. Rev. 1533 (1998) (reviewing HUMAN RIGHTS, LABOR RIGHTS, AND INTERNATIONAL TRADE, Lance A. Compa & Stephen F. Diamond, eds., 1996).
[194] Liubicic, *supra* note 152, at 138.
[195] See *Watching the Sweatshops*, New York Times, Editorial, August 20, 1997.
[196] See William B.T. Mock, *Corporate Transparency and Human Rights*, 8 Tulsa J. Comp. & Int'l L. 15 (2000). The monitoring was done by an auditing firm, Arthur D. Little. For further dicussion on this, see Hess & Dunfee, *supra* note 61, at 617.

accomplish much, although one would not want to take away some of its successes[197]. The initiator, Rev. Sullivan, was constrained to call it a failure[198] and withdrew his support.[199] Douglass Cassell comments thus, on the impact of the Sullivan Principles:

> Nevertheless, far-reaching as they were, the Sullivan Principles failed both in their ostensible goal, to bring down apartheid, and in their tactical goal, to offer a publicly palatable alternative to divestment from South Africa. By 1987, even Reverend Sullivan pronounced his principles a failure and disassociated himself from their future use.[200]

As a matter of fact, the relative ineffectiveness of the Sullivan Principles led to their replacement by laws that prohibited most types of business relations with the apartheid government in South Africa.[201]

Another problem with corporate codes is vagueness.[202] It is not unusual to see a code referring to "standards" without a definition of what that word entails.[203] The Voluntary Principles on Security and Human Rights, realizing that this was a weak point in previous codes, set out to confront it from the onset and made sure that its

[197] See Sethi, *supra* note 36, at 117, 121 (acknowledging Sullivan Principles' success, but also noting their reduced impact. "Despite its apparent success in funneling badly needed funds to community-related causes, it is doubtful that the Sullivan Principles contributed more than marginally to the abolition of apartheid, or left a lasting legacy in terms of improving black economic empowerment.") Sethi also states that the Sullivan Principles were "a significant step forward" but further observes that the Principles were not successful in ending apartheid and were later rejected by Rev. Sullivan. *Id.*, at 90.
[198] See Richard T. De George, *"Sullivan-Type" Principles For U.S. Multinationals In Emerging Economies*, 18 U. Pa. J. Int'l Econ. L. 1193 (1997).
[199] See J. Clay Smith, Jr, *United States Foreign Policy and Goler Teal Butcher*, 37 How. L.J. 139, 186 (1994).
[200] Cassell, *supra* note 27, at 1971. Citation omitted.
[201] Nichols, *supra* note 126, at 285 n.15; Compa & Tashia Hinchliffe-Darricarrere, *supra* note, at 666-67; See Comprehensive Anti-Apartheid Act of 1986, Pub. L. No. 99-440, 100 Stat. 1086 (1986) (codified at 22 U.S.C. 5001 (1988 & Supp. III 1991. The Act has been repealed.
[202] Toftoy, *supra* note 179, at 905 (1998). See also Kimerling (2002), *supra* note 18, at 531 (stating that "most corporate commitments are vague and inexplicit . . . .")
[203] See Toftoy, *supra* note 179. But see Baker, *supra* note 138, at 138 (stating that some codes are "quite specific in the behavior that they do and do not tolerate.")

provisions go beyond general statements.[204] Unlike many previous efforts, the Voluntary Principles are "narrowly tailored to address substantive issues with a high level of detail."[205] The vagueness of codes sharply contrasts with legal stipulations and regulations, which are usually more detailed and precise.[206] The lack of clarity and specificity means that obligations supposedly assumed can easily be evaded.[207] The blurred lines between what is required and what is recommended, and between that which employees are prohibited from doing and that which is merely discouraged, portends a scenario in which everything is acceptable.[208] In the absence of a clear definition of standards and obligations, compliance becomes difficult to measure. Lack of compliance becomes harder to spot and stop. Those who are under-performing go scot-free. Such a system is simply not the best.[209]

Corporate codes are also faulted because they generally do not afford any remedies to injured parties.[210] While it may be a commendable step to profess all the good things that a company would do, and all the not-so-good things that it would refrain from doing, one cannot but question the value of any code, if those injured in breach of its provisions get no redress or remedy. Therefore, for codes to accomplish their stated objectives, one writer notes, "[m]eaningful remedies must also be available when corporations violate their own codes. Among other things, code

[204] Freeman, et al., *supra* note 71, at 435.
[205] *Id.*
[206] See Isabelle Martin, *The Limitations to the Implementation of a Uniform Environmental Policy in The European Union, 9 Conn. J. Int'l L. 675 , 699 (1994).*
[207] Anderson, *supra* note 28, at 490.
[208] See Seymour J. Rubin, *Transnational Corporations and International Codes of Conduct*, 10 Am. U. J. Int'l L. & Pol'y 1275, 1286 (1995).
[209] For further discussions on vagueness and lack of specificity of codes, especially in the international context, see Salbu, *supra* note 153, at 341-42.
[210] Anderson, *supra* note 28 , at 490.

violations must be rectified swiftly and with enough force to act as deterrents of future violations."[211]

One additional observation to be made about the concept of voluntary codes of conduct is that it has garnered enemies from both sides of the ideological spectrum. While those on the left would prefer that codes are strengthened or discarded in favor of regulation, some on the right find problem with the whole idea of codes. These critics on the ideological right assail corporate codes, insisting that codes stifle innovation and divert the corporation's attention from its core mission, which is the maximization of profit for its shareholders.[212] Nobel prize-winning economist, Milton Friedman, is noted as stating that "there is one and only one social responsibility of business – to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition without deception or fraud."[213]

It should be noted however, with due respect to Professor Friedman, that his views on this subject does not enjoy wide acceptance, even from the corporate community.[214] Indeed the notion that corporations should only focus on profits and be oblivious to social and economic problems arising from their operations will continue to receive strident opposition.[215] It is hard to argue against the observation of a noted

[211] Herrnstadt, *supra* note 21, at 363.
[212] See Pitt & Groskaufmanis, *supra* note 17, at 1630, 1633.
[213] Milton Friedman, *The Social Responsibility of Business is to Increase its Profits*, N.Y. Times, Sept. 13, 1970 [Magazine] , at 32. This is a popular view from this ideological spectrum. For similar views, see David Henderson, *The Harm in CSR*, FINANCIAL POST, February 2, 2002, at FP 11; Terence Corcoran, *Misguided Virtue*, FINANCIAL POST, February 2, 2002, at FP 11.
[214] Freeman, *supra* note 71, at 429.
[215] See Perry E. Wallace, *Global Climate Change and the Challenge to Modern American Corporate Governance*, 55 SMU L. Rev. 493 (2002). Wallace states that to ensure the profitability of their business, even corporate managers that subscribe to the traditional model of corporate governance cannot afford, at a minimum, not to engage employees, consumers, suppliers, nongovernmental organizations, governments, governments and others, as this is essential to the shaping of the kind of

human rights scholar that as multinational corporations "become publicly linked to grave human rights abuses . . . either through direct involvement or tacit support of governmental violations, the theoretical separation between maximizing profits and responsible corporate activity collapses."[216]

Another unsavory feature of many of today's codes is their conclusion without the participation and contribution of stakeholders and people that would directly be affected by the code's objectives.[217] Involving international NGOs as some initiators of codes[218] have chosen to do is a commendable move. But it is not adequate. Representatives of oil producing communities must be a part of the code formulation and implementation process for the code to enjoy high credibility and wide acceptance. When stakeholders are invited to be a part of the process, it evidences

economic environment conducive to profit-making. In any case, it is doubtful that business will thrive for long in a chaotic environment. Neglect of human rights, environment and other social issues that are important to the community in which a corporation operates could be dangerous for business. It is in a company' interest therefore to promote and protect these rights and community wellbeing. As, Mark Moody-Stuart, Chairman of Royal Dutch/Shell aptly surmised: "the demands of economics, of the environment and of contributing to a just society are all important for global commercial enterprise to flourish." Mark Moody-Stuart, *The Values of Sustainable Business in the Next Century,* Lecture at St. Paul's Cathedral, London (July 12, 1999), *available at* http://www.wbcsd.ch/newscenter/speeches/sdvalues.pdf.

[216] Frey, *supra* note 98, at 157.

[217] Writing on the importance of involving stakeholders in the formulation and implementation process, one writer states:

> A stakeholder approach sorts out descriptively who in a particular context is affected and how, and, normatively, what responsibilities each party has to the other. Stakeholders are any persons, social groups, collectives, institutions, political/economic systems, or even the ecosystem that affects, participates in, or is affected by, a particular situation, dilemma or action."

Post, *supra* note 35, at 113 (quoting Patricia H. Werhane, *Commentary: The Business Ethics of Risk, Reasoning, and Decision-Making, in* David M. Messick and Ann E. Tenbriensel, eds., CODES OF CONDUCT: BEHAVIORAL RESEARCH INTO BUSINESS ETHICS 332-33 (1996)) Citation omitted. See also R.E. FREEMAN and D.R. GILBERT, CORPORATE STRATEGY AND THE SEARCH FOR ETHICS (1988); Sethi, supra note 36, at 117, 118.

[218] For Example, The U.S./UK Voluntary Principles on Security and Human Rights, *supra* note 64.

trust, a critical element in any meaningful relationship, and an important factor in the eventual success or otherwise of that code.[219]

Related to the above is the lack of communication that is associated with many codes. The supposed beneficiaries of a code often do not know of its existence. "Companies always distribute these documents to employees but often do not make a conscious effort to provide them to suppliers, customers and other interested stakeholders."[220] During the investigator's research trips to Nigeria in 1999 and 2002, where he held meetings with a number of activists and community leaders in the oil producing areas, none of the people he met seemed to know anything about the corporate codes of any of the oil companies operating in Nigeria. An official of Chevron that was gracious enough to grant an interview to the investigator under anonymity did not extend his magnanimity to providing a copy of the code to him, even when when specifically requested.[221]

Codes are clearly insufficient.[222] The verdict in many quarters is that codes have not been a huge success.[223] In short, codes are perceived to be of such limited utility that "critics have dismissed [them] as meaningless generalities, unreliable guidances, unenforceable promises, and inadequate substitutes for regulation."[224]

[219] See Herrnstadt, *supra* note 21, at 360 – 61.

[220] Murphy, *supra* note 24, at 295, 298. Murphy found in a 1997 survey that only 47% of the companies surveyed communicated their statements to both internal and external stakeholders. *Id.*, at 300.

[221] This even contrasts with the position under Chevron's code that the company would communicate its policies to the communities where it operates. See Chevron Code, *supra* note 40.

[222] Anderson, *supra* note 28 , at 499.

[223] See Douglas S. Morrin, **Book Review**, *People Before Profits: Pursuing Corporate Accountability for Labor Rights Violations Abroad Through the Alien Tort Claims Act*, 20 B.C. Third World L.J. 427 (2000). "[W]hile codes of conduct may seem impressive, they have been largely ineffective at realizing the goals they purport to pursue." *Id.*, at 429. Citation omitted. See also RUSSELL MOKHIBER & ROBERT WEISSMAN, CORPORATE PREDATORS: THE HUNT FOR MEGA-PROFITS AND THE ATTACK ON DEMOCRACY 84 (1999).

[224] Baram, *supra* note 128, at 42. Citation omitted.

The limitations of codes have prompted victims of corporate abuse to seek other avenues of calling corporations to account.[225] One of such avenues is international civil litigation.[226] The next part will discuss that. Unfortunately, international litigation as it currently exists does not offer sufficient remedy or provide an adequate solution. Therefore, part IV also examines ways of improving the situation mainly through international legal and policy reforms that would create definite rights and correlative duties in relation to multinational corporations.

V: BEYOND VOLUNTARY CODES OF CONDUCT

Corporate codes of conduct could prove a useful tool for corporate accountability. Unfortunately, they also have a number of limitations that militate against their effectiveness. Translating their dictates into reality is a big problem. Many codes "declare laudable goals that, if implemented as advertised, would indeed better protect people and their resources."[227] Sadly, they are not. As a consequence, corporate abuses have continued, even where codes exist. Victims of such abuses, apparently unwilling to place their salvation in the hands of these codes, have called attention to their plight and sought solace through other devices and avenues. One of such avenues is the domestic judicial system in the United States. This part will briefly discuss that journey and how it may not be able to achieve the ultimate goal,

[225] Anderson, *supra* note 28, at 490.
[226] See *id.*, at, 490; Brad Kieserman, *Profits and Principles: Promoting Multinational Corporate Responsibility by Amending the Alien Tort Claims Act*, 48 Cath. U. L. Rev. 881, 885 (1999).
[227] Leighton, et al., *supra* note 1, at 50.

because it may be hamstrung by its own inadequacies. Accordingly, it is necessary to consider international policy changes, which this part also recommends.

A. DOMESTIC JUDICIAL REMEDIES

In 1996, victims of abuses emanating from a commercial relationship between an American oil company, Unocal, and the military government of Burma (Myanmar) resorted to litigation as a weapon to address and redress their grievances against the alleged perpetrators.[228] The emergence of the transnational cases against Unocal is but another illustration of the difficulty in relying on codes as a panacea to the problem of corporate malfeasance. The lawsuits were brought under the Alien Tort Claims Act, an 18th century statute that empowers United States district courts to hear "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[229] A federal court in California held that Unocal could be held liable under the ATCA.[230] Although the court eventually granted Unocal's motion's for summary judgment and ruled that the case could not go ahead because the facts were not sufficient to hold Unocal liable, the finding that the court had subject matter jurisdiction was in itself a milestone.[231] In September 2002, the 9th Circuit Court of Appeals reversed the district court, ruling that Unocal can be sued for forced labor, rape, and murder committed by the Burmese soldiers who were guarding a major gas pipeline project that Unocal was involved with.[232] In

[228] *See* NCGUB v. Unocal, Inc., 176 F.R.D. 329, 344 (C.D. Cal. 1997). John Doe v. Unocal Corp., 963 F. Supp. 880 (C.D. Cal. 1997).
[229] 28 U.S.C. 1350.
[230] See *supra* note 228. Both cases survived the motions Unocal brought to dismiss the suits.
[231] See Carlyn Carey, *Unocal Corporation Can Be Liable for Human Rights Abuses in Burma*, 7 Hum. Rts. Br. 9, 11 (1999).
[232] Jim Lobe, *Oil Firm Liable for Overseas Abuses by Agents*, Inter Press Service, September 19, 2002.

the court's reasoning, "because Unocal knew the acts of violence would probably be committed, it became liable as an aider and abettor when such acts of violence – specifically, murder and rape – were in fact committed."[233]

Similar cases have been brought against a number of corporations in a variety of industries including oil,[234] mining,[235] beverages[236] and agriculture.[237] In 2002, a state court in California, where the Unocal case was re-filed for state law claims, held that Unocal should stand trial for alleged abuses in Burma.[238] This is a watershed decision as it is the first case to so hold.[239]

Apart from international civil litigation arising from alleged corporate misconduct abroad, the domestic legal system has also proven a veritable vehicle for calling corporations to account when they misbehave. There have been numerous cases where oil companies have been subjected to sanctions under existing laws for some violation or the other. Faced with a lawsuit alleging that it had polluted Santa Monica Bay when it dumped thousands of pounds of oil, grease, ammonia, and some other pollutants in excess of discharge permits, Chevron agreed to settle the lawsuit in 1988, the terms of which settlement required the company to pay a civil penalty of

[233] *Jane Doe I v. Unocal Corporation*, 2002 U.S. App. LEXIS 19263; 2002 Cal. Daily Op. Service 9585; 2002 Daily Journal DAR 10794 (United States Court of Appeals for the Ninth Circuit, September 18, 2002), at 63.
[234] *See John Doe v. Exxon Mobil*, No. 1:01CV01357 (D.D.C. filed June 20, 2001); *Aguinda v. Texaco*, Inc., 142 F. Supp. 2d 534 (S.D.N.Y. 2001); *Jota v. Texaco, Inc.*, 157 F.3d 153 (2d Cir. 1998); *Bowoto, et al., v. Chevron Corporation*, Case No. C 99-2506 CAL, United States District Court, Northern District of California, San Francisco; *Wiwa v. Royal Dutch Petroleum Co.*, No. 96 Civ. 8386, slip op. at 2-3 (S.D.N.Y. Sep. 25, 1998).
[235] See *Beanal v. Freeport McMoran* 969 F. Supp. 362, 373 (E.D. La. 1997).
[236] See *Sinaltrainal v. Coca-Cola*, No. 01-03208-CIV (S.D. Fla. filed July 21, 2001).
[237] See *Villeda Aldana v. Fresh Del Monte Produce*, No. 01-3399-CIV (S.D. Fla. filed August 30, 2001).
[238] John Roe III v. Unocal Corp., No BC237679 (Cal. Super. Ct., L.A., filed August 20, 2001).
[239] "For the first time, an American judge has ordered a U.S. corporation to stand trial for alleged human rights violations committed by a joint-venture partner overseas." Peter Waldman, *Unocal to face Trial Over Link to Forced Labor*, WALL STREET JOURNAL, June 12, 2002, at B1, B3.

$1.5 million.[240] Also with regard to water pollution, Chevron's President decided to personally plead guilty to more than sixty violations of the Clean Water Act, and in addition to that, paid fines of up to $8 million in lieu of trial.[241] Unocal's operations led to what has been described as California's 'largest and America's fourth largest oil spill.'[242] Because of soil contamination, through the leak of 8.5 million gallons of clear, diesel-like fluid over a forty-year period, Unocal had to agree to a settlement with the Attorney General of California, under which the company would pay $43.8 million, excluding clean-up costs, unarguably the largest civil action settlement in California's history.[243]

The existence of corporate codes did not, or would not have been able to, stop any of the above punished acts of conduct. If there were no laws or legal structures and institutions to call them to account, the delinquent corporations would have escaped accountability. Unfortunately, this is the situation today both in some developing countries and in international law, where the extant system does not have much application to these major corporations.[244]

A lucid illustration of this state of affairs is provided by the recent skirmish between some groups of Nigerian women and some major oil corporations operating in the Niger Delta region of Nigeria. In July 2002, Itshekiri women took scores of local and expatriate Chevron-Texaco oil workers hostage, threatening to pull their

[240] See Leighton, et al., *supra* note 1, at 59.
[241] *Id.*
[242] *Id.*, at 64.
[243] *Id.* For more on Unocal's corporate practices in relation to human rights and environment, see ROBERT BENSON, CHALLENGING CORPORATE RULE: THE PETITION TO REVOKE UNOCAL'S CHARTER AS A GUIDE TO CITIZEN ACTION (2000).
[244] The prevailing view is that international law applies to States and that corporations of municipal law do not have international legal personality. See, IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 68 (5th ed., 1998).

clothes and expose their nakedness if their demands were not met.[245] Shortly, thereafter, women from Ijaw and Ilaje ethnic groups followed suit, seizing production platforms of Shell Petroleum Development Company and Chevron-Texaco.[246] They complained of various social and economic problems arising from oil production and the attendant devastation of the natural environment, and demanded that the consequences be remedied.[247]

The women took this course of action apparently because they felt that neither the oil companies code of conduct nor the Nigerian legal structure afforded sufficient protection or inclination to prevent and remedy the situation.[248]

There is the dire need for the establishment of strong governance structures in many States and a restructuring of international law to address the social and economic costs of multinational corporate activity. Reliance on codes and any other form of corporate self-regulation is not good enough and while codes have their use, they should not replace governmental efforts. As one scholar puts it: "Corporate ethics and self-regulation should play a role in raising levels of environmental

[245] For a report on the demonstrations, see *Women Remain at Chevron Terminal; Nigerian women storm facility demanding amenities*, 131:52 OIL DAILY, July 11, 2002 . See also Daphne Wysham, *America's SUVs and the women of the Niger Delta*, Plain Dealer, August 11, 2002, at F1.
[246] See *Nigerian women expand Chevron takeover: Demands for jobs, improvements, spread to four more facilities of oil giant*, Edmonton Journal, July 18, 2002, at A5.

[247] See Michael Peel, *Chevron near deal to end women's sit-in*, Financial Times (London), July 17, 2002, at 5.
[248] See also petition launched in November 2002 by a Geneva-based NGO (World Organisation Against Torture) against Shell and Chevron. Case NGA 181102. VAW/ESCR: Violence Against Women/Violations of Economic, Social, and Cultural Rights, Torture and Ill Treatment Against Shell Petroleum Development Company (SPDC) and Chevron/Texaco Nigeria Ltd; *available at* http://www.omct.org. Last visited December 8, 2002.

protection in the oil fields, but they are not a panacea that can replace government regulation."[249]

A. INTERNATIONAL REGULATION

The approach favored by this work in addressing the social and economic costs of multinational business activity is international legal control of multinational corporations. This approach is anchored on two broad premises: that codes are inadequate and that the current wave of international lawsuits is not capable of sufficiently addressing these problems.

Regarding the first premise, it can safely be asserted that the existing system of codes has not been as effective as required for societal well-being inasmuch as it simply expects corporations to do the right thing, because it is the right thing to do. Thus, it anchors participation and compliance on "grace", rather than "obligation."[250] This is problematic. A transformation to a stronger system is necessary, if meaningful changes are expected. As Professor Mock has observed:

> In order for corporate support for human rights to become a routine of corporate commitment, it must cease to be a matter of corporate grace and rise to the level of corporate obligation. In other words, corporate support for human rights must operate on the level of social, political, and economic activity, however inspired such commitment may be from the moral level. The essential practical distinction between the social, political, and economic levels, on the one hand, and the moral level, on the other, is that accountability for one's

[249] Judith Kimerling, *International Standards in Ecuador's Amazon Oil Fields: The Privatization of Environmental Law*, 26 Colum. J. Envtl. L. 289, 396 (2001).
[250] William B.T. Mock, *Corporate Transparency and Human Rights*, 8 Tulsa J. Comp. & Int'l L. 15 (2000).

> actions arise temporally in the former spheres of action, whereas accountability or credit for moral actions must await another, less visible world. Corporations must, therefore, be made accountable in the coin of the temporal, workaday world for their actions or inactions on issues of human rights.[251]

One way of accomplishing this is to strengthen the extant system by making sure that the codes "create a common set of standards and reporting formats"[252] and mandate "external review and auditing of compliance."[253] Without questioning that suggestion, this work believes that a coordinated system of rights and responsibilities for multinational corporations under international law will best accomplish the objective of obliging corporations to recognize the social and economic costs of their operations and take necessary measures to prevent their occurrence or ameliorate their effects when they occur.[254]

The second premise, as earlier stated, is informed by the perceived inability of international civil litigation, in the way it is presently structured, to address the negative consequences of international business activities. It should be noted that transnational litigation, especially under the Alien Tort Claims Act, is a welcome

[251] *Id.*, at 15.
[252] *Id.*, at 24.
[253] *Id.*
[254] Some scholars believe that corporations may not be comfortable with the idea of giving them international rights because they do not want to be saddled with international duties, especially in the area of human rights. Stephen G. Wood & Brett G. Scharffs, *Applicability of Human Rights Standards to Private Corporations: An American Perspective*, 50 Am. J. Comp. L. 531 (2002).

> Given the other sources of law available for protecting rights important to corporations, one suspects that most corporations would resist seeking the benefits of international human rights protections if the price is being held to a duty to protect and realize the human rights of others, especially given the broad, open-ended and aspiration nature of many human rights, especially the so-called positive human rights, such as those contained in the International Covenant on Economic, Social and Cultural Rights.

Id., at 547 n.82

development. Without doubt, there are some advantages to employing this tool in the battle for corporate accountability.[255] Commenting on the decision in *Doe v. Unocal*, one scholar notes: The consequences of this decision should be far-reaching . . .. Private companies subject to suit in the United States may be more cautious about entering into agreements with foreign governments that have a poor human rights record."[256]

Because such lawsuits have the potential to affect their pocket book or bottom line, corporations will have an added incentive to improve their environmental practices and to pressurize governments to refrain or desist from human rights abuses.[257]

Successful cases would provide litigants with some needed relief including monetary compensation.[258] Nevertheless, even when those cases do not succeed, it is not entirely a loss for corporate accountability. Some price may be exerted from companies facing such lawsuits, for instance through the stock market[259] and consumer backlash arising from the negative publicity that the lawsuits may

[255] There seems to be sufficient basis to proclaim that "the ATCA, while not yet a panacea for the ills of the global economy, has become an increasingly powerful tool in promoting corporate accountability abroad." Morrin, *supra* note 223, at 427.
[256] William J. Aceves, *International Decisions: Doe v. Unocal*, 92 Am. J. Int'l L. 309, 314 (1998).
[257] See Eileen Rice, *Doe v. Unocal Corporation: Corporate Liability for International Human Rights Violations*, 33 U.S.F. L. Rev. 153, 163 (1998).
[258] See Craig Forcese, *ATCA's Achilles Heel: Corporate Complicity, International Law and the Alien Tort Claims Act*, 26 Yale J. Int'l L. 487, 515 (2001) (stating that the ATCA may yet prove a means for plaintiffs to seek compensation from companies practicing an unabashed form of militarized commerce in joint ventures with human rights abusing regimes.")
[259] Halina Ward, *Securing Transnational Corporate Accountability Through National Courts: Implications and Policy Options*, 24 Hastings Int'l & Comp. L. Rev. 451 (2001). But see FT McCarthy, *Doing Well by Doing Good: Anti-Globalisation Protesters see Companies as Unethical as well as Exploitative: firms demur, of course, But Face an Awkward Question: Does Virtue Pay?* The Economist, April 22, 2000 (suggesting that, although there may be a brief decrease in market share, negative publicity does not always do lasting damage to the sales or share price of a corporation.) See also Hall, supra note 175, at 432.

engender,[260] and this may deter corporations from engaging in nefarious business activities or prompt them to change.[261] Most important, ATCA provides international law with much needed teeth, ensuring that its dictates are enforced, not left to the whims of international actors.[262]

However, litigating claims under the ATCA is also fraught with difficulties. There are enormous challenges that a litigant must stridently confront in the course of the legal action. The doctrine of *forum non conveniens* [263]and other constraints impede the ability of plaintiffs to succeed in the courts.[264]

Moreover, the ATCA does not appear to apply to environmental claims.[265] Considering that a major charge leveled against multinational corporations operating

[260] See Patrick Smith, *Globalism Takes A Turn As Unocal Heads for Court*, Bloomberg News, July 22, 2002 (stating that the circulation of allegations of misbehavior could reduce the reputation and stock value of affected companies); Eric Marcks, *Avoiding Liability For Human Rights Violations In Project Finance*, 22 Energy L. J. 301, 306 (2001).

[261] See Hall, *supra* note 175 , at 432.

[262] Inadequate enforcement is a big deficiency of international law. Through litigation under the ATCA, multinational corporations could be made to face legal sanctions where there conduct runs contrary to some norms of international law. Leslie Wells, *A Wolf in Sheep's Clothing: Why Unocal Should be Liable Under U.S. Law for Human Rights Abuses in Burma*, 32 Colum. J. L. & Soc. Probs. 35, 36 (1998).

[263] "As it is used today, forum non conveniens is a significant legal barrier to transnational corporate accountability." Malcom J. Rogge, *Towards Transnational Corporate Accountability in the Global Economy: Challenging the Doctrine of Forum Non Conveniens in Re: Union Carbide, Alfaro, Sequihua, and Aguinda*, 36 Tex. Int'l L. J. 299 (2001). See also Armin Rosencranz & Richard Campbell, *Foreign Environmental and Human Rights Suits Against U.S. Corporations in U.S. Courts*, 18 Stan. Envtl. L. J. 145 146 (1999). "[*Forum non conveniens*] and the doctrine of comity have a powerful hold on U.S. federal courts and have frequently been held to be sufficient grounds for dismissal of a foreigner's complaints." But see Aaron Xavier Fellmeth, *Wiwa v. Royal Dutch Petroleum Co.: A New Standard for the Enforcement of International Law in U.S. Courts?* 5 Yale H.R. & Dev. L.J. 241 (2002) (suggesting a softening of the hitherto applicable standards on *forum non conveniens*.).

[264] For a discussion of the obstacles to an ATCA suit, see DAVID WEISSBRODT, ET AL., INTERNATIONAL HUMAN RIGHTS: LAW, POLICY AND PROCESS, (3d. ed) 794 – 818 (2001); Cyril Kormos, et al., *U.S. Participation in International Environmental Law and Policy*, 13 Geo. Int'l Envtl. L. Rev. 661, 678-681 (2001).

[265] Kormos, et al., supra note 264 , at 661 (discussing two environmental cases brought under the ATCA namely, *Amlon Metals, Inc. v. FMC Corp.*, 775 F. Supp. 668 (S.D.N.Y. 1991) and *Beanal v. Freeport-McMoran*, 969 F. Supp. 362, 373 (E.D. La. 1997) both of which decided that the ATCA did not apply to environmental claims.)

in developing countries is that of operating without respect for the environment,[266] this limitation of the ATCA is not one to be easily overlooked. It is imperative that egregious cases of environmental destruction be actionable in court.[267]

Further, because the ATCA is a uniquely American piece of legislation, its use is limited to the United States. Those who lack the resources or for some reason are unable, to bring a claim before a U.S. court will not be availed of its benefits. On the other hand, as opposed to other countries, transnational cases are more likely to be brought in the United States. Other jurisdictions, especially in the developed world, may be available. However, the United States seems to be the destination of choice. One writer has made the observation that "as Canadian companies globalize their activities, there is every possibility that the shadow of Canadian law will globalize with them, thereby holding companies accountable in Canada for their overseas wrongs."[268] Yet, when a lawsuit was filed against the Canadian oil company, Talisman, for human rights violations in the Sudan, it was not in Canadian court, but

[266] Gregory G.A. Tzeutschler, *Corporate Violator: The Alien Tort Liability of Transnational Corporations for Human Rights Abuses Abroad,* 30 Colum. Human Rights L. Rev. 359, 361 (1999); David Wheeler, et al., *Paradoxes and Dilemmas for Stakeholder Responsive Firms in the Extractive Sector: Lessons from the Case of Shell and the Ogoni*, 39:3 J. BUS. ETHICS 297 (2002).

[267] Some scholars hold some belief in the possibility of environmental claims succeeding under the ATCA. See Richard L. Herz, *Litigating Environmental Abuses Under the Alien Tort Claims Act: A Practical Assessment*, 40 Va. J. Int'l L. 545 (2000) for an extensive and impressive discussion of ATCA environmental litigation. Herz, who served as counsel to plaintiffs in a number of ATCA cases including *Doe v. Unocal* and *Wiwa v. Royal Dutch Petroleum Co.*, argues that the ATCA "has the potential to provide redress to victims of environmental abuses abroad" but cautions that plaintiffs' claims should be crafted narrowly to avoid dismissals by the courts. *Id.*, at 638.

[268] Craig Forcese, *Deterring "Militarized Commerce": The Prospect of Liability for "Privatized" Human Rights Abuses*, 31 Ottawa L. Rev. 171, 211 (2000).

in federal court in New York.[269] This trend stems from the advantages that the United States legal system provides.[270]

The fact that the ATCA in particular, and the American legal system as a whole, holds out huge prospects for redressing wrongs done to a victim in a way that hardly any other country does,[271] carries with a risk that American courts would be overwhelmed by the multiplicity of suits.[272] This could lead to resentment and negative reactions internally and externally. American taxpayers might feel that their resources are being used to right the world's wrongs in a disproportionate manner. Foreign governments may view the United States as inching to take on the role of the World's judicial officer. American corporations may complain that they are being placed at a competitive disadvantage vis-à-vis their counterparts from other countries who do no have to make difficult financial choices in order to avoid accountability in their home courts.[273] The corporations could even move to have the ATCA repealed as being anti-business and if they have public opinion on their side, may very well succeed.[274] Add to the above the fact that it is quite unfair and unjust to allow

[269] See Chris Varcoe, et al., *Talisman can't make clean break from Sudan: Outstanding $1.2B lawsuit dogs company*, Calgary Herald, November 1, 2002 , at C4.

[270] See generally Ugo Mattei and Jeffrey Lena, *U.S. Jurisdiction Over Conflicts Arising Outside of the United States: Some Hegemonic Implications,* 24 Hastings Int'l & Comp. L. Rev. 381, 394 (2001); Beth Stephens, *Corporate Liability: Enforcing Human Rights Through Domestic Litigation*, 24 Hastings Int'l & Comp. L. Rev. 401, 409 (2001).

[271] *Id.*

[272] But see, Rosencranz and Campbell, *supra* note 263 (arguing that due to in-built checks and balances in the American system, many cases would be weeded out.) This argument, however, seems to ignore the fact that even the process of weeding out unmeritorious claims, in the face of a huge volume of cases, imposes enormous responsibilities on the system and could heavily strain court personnel.

[273] See Russell J. Weintraub, *International Litigation and Forum Non Conveniens*, 29 Tex. Int'l L.J. 321, 352 (1994) (arguing that by entertaining suits by foreigners injured abroad, the courts are placing American corporations at a world-wide competitive disadvantage).

[274] Corporations adopted such stance in the aftermath of the Supreme Court of Texas' abolition of *forum non conveniens* doctrine in personal injury matters in Dow Chemical Co. v. Castro Alfaro, 786 S.W.2d 674 (Tex.1990), petition for cert. filed, 56 U.S.L.W. 2602 (Aug. 30, 1990), in order to enable or permit Costa Rican nationals to sue a Texas corporation in Texas for alleged violations in Costa Rica, (See Alfaro, 786 S.W.2d at 689 (Hightower, J., concurring). See Joseph H. Sommer, *The*

companies from other countries and their governments to avoid investing in practices and institutions that protect the society against multinational corporate abuse, while other companies and governments are not allowed such 'luxury.'

In view of the foregoing, it is apposite to consider uniformalizing and internationalizing regulations and sanctions in relation to multinational corporations. International law holds the best prospect for accomplishing such a monumental task. What is needed is an international regulatory structure that addresses the deficiencies of tools currently in use, including codes and international litigation. With regard to codes, it will introduce uniformity, certainty, specificity and enforceability. In the case of international litigation, it will eliminate or streamline the use of existing impediments such as *forum non conveniens*. It will also fill in gaps, for instance, by making massive environmental damage that destroys the lives, livelihood and health of communities actionable. The difficulties that victims of egregious environmental abuse have faced in litigating their claims will be redressed under the regime being proposed here.[275] This arrangement will also level the playing field economically, since all companies would need to comply and the laggards would have to improve their performance.

This new structure will also draw from and strengthen the salutary qualities of existing tools. It will refine their good points and make them more efficient. Existing

Subsidiary: Doctrine Without a Cause? 59 Fordham L. Rev. 227, 252 n.94 (1990). Business groups were able to lobby and get the Texas legislature to partially reinstate the doctrine in Texas. See Brooke Clagett, *Forum Non Conveniens In International Environmental Tort Suits: Closing The Doors Of U.S. Courts To Foreign Plaintiffs*, 9 Tul. Envtl. L.J. 513, 524 (1996).

[275] See Joanna E. Arlow, **Note**, *The Utility of ATCA and the "Law of Nations" in Environmental Torts Litigation: Jota v. Texaco, Inc. and Large Scale Environmental Destruction*, 7 Wis. Envtl. L.J. 93, 94

qualities under the U.S legal system that makes it more attractive to litigants will be a part of this arrangement, thus making the features available in other countries. International law could define corporate obligations and provide for their enforcement through national judicial systems as is currently done under the ATCA.

Accordingly, this proposal would involve a restructuring of international law. While the State is not likely to disappear in the foreseeable future,[276] there is no doubt that corporate power has increasingly gained ascendancy, consequently weakening the power of States.[277] Many States are too enfeebled to control the large corporations operating in their territory, thus necessitating the intervention of a supranational entity. International law should step in with a change in the present international legal and political structure. Instead of the current system which leaves the regulation of multinational corporations to States who are increasingly and unable to regulate them, or instead of proposing a fully direct regulation of these entities in a manner that places them at par with States, this work proposes a third layer or structure in international law.[278] This structure will be a quasi-direct regulation that takes multinational corporations to a level higher than what they presently occupy, but a

(2000) (stating that foreign plaintiffs have encountered enormous difficulties in their bid to seek remedies for environmental torts allegedly committed by multinational corporations.)

[276] Oscar Schachter, *The Decline of the Nation-State and its Implications for International Law*, 36 Colum. J. Transnat'l L. 7, 22 (1997).

[277] Edgardo Rotman, *The Globalization of Criminal Violence*, 10 Cornell J. L. & Pub. Pol'y 1, 37 (2000) (attributing the weakening of nation-states to the phenomenom of globalization.)

[278] See Pridan-Frank, *supra* note 1, at 670, asking whether the time has come for the development of another tier to the international legal framework for the purposes of direct application of international norms to multinational corporations. Such a restructuring would recognize MNCs as international persons with attendant rights and correlative duties. Its major advantage is that, by neutralizing the influence of MNCs in countries where they operate, the new arrangement would facilitate the enforcement of those duties imposed on them, even where the host states do not evince any willingness or lack the ability to so do. The writer however seems to favor an "international forum" for the adjudication of claims arising under the proposed structure. See *id.*, The position preferred in this work is enforcement through existing domestic institutions, but not necessarily in the host State of the multinational in question.

notch or two below the arena in which States operate. Its hallmark will be the elaboration of international rules that are applicable to multinationals and enforceable against them anywhere.

It is difficult to continue to argue against international regulation in favor of the existing system of unreliable national regulation and weak self-regulation.[279] The absence of international regulation essentially guarantees that MNCs will avoid accountability at both domestic and international levels.[280] Because of the weakness of governance systems in the developing world, the need to eliminate unnecessary double standards between what is permissible in the MNCs' home countries and their actual operations in their host countries,[281] and the propriety of ensuring that victims of environmental and human rights abuses get adequate redress, the importance of an accountability system in international law cannot be overemphasized.[282]

Even some corporations already accept the fact that laws and regulations will improve the situation of things.[283] This is not surprising considering that corporations are aware of the fact that in the absence of structural constraints, requirements and stipulations, the possibility of doing the right thing is severely diminished.[284]

[279] See Kimberly Gregalis Granatino, *Corporate Responsibility Now: Profit at the Expense of Human Rights with Exemption from Liability?* 23 Suffolk Transnat'l L. Rev. 191, 221 (1999) (making the case for mandatory, uniform and well regulated human rights codes of conduct as a vehicle for ensuring corporate compliance with international law.)

[280] Martin A. Geer, *Foreigners In Their Own Land: Cultural Land and Transnational Corporations – Emergent International Rights and Wrongs*, 38 Va. J. Int'l L. 331, 336 n.13 (1998).

[281] Judith Kimerling, *Rights, Responsibilities, and Realities: Environmental Protection Law in Ecuador's Amazon Oil Fields*, 2 Sw. J. of L. & Trade Am. 293, at 385, 388 (1995) (discussing various cases where corporations operate in a different legal climate and engage in practices that are not permissible under their home country laws.)

[282] *Id.*, at 380.

[283] Macek, *supra* note 34, at 119;

[284] Studies conducted by two environmental groups, Friends of the Earth and Public Data Project, indicate that American multinational corporations involved in chemical manufacturing in Europe were not willing to release data on toxic emissions unless they were legally required to do so,

There is no gainsaying the fact that any effort to restructure international law in order to clearly define and prescribe a role for the multinational corporation would be beset with obstacles. Questions will continue to arise as to what form the suggested changes will take; that is, whether or not it should be in the form of treaty.[285] The possibility of the proposed changes receiving the unqualified support of a broad spectrum of the international community is also not something that should be glossed over. This takes on added importance when considered in the light of the fact that sovereignty is a jealously guarded concept among States.[286] To the extent that these changes might impinge on their sovereignty, whittle down their influence, negatively affect their citizens (corporations incorporated by them), or interfere with

notwithstanding that 12 of the companies are members of the Chemical Manufacturers Association, which requires its members to subscribe to its *Responsible Care Program*. *See* Melissa S. Padgett, *Environmental Health and Safety - International Standardization of Right-to-Know Legislation in Response to Refusal of United States Multinationals to Publish Toxic Emissions Data for the United Kingdom Facilities*, 22 GA. J. INT'L & COMP. L. 701 (1992). Some critics have argued that an independent incentive for observance of these codes is needed, otherwise the effectiveness of these codes will not be guaranteed, even if the codes are widespread. See Craig Forcese, Insuring Human Rights: Linking Human Rights to Commercial Activities at the Export Development Corporation, Brief Prepared for the EDC Legislative Review (Canada), December 22, 1998; available at http://www.web.net/~claihr/pubs/edc.html. Last visited, September 7, 2002.

[285] A global environmental group, Friends of the Earth International, has proposed a Corporate Accountability Convention. Such a treaty will:

- establish mechanisms for adversely affected stakeholders to obtain redress through exercising rights;
- establish social and environmental duties for corporations;
- establish rules for consistent high standards of behaviour of corporations;
- create a market framework in which progressive companies can thrive, and governments respond fairly to the demands of their citizens rather than to the lobbying of corporations;
- establish sanctions;
- ensure the ecological debt owed by corporations to the South is repaid; and
- secures environmental justice for communities threatened with or exposed to environmental injustice - north and south.

See Friends of the Earth International, Towards Binding Corporate Accountability http://www.foei.org/publications/corporates/accountability.html. Last visited November 6, 2002.

[286] Ranee K.L. Panjabi, *Human Rights in the 1990s: Promise or Peril?* 28 Cornell Int'l L.J. 229, 239 (1995) (Reviewing INTERNATIONAL HUMAN RIGHTS By Jack Donnelly, 1993).

their economic development through foreign investment and international trade, a strong resistance from States on both sides of the world divide cannot be ruled out.

The recurring issue of legal personality in international law is also another impediment. Publicists and others that favor the traditional theory that international law should apply only to States might oppose any measure that seeks to imbue corporations with international legal personality.[287] The traditional theory, however, needs to look more closely to the extant state of affairs and adapt itself to the new realities regarding corporate position, power and influence in world affairs. As some scholars have observed, some of the large multinational corporations have annual revenues that are larger than the economies of most Member States of the United Nations.[288] Accordingly, since these corporations have acquired the kind of powers that was the exclusive preserve of States, it is only appropriate that they should attract the caliber of responsibilities that are imposed on States by international law.[289]

VI. CONCLUSION

The primary conclusion drawn from this discussion on the utility and limits of codes of conduct is that corporate codes are of limited utility. The current practice of depending on corporate codes and voluntary initiatives to promote corporate accountability is clearly inadequate. It is time that the United Nations stepped up to the plate to address this issue in a more serious manner. A starting point would be to

[287] The traditional view is that corporations of municipal law are not subjects of international law. On this, see IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 68 (5th ed., 1998).
[288] Meintjes, *supra* note 92, at 86.
[289] *Id.*

define and design an appropriate place or position for the multinational corporation in international law. Such an undertaking would be to the benefit of us all.

The next chapter discusses the present activities of the United Nations in relation to multinational corporate control and the adequacy or otherwise of those measures.

CHAPTER 5

UNITED NATIONS AND CORPORATE CONTROL

I. INTRODUCTION

In the international system, a number of steps have been taken in recent times to confront the challenges posed by corporations in an era of globalization. Prominent in the list of such measures are the UN Global Compact initiative and the on-going work of the UN Sub-Commission on the Promotion and Protection of Human Rights. This chapter discusses both efforts by the United Nations to provide a measure of control over corporate activity. The role of the United Nations in promoting the issue of corporate control as well as other important matters cannot be over-emphasized, moreso as the relevance of the global organization to the modern society is gaining increasing recognition.[1]

While the work of the United Nations is acknowledged, it needs to be emphasized that huge gaps still remain. The activities of the UN in this regard so far does not march the silent revolution currently sweeping through the domestic legal system of some countries. If domestic law can provide a forum for the enforcement of international rules and impose liability for breach of same, certainly the international system can consider streamlining such a system and using it to the advantage of all. Accordingly, this chapter contrasts the moves at both the international and municipal levels and indicates that a great need exists for international legal and policy reform.

Part II below discusses the most recent efforts at the United Nations to improve international control over multinational corporations. In particular, the UN

Global Compact and the work of the UN Sub-Commission on the Promotion and Protection of Human Rights will be discussed.

Part III looks at the growing movement toward corporate accountability through the agency of national courts. Cases brought in home country courts for activities that took place in other countries will be considered. Also pertinent is the use of international law principles to hold corporations accountable in the United States under the Alien Tort Claims Act.

In the concluding pages, the point is canvassed that there is the need to address the issue of corporate abuse through international legal mechanisms. However, this suggestion must first confront the perennial problem of international legal personality, as the status of multinational corporations in international law is still shrouded in controversy.

II. RECENT INTERNATIONAL TRENDS ON CORPORATE CONTROL

Over the years, a number of measures have been attempted or put in place in the international system to address the excesses of multinational corporate entities. International law and other instruments have been invoked to ensure that the operations of large corporations are brought within acceptable parameters. The major actors at the forefront of the campaign for international legal control of multinational corporations include States, international organizations and interested individuals. This study looks at the most recent efforts emanating from the United Nations,

[1] See Speech of George W. Bush, President of the United States, to the United Nations, September 12, 2002.

namely the UN Secretary General's Global Compact initiative and the activities of the UN Sub- Commission on the Promotion and Protection of Human Rights.

A. UN GLOBAL COMPACT

Current trends in the international system indicate a growing interest in checking the activities of multinational corporations and to involve them in issues of global concern more than ever before. The United Nations Secretary-General at the World Economic Forum in Davos, on January 31, 1999, challenged world business leaders to demonstrate good global citizenship. This would entail embracing and incorporating a number of universally-agreed values and principles in their individual corporate practices and by supporting appropriate public policies in that regard.[2]

Drawing from leading international instruments on human rights, labor and environmental issues namely the Universal Declaration of Human Rights, The Fundamental Principles on Rights at Work of the International Labor Organization (ILO), and the Rio Principles on Environment and Development,[3] the Secretary General in his *Global Compact* initiative asked world business to:

- support and respect the protection of international human rights within their sphere of influence;

[2] See UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, THE SOCIAL RESPONSIBILITY OF TRANSNATIONAL CORPORATIONS, 17 (1999).

- make sure that their own corporations are not complicit in human rights abuses
- uphold freedom of association and the effective recognition of the right to collective bargaining;
- uphold the elimination of all forms of forced and compulsory labor;
- uphold the effective abolition of child labor;
- uphold the elimination of discrimination in respect of employment and occupation;
- support a precautionary approach to environmental challenges;
- undertake initiatives to promote greater environmental responsibility; and
- encourage the development and diffusion of environmentally-friendly technologies.[4]

July 2000 saw the creation by the United Nations of the Global Compact as a voluntary coalition for the promotion of human rights and environmental standards in business.[5] The Global Compact recognizes that there are negative social and economic consequences stemming from economic globalization and sets out to address and correct the resulting disequilibrium. The fundamental objective of this initiative therefore, is to

[3] See http://www.unglobalcompact.org/un/gc/unweb.nsf/content/whatitis.htm.
[4] United Nations, *The Global Compact*, http://www.unglobalcompact.org.
[5] See Nicole Winfield, *U.N. Launches Partnerships*, Associated Press, July 26, 2000, available in 2000 WL 24550705.

bridge the imbalance between the two competing sides of international business transactions and the costs or concerns arising from them.[6]

Underlying the Compact is a "spirit of partnership and solidarity"[7] in which different segments of the global community are expected to come together and work harmoniously for the good of our world.

At its inception, nearly fifty corporations made a commitment to the Global Compact, pledging themselves to the nine key principles outlined above.[8] The number has since increased.[9] Corporations will be expected to post each year, progress they have made in implementing the nine principles.[10] These examples will be posted on a United Nations website, with an opportunity provided for citizens' groups to offer responses.[11]

Issues that have received closer attention from the initiative include corporate social responsibility generally, domestic litigation against corporations for human rights abuses in countries where they have operations and the impact of such litigation on corporate liability, diamond trade in conflict zones, the inclusion of

[6] Shira Pridan-Frank, *Human-Genomics: A Challenge to the Rules of the Game of International Law*, 40 Colum. J. Transnat'l L. 619, 669 (2002).
[7] Mark A. Drumbl, *Northern Economic Obligation, Southern Moral Entitlement, and International Environmental Governance*, 27 Colum. J. Envtl. L. 363, 369 n20 (2002).
[8] *Id.*
[9] At present, over 500 companies have submitted letters of intent to UN Secretary-General Kofi Annan pledging their support for the Global Compact and its nine principles. See *Global Compact Publishes List of Participating Companies*, November 20, 2002, *available at* http://www.unglobalcompact.org/irj/servlet/prt/portal/prtroot/com.sapportals.km.xmlformpreview? Last visited November 26, 2002.
[10] See Nicole Winfield, *U.N. Announces Business Initiatives,* Associated Press, July 20, 2000, available in 2000 WL 24002700.
[11] *Id.*

corporate behavior in studies conducted by U.N. special rapporteurs, and the work of international financial institutions and regional organizations.[12]

The Compact may be considered as an important step in the march toward addressing the social and economic costs of corporate activities. It is yet one more brick in the building process and has the potential to do some good. For instance, it may prove valuable in rewarding those corporations that exhibit an appreciable level of responsibility in relation to human rights and environmental protection.[13] At the same time, it could serve as a useful tool for improving corporate behavior by shaming those corporations whose performance is not adequate, and thereby set them on course for better practices.[14] Indeed, the Global Compact has already been utilized as a basis for a Framework Agreement that Statoil entered into with the International Federation of Chemical, Energy, Mine and General Workers' Unions (ICEM).[15]

Nevertheless, complaints remain. The complaints stem mainly from the Compact's weakness, which is rooted in its voluntary nature. The decision to couch the Compact in soft terms and make it voluntary is a reflection of the power and influence that big corporations hold in the international scheme of things.[16] The UN

[12] Office of the High Commissioner for Human Rights, *Business and Human Rights: An Update* (June 26, 2000), *at* http://www.unhchr.ch/businessupdate.htm. See also Dinah Shelton, *Protecting Human Rights in A Globalized World*, 25 B.C. Int'l & Comp. L. Rev. 273, 318 (2002).
[13] William H. Meyer & Boyka Stefanova, *Human Rights, the UN Global Compact, and Global Governance*, 34 Cornell Int'l L.J. 501, 504 (2001).
[14] *Id.*
[15] Peter Utting, *Regulating Business via Multistakeholder Initiatives: A Preliminary Assessment*, Paper prepared in late 2001 under the United Nations Research Institute for Social Development (UNRISD) research project "Promoting Corporate Environmental and Social Responsibility in Developing Countries: The Potential and Limits of Voluntary Initiatives," *available at* http://www.unsystem.org/ngls/documents/publications.en/develop.dossier/dd.07%20(csr)/ Last visited December 4, 2002.
[16] See Beth Stephens, *The Amorality of Profit: Transnational Corporations and Human Rights*, 20 Berkeley J. Int'l Law 45, 81 (2002).

realized that the corporate world did not evince any desire or willingness to accept global standards of a binding nature on corporate governance.[17]

This approach has doubtless opened a crevice for critics to assail the Compact. The above position of the UN, which it can defend as being grounded in reality, is seen as a capitulation to the interests of western companies, enabling them to have access to new markets without a corresponding set of regulations believed to be the only effective means of holding the corporations to account.[18] This is interpreted as taking sides with the powerful corporations in a contest with the powerless victims[19] of multinational corporate activity, a role the United Nations obviously should not be expected to play.

The Global Compact has also been dismissed by critics from the human rights and environmental community as inadequate. Some groups have therefore called on the UN Secretary General to gear his efforts toward the creation and implementation of a binding legal framework to oversee the conduct of multinational corporations.[20] Hopefully, this will only be a beginning step in the march to address the complex issue of corporate regulation in international law.[21]

[17] Irwin Arieff, *UN: One Year Later Global Compact Has Little to Show*, Reuters, July 27, 2001. (citing the views of U.N. Assistant Secretary-General Michael Doyle).
[18] George Monbiot, *The United Nations is Trying to Regain its Credibility by Fawning to Big Business*, The Guardian, Aug. 31, 2000.
[19] *Id.*
[20] See Meaghan Shaughnessy, *The United Nations Global Compact and the Continuing Debate About the Effectiveness of Corporate Voluntary Codes of Conduct*, 2000 Colo. J. Int'l Envtl. L. & Pol'y 159, 161.
[21] For more discussions on the Global Compact, see Allan Gerson, *Peace Building: The Private Sector's Role*, 95 Am. J. Int'l L. 102 (2001); Isabella D. Bunn, *The Right To Development: Implications for International Economic Law*, 15 Am. U. Int'l L. Rev. 1425 (2000); Ben Saul, *In the Shadow of Human Rights: Human Duties, Obligations and Responsibilities*, 32 Colum. Human Rights L. Rev. 565 (2001).

B. UN SUB-COMMISSION ON HUMAN RIGHTS

The Sub-Commission on the Promotion and Protection of Human Rights currently occupies a center stage on the issue of corporate accountability. The Sub-Commission, the main subsidiary body of the United Nations Commission on Human Rights, started out in 1947 as the Sub-Commission on Prevention of Discrimination and Protection of Minorities.[22] It is composed of 26 experts, acting in their personal capacity and elected from different regions of the world.[23] It has six working groups, the most relevant of which, for the purposes of this study, is the Working Group on Transnational Corporations.[24] The Sub-Commission in 1998, pursuant to resolution 1998/8, decided to establish a working group to examine the effects of the working methods and activities of multinational corporations on human rights and to make recommendations in that regard.[25]

After the working group's first meeting in August 1999, it made a number of recommendations including:

- Developing a code of conduct for transnational corporations based on international human rights standards;

[22] Sub-Commission on the Promotion and Protection of Human Rights, http://www.unhchr.ch/html/menu2/2/sc.htm. Last visited, July 6, 2002.
[23] *Id.*
[24] The working groups are those on Communications, Contemporary Forms of Slavery, Indigenous Populations, Minorities, Administration of Justice, and Transnational Corporations. *Id.*
[25] Office of the United Nations High Commissioner for Human Rights, Business and Human Rights: A Progress Report 22.

- Drafting and adopting mechanisms though which host and home governments would be obliged to elaborate internal legal monitoring standards with respect to the activities of transnational corporations;

- Analyzing the possible liability of States and transnational corporations, which fail to fulfill their obligations.[26]

The Sub-Commission has set in motion a process to develop a set of principles that would guide and hopefully constrain the operation of companies in relation to human rights. Under its authority, a declaration entitled the Human Rights Principles and Responsibilities for Transnational Corporations and Other Business Enterprises has been prepared.[27] It is expected that the Sub-Commission will endorse it in the near future, after which they may receive the consideration and endorsement of the governments who constitute the UN Commission on Human Rights.[28] The aim of the Human Rights Principles is "both to supplement existing international law, and help to clarify the scope of legal obligations on companies."[29]

The Principles cover a number of topics including the Right to Equal Opportunity and Non-Discriminatory Treatment, Right to Security of Persons, Rights of Workers, Respect for National Sovereignty and Local Communities, Obligations

[26] *Id.*
[27] Draft for Discussion, Draft Fundamental Human Rights Principles for Business Enterprises, Addendum 1, UN Doc. E/CN.4/sub.2/2002/XX/, E/CN.4/Sub.2/2002/WG.2/WP.1 (February 2002) See http://www1.umn.edu/humanrts/principlesW-OutCommentary5final.html for this version. Last visited July 11, 2002.
[28] INTERNATIONAL COUNCIL ON HUMAN RIGHTS POLICY, BEYOND VOLUNTARISM: HUMAN RIGHTS AND THE DEVELOPING INTERNATIONAL LEGAL OBLIGATIONS OF COMPANIES 154 (2002).
[29] *Id.*, at 155.

with regard to Consumer Protection, and Obligations with regard to Environmental Protection.[30]

The current draft recognizes that the primary responsibility for the promotion and protection of human rights resides in governments, but, drawing from the language of the Universal Declaration of Human Rights,[31] adds that "transnational corporations and other business enterprises, as organs of society, are also responsible for promoting and securing . . . human rights."[32] Corporate officers, company workers and the corporations themselves have a distinct obligation "directly or indirectly to respect international human rights and other international legal standards."[33]

In its first article, the declaration states that "transnational corporations and other business enterprises also have the obligation to respect, ensure respect for, prevent abuses of, and promote international human rights within their respective spheres of activity and influence."[34]

The Declaration on Human Rights Principles contains some general provisions on implementation. Responsibility for implementing the principles rests on corporations and business enterprises. There is also a role for national, international, governmental, or nongovernmental mechanisms in the monitoring of corporate compliance with the principles.[35]

[30] Draft Principles, *supra* note 27.
[31] Universal Declaration of Human Rights G.A. Res. 217A, U.N. GAOR, 3d Sess., Supp. No. 3, at 71, U.N. Doc. A/810 (1948).
[32] Draft Principles, *supra* note 27, Preamble.
[33] *Id.*
[34] *Id.*, Article 1.
[35] *Id.*, Articles 15 – 18.

The Principles when adopted will prove to be a valuable tool for promoting corporate accountability. As the International Council on Human Rights Policy has observed, the Principles

> . . . provide the foundation for an authoritative and comprehensive statement of the scope of companies' obligations in relation to human rights. The principles offer the best chance to clarify, at least in a soft law instrument, that international law can impose direct obligations on companies.[36]

It is pertinent to mention that the United Nations High Commissioner for Human Rights has also expressed the Office's resolve in this area, stating that while mindful of the fact that it is governments that are primarily responsible for the protection of human rights, the Office of the High Commissioner for Human Rights "is exploring the question of international accountability for alleged corporate violations of human rights."[37] The High Commissioner in furtherance of this objective has asked the six human rights treaty bodies and the special rapporteurs and working groups appointed by the United Nations Commission on Human Rights to study how they could best promote within their mandates such accountability.[38] More recently, the High Commissioner emphasized that while the Global Compact is relevant, it is not enough as there is still the need for a ". . . legal regime [to] help to underpin the values of ethical globalization."[39] Her position is that there should be a "next phase" in this

[36] International Council on Human Rights Policy, *supra* note 28, at 160.
[37] *Supra* note 25.
[38] *Id.*
[39] Mary Robinson, address, Second Global Ethic Lecture, University of Tubingen, Germany, January 21, 2002, *reprinted* in *Globalization has to take human rights into account*, Irish Times, Jan. 22, 2002.

journey, a phase that would be "less aspirational, less theoretical and abstract, and more about keeping solemn promises made."[40]

The High Commissioner's statements are strong evidence that while the current developments are certainly welcome, a lot more needs to be done, as it will not be sufficient to rely entirely on self-regulation or any form of regulatory structure that is not binding and enforceable. To ensure that harmful business activities are eliminated, limited or punished, a strong regulatory and enforcement network under international law is called for. It is interesting to note that there is a growing movement to use international law to address some of the contemporary problems facing humanity through the agency of domestic courts. Obviously, aggrieved parties are beginning to fill the vacuum left by international policy makers. The next part will discuss such creative use of international law in the United States under the Alien Tort Claims Act. The discussion also includes a closer look at the new wave of international civil litigation that is not necessarily based on a breach of principles of international law. An examination of their limitations and implications for international law reform is also included.

III. NATIONAL COURTS AND INTERNATIONAL CORPORATE CONTROL

Simultaneously with efforts by international organizations to address the social and economic costs of multinational corporate activity, individuals and private groups have taken it upon themselves to fight the harmful effects of business. These

[40] *Id.*

persons are usually victims of corporate environmental and human rights abuses, public-spirited people and non-governmental organizations dedicated to the public interest. The vehicle they have chosen is the domestic court system with international law as a major tool for vindicating their rights.

These cases that have been brought in several countries have been viewed as "the flip side of foreign direct investment" and aptly referred to as "foreign direct liability."[41] The beauty of foreign direct liability is that it "potentially offers a way to apportion responsibility among private actors, rather than between governments on the basis of their international legal responsibilities."[42]

Notably, two particular types of international cases are currently making the rounds in the domestic courts of certain countries. In one category, cases are brought in one country, usually in the developed world, by people affected by the activities of some corporations that took place in another country, usually in the developing world. A distinguishing feature of this species of cases is that while they have international character, the cause of action is not necessarily anchored in international law. In the second category, civil litigation addresses the breach of international law by corporations. The discussion on this second aspect focuses on the use of the courts of the United States to pursue this objective under a domestic statute, the Alien Tort Claims Act. The two types of cases will be discussed, leading to suggestions for international law reform.

[41] Halina Ward, *Securing Transnational Corporate Accountability Through National Courts: Implications and Policy Options*, 24 Hastings Int'l & Comp. L. Rev. 451, 454 (2001).

A. HOME COUNTRY LITIGATION

In recent years, there has been a growing movement in the direction of instituting court actions in developed countries against parent companies of multinational corporate groups. These lawsuits stem from the activities of corporations that have had environmental, social and human rights effects in developing countries.[43] A striking feature of this type of cases is that while the litigation is transnational in the sense that the parties, place of the alleged wrong, causes of action, and forums cut across a number of countries, not all the cases allege a breach of a principle of international law. Instead, a good number of them are based on violations of standards in developed countries, which the MNCs were expected to follow in their operations in the developing world.[44]

In the *Thor Chems Holdings Ltd Cases*,[45] workers in South Africa who had suffered injuries while working in a South African company engaged in manufacturing and reprocessing mercury-based chemicals instituted action in England. The suits were against the parent company, which had relocated and opened the South African subsidiary because of health and safety concerns in England. The plaintiffs contended that liability should attach to the defendant parent company and its chairman because they knew or ought to have known that operating the factories in South Africa would expose their workers to conditions hazardous to their health and safety. A number of the actions brought against the Thor company were eventually settled with the company agreeing to pay millions of dollars to the plaintiffs.[46]

[42] *Id.*
[43] *Id.*, at 451.
[44] *Id.*, at 451, 456.
[45] See *id.*
[46] The company paid 1.3 million pounds sterling to settle the first and second law suits and 270,000 pounds sterling for the third. See Ward, *supra* note 41, at 458. See also Richard Meeran at www.labournet.net/world/010/thor2.html

In the landmark case[47] of *Lubbe v. Cape Plc*,[48] plaintiffs who said they were exposed to asbestos in the course of their employment or as a result of living in an area contaminated by asbestos brought a civil action in England. The exposure allegedly took place in South Africa. The defendant was the parent company of the South African company whose operations, according to the plaintiffs' claim, led to the exposure and contamination. The gravamen of the plaintiffs' case was that the defendant owed – and breached – a duty of care to those employed by its subsidiaries or living in the area where they operated, to ensure that adequate steps and precautionary measures were taken to avoid exposing them to asbestos, which the defendant knew was gravely injurious to health. The defendant applied to stay the action, *inter alia*, on the grounds of *forum non conveniens*, contending that South Africa was a more appropriate forum. The House of Lords refused to stay the Plaintiffs' proceedings.[49] Lord Bingham of Cornhill based his lead decision, in part, on "the absence, as yet, of developed procedures for handling group actions in South Africa,"[50] a factor, which could make it much more difficult for plaintiffs to obtain adequate legal representation.[51]

[47] See Anita Ramasastry, *Corporate Complicity: From Nuremberg to Rangoon: An Examination of Forced Labor Cases and Their Impact on the Liability of Multinational Corporations*, 20 Berkeley J. Int'l Law 91, n7 (2002).
[48] Lubbe v. Cape Plc, [2000] 1 W.L.R. 1545. For an internet version, see http://www.parliament.the-stationery-office.co.uk/pa/ld199900/ldjudgmt/jd000720/lubbe-1.htm. Last visited July 10, 2002.
[49] For an extensive and excellent discussion of this case, see C.G.J. Morse, *Not in the Public Interest? Lubbe v. Cape PLC*, 37 Tex. Int'l L.J. 541 (2002).
[50] Lubbe, *supra* note 48.
[51] *Id.*

A solicitor for the claimants in the *Lubbe Case* reported in January 2002 that a settlement has been reached between some 7,500 claimants and Cape PLC for 21 million pounds sterling.[52]

Similar home country lawsuits have also been brought in such other jurisdictions as Canada[53] and Australia.[54] Most recently, a lawsuit was launched by two Burmese nationals in French court against the French multinational, Total Fina Elf for alleged human rights abuses in Burma.[55] The utility and efficacy of this form of transnational litigation will be discussed generally in section C below.

A. LITIGATION UNDER THE ALIEN TORT CLAIMS ACT

In April 2000, a United States District Court for the Northern District of California issued a preliminary ruling dismissing an objection by Chevron Oil Corporation to the court's jurisdiction.[56] Chevron had contended, in this particular instance, that considerations of international comity and *forum non conveniens* necessitated that the case should not be tried in the United States but in Nigeria where the incidents were alleged to have taken place. The plaintiffs in this case are alleging

[52] Richard Meeran, *Cape Pays the Price as Justice Prevails*, Times (London), Jan. 15, 2002, 2, at 5.
[53] See Recherches Internationales Quebec v. Cambior Inc., [1998] QJ No.2334 (Quebec Superior Court, 14 August 1998). For discussions of this case, see Sara L. Seck, Environmental Harm in Developing Countries Caused by Subsidiaries of Canadian Mining Corporations: The Interface of Public and Private International Law, 37 Can. Y.B. Int'l L. 139 (1999); Winston Anderson, Forum Non Conveniens Checkmated? - The Emergence of Retaliatory Legislation, 10 J. Transnat'l L. & Pol'y 183 (2001).
[54] See *BHP Mining Company Case*, which centered on environmentally-disruptive and destructive activities in Papua New Guinea. It was eventually settled out of court. See also Fiona Gill, Transnational Litigation: Claims Against UK Based Multinationals, http://www.risksociety.com/uploads/papers/Transnational%20Litigation.ppt. Last visited July 4, 2002.
[55] See *Total, objet d'une plainte en France pour travail force en Birmanie*, (Agence France Presse, August 29, 2002).

that the Nigerian government, with the collaboration of Chevron, violated their human rights and committed torts actionable under United States law.[57]

More recently, a lawsuit was filed against the giant oil corporation, Exxon Mobil.[58] The basis of the lawsuit is a panoply of alleged human rights abuses in the Aceh Province of Indonesia where ExxonMobil is said to be complicit in the measures undertaken by a unit of the Indonesian military against residents of the Aceh area where the company has a gas extraction and liquification project.[59]

These cases bring afresh to the forefront, questions regarding the desirability (or otherwise) of multinational corporations doing business with repressive and brutal regimes. They raise once again the issue of holding multinational corporations accountable for their actions that arise outside of contractual obligations. In essence, while a corporation is bound by terms agreed to in a contract, and can be held accountable thereunder, human rights abuses and some other harms of a tortious nature occurring in connection to, or incidental to, their business operations often go without any remedy to the victims.[60] This is especially the case with multinational

[56] Bowoto, et al., v. Chevron Corporation, Case No. C 99-2506 CAL, United States District Court, Northern District of California, San Francisco, Transcript of Proceedings, April 7, 2000 (on file with author).
[57] Bowoto, et al., v. Chevron Corporation & MOES 1-50, No. c99-2506 CAL, Second Amended Complaint (on file with author).
[58] John Doe v. Exxon Mobil, No. 1:01CV01357 (D. D.C. filed June 20, 2001).
[59] *Id.*
[60] See Beth Stephens, *The Amorality of Profit*, *supra* note 16, at 82.

> A great deal of effort has been spent developing enforceable rules to govern the economic behavior of multinational corporations: trade, patents, investment, financing are all the subject of existing international regulation or ongoing efforts to draft rules. These economic regulatory systems include well-elaborated enforcement mechanisms. Ironically, the human rights consequences of multinational corporate operations have received much less international attention, despite the fact that transnationals have an ongoing, and at times devastating, impact on human rights around the world.

corporations whose economic and political influence make it virtually impossible for them to be held accountable under the domestic courts of their host states. At the same time, international law does not really apply to these entities under the belief strongly held in some quarters that States primarily or exclusively are the subjects of international law.

In order to ensure that these corporations do not totally escape accountability, litigants have resorted to the courts of the United States where these corporations are based or have operations.[61] The primary weapon they have used is the Alien Tort Claims Act, an 18th century piece of legislation, which frowns at a breach of the law of the nations.

1. The Problem: Corporate practices and absence of accountability

Multinational corporations (MNCs) in the pursuit of their legitimate businesses have extended their operations to virtually every nook and cranny of the

Id., Citation omitted.

[61] The Chevron case joins a long list of cases brought under this remedy. See, e.g., *Wiwa v. Royal Dutch Petroleum Co.*, No. 96 Civ. 8386, slip op. at 2-3 (S.D.N.Y. Sep. 25, 1998) (plaintiffs alleged that Royal Dutch Shell Corporation collaborated with the Nigerian Government to execute environmental activist, Ken Saro-Wiwa and perpetrate other violent acts against the Ogoni ethnic group); *National Coalition Gov't of the Union of Burma* v. *Unocal, Inc.*, 176 F.R.D. 329 (C.D. Cal. 1997) (alleged Unocal's collaboration with the military government of Burma in torturing and enslaving Burmese citizens); *Beanal v. Freeport-McMoRan, Inc.*, 969 F. Supp. 362 (E.D. La. 1997) (defendant Freeport-McMoRan Corporation was alleged to have been complicit with the Indonesian government in the perpetration of genocidal, environmentally harmful, and violent acts on an indigenous tribe); *John Doe I v.Unocal Corporation*, 963 F. Supp. 880 (C.D. Cal. 1997) (Unocal was alleged to have collaborated with the military government of Burma in the perpetration of torture, forced labor, and slavery); *Alomang v. Freeport McMoRan, Inc.*, No. 96 CIV. A. 96-2139, 1996 WL 601431 (involving an allegation of complicity between Freeport-McMoRan Corporation and the Indonesian Government in the perpetration of genocide, environmental harms, and violent acts on indigenous workers); Aguinda v. Texaco Inc., 945 F.Supp. 625 (S.D.N.Y. 1996); Aguinda v. Texaco, Inc., 142 F. Supp. 2d 534 (S.D.N.Y. 2001); Jota v. Texaco, Inc., 157 F.3d 153 (2d Cir. 1998) (alleging that Texaco's oil operations in Ecuador and Peru polluted the rain forests and rivers in those countries. The 2nd U.S. Circuit Court of Appeals rendered the final decision, affirming its dismissal on *forum non conveniens* on August 16, 2002. See, *Decision of the day*, New York Law Journal, August 22, 2002.)

world.[62] There is no doubt that this has been good for the world's economy.[63] The only question is whether it has been good for the world's society. Some of the fall-outs of multinational corporate activity include environmental harms[64], human rights abuses[65] and labor rights violations.[66] While every sector of business is susceptible to any or all of this, multinational corporations in the oil sector have gained a lot of spotlight in recent times.[67]

Chevron's case arose out of a series of abuses of rights of Nigerians in the oil producing communities in which the company operates. Chevron is alleged to have assisted, aided or abetted the perpetration of these assaults on those Nigerians.[68] Although it has not been in as much spotlight as another major oil company operating in Nigeria, Royal/Dutch Shell,[69] Chevron has not had an entirely smooth operation. In May 1994, members of the Opuekebo community (Delta State of Nigeria) in which Chevron had its oil producing operations protested the company's activities in their

[62] Thousands of multinational corporations litter the business landscape, with tremendous influence on the global economy. See UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, THE WORLD INVESTMENT REPORT 2002: TNCS AND EXPORT COMPETITIVENESS
See also UNCTAD, Press Release, *Are Transnationals Bigger Than Countries?* TAD/INF/PR47, 12 August 2002, *available at* http://r0.unctad.org/en/press/pr0247en.htm. Last visited November 26, 2002.

[63] *Id.*

[64] See Armin Rosencranz & Richard Campbell, *Foreign Environmental and Human Rights Suits Against U.S. Corporations in U.S. Courts*, 18 Stan. Envtl. L. J. 145 (1999).

[65] See Leslie Wells, *A Wolf in Sheep's Clothing: Why Unocal Should be Liable Under U.S. Law for Human Rights Abuses in Burma*, 32 Colum. J.L. & Soc. Probs. 35 (1998); Eileen Rice, **Note**, *Doe v. Unocal Corporation: Corporate Liability for International Human Rights Violations*, 33 U.S.F.L. Rev. 153 (1998).

[66] See Ryan P. Toftoy, **Note**, *Now Playing: Corporate Codes of Conduct in the Global Theater: Is Nike Just Doing It?* 15 Ariz. J. Int'l & Comp. Law 905 (1998); Laura Ho, et al., *(Dis)Assembling Rights of Women Workers Along the Global Assembly Line: Human Rights and the Garment Industry*, 31 Harv. C.R.-C.L. L. Rev. 383 (1996).

[67] See PETER SCHWARTZ & BLAIR GIBB, WHEN GOOD COMPANIES DO BAD THINGS: RESPONSIBILITY AND RISK IN AN AGE OF GLOBALIZATION (1999).

[68] Specific allegations against Chevron include summary execution, crimes against humanity, torture, cruel, inhuman, or degrading treatment, violation of the rights to life, liberty and security of person and peaceful assembly and association, battery, intentional infliction of emotional distress, among others. See Second Amended Complaint, *supra* note 57.

[69] See, e.g., Joshua P. Eaton, **Note**, *The Nigerian Tragedy, Environmental Regulation of Transnational Corporations and the Human Right to a Healthy Environment*, B.U. Int'l L. J. 261 (1997).

area.[70] They tied 16 boats together to block access to Chevron's installations. Chevron invited the Nigerian police to handle the skirmish. The Police sent in a self-propelled barge that rammed the blockade and sank all 16 boats. Three people died (by drowning) and many more were injured.[71]

No sanctions were imposed on the company as a result of this incident. Not surprisingly therefore, when a few years later, further violations of rights occurred, consequent on the company's operations, the members of the affected communities decided to take action. The people of Ilaje who resided near Chevron's offshore operations in Ondo State had occupied the Parabe oil platform in protesting against some of the company's activities. The community members were asking the company to be more socially responsible, employ the indigenes of the area, and provide portable drinking water as their sources of drinking water had been polluted by the company's oil production.[72]

Chevron allegedly responded by bringing, early morning on May 28 1998, choppers carrying military, naval, and mobile police personnel who, even before landing, started shooting indiscriminately at the protestors who were still at the platform.[73]A lot of people were injured while two of the protestors were killed as a result of this armed attack. This incident formed the basis of the lawsuit currently pending in the U.S. District Court in San Francisco.[74]

There was another event in this catalog of human rights violations and abuses that needs to be mentioned. According to data contained in the lawsuit against

[70] Scott Pegg, *The Cost of Doing Business: Transnational Corporations and Violence in Nigeria*, 30 SECURITY DIALOGUE 473, 477 (1999).
[71] Id.
[72] Id., at 478.

Chevron, protesting villagers at Opia and Ikeyan in Delta State were on January 4, 1999 attacked by Nigerian military/or police personnel. The attack was launched following Chevron's provision of helicopters and sea trucks (large boats) with pilots and other crewmembers to transport Chevron's security and other personnel, along with the Nigerian military officials. Four people were confirmed dead as a result of this incident while more than 60 persons were missing and presumed dead.[75]

As has always been the case, corporations usually have one form of defense or another to present in the face of grave allegations.[76] Thus, while the company admitted that it requested for and transported military troops, along with the company's Head of security to the platform, and conceded that the Parabe platform deaths were "regrettable,"[77] an official of the company with whom the present researcher spoke in Nigeria disclaimed any liability. He argued that the protestors were hostage takers and as such the company had to act to counter their illegal activity.[78] The company also states that it "insists on exercising reasonable control over those deployed to assist, ensuring that no more than minimum force required to bring a situation under control is applied."[79]

[73] Id.
[74] *Supra* notes 56 and 57.
[75] Id.
[76] E.g. Unocal said that what happened in Burma was not their fault and that they had no option in choosing where to operate since their operations depend on where oil exists. According to the company, it follows geography and geology, not geopolitics.
[77] Pegg, *supra* note 70, at 478.
[78] The interview was granted on the grounds of anonymity and strict confidentiality since Chevron's recent policy in Nigeria is not to grant interviews except the interviewer applies to the office of the president. The author was made to understand that this was sequel to an interview granted by a Chevron official in the Delta area to people he thought were casual visitors (as they had introduced themselves). They turned out to be journalists and the interview was published in the New York Times. See Norimitsu Onishi, *Deep in the Republic of Chevron*, N.Y. Times, July 4, 1999, Section 6; Page 26; Column 1; Magazine Desk.
[79] Brownen Manby, The Price of Oil: Corporate Responsibility and Human Rights Violations in Nigeria's Oil Producing Communities, Human Rights Watch Report on Nigeria 119 (1999).

The kind of allegations leveled against Chevron is a replication and reflection of adverse corporate practices in different sectors ranging from oil[80]and apparel[81] to agriculture.[82] The common thread that runs through all of them, when it comes to the law, is that often times nothing is done to the companies. In other words, they literally walk scot-free, without any form of legal accountability. A number of reasons account for this ugly scenario.

Most of these corporations get away with activities which were it to be in their home countries, they would not think of getting involved in. They are quite aware that where their host country is in the developing world, it is unlikely to demand any level of accountability from them, regardless of the existence of a regulatory structure for

[80] See Lucien J. Dhooge, *A Close Shave in Burma: Unocal Corporation and Private Enterprise Liability for International Human Rights Violations*, 24 N.C.J. Int'l Law & Com. Reg. 1 (1998) (detailing and discussing the catalog of human rights abuses associated with the California oil corporation, Unocal, in its operations regarding a gas pipeline construction in Burma).

[81] One of the corporations that have come under searchlight here is Nike. A lawsuit was filed against the company in San Francisco in 1998. See Kasky v. Nike Inc, (Complaint for Statutory, Equitable, and Injunctive Relief); No. 99-4446 (Cal. Super. Ct., San Francisco, filed Apr. 20, 1998). The California Supreme Court held that Nike could be held liable for untrue statements. *Nike v. Kasky,* 119 Cal. Rptr. 2d 296 Cal., 2002. See also, Toftoy, *supra* note 66, at 905:

> 'International labor abuse by multinational corporations (MNCs) manufacturing in economically developing regions such as Southeast Asia, China, South Korea, the Caribbean, and Latin America, is a significant problem facing the international community. The apparel and garment industry has recently undergone severe criticism, as companies like Nike Inc. (Nike) encounter allegations and reports of sweatshop labor practices, unfair and unlivable wages, unreasonable hours, unsafe working conditions, and physical and mental abuse by supervisors. For example, in Ho Chi Min City, Vietnam, Nike factory workers are paid the United States equivalent of $1.50 a day, which is not enough to cover the cost of such basic needs as food, shelter, and transportation . . . "Nike pays Vietnamese workers $1.60 a day, the minimum wage in Vietnam, but three basic meals there cost $2.10." ' Citations omitted.

[82]See Robert J. Liubicic, *Corporate Codes of Conduct and Product Labeling Schemes: The Limits and Possibilities of Promoting International Labor Rights Through Private Initiatives*, 30 Law & Pol'y Int'l Bus. 111 (1998). "In 1994, a coalition of consumer and human rights groups began to pressure Seattle-based coffee retailer Starbucks to adopt standards requiring improved wages and conditions for workers on the Guatemalan plantations from which it sources beans." Id., 115.

such operations. For instance, in Nigeria,[83] there are provisions in environmental laws, but they are rarely enforced. Human rights also take a back seat among dictatorial governments,[84] even where, as in Nigeria, there are constitutional provisions respecting human rights.[85] International law, as earlier stated, does not play a very active role in the battle to rein in these corporations.

It is not surprising, therefore, that aggrieved persons have taken it upon themselves to seek their own destiny. One of the places to which their search for justice has led them is the United States through the use of a hitherto obscure enactment – the Alien Tort Claims Act, discussed below.

2. The Alien Tort Claims Act

The history of the Alien Tort Claims Act 1789[86] is shrouded in mystery.[87] This work does not dabble into the controversy surrounding its origins and the original intent of the lawmaker, as such are considered unnecessary for the purposes of this study.[88]

[83]See Emeka Duruigbo, Oil Development in Nigeria: A Critical Investigation of Chevron Corporation's Performance in the Niger River Delta (Natural Heritage Institute, 2001), available at http://www.n-h-i.org/Publications/Publications.html. Last visited November 5, 2002. See also Chris N. Okeke, Africa and the Environment, 3 Ann. Surv. Int'l & Comp. L. 37, 46 n.24 (1996) (stating that "successive Nigerian governments (military and civilian alike) since Nigeria's political independence in 1960, have utterly failed, even in the face of an existing environmental legal framework, to adequately deal with the nation's environmental problems."); Liubicic, *supra* note 82, at 122. "Government enforcement of labor laws in developing nations is often lax."

[84] Examples are the dictatorships in Burma and Nigeria. Nigeria has since reverted to a democratic government in May 1999.

[85] Chapter 4 of the Constitution of the Federal Republic of Nigeria 1979; Similar provisions in Chapter 4 of the 1989 Constitution (now replaced by the 1999 Constitution).

[86] Created as part of the Judiciary Act of 1789; ch. 20, 9, 1 Stat. 73, 77 (current version at 28 U. S. C. 1350 (1994)).

[87] "The ATCA has no explicit history." Brad J. Kieserman, **Comment**, *Profits and Principles: Promoting Multinational Corporate Responsibility By Amending the Alien Tort Claims Act*, 48 Cath. U.L. Rev. 881, 887 n23 (1999). See also Donald J. Kochan, *Constitutional Structure as a Limitation on the Scope of the "law of Nations" in the Alien Tort Claims Act*, 31 Cornell Int'l L.J. 153, 161, n47 (1998).

[88] For a debate on what the Act is meant to accomplish, see Joseph Modeste Sweeney, *A Tort Only in Violation of the Law of Nations*, 18 Hastings Int'l & Comp. L. Rev. 445, 446-47 (1995) (contending

Suffice it to say that the enactment has seen better days, although it had hardly been utilized, moreso in corporate litigation, until recently[89].

The ATCA provides that "the district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[90] Under it, "a foreigner who suffers an environmental or human rights injury outside the United States at the hands of an American corporation or a multinational corporation with business operations in the United States . . . may sue the corporation and its foreign business partners in U.S. courts."[91]

Using the Act, a number of cases has been brought in the United States courts dealing with a broad range of issues.[92] While in the past, it was mainly used against individuals who had perpetrated human rights abuses while in government,[93] there is a perceptible shift toward using it against multinational corporations operating business joint ventures with repressive regimes.[94] This reached a milestone in the *Unocal Case,*[95] in which, for the first time, a federal district court (in California) held that the ATCA provided subject matter jurisdiction in a human rights case involving a multinational corporation which had not been alleged to have participated directly in the perpetration of the wrongs.[96]

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that the intention of Congress was that the ATCA would provide jurisdiction only over prize cases); Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 Am. J. Int'l L. 461, 493 (1989) (favoring a more liberal interpretation to accommodate the United States' expanding international legal and moral obligations).

[89] Kieserman, *supra* note 87.

[90] 28 U.S.C. 1350.

[91] Rosencranz & Campbell, *supra* note 64, at 146.

[92] See note 61, *supra*.

[93] See e.g., Filartiga v. Pena-Irala 630 F. 2d 876 (2d Cir. 1980).

[94] E.g., Wiwa v. Royal Dutch Shell, *supra* note 61.

[95] John Doe I, et al., v. Unocal Corp., et al., 963 F. Supp. 880; 1997 U.S. Dist. LEXIS 5094.

[96] Kieserman, *supra* note 87 at 919.

In that case, plaintiffs farmers from the Tenasserim region of Burma brought a class action against Unocal and other defendants seeking injunctive, declaratory, and compensatory relief for alleged international human rights violations perpetrated by the Burmese junta in furtherance of a joint venture with Unocal. The joint venture was for the building of offshore drilling stations to extract natural gas from the Andaman Sea and a port and pipeline to transport the gas through the Tenasserim region of Burma and into Thailand. The plaintiffs alleged that the defendants, through the Burmese military, intelligence or police forces, had used and continued to use violence and intimidation to relocate whole villages, enslave farmers living in the area of the proposed pipeline, and steal farmers' property for the benefit of the pipeline. The plaintiffs further alleged that the defendants' conduct had caused plaintiffs to suffer death of family members, assault, rape and other torture, forced labor, and the loss of their homes and property, in violation of state law and customary international law. The court held that the allegations were sufficient to support subject-matter jurisdiction under the ATCA.[97]

The Unocal case was eventually dismissed,[98] but the decision to grant jurisdiction is a very significant one. In that case, the court took the position that international norms that have been recognized by the United States provide the standards of conduct for assessing the activities of American corporations doing business overseas.[99] Acts by corporations or their business partners that contravene *jus cogens* norms are clear grounds for liability, while the possibility also exists that

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[97] Doe v. Unocal, *supra* note 101. The case was eventually dismissed in 2000.

[98] *Id.*

even international norms that have not attained *jus cogens* status may be relied on to determine the acceptability of corporate conduct.[100] It is incumbent on United States corporations, therefore, to conduct themselves in a way that is in concord with American-recognized international norms, and it is immaterial for purposes of liability, whether they act jointly with governments or perpetrate the wrongful acts alone.[101]

More recently, a state court in California in which the Unocal case was refiled decided that Unocal should stand trial.[102] This is yet another landmark as it is the first case of its kind (under the ATCA) to go to trial.[103] Further, in September 2002, the United States Ninth Circuit Court of Appeals reversed the earlier decision of the district court in the Unocal Case, indicating that Unocal could also face trial in federal court for the alleged abuses in Burma.

The foregoing suggests that the utility of the ATCA should not be underestimated. It holds potential for addressing harmful business practices by filling a lacuna that has been there for ages. Nevertheless, the statute is saddled with limitations. A handful of those dark spots will be discussed as part of a general discussion on the limitations of transnational litigation..

[99] Dhooge, *supra* note 80, at 49 – 51. These international norms are contained in treaties, customs, juridical writings on public law, and decisions of courts that recognize and enforce international law. *Id.*
[100] *Id.*
[101] *Id.*
[102] John Roe III v. Unocal Corp., No BC237679 (Cal. Super. Ct., L.A., filed August 20, 2001).
[103] "For the first time, an American judge has ordered a U.S. corporation to stand trial for alleged human rights violations committed by a joint-venture partner overseas." Peter Waldman, *Unocal to face Trial Over Link to Forced Labor*, WALL STREET JOURNAL, June 12, 2002, at B1, B3.

The next section takes a more in-depth look at international civil litigation, examining what propels people to resort to this alternative, what it portends for the global community and how far it can go as a tool for corporate accountability.

A. ATTRACTION, IMPLICATIONS AND LIMITATIONS OF INTERNATIONAL CIVIL LITIGATION

1. Attraction

The attraction of international civil litigation lies in its perceived ability to fill a vacuum existing both in public international law and in the national legal systems of most countries. While international law has had an age-old problem of enforcement, the capacity to hold corporations accountable for human rights violations and environmental abuses is simply non-existent in many parts of the globe. International civil litigation seeks to confront and address these problems under one rubric: enforcing international rules by using international and municipal laws to hold corporations accountable for wrongs that otherwise would have gone unremedied.[104]

Certainly, the increasing trend toward litigation in developed countries over activities that took place in developing countries suggest that there must be some cognizable basis for its attractiveness to the litigants. Obviously, there are some perceived benefits, which serve as a magnet that attracts them. Conversely, there must

[104] See Sarah H. Cleveland, **Book Review**, *Global Labor Rights and the Alien Tort Claims Act*, 76 Tex. L. Rev. 1533, 1563 (1998) (stating that the ATCA "stands as a unique transnational public law vehicle for the articulation and vindication of fundamental international rights." Citation omitted.) See also Richard Meeran & David McIntosh, *When is There a Duty of Care*, THE TIMES, Jan. 11, 2000

be some deficiencies in the systems that the plaintiffs abandoned in order to seek remedies from foreign courts. Transnational litigation therefore provides, or has the potential to provide, a number of benefits, which make it attractive to those who resort to it.

Some of the benefits may be intangible in some cases, and in other cases, material or physical rewards are within the range of expectations, if not the primary motivating factor. Public interest law firms, civil society groups and public-spirited individuals may be supportive of international litigation for reasons that bear direct relation to principle. Protecting, promoting, projecting or advancing such principles as equality before the law,[105] the existence of remedies where rights have been breached (*ubi ius ibi remedium*),[106] and protection of the weak among us from the tyranny or oppression of the strong and mighty could be a driving force. Seeing these principles vindicated by demanding corporate accountability is therefore a solid philosophical motivation to be on the side of transnational civil litigation.[107]

For victims of corporate abuse, there will always be an even closer, personal reason for seeking redress. Ordinarily, the forums in which that should be done are the courts of the victim's country, where the abuses in question took place.

(noting that the absence of home country litigation leads to MNCs escaping responsibility and victims going without redress.)

[105] The notion of equality before the law is a component of the doctrine of rule of law. A. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 198 (7th ed. 1907). (This particular text is the last that Dicey himself revised.)

[106] For discussions of this maxim, see Richard A. Epstein, *Standing and Spending - The Role of Legal and Equitable Principles*, 4 Chap. L. Rev. 1, 13 (2001); Reinhard Zimmermann, *Relationships Among Roman Law, Common Law, And Modern Civil Law: Roman-Dutch Jurisprudence And Its Contribution To European Private Law*, 66 Tul. L. Rev. 1685, 1696 (1992).

[107] This is a strong motivation for many social justice activities. See James E. Post, *Global Codes of Conduct: Activists, Lawyers, and Managers in Search of a Solution*, *in* GLOBAL CODES OF CONDUCT: AN IDEA WHOSE TIME HAS COME 103 (Oliver F. Williams, ed., 2000) : "We have sought to make a difference in our organizations, our communities, and our professions. Our

Unfortunately, such a forum is often a luxury, unavailable to many a victim. Some solicitors involved in some of the transnational claims in England put it succinctly:

> The plain truth of the matter is that claimants want to sue in England because they cannot get justice overseas and MNCs want to stay the claims for precisely the same reason.[108]

Legal and institutional structures are lacking, weak or antiquated in some of the countries in the developing world. In some cases, the (natural) resource at the center of the controversy is the economic mainstay of the country, thus provoking reluctance on the part of the organs of the government to disrupt the operations of the industry.[109]

Related to the above is that corporations and governments have learnt to forge a siamese, symbiotic relationship that makes them eager to protect each other's interests against any "third party." Some victims thus face an awkward situation in which their own governments are unwilling to help them get justice. In worse cases, the government is a co-perpetrator of the injustice and therefore has every incentive to work against the emergence of a functional justice system or its smooth operation.[110]

Moreover, even when the forums are available and remedies provided, they amount to little, especially when compared with what is potentially available in the

commitments may have stemmed from frustrations, recognition of an injustice, or issues so fundamental to our beliefs and values as human beings that we felt compelled to act." *Id.*

[108] Meeran & McIntosh, *supra* note 104.

[109] Scott Dolezal, *The Systematic Failure to Interpret Article IV of the International Covenant on Civil and Political Rights: Is There a public Emergency in Nigeria?* 15 Am. U. Int'l L. Rev. 1163, 1191 – 1193 (2000).

[110] See *id.*

judicial havens where the action is brought.[111] That kind of compensation is a disincentive to plaintiffs and is unlikely to deter corporations from continuing with the stated abuse. One writer summarizes the raison d'etre as follows:

> Governance deficits in host countries, substantive differences between legal systems, the possibility of higher damages awards being awarded in home rather than host countries, and innovative strategies on the part of plaintiffs' lawyers all play a role in the emergence of foreign direct liability cases.[112]

The implication is that this trend will continue unless there is a sharp reversal in the benefits offered or the burdens imposed. We will briefly look at the principal petroleum and environmental enactments in a developing country (Nigeria) and what it provides for victims of corporate excesses. This will be contrasted with some features of the American legal system that are germane to this discussion.

a) Nigerian Law

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 socio-economic calculations has steadily risen to the point of dominance.[113] Nigeria, however, has not completely closed its eyes to

[111] Bhopal plaintiffs were attracted to the U.S. partly because of the availability of higher damages. For an extensive discussion of the Bhopal cases and issues relating thereto, see Sudhir K. Chopra, Multinational Corporations in the Aftermath of Bhopal: The Need for a New Comprehensive Global Regime for Transnational Corporate Activity, 29 Val. U. L. Rev. 235 (1994).

[112] Ward, *supra* note 41, at 462.

[113] See Briony Hale, *Nigeria's Economy Dominated by Oil*, BBC News, January 16, 2002, available at http://www.globalpolicy.org/security/natres/oil/nigeria/2002/0116strike.htm;
Antony Goldman, et al., *SURVEY - NIGERIA: Hold on economy is ever-stronger*: *Oil*, FINANCIAL TIMES; Apr 9, 2002. "The oil industry has dominated the country's economy since the start of large-scale exploitation in the 1960s and 1970s of its substantial reserves of high-quality crude. Oil exports in 2000 reached Dollars 19.1bn, or more than 90 per cent of the value of total exports, according to International Energy Authority data." *Id.*

the negative impact of the pervasive use, production, and marketing of oil and its derivatives, the most prominent of which is environmental degradation.[114] Thus, a number of laws have been enacted to deal with the issue.[115] This work examines some of this legislation. At the end, appropriate conclusions will be drawn suggesting that Nigeria at the moment has an array of petroleum and environmental legislation that can at best be described as obsolete and inadequate.

i) *Petroleum Law*

The principal enactment under this head is the *Petroleum Act* of 1969.[116] The Act provided for delegated legislation[117] 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.[118] The most prominent provision of the regulations bearing on environmental protection is

[114] The environmental pollution that has accompanied oil production in Nigeria has been on a large scale. Thousands of oil spills involving millions of gallons of oil have been recorded by the Nigerian government. The incidence of gas flaring and its deleterious effect on the environment is also worthy of mention. On the foregoing, see Eno Okoko, *Women and Environmental Change in the Niger Delta, Nigeria: Evidence from Ibeno*, 6:4 GENDER PLACE AND CULTURE: A Journal of Feminist Geography 373 (1999).

[115] However, Nigeria still lacks a National Energy Policy. Also, no pollution control policy in relation to air and marine pollution, has been put in place. This lacuna in the policy framework is a real impediment to accomplishing the goals of a clean environment or sustainable development. A senior official of the Department of petroleum Resources, Dr. C.N. Ifeadi (now retired) with whom the author spoke in Nigeria in September 2000 said that a National Energy Policy had been prepared and was awaiting enactment or implementation. See also U.S. Energy Information Administration, *Nigeria: Environmental Issues*, April 2000, *available at* http://www.eia.doe.gov/cabs/nigenvhtm. Last visited June 27, 2002.

[116] 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 pollution matters) 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.

[117] *Id.*,S. 8.

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.[119]

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 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.[120]

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.[121] 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.[122]

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[118] L.N. 69 of 1969.
[119] *Id.*
[120] OLUWOLE AKANLE, POLLUTION CONTROL REGULATION IN THE NIGERIAN OIL INDUSTRY 11 (1991).

[121] Petroleum Drilling Regulations, supra note, Regulation 23.
[122] Id., Regulation 40

It is also necessary to make mention of the *Oil Pipelines Act* enacted in 1956.[123] The Act provides that the Governor General (now the President) 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."[124]

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.[125]

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,[126] which emphasizes that "environment and development are not only interrelated but

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

[124] Id., S 31 (c).
[125] See Akanle, *supra* note 120, at 11.

[126] The Brundtland Report defines sustainable development simply as "development that meets the needs for the present without compromising the ability of future generations to meet their own needs." See WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, OUR COMMON FUTURE 43 (1987).

inseparable."[127] 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.

ii). *Maritime Law*

Nigeria's most significant legislation on oil pollution of the marine environment by ships is the *Oil in Navigable Waters Act*[128] which is the implementing legislation of the *International Convention for the Prevention of Pollution of the Sea by Oil* 1954[129] and its 1962 amendment.[130]

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."[131] 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.[132] This accords with the notion of flag State jurisdiction by which discharge violations in areas outside another State's territorial or internal waters are punishable by the State of the ship's registry and under its law.[133]

[127] Karin Mickelson, *Carrots, Sticks or Stepping stones: Differing Perspectives on Compliance with International Law*, in TRILATERAL PERSPECTIVES ON INTERNATIONAL LEGAL ISSUES: FROM THEORY INTO PRACTICE 35, 42 (Thomas J. Schoenbaum,et al, eds., 1998).

[128] *Oil in Navigable Waters Act* 1968 (Nigeria), 1990 c.337
[129] 327 U.N.T.S. 3 [hereinafter OILPOL].
[130] Oil in Navigable Waters Act, *supra* note 128, Preamble
[131] Id., S.1.
[132] Id., Parts 1 and 2 of the Schedule to the Act.

[133] See G. ETIKERENTSE, NIGERIAN PETROLEUM LAW 72 (1985).

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.[134] 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.[135]

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.[136] 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.[137] 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.[138] The responsible harbor authority, that is, the Nigeria Ports Authority, is also required to provide oil reception facilities for the disposal of oil residues.[139]

[134] *Oil in Navigable Waters Act,* supra note 121, s. 3 (1).

[135] Id., S 3 (2).
[136] Id.,S. 5.

[137] Id., S. 6. That is, approximately twenty dollars.
[138] Id., S. 7 (1).
[139] Id., S 8.

The Act provides a number of defenses to the offences created by it and this has been criticized for substantially whittling down the efficacy of the provisions:[140] "Surely, by the time all these defences are pleaded, it is hardly feasible to convict anybody under the provisions of the enactment."[141]

Some of these criticisms however, either are misplaced or are of questionable import. For instance a number of commentators criticize the defense available to a person who discharges oil in order to save lives, viewing it as alarming.[142] 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."[143] 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

[140] See David Iyalomhe, Environmental Regulation of the Oil and Gas Industry in Nigeria: Lessons from Alberta's Experience 60 (Unpublished LL.M. Thesis, 1998) (On file with the University of Alberta Library).

[141] Akanle, supra note 120, at 9.

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

[143] Ekpu, *supra* note 142, at 83.

based.[144] 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.

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.[145] The 1954 convention and its 1962 amendment have undergone further amendments in 1969 and 1971[146] 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.*[147] This latter convention has in turn undergone changes including the 1978 Protocol relating thereto[148] and the 1992 amendments introducing the double hull arrangement for oil tankers.[149] That Nigeria should be relying on the 1954 convention

[144] See OILPOL, *supra* note 129, art. IV.

[145] See R. M'GONIGLE & M. ZACHER, POLLUTION, POLITICS, AND INTERNATIONAL LAW: TANKERS AT SEA 219 (1979); R.B. Bilder, *The Canadian Arctic Waters Pollution Act: New Stresses on the Law of the Sea*, 69 Mich. L. Rev. 1, 34 (1970).

[146] See D.P. O'CONNELL, THE INTERNATIONAL LAW OF THE SEA 1002, Vol. II (I.A. Shearer ed., 1984).

[147] 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. See also Robin R. Churchill & Geir Ulfstein, *Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law*, 94 Am. J. Int'l L. 623, at 631 (2000); James Carlson, *Presidential Proclamation 7219: Extending the United States Contiguous Zone – Didn't Someone Say This Had Something to do with Pollution?* 55 U. Miami L. Rev. 487, 504 (2001).

[148] 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].

[149] *MARPOL 73/78 Amended for New and Existing Tankers*, [1992] 2 IMO NEWS 3.

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 domestic legislation.[150]

iii). *Environmental Law*

Under this heading, the *Federal Environmental Protection Agency Act* 1988 will be discussed.[151] 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."[152] 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.[153] 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 was

[150] 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.

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

[152] Ameze Guobadia, *The Nigerian Federal Environment Protection Agency Decree No. 58 of 1988: An Appraisal*, 5 J. Afr. & Comp. L. (RADIC) 408, 409 (1993).

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

moved to the Presidency.[154] The present civilian government of Nigeria has created a full-fledged Ministry of Environment under which FEPA now operates.[155]

FEPA is assigned with the "responsibility for the protection and development of the environment in general and environmental technology, including initiation of policy in relation to environmental research and technology."[156] FEPA's general mandate and the scope of the enactment extend to the territorial waters of Nigeria and the Exclusive Economic Zone.[157] 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

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

[155] See Muhammad Kabir Sa'id, Honourable Minister of Environment, Protecting Our Environment and Natural Resources for Sustainable Development, Ministerial Media Summit, May 23, 2002, available at http://www.nigeria.gov.ng/ministryinformation/ mediasummit/Environment.htm. Last visited November 5, 2002. (stating that "the Federal Ministry of Environment was created in 1999 with the fundamental objectives of securing a quality environment adequate for good health and well-being, conserving and using the environment's natural resources for the benefit of present and future generations.")

[156] FEPA Act, *supra* note 151, S. 4

[157] *Id.*, S. 38.

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.[158] Such standards are for the purposes of protecting the public health and enhancing the quality of water.[159]

The discharge of hazardous substances into the air, land, waters and shorelines is prohibited except for cases permitted by law.[160] 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 refining process such as slop oil, emulsion solids and leaded tank bottoms.[161] Any breach of the above provision is punishable and attracts a fine or a term of imprisonment or both.[162] 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.[163]

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[164] or the responsibility for cleaning up the affected areas and

[158] Id., S. 5(1) & S. 15 (1).

[159] Id., S. 15 (1).

[160] Id., S. 20 (1).
[161] FEPA, Guidelines and Standards for Environmental Pollution Control in Nigeria (1991).
[162] FEPA Act, *supra* note 151, S. 20 (2).
[163] Id., S. 20 (4).
[164] Id., S. 21.

removing the substances.[165] There is also a duty on the "spiller" to promptly inform the Agency and other relevant bodies in the event of a discharge.[166]

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.*[167] 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.*[168] Under these regulations, the release of hazardous or toxic substances into the air, water or land of Nigeria's ecosystems beyond the approved 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.[169]

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

[165] Id., S. 21 (2) (b).
[166] Id., S. 21 (2) (a).
[167] S.I. 8 of 1991.

[168] S.I. 9 of 1991
[169] *Id.*, regulation 15 (2).

from the onset by providing for an arrangement for the enforcement of its provisions.[170]

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.[171]

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.[172] A similar language was used in the United States *Clean Water Act*[173] and this was interpreted to impose a requirement to show that a discharge caused actual harm before liability could attach to that discharge.[174] The section underwent amendment thereafter and the new provision prohibits discharge of oil or hazardous substances in such quantities "as may be harmful" as determined by regulations made under the legislation.[175]

[170] Guobadia, *supra* note 152, at 416. See Akanle, *supra* note 120, at 15 on this pitfall of previous legislation.

[171] Guobadia, *supra* note 152, at 414.
[172] Ekpu, *supra* note 142, at 85.
[173] *Federal Water Pollution Control Act*, 33 U.S.C. 1251 - 1387 (1988). The Act was originally enacted in 1948.

[174] *United States* v. *Chevron Oil Company,* 583 F.2d 1357 (5th Cir. 1978). See also Ekpu, *supra* note 142.
[175] 33 U.S.C. 1321 (b) (3).

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.[176] The added advantage is that it removes the administrative burden of case-by-case proceedings.[177] 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.[178]

Further, 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.[179]

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."[180] At the time of writing, the Nigerian government announced the introduction of some new guidelines

[176] *Chevron U.S.A., Inc.* v. *Yost,* 919 F.2d 27 (5th Cir. 1990). See also Ekpu, *supra* note 142.

[177] Id., See also *Orgulf Transport Co.* v *United States,* 711 F. Supp. 344 (W.D. Ky. 1989). See also Ekpu, *supra* note 142.

[178] Ekpu, *supra* note 142, at 85. These constraints include budget facilities, personnel competencies, and the role of the government in the oil industry. *Id.*, at 98 - 99.

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

on the environment.[181] It is only expected that they would be a considerable improvement on previous efforts, both in content and implementation.[182]

Ordinarily, some of the alleged human rights abuses would have been avoided if the people had a strong reason to believe that they could proceed judicially against companies engaging in environmental pollution and corporate irresponsibility. In place of some of the protests and demonstrations that eventually turned ugly and deadly, resort to litigation would have been a viable option.[183] However, it is clear from the above foray into Nigerian legislative landscape that the laws that are supposed to cater for the Nigerian people are weak, inadequate and obsolete.

The greater outrage is that they are hardly enforced by the government officials charged with that responsibility.[184] With the exception of a limited provision

[180] Guobadia, *supra* note 152, at 415.

[181] *NIGERIA: New Environmental Guidelines for Oil Industry*, UNITED NATIONS, Office for the Coordination of Humanitarian Affairs (OCHA) Integrated Regional Information Network (IRIN), August 1, 2002. The Special Adviser to the Nigerian president on Petroleum Matters, Dr. Rilwan Lukman, stated that the Guidelines are the outcome of a review of old rules with a view to bringing them in line with global trends while at the same time setting high performance standards for the country's oil industry. According to the report:

> [Dr.]Lukman acknowledged that the environmental practices of oil transnationals in Nigeria had been found to be below internationally acceptable standards. He said the government had information that oil companies had stockpiled about 35,000 metric tonnes of drilling waste in various parts of the Niger Delta, and had planned to dump them in remote locations.

Id.

[182] "Senior officials said the 300-page guidelines provided rules to reduce pollution, procedures for environmental monitoring and analytical parameters. The government, through its Department of Petroleum Resources, will also conduct regular health, safety and environment audits on the oil companies." *Id.*

[183] For a discussion of the protests and attendant human rights abuses in oil producing communities in Nigeria, see Brownen Manby, *The Role and Responsibility of Oil Multinationals in Nigeria*, 53:1 J. Int'l. Aff. 281 (1999).

[184] See Emeka Duruigbo, Oil Development in Nigeria: A Critical Investigation of Chevron Corporation's Performance in the Niger River Delta (Natural Heritage Institute, 2001), available at http://www.n-h-i.org/Publications/Publications.html. Last visited November 5, 2002.

in the *Oil Pipelines Act*,[185] the right to citizen suits does not exist.[186] Victims of environmental abuse and oil company excesses are left with little option.

In the few cases that aggrieved citizens decided to go to court, the results have not been encouraging.[187] The oil companies fight with superior resources to deprive the victims of justice. The attitude of the courts seems to be pro-corporate or at least in favor of continued oil production at the expense of virtually every other thing. In a particular case, the court stated that nothing should be done to disrupt a trade, which was the country's main source of revenue.[188] The judiciary is not immune from the corruption evident in different aspects of the society, especially in government circles.[189] While there may not be any strong evidence to that effect, the perception that oil companies buy justice or buy themselves out of punishment is strong.

Military rule also worsened matters for both the court system and the citizens.[190] The dictators who seized the reins of office used different measures to emasculate the judiciary. These include suspending the supremacy clause of the

[185] Laws of the Federation of Nigeria, Cap. 338 (1990).

[186] See Ekpu, *supra* note 142.

[187] *Id.*

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

[189] A Committee headed by a retired Supreme Court Justice, Kayode Eso, found many judges wanting and came down heavily against them for corruption. The committee's report or recommendations still have not been made public, but the Nigerian Government recommended the removal from office of a senior judge recently on the basis of that report. See Eddy Odivwri and Lilian Okenwa, *Six Judges May Be Sacked, As FG implements Kayode Esho panel report*, THISDAY, September 26, 2002.

[190] On the effect of military rule on human rights in Nigeria, see U.S. State Department Country Reports on Human Rights Practices in the past few years. Interestingly, even with a civilian government that is generally believed to more amenable to human rights protection than military regimes, the Country Report released in March 2002, still states that the "[t]he Government's human rights record was poor," and that notwithstanding some improvements, "serious problems remain."

constitution and subjecting constitutional provisions to military decrees, intimidating judges, and forcing the judiciary to conform by denying them financial independence.[191] The weakening of the court system stunted judicial development.[192] All of this has had a demoralizing effect on those who would be expected to bring lawsuits against the corporations. Citizens have grown increasingly weary of the courts and see them as institutions that have little meaning and of minimal help in their plight[193] Transnational litigation and resort to international judicial or quasi-judicial forums became, and remain, highly attractive options.

Recently, the social, economic and environmental problems that have attended oil production in Nigeria were again brought to the forefront when the African Commission on Human and Peoples' Rights reviewed a complaint against the government of Nigeria. The complaint principally alleged that oil production under the joint venture between the State-owned oil corporation (NNPC) and Shell Petroleum has had huge social, economic, health and environmental impacts on the people of Ogoniland, in the Niger Delta.[194] In a decision communicated on May 2002, the Commission held the Nigerian government in violation of several articles of the

U.S. Department of State, Country Reports on Human Rights Practices – 2001, Released by the Bureau of Democracy, Human Rights, and Labor, March 4, 2002.

[191] On the state of the judiciary in Nigeria under military rule, see Okechukwu Oko, *Consolidating Democracy on a Troubled Continent: A Challenge for Lawyers in Africa*, 33 Vand. J. Transnat'l L. 573, 601-609 (2000).

[192] See Ambrose O. O. Ekpu, *Judicial Response to Coup D'etat: A Reply to Tayyab Mahmud (From a Nigerian Perspective)*, 13 Ariz. J. Int'l & Comp. L. 1 (1996) (discussing the dilemma that the judicial branch confronts in the event of a military incursion into politics.)

[193] People in the oil producing communities that the researcher spoke to in Nigeria in 1999 did not have much confidence in litigation as a tool for social, economic and environmental justice. See Duruigbo (Natural Heritage Institute), *supra note*184.

[194] For a discussion on what needs to be done through international law to address issues pertaining to the Ogonis and other indegenous groups, see Sompong Sucharitkul, *The Inter-temporal Character of International and Comparative Law Regarding the Rights of the Indigenous Populations of the World*, 50 Am. J. Comp. L. 3 (2002).

African Charter on Human and Peoples' Rights[195]. The Commission appealed to the Nigerian government to ensure the protection of the environment, health and livelihood of the Ogoni people, ensure adequate compensation to the victims of human rights violations, provide information to oil communities and grant them access to participate in the making and implementation of decisions that affect them.[196]

b) American Legal System

Most of the transnational cases, especially those that border on human rights and international law violations, will likely be filed in the United States.[197] This is because while the domestic courts of some other developed countries are available, the U.S. legal system arguably holds the greatest attraction.[198] Accounting for this state of attraction are some peculiar features of American law. Because many of these factors in the context of international litigation are primarily based on procedural advantages, this work will not be discussing the details of American petroleum or

[195] African Commission on Human & Peoples' Rights, *Re Communication 155/96*, May 27, 2002. Decision reached at the 30th Ordinary Session held in Banjul, The Gambia, from October 13 – 27, 2001.

[196] This is consistent with some scholarly submissions on the plight of the oil producing communities in Nigeria. See Okechukwu Ibeanu, *Oiling the Friction: Environmental Conflict Management in the Niger Delta, Nigeria*, 6: ENVIRONMENAL CHANGE & SECURITY PROJECT REPORT 19, 31 (2000). In addition to the right to participation in the formulation and implementation of environmental and developmental decisions, Dr. Ibeanu also recommends the institution of trust funds to build the economic capacity of oil communities. *Id.*, at 31 – 32.

[197] The point has been canvassed that ATCA-like cases can be brought in Canada. Craig Forcese, *Deterring "Militarized Commerce": The Prospect of Liability for "Privatized" Human Rights Abuses*, 31 Ottawa L. Rev. 171, 211 (2000). This remains to be shown. As a matter of fact, an ATCA case was brought against a Canadian oil company,Talsiman, based on its operations in Sudan. The case was brought not in Canada, but in a U.S. federal court, Southern District of New York. See Jon Dougherty, *Company sued for abetting Sudan genocide Anti-slavery group files $1 billion suit against Canadian firm*, November 9, 2001, available at http://www.worldnetdaily.com/news/ printer-friendly.asp?ARTICLE_ID=25262. Last visited November 5, 2002.

environmental legislation.[199] Instead, focus will be on the procedural aspects of American law that litigants consider beneficial or important for successful litigation.

A plethora of reasons have been advanced by scholars for the continued interest in American courts by foreign claimants. In the first place, "[n]o other country has a statute that creates a specific statutory claim for human rights violations."[200]

Further, the United States have rules of personal jurisdiction that make it possible to proceed against defendants who are temporarily present in the country. Also, foreign corporations whose business contacts with the United States represent only a minor fraction of their worldwide operations could still be sued in the U.S. Besides, no connection needs exist between the events at issue and the United States.[201] It should be noted that other countries have jurisdiction rules that may be as expansive as, or even much more expansive than, U.S. jurisdictional rules. However, the U.S. rules are better streamlined and much more suited for litigation of human rights claims by aliens for events that took place in another country.[202]

Some practical litigation rules also make the U.S. a more attractive forum for foreign litigants. The "loser pays" system of attorney fees is one such example. The requirement in most jurisdictions that the loser in a law suit pays the attorney fees of the prevailing party would have inhibited the numerous human rights cases brought in

[198] See Beth Stephens, *Translating Filártiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations*, 27 Yale J. Int'l. L. 1 (2002). [Hereinafter Stephens (2002)].
[199] For discussions on American law pertaining to oil and the environment, see Judith Kimerling *International Standards in Ecuador's Amazon Oil Fields: The Privatization of Environmental Law*, 26 Colum. J. Envtl. L. 289 (2001); Santiago Cueto, **Note**, *Oil's Not Well In Latin America: Curing The Shortcomings Of The Current International Environmental Law Regime In Dealing With Industrial Oil Pollution In Latin America Through Codes Of Conduct*, 11 Fla. J. Int'l L. 585, 595 – 598 (1997).

[200] Beth Stephens, *Corporate Liability: Enforcing Human Rights Through Domestic Litigation*, 24 Hastings Int'l & Comp. L. Rev. 401, 409 (2001). [Hereinafter Stephens (2001)].
[201] *Id.*

the U.S., considering that the plaintiffs generally are people with minimal resources and the cases are novel.[203] Court filing costs and pre-paid attorney fees could also serve as impediments to environmental and human rights claims. In the United States, law suits are facilitated by "a broad network of public interest law firms, supported by pro bono assistance from private firms,"[204] a feature that is hardly existent in most of the world.[205] Lawyers and litigants enter into attractive contingency fee arrangements that are unavailable in other jurisdictions.[206]

The notice pleading system and liberal discovery rules that make it easier to bring an action with little facts while leaving room to flesh it out later, are also to a plaintiff's advantage. Plaintiffs are thereby enabled to proceed with the sparse factual material they have against defendants who are then placed in the more onerous position of furnishing every relevant piece of information in their possession or control.[207]

Other benefits include the vehicle of the class action, the availability of punitive damages and the use of jurors who tend to be sympathetic to the "little victims" of the "gargantuan corporations" to determine liability and damages.[208]

Finally, the United States has had a long tradition of using "public law litigation"[209] to promote social reform.[210] This legal culture is well suited for the role

[202] *Id.*, at 410 – 411.
[203] *Id.*, at 411.
[204] *Id.*, at 411.
[205] *Id.*
[206] Ugo Mattei and Jeffrey Lena, *U.S. Jurisdiction Over Conflicts Arising Outside of the United States: Some Hegemonic Implications,* 24 Hastings Int'l & Comp. L. Rev. 381, 394 (2001).
[207] Stephens, *supra* note 200, at 412.
[208] Mattei and Lena, *supra* note 206, at 394 – 395.
[209] The expression "public law litigation" was coined almost thirty years ago by Professor Abram Chayes to describe this kind of litigation. See Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).
[210] Stephens, *supra* note 200, at 413.

of demanding corporate reform and accountability through litigation.[211] In fact, the United States is considered a "plaintiff's paradise" because it confers enormous advantages on the plaintiff without risk, while imposing huge costs – financial and otherwise – on the defendant.[212]

2. Implications

The question about whether international civil litigation has enormous implications for multinational corporations, national legal systems and public international law can easily be answered in the affirmative.

The principal implication for corporations with regard to the vibrant use of the ATCA is that it holds them accountable for actions that otherwise would have gone unremedied. Thus, the ATCA "provides one possible solution to the present day inability to hold an MNC accountable for human rights violations."[213] Home country litigation is reversing the previous position in which corporations that had strong connections with, and extensive financial, managerial and technical control over, their delinquent subsidiaries in developing countries were able to escape accountability, where those subsidiaries could not be called to account, due to bankruptcies and other reasons. "Notwithstanding those control mechanisms, there was no significant fear of legal accountability on the part of MNCs until fairly recently."[214]

Even when cases do not succeed, the very prospect of success at the initial stage or the mere fact of litigation could have some adverse effect on the company.

[211] *Id.*
[212] Mattei and Lena, *supra* note 206, at 393.
[213] Ariadne K. Sacharoff, **Note**, *Multinationals in Host Countries: Can They Be Held Liable Under the Alien Tort Claims Act for Human Rights Violations*?, 23 Brook J. Int'l L. 927, 937 (1998).

Resources will be invested to fight the lawsuit. More important, other economic consequences are likely to arise. A company's shares may trade lower at the stock markets[215] as it grapples with the pitfalls of negative publicity. On the positive side, bowing to public opinion that is more likely to be shaped by the lawsuit, a company may choose to mend its ways and become more responsible in the conduct of its international business operations.[216]

For national governments, it suggests to countries from which the suits originate that there is a clear rejection of their extant legal system. At least it will be a loud and clear statement that all is not well with their judicial system. Indeed, a court is unlikely to accept jurisdiction if an adequate alternative forum exists.[217] Transnational litigation that proceeds, therefore, will likely propel them to overhaul their judicial machinery and accordingly ensure justice for their citizens.[218]

[214] Meeran & McIntosh, *supra* note 104.
[215] See Ward, *supra* note 41.

[216] Talisman Energy, a Canadian oil company, recently sold its assets and withdrew its operations from the Sudan. A lawsuit launched against the company 11 months earlier, in federal court in New York, while not the sole cause of the company's decision, may have played a role. See *Talisman to Sell Its Stake in Company in Sudan*, N. Y. TIMES, October 31, 2002, available at http://www.nytimes.com/2002/10/31/business/31TALI.html. Last visited November 5, 2002.

[217] Wiwa v. Shell, *supra* note 61, was dismissed because Shell successfully argued that an adequate alternative forum – England – exists. The appellate court reinstated the case. See *Wiwa v. Royal Dutch Petroleum Co.*, 226 F. 3d 88 (2d Cir. 2000). The United States Supreme Court on March 26, 2002, denied certiorari and thus declined to review the decision of the U.S. Court of Appeals for the 2nd Circuit, thus paving the way for the lawsuit to proceed against Shell. See Andrew Buncombe, *US Supreme Court Clears Way for Relatives to Sue Shell over Saro-Wiwa's Death*, INDEPENDENT (UK) March 27, 2001.
[218] It should be noted that some States may be willing, yet unable, to carry out any meaningful or extensive judicial reforms. There have been cases when some countries supported lawsuits abroad by their citizens, suggesting that they are not necessarily opposed to holding those corporations accountable. Examples are Ecuador's support for the lawsuit against Texaco and South Africa's endorsement of the case against Cape PLC.

In the case of public international law, it helps in addressing a perennial problem of international law – enforcement.[219] It is a known fact that international law is chronically weak on enforcement.[220] Because of this weakness, where there have been breaches of international laws on human rights and the environment, in some places, not much has been done to redress the wrong. Under the ATCA, we now see at least the potential of international law being enforced. The fact that it is sought to be enforced against entities considered as non-subjects of international law – corporations – does not minimize its importance. If corporations are forced to behave, the State governments with whom they have been collaborating will be compelled to rethink their practices, thus giving international law the kind of strength it had lacked, by effectuating its intent.

Another implication for public international law is that it points the direction toward some future reform of the nature, structure, and object of the international system. This type of litigation takes international law from the level of seeking enforcement of its dictates against States to actual enforcement of international rules against multinational corporations. This in itself is a substantial restructuring of the international legal system that has hitherto adopted a States-centric paradigm.[221] From

[219] "[T]he problems of implementation, compliance, and enforcement . . . [hang] like an albatross around the neck of international law generally." Emeka Duruigbo, *Reforming the International Law and Policy on Marine Oil Pollution*, 31 J. Mar. L. & Com. 65, 79 (2000). Citation omitted.
[220] Elli Louka, *Cutting the Gordian Knot: Why International Environmental Law is Not Only About the Protection of the Environment*, 10 Temp. Int'l & Comp. L. J. 79 (1996).
[221] Sacharoff, *supra* note 213.

> By starting with the most egregious acts – human rights violations – the international community can slowly adapt to holding MNCs responsible for their activities in host countries. If the ATCA finds an MNC liable, it not only will be providing a civil remedy for victims of human rights violations, but the ATCA will be promoting a restructuring of the statist paradigm of international law.

that standpoint, these lawsuits may serve as instruments for improving or shaping public policy and vehicles of social change. From international civil litigation[222] could emerge far-reaching policies that protect people all over the world from corporate excesses.[223] Notwithstanding the above benefits and implications, several limitations exist.

2. *Limitations*

There is no doubt that international litigation as a tool for holding corporations accountable has some merit. There is also every indication that this trend of launching lawsuits by foreign litigants will continue in the days and years ahead. Nevertheless, as is presently employed, the use of the courts to enforce international law or redress wrongs has a number of limitations.

First, instituting a case under the ATCA requires a certain level of readiness on the part of the plaintiff to confront a host of hurdles that surround the statute.[224] These obstacles include meeting standing requirements and achieving personal jurisdiction over the defendant, *forum non conveniens*[225] and the doctrine of comity.[226] "[*Forum*

Id., at 937.
[222] These cases, especially those with an international law component, has been referred to as transnational public law litigation. See Harold Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347(1991). "Transnational public law litigation. . . seeks redress for individual victims at the same time as articulating a norm of international law that can be applied to other violators of international law." *Id.*, at 2395. See also Lyndsy Rutherford, **Note**, *Redressing U.S. Corporate Environmental Harms Abroad through Transnational Public Law Litigation: Generating a Global Discourse on the International Definition of Environmental Justice*, 14 Geo. Int'l Envtl. L. Rev. 807 (2002).
[223] For a discussion of the ability and limitations of litigation to shape public policy or orchestrate social change, see Peter D. Jacobson & Soheil Soliman, *Litigation as Public Health Policy: Theory or Reality*, 30:2 J. Law, Medicine & Ethics, 224 (June 22, 2002).
[224] For an extensive discussion pf these obstacles, see DAVID WEISSBRODT, ET AL., INTERNATIONAL HUMAN RIGHTS: LAW, POLICY AND PROCESS, (3d. ed) 794 – 818 (2001).
[225] It should be noted, however, that while the doctrine of *forum non conveniens* can be a major obstacle to a plaintiff, "any defendant seeking dismissal in favor of a foreign forum bears a substantial burden of proof'" which may be difficult to satisfy in order to justify the dismissal of a suit. Cleveland, *supra* note 104, at 1577.

non conveniens] and the doctrine of comity have a powerful hold on U.S. federal courts and have frequently been held to be sufficient grounds for dismissal of a foreigner's complaints."[227] The doctrine of *forum non conveniens* is also a a major limitation on plaintiffs bringing transnational cases in home countries. According to Professor C.G.J. Morse, "the doctrine generates litigation about where to litigate,"[228] and leads to arguments as to its real value in the English legal system.[229]

Moreover, the basis for subject matter jurisdiction, which the Act provides for, does not cover *all* human rights and environmental abuses.[230]As a matter of fact, the courts are hesitant to extend it to environmental harms.[231] Therefore, foreign claimants are constrained to seek other bases for subject matter jurisdiction, even when human rights and environmental abuses are involved.[232]

In *Beanal v. Freeport McMoran,*[233] the United States Court of Appeals for the Fifth Circuit rejected an ATCA claim that was based on a human right to a minimally adequate environment under international law.[234] Since a good portion of corporate misdeeds in developing countries are of an environmental nature, this poses a big problem for victims of corporate abuse. It should be noted that there is a strong belief in some scholarly circles that such a right exists in international law.[235] Accordingly,

[226] Rosencranz & Campbell, *supra* note 64, at 146.
[227] Id.
[228] Morse, *supra* note 49, at 557.
[229] *Id.*
[230] Rosencranz & Campbell, *supra* note 64, at 146.
[231] See Kieserman, supra note 87.
[232] See Rosencranz & Campbell, *supra* note 64, at 146.
[233] 197 F. 3d 161 (5th Cir. 1999)
[234] Richard Herz, *Text of Remarks on Panel: Indigenous Peoples, Environmental Torts and Cultural Genocide*, 24 Hastings Int'l & Comp. L. Rev. 503, 505 (2001).
[235] Martin Wagner, *The International Legal Rights of Indigenous Peoples Affected by Natural Resource Exploitation: A Brief Case Study*, 24 Hastings Int'l & Comp. L. Rev. 491(2001).

some scholars contend, courts presented with ATCA claims premised on this right should recognize its existence.[236]

The fact that international civil litigation remedies are more readily available in some countries imposes a cost on those countries which other countries are able to avoid. These costs could be direct financial, physical and infrastructural burdens on the statutory institutions involved and the indirect costs of lost business opportunities and the benefits that flow therefrom. As earlier stated, American courts are the most attractive forums at the moment for international litigation. This leaves the possibility that "the United States may be transformed into a forum for the world's grievances."[237] Such a scenario would be overwhelming for the domestic courts, which were not created for that purpose. The strain put on the system may create a backlash from taxpayers who would consider it a drain on much needed resources.[238] Opposition may also come from people and governments in other countries who would view the United States as inching toward becoming the global judicial officer.

The situation in which litigation only thrives in a few jurisdictions also comes with a competitive disadvantage for certain corporations. Those companies whose home countries provide an easily accessible platform for court actions find themselves in a situation in which their actions, but not those of their competitors, are more likely to be called into question. Thus, some corporations could have a

[236] Herz, *supra* note 234, at 503 – 506.
[237] Mattei and Lena, *supra* note 206, at 385.
[238] A contrary argument is that lawsuits in a foreign forum is to the advantage of that forum and the country may even benefit economically. Some scholars have reasoned that "[w]hen foreigners litigate in England this forms valuable invisible export, and confirms judicial pride in the English legal system." Sir PETER NORTH & J.J. FAWCETT, CHESHIRE AND NORTH'S PRIVATE INTERNATIONAL LAW 346-47 (13th ed. 1999). This may be true when what are being considered are a few cases in a year, but with a myriad lawsuits, the argument may be difficult to sustain.

competitive advantage, not because their practices are better, but because they come from a country that shields its own corporate citizens, or otherwise provides them with greater protection by deliberately deciding to provide an atmosphere that is less international litigation–friendly. Of course, such insulation could come by default, in the sense that the action of the protecting State was not a result of a conscious decision. Either way, corporations from those countries are rewarded with a higher sense of security.[239]

This could lead to relocations by major corporations to areas that are more protective, and thus more favorable to their business operations.[240] Indeed, in England, the Lord Chancellor's Department has already made its fears known in this regard, arguing that exposure to lawsuits in English courts could deter multinational corporations from having a presence in England.[241]

The point could be made that while a disproportionate number of the lawsuits may be launched in American courts, the United States is still the world's largest economy[242] and corporations may not be too quick to abandon their operations for more favorable climes. Still, they might react strongly and the threat of a loss of tax revenue and jobs, no matter how remote, may serve to shift public opinion and galvanize interests against transnational corporate accountability. Besides, concerned

[239] See Philip M. Nichols, *Regulating Transnational Bribery in Times of Globalization and Fragmentation*, 24 Yale J. Int'l L. 257, 288 (1999) (discussing the issue of competitiveness in the context of more stringent regulations on corporations from a particular countries vis-à-vis their counterparts from other countries with less onerous demands.)

[240] When Unocal faced mounting pressure, the company announced that it was becoming a global oil company and opened a second headquarters outside the United States (i.e., additional to the corporate headquarters at El Segundo, California).

[241] Ward, *supra* note 41, at 466 (citing Letter from M. Kron, Lord Chancellor's Department (September 15, 1998)).

[242] *The challenge of world poverty:Developing countries*, ECONOMIST, March 14, 2002.

corporations may decide to lobby heavily for the repeal of the ATCA, following in the footsteps of a similar battle fought in the state of Texas, when the legal climate seemed to favor international civil litigation.[243]

In any case, it raises issues of equity that needs to be addressed. Universalizing the jurisdiction provided by American courts and internationalizing those principles that make American courts attractive would be a veritable step in that direction. This calls for some reform at the international level. However any reform that seeks to impose direct obligations on corporations in international law or attach rights and privileges to them would have to confront the perennial issue of subjects of international law. This issue is fundamental and must be disposed of before credible proposals for reform can be made. In view of that, the next chapter discusses the topic of international legal personality.

IV. CONCLUSION

The United Nations has recently responded to the problem of corporate activities that are detrimental to the health and well being of humanity through the Global Compact Initiative. At the moment, the UN Human Rights Commission through its SubCommission on the Promotion and Protection of Human Rights have been busily working on Principles to guide and circumscribe corporate behavior in relation to

[243] Corporations adopted such stance in the aftermath of the Supreme Court of Texas' abolition of *forum non conveniens* doctrine in personal injury matters in Dow Chemical Co. v. Castro Alfaro, 786 S.W.2d 674 (Tex.1990), petition for cert. filed, 56 U.S.L.W. 2602 (Aug. 30, 1990), in order to enable or permit Costa Rican nationals to sue a Texas corporation in Texas for alleged violations in Costa Rica, (See Alfaro, 786 S.W.2d at 689 (Hightower, J., concurring). See Joseph H. Sommer, *The Subsidiary: Doctrine Without a Cause*? 59 Fordham L. Rev. 227, 252 n.94 (1990). Business groups were able to lobby and get the Texas legislature to partially reinstate the doctrine in Texas. See Brooke Clagett, *Forum Non Conveniens In International Environmental Tort Suits: Closing The Doors Of U.S. Courts To Foreign Plaintiffs*, 9 Tul. Envtl. L.J. 513, 524 (1996).

such issues as human rights and the environment. Unless binding mechanisms are introduced, these measures clearly will fall short of the initiators' objectives. A useful model for holding corporations accountable that can be introduced into the international system is that being used at the municipal level. Through the use of international law and some other principles of municipal law, multinational corporations are legally being called to account for their harmful activities, even when the harm occurred thousands of miles away from their host countries. While the whole idea of enforcing international law through domestic courts is welcome, the nagging question remains the legal basis for seeking to hold corporations accountable for international law violations. That question and related issues are addressed in the next chapter.

CHAPTER 6

INTERNATIONAL LEGAL PERSONALITY OF THE MULTINATIONAL CORPORATION

I. INTRODUCTION:

The international legal and political system is States-centric. It is primarily concerned with, and concentrates attention on, nation-States. Four decades ago, J.L. Brierly defined international law as "the body of rules and principles of actions which are binding upon civilized States in their relations with one another."[1] This overwhelming focus on States has led to the conclusion by many scholars that international law is law pertaining to States only and that only States are the subjects of international law.

The above is not a mere theoretical position, with little practical consequences. The implications are overwhelming. It suggests that where other entities and actors in the global community breach rules of international law, it will not be within the province of the international legal system to directly address their misdeeds.

In the course of time, noticeable changes have begun to occur in the perception of non-State actors on the international stage. The structure of international law has begun to undergo some transformation with a recognition that in certain situations and under a range of circumstances, some other entities, besides the State, come within the direct protection of international law and owe some corresponding duties to uphold the dictates of that law. This is particularly evident in human rights and humanitarian issues.

There is a perceptible lacuna in this movement toward change. While the international rights and duties of international organizations and, to a lesser extent, individuals have received some recognition under the international legal system, the same cannot completely be said of the multinational corporation.[2] There is little doubt that the status of the corporation in the international sphere has appreciated. Corporations play key roles in the global marketplace and participate vibrantly in the shaping of international law, albeit indirectly. Their rights, especially regarding investment issues, have also been recognized in a number of international instruments. Yet, they clearly remain outside the mainstream of international law. A pertinent question is whether the change going on in the international system would be wide enough to accommodate the multinational corporation. This change is imperative in view of the place that corporations hold today in the daily lives of people all over the world. Put in simple terms, there is the need to revisit the issue of who is a legal person in the international system.

The controversy surrounding legal personality in international law is an age-old one. There is an entrenched view that only States are the subjects of international law. Individuals, multinational corporations, intergovernmental and non-governmental organizations all interact with the international system but are not necessarily subjects. This view has come under intense scrutiny and increasing criticism as not reflecting both the original state of affairs in international law and modern trends in the global community.

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[1] J. BRIERLY, LAW OF NATIONS 1 (1963).
[2] M. SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 55 (1994); I. SEDL-HOHENVEVELDERN, THE CORPORATION IN AND UNDER INTERNATIONAL LAW (1987).

Today, the issue acquires greater importance considering the growing significance of the multinational corporation. This species of corporation, in this era of globalization and liberalization of trade and investment barriers, now dominates the headlines. Analysts posit that international law cannot continue to play the ostrich and pretend that these corporations are like their smaller counterparts, subject only, and amenable, to the control of individual States. As multinational corporations continue to impact our lives on a daily basis, it is no longer realistic to expect them to remain under the current arrangement, which subordinates them in virtually all respects to the nation-States, most of whom are smaller and less influential. At the same time, those who have experienced the negative aspects of multinational corporate activity, are acutely aware that many national governments are unable or unwilling to regulate the multinational corporations operating in their territory and that perhaps, only the international system can remedy this situation. Some of the victims have resorted to transnational litigation, using international law as an instrument, to seek redress for wrongs allegedly done by corporations operating in their area. The principal instrument used in this regard is piece of domestic legislation in the United States known as the Alien Tort Claims Act.

The crucial question being asked is why international law will continue to remain aloof to these developments. In fairness to the international system, a number of steps have been taken in recent times to confront the challenges posed by corporations in an era of globalization. Prominent in the list of such measures are the UN Global Compact initiative, the on-going work of the UN Sub-Commission on the Promotion and Protection of Human Rights and the (revised) OECD Guidelines for

Multinational Enterprises. All of these efforts are commendable, but one cannot gloss over gaps that still remain. When compared with what is going on at the domestic level, it is apparent that a lot of work still needs to be done at the international level. If domestic law can provide a forum for the enforcement of international rules and impose liability for breach of same, certainly the international system can consider streamlining such a system and using it to the advantage of all.

The answer lies in the fact that international law has not shown much interest in directly controlling multinational corporations. This disposition of international law cannot be entirely divorced from the question of whether multinational corporations are subjects of international law. If they are subjects, why is international action scanty? If they are not, can they be brought under direct international control through the conferment of personality on them? This work, exasperated by the iniquities, inequities and inadequacies characterizing the prevailing position, will seek to address these issues with a view to clarifying the legal position and making suggestions for a more just world in which the role of corporations is recognized and appropriate responsibility attached to them.

Part II below tackles the perennial problem of international legal personality. The predominant theories on legal personality will be examined and the question answered as to whether corporations are subjects of international law. The issue of whether corporations are entities capable of possessing rights and duties in international law is most relevant to the current debate as to whether the international system should intervene in reining in the excesses of multinational corporate groups.

Part III makes the case for an enhanced status for multinational corporations in international law. The arguments in favor of elevating the position of multinational corporations are considered alongside those in opposition to it.

Part IV deals with the way forward in the bid to address the multifarious problems associated with multinational corporations. This will entail detailed international legal reforms and restructuring. The change in structure being contemplated here does not place corporations at an equal footing with States. However, it also does not subscribe to their being placed on the same level as individuals. This work therefore advocates a hybrid arrangement that defines the rights and obligations of corporations in international law while permitting the enforcement of those laws against them at the domestic level. At the end, appropriate conclusions are drawn from the foregoing discussion, essentially reiterating the need for corporate regulation in international law.

II. INTERNATIONAL LEGAL PERSONALITY

The terms "international legal person" or "legal personality"[3] are usually employed in reference to entities that are "capable of possessing international rights and duties and endowed with the capacity to take certain types of action on the international plane."[4] Such entities are also known as subjects of international law.[5] This part discusses some theoretical issues relating to international legal personality.

[3] For a discussion of the concept of legal personality in the domestic and international systems, see Esa Paasivirta, *The European Union: From An Aggregate of States to a Legal Person?* 2 Hofstra L. & Pol'y Symp. 37, 38-45 (1997).
[4] LOUIS HENKIN, ET AL., INTERNATIONAL LAW: CASES AND MATERIALS 241 (3d. ed 1993)
[5] *Id.*

A. THEORIES OF LEGAL PERSONALITY

Various theories exist regarding the notion of legal personality in the international system. The question has been posed countless times, and answers attempted that much often, concerning who falls within the definition of a subject of international law. This in itself reveals the difficult and controversial nature of the subject. One of the leading theories is the traditional or orthodox theory that emphasizes the position and capacity of States. "According to that theory, the only subjects of international law are nation-states. All other entities, particularly individuals and business organizations, interact with international law indirectly through their national governments."[6]

Providing a rationale for this position, L. Oppenheim reasoned that "[s]ince the Law of Nations is primarily a law between States, States, are to that extent, the only subjects of the Law of Nations."[7]

This traditional theory finds sanctuary in the hallowed domain of those who subscribe to the classic dualist theory in international law. Dualism is well-known for its association with "positivist theories and with the notion that States, not individuals, are the primary subjects of international law."[8] Professor John Starke, while discussing the work of a noted dualist, the German scholar Heinrich Triepel, adverts his mind to the issue, noting that Triepel "contends . . . that . . . state law deals with individuals, international law regulates the relations between states, who alone are subject to it."[9]

Over the years, this traditional view has been vigorously challenged. Some scholars question the correctness of the view in the first place, seeing it as inconsistent with the history of international law.[10] It was on that basis that two scholars described the proposition that public international law deals with relations among States as a "nineteenth century canard."[11] The emphasis on relations between States, to the exclusion of individuals, is viewed as a derogation, a practice that only came into being more recently as a product of nineteenth century positivism.[12]

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[6] Jonathan I. Charney, *Transnational Corporations and Developing Public International Law*, 1983 Duke L.J. 748, 753. Citations omitted. See also Daniel C.K. Chow, *Limiting Erie in a New Age of International Law: Toward a Federal Common Law of International Choice of Law*, 74 Iowa L. Rev. 165 (1988). "Under orthodox theory, only nation-states can be the subject of international law." *Id.*, at 193 n. 145; M. AKEHURST, A MODERN INTRODUCTION TO INTERNATIONAL LAW 1 (5th ed. 1984); Timberg, *An International Trade Tribunal*, 33 GEO. L. J. 373, 394-8 (1945).

[7] L. OPPENHEIM, INTERNATIONAL LAW 636 (H. Lauterpacht ed., 8th ed. 1955).

[8] J.G. Collier, *Is International Law Really Part of the Law of England?* 38 INT'L & COMP. L.Q. 924, 925 (1989). It has been observed thus:

> A strictly dualistic view denies a meaningful role to both individuals and domestic courts in the making of international law. In a dualistic system, individuals injured by foreign states would have no right to pursue claims directly against those states in either domestic or international fora. Instead, their states would pursue those claims for them on a discretionary basis in international fora, and subsequently determine the rights of those injured individuals to redress as a matter of domestic law."

Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2349 n10 (1991).

[9] J.G. Starke, *Monism and Dualism in the Theory of International Law*, 1936 BRIT. Y.B. INT'L L. 66, 70 (Citing HEINRICH TRIEPEL, VOLKERRECHT UND LANDESRECHT (Liepzig, C.L. Hirschfeld 1899). For more discussions on dualism and monism, see Jonathan Turley, *Dualistic Values in the Age of International Legisprudence*, 44 HASTINGS L.J. 185 (1993); Fitzmaurice, The General Principles of International Law Considered from the Standpoint of the Rule of Law 92 Hague Recueil, 70-80 (1957 –II) (cited in D.J. HARRIS, CASES AND MATERIALS ON INTERNATIONAL LAW 55-57 (1983).

[10] See Charney, *supra* note 1, at 753.

[11] McDougal & Leighton, *The Rights of Man in the World Community: Constitutional Illusion Versus Rational Action*, 59 YALE L. J. 60, 74 (1949).

[12] See Charney, *supra* note 1, at 753 n9; D. O' CONNELL, INTERNATIONAL LAW 106-11 (2d ed. 1970); CHRISTIAN OKEKE, CONTROVERSIAL SUBJECTS OF INTERNATIONAL LAW: AN EXAMINATION OF THE NEW ENTITIES OF INTERNATIONAL LAW AND THEIR TREATY-MAKING CAPACITY 68-69 (1974); Bartram S. Brown, *Nationality and Internationality in International Humanitarian Law*, 34 Stan. J. Int'l L. 347 (1998). "Mark Janis argues that "the law of nations of the seventeenth and eighteenth centuries [was] a law common to individuals as well as to states," which developed into an international law of narrower scope in the era of nineteenth century positivism." *Id.*, at 406 (quoting MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 228 (1993).

Tremendous boost for this position can be found in the fact that a non-State entity, the Catholic Church has long played an important role in the international legal system.[13]

Diametrically opposed to the traditional theory that States are the only subjects of international law is another theory that assigns that preeminent position to individuals. Early in the twentieth century, a French scholar, George Scelle, argued that individuals are the only subjects of international law, anchoring that view on the contention that the State is a fiction.[14] Critics assail this view as abandoning legal analysis and taking an excursion into philosophy.[15]

Another approach to the issue is one that does not dismiss the traditional view, but holds that the notion of States as the only subjects of international law is not cast in concrete. The point being made is that modern developments in the international system have had a huge effect on legal attitudes toward non-State entities. Thus, international organizations, individuals, multinational corporations and a host of other entities almost undeniably have acquired an enhanced status in international law. In *Reparations for Injuries in the U.N. Service*,[16] the International Court of Justice, in an advisory opinion, stated that international organizations such as the United Nations are subjects of international law.[17]

Regarding individuals, Jessup recognizes that States traditionally were the subjects of international law and that in international legal relations, the individual

[13] Charney, *supra* note 1, at 753 n9; J. LADOR-LEDERER, INTERNATIONAL NON-GOVERNMENTAL ORGANIZATIONS AND ECONOMIC ENTITIES 29 (1963).
[14] WOLFGANG FRIEDMANN, THE CHANGING STRUCTURE OF INTERNATIONAL LAW 233 (1964) (Citing GEORGE SCELLE, PRECIS DE DROIT, DES GENS 42 – 44 (1932).
[15] See Friedmann, *supra* note 10, at 233; Humphrey Waldock, *General Course on Public International Law*, 106 RECUEIL DES COURS 192 (1962). See also Alexander Orakhelashvili, *The Position of the Individual in International Law*, 31:2 CAL. W. INT'L L. J. 241 (2001).
[16] *Reparations for Injuries Suffered in the Service of the United Nations*, 1949 I.C.J. 174 (Apr. 11) (Advisory Opinion).

had to rely on the State, but adds that over the years this has substantially changed and that such change in direction is not likely to be truncated soon.[18] Hersch Lauterpacht, in his revision of Oppenheim's seminal work, attributes the recognition of, and justification for, the international legal personality of the individual to the development of human rights and humanitarian values. As a consequence, he contends, the traditional view has become moribund:

> The various developments since two World Wars no longer countenance the view that, as a matter of positive law, States are the only subjects of international law. In proportion as the realisation of that fact gains ground, there must be an increasing disposition to treat individuals, within a limited sphere, as subjects of international law.[19]

At a different forum, Lauterpacht also argued that by reason of the fact that international law has witnessed an expansion beyond the issues of war, a similar expansion has trailed the definition of international legal personality to include international organizations and individuals.[20] Lauterpacht also adds another interesting dimension to the debate: that international law is flexible enough to allow for the admission of new entities into the revered club of subjects of international law:

> Gradually, a consensus of opinion is evolving to the effect that although it is States which are the normal subjects of international law, there is nothing in international law which is fundamentally opposed to individuals and other legal persons becoming subjects

[17] *Id.*, at 178-79.
[18] P. JESSUP, A MODERN LAW OF NATIONS 15-16 (1968); Friedmann, *supra* note 9, at 162; Okeke, *supra* note 7, at 2-3; Charney, *supra* note 1, at 753 n10.
[19] Oppenheim, supra note 2., at 639.
[20] Lauterpacht, *The Subjects of the Law of Nations*, 64 LAW Q. REV. 97, 117-19 (1948).

> of international rights and duties, i.e., subjects of international law.[21]

The legal position or status of the multinational corporation and the arguments surrounding that are somewhat similar. The next part will particularly focus on that.

B. CORPORATIONS AND INTERNATIONAL LEGAL PERSONALITY

The question on whether multinational corporations are legal persons in international law would have been easier to answer if there was a clear agreement among scholars on what constitutes legal personality under the international legal system. "Unfortunately, there is little agreement among scholars on the essential elements of legal personality."[22] This part will navigate the murky waters of the controversy surrounding this issue with a view to exploring the possibility of presenting a clearer picture of the status of the multinational corporation in international law.

In his epic work on the subject, *Controversial Subjects of Contemporary International Law: An Examination of the New Entities of International Law and Their Treaty-Making Capacity,* Professor Christian Okeke outlines three essential elements that should be considered *conditio sine qua non* before an entity can properly be regarded as a subject of a legal system. Such an entity must (1) possess duties as well as responsibility for violating those duties, (2) have the capacity to benefit from legal rights as a direct claimant and not as a mere beneficiary, and (3) in

[21] H. LAUTERPACHT, PRIVATE LAW SOURCES AND ANALOGIES OF INTERNATIONAL LAW 79 (1927). See also E. NWOGUGU, LEGAL PROBLEMS FOR INVESTMENTS IN DEVELOPING COUNTRIES, 30, 249-50 (1965).
[22] Charney, *supra* note 1, at 774.

some capacity, be able to enter into contractual or other legal relations with other subjects of the system.[23]

Looking at Okeke's criteria, a credible case could be made that multinational corporations, at least to a certain extent, are subjects of international law. Professor Jonathan Charney does not seem to consider it far-fetched to posit that MNCs possess international legal personality.[24] He draws from previous and present activities involving these business enterprises to bolster his point:

> There is evidence that [multinational corporations] have had international legal personality and have participated in the international legal system for some time. Examples of such participation include application of public international law to contracts with state entities and participation in dispute settlement forums established either by treaty or intergovernmental organizations. Some principles of public international law have become so widely accepted that they have been viewed as binding on the [MNCs'] international activities. Finally, [MNCs] advise international organizations when their interests are at stake and it is clear that they play a direct role in influencing national behavior on relevant international matters."[25]

Professor David Ijalaye holds a similar view. He advances the claim that multinational corporations could now be regarded as selective subjects of public international law and that contracts they enter into (especially with States) are subject

[23] Okeke, *supra* note 7, at 19. See also IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 57 (5th ed. 1998). "A subject of law is an entity capable of possessing international rights and duties and having the capacity to maintain its rights by bringing international claims." *Id.*, at 58 (citing *Reparations for Injuries case*, 1949 I.C.J. Reports 174, 179).

[24] Charney, *supra* note 1. Ascription of international legal personality to the multinational corporation has been anchored on the volume, transboundary nature, international effect of multinational corporate actvitity and access to international legal processes. See CYNTHIA DAY WALLACE, LEGAL CONTROL OF THE MULTINATIONAL ENTERPRISE 1 (1983).
[25] Charney, *supra* note 1, at 762-64. Citations omitted.

to that law.[26] Professor Ijalaye's position can be supported to an extent by international arbitral practice. For instance, in the *Libya-Oil Companies Arbitration*,[27] the arbitrator, Umpire Dupuy, was emphatic in holding that international law would be the applicable law in a dispute between a State and a private oil company, viewing international law as part of the governing law of the contract (in addition to Libyan law).[28]

Elihu Lauterpacht, looking at the dispute settlement mechanisms contained in modern investment treaties as well as earlier developments in investor-State arbitration, reasons that these developments have "put an end to the myth, so prevalent until the end of the Second World War, that only States are subjects of international law and that individuals cannot possess rights or bear duties directly under international law."[29] The scholar thus contends that corporations, by virtue of these agreements and other modern developments in the international system, have been shown to possess international legal personality.[30]

Michael Reiterer, in a book review, 'challenges the proposition that "States alone are the subject of international law" '[31]and believes that NGOs, transnational corporations and the individual are "new (at least partly) subjects of international law."[32] Reiterer reiterates that traditional international law concerned itself principally

[26] D. IJALAYE, THE EXTENSION OF CORPORATE PERSONALITY IN INTERNATIONAL LAW 221-23 (1978).
[27] Rudolf Dolzer, Libya-Oil Companies Arbitration, in 3 Encyclopedia of Public International Law 215, 216 (Rudolph Berhardt et al., eds., 1997).

[28] *Id.*
[29] Elihu Lauterpacht, *International Law and Private Foreign Investment*, 4 Ind. J. Global Legal. Stud. 259, 274 (1997).
[30] *Id.*, at 272 –276.
[31] Michael Reiterer, (reviewing Ruth Donner, The Regulation of Nationality in International Law) 81 Am. J. Int'l L. 970 (1987).
[32] *Id.*

with relations between sovereign entities and recognized them as the sole subjects of international law, but notes that things have moved to a situation in which nation-states, while still the main actors in international law and international relations, have had to give up their claim to being the sole subjects of international law.[33] This accords with the observation of another scholar that "[t]he modern trend is to recognize that there are other subjects of international law, including certain corporations."[34]

The above views are by no means conclusive on this issue. In their work entitled *International Law: Cases and Materials*, Professors Louis Henkin, Richard Pugh, Oscar Schachter and Hans Smit, after discussing the point that multinational corporations have become the subject of considerable controversy stemming from the power they wield economically and politically, the complexity that surround their operations, and the difficulties associated with exercising legal authority over them whether by home or host States, add: "Such corporations are "private," nongovernmental entities, they are subject to applicable national law, and they are not international legal persons in the technical sense."[35]

Professor Ian Brownlie, while noting that "jurists have argued that the relations of states and foreign corporations as such should be treated on the international plane and not as an aspect of the normal rules governing the position of

[33] *Id.*
[34] Chow, *supra* note 1, at 165. See also Jonathan Fried, *Globalization and International Law – Some Thoughts for States and Citizens*, 23 Queen's L.J. 259, 266 (1997). "Over twenty years ago, Wolfgang Friedmann already presaged this expansion of international regulation in highlighting the new subject-matters and new subjects of international law. These included corporations, individuals, and international organizations – a so-called "vertical" expansion of international law beyond the nation state to reach other actors within."
[35] Henkin, et al., *supra* note 3, at 368-369.

aliens and their assets on the territory of a state,"[36] minces no words however, in rejecting that argument. Instead, he makes the contrary assertion that "[i]n principle, corporations of municipal law do not have international legal personality. Thus, a concession or contract between a state and a foreign corporation is not governed by the law of treaties."[37]

Peter Malanczuk, in a recent study of the multinational corporation, adopts a similar position, rejecting outright the notion that special "internalized contracts" with a sovereign State is capable of making a corporation a subject of international law, even in a partial or limited sense.[38]

The views immediately expressed above finds support in the jurisprudence of the Permanent Court of International Justice (PCIJ) and its successor, the International Court of Justice (ICJ). In the *Serbian Loans Case*[39], the PCIJ held that the governing law for an agreement not concluded between subjects of international law should be the municipal law of the State concerned with the dispute. In the *Anglo-Iranian Oil Company Case*[40] involving the government of Iran (then Persia) and a British oil company, the ICJ adopted a line of reasoning that suggested that an oil corporation was not a subject of international law. Accordingly, it refused to exercise jurisdiction when Iran declined to consent to the Court's jurisdiction. The

[36] Brownlie, *supra* note 23, at 67. Citation omitted.
[37] *Id.*, at 68. Citation omitted.
[38] Recent Publications: The New Public Order, 26 Yale J. Int'l L. 527, 547 (2001) (reviewing Multilateral Treaty-Making: The Current Status of Challenges to and Reforms Needed in the Internal Legislative Process, Vera Gowland-Debbas ed., 2000).
[39] *Payment of Various Serbian Loans Issued in France* (Fr. V. Serb.), 1929 P.C.I.J. (ser. A). No.20, at 41 (July 12); Serbian Loans Case, in 2 Encyclopedia of Public International Law 256-57 (Rudolph Berhardt et al., eds., 1992).
[40] (Rudolf Dolzer, Anglo-Iranian Oil Company Case, in 1 Encyclopedia of Public International Law 167-68 (Rudolph Berhardt et al., eds., 1992).

ICJ was of the opinion that the contract was not an international treaty and therefore should not invite the intervention of the Court.[41]

Moreover, it has also been argued that because of the decentralized nature of the international legal order, where no centralized law-making and law-enforcing authorities exist, possession of rights and duties are not sufficient to confer legal personality.[42] An international person therefore, the argument continues, should also be capable of making[43] and enforcing international law. In essence, there has to be a public component in which the role of the subject transcends private interests and includes some functions of public character.[44]

On the issue of contracts between corporations and States, a credible, converse argument could be made. One could review the relevant cases from which the conclusion had been drawn that international law governed such contracts and arrive at a different conclusion. The *Serbian Loans* case,[45] the *Anglo-Iranian Oil Company* case,[46] the *Aramco* arbitration,[47] the *Abu-Dhabi Oil Arbitration*,[48] the *Ruler of Qatar* arbitration,[49] the *Sapphire* arbitration,[50] the *Lena Goldfield* decision,[51] the

[41] *Id.*
[42] Orakhelashvili, *supra* note 28, at 256.
[43] Soviet jurists also held the view that an important aspect of legal personality is an active participation in the international law-creating process. See Okeke, *supra* note 7, at 12-13 (citing G. TUNKIN, OSNOVY SOVREMENOGO MEZHDUNARODNOGO PRAVA (1956)).
[44] Orakhelashvili, supra note 28., at 256.
[45] *Supra* note 31.
[46] *Supra* note 32.
[47] Rudolf Dolzer, Aramco Arbitration, in 1 Encyclopedia of Public International Law 207 (Rudolph Berhardt et al., eds., 1992). Id. at 208-09.
[48] Rudolf Dolzer, Abu-Dhabi Oil Arbitration, in 1 Encyclopedia of Public International Law 1-2 (Rudolph Berhardt et al., eds., 1992).
[49] McNair, The General Principles of Law Recognized by Civilized Nations, 1957 Brit. Y.B. Int'l L. 1, 14 (citing Ruler of Qatar v. International Marine Oil Co., 20 I.L.R. 534 (1953) (Award of June, 1953)).
[50] The Sapphire Arbitration, 35 I.L.R. 136 (1967).
[51] McNair, *supra* note 41, at 11 (citing Lena Goldfields, Ltd. v. Russia (Judgment of Sept. 3, 1930).

Libya-Oil Companies arbitration[52] and the *BP v. Libya* arbitration,[53] may not be used in a definitive way to show that corporations have an international legal personality.[54] With a singular exception, the references to international law in those decisions do not automatically import an intention to place those contracts at the same level as international treaties.[55] The fact that there was an unwillingness to apply domestic law in one particular case is not conclusive either, as certain exceptional circumstances peculiar to that case justified that course of action.[56]

The point may be canvassed that the views above, while forceful, nevertheless adopts a very restricted approach to the definition of subjects of international law. A more helpful approach would be to recognize, first, that States are the primary and predominant subjects of international law.[57] But that this recognition is not exclusionary: other legal entities are not necessarily non-subjects nor are they precluded from gaining international legal personality at some point in time. Secondly, a subject of international law does not need to possess all the attributes of a State to fit into the definition of a subject. In other words, there are degrees of legal personality.[58] As Okeke puts it, "any subject of law must be capable of having certain

[52] *Supra* note 23.
[53] Rudolf Dolzer, British Petroleum v. Libya Arbitration, in 1 Encyclopedia of Public International Law 505 (Rudolph Berhardt et al., eds., 1992). See Orakhelashvili, *supra* note 15, at 257 – 261.
[54] *Id.*, at 261.
[55] *Id.*
[56] *Id.*
[57] See Oppenheim's International Law, Peace, at 16 (Sir Robert Jennings & Arthur Watts eds.) (9th ed. 1992). "States are primarily, but not exclusively, the subjects of international law . . . States may treat individuals and other persons as endowed directly with international rights and duties and constitute them to that extent subjects of international law."
[58] "[M]any scholars recognize varying degrees of legal personality." Charney, *supra* note 1, at 775. Regarding the personality of international organizations, Friedmann favors the opinion that entities could possess different degrees of personality in international law. Friedmann, *supra* note 7, at 218-219 (stating: "There is no reason why there should not be different degrees of subjectivity in international law.") See also, Henkin, et al., *supra* note 2, at 242 (stating that "[a]s in any legal system,

rights and duties under the given legal system, any differences in the *degree of capacity* notwithstanding."[59] When it is viewed that way, one can safely conclude that multinational corporations to an extent have, or at least have the potential to possess, international legal personality.

If multinational corporations are assumed to be subjects of international law, the question arises as to what role international law has played in providing them a forum to function as active participants in the system as well as hold them responsible for a number of international wrongs to which they have been linked. The answer probably resides in the fact that international law has not allowed them to assert some rights (for instance to participate in law-making) or emphasized the obligations, duties and responsibilities that attach to them. If they are not subjects, one wonders what would explain or justify the fact that a specific norm for their legal personality has not been created by the international community both to clarify the issue and to relate with them in a manner commensurate with their real status. All of this inactivity has led to an unpalatable state of affairs. The next part discusses the need to make some changes in the structure of the international legal system by providing an enhanced legal status for multinational corporations in international law.

not all subjects of international law are identical in their nature or their rights and one must constantly be aware of the relativity of the concept of international legal person.")
[59] Okeke, *supra* note 7, at 1-2. The emphasis is mine. See also, Joanna Balaskas, **Note**, *The International Legal Personality of the Eastern Orthodox Ecumenical Patriarchate of Constatinople*, 2 Hofstra L. & Pol'y Symp. 135, 157 (1997). A "non-state entity may indeed have a limited scope of international legal personality either for a specific purpose or event, or for a temporary period of time. Individuals, international organizations, non-governmental organizations (NGOs), and multinational (or transnational) corporations all have been acknowledged to possess a limited degree of international legal personality."

III. NEED FOR AN ENHANCED LEGAL STATUS FOR MNCs

Thirty years ago, a "Group of Eminent Persons" reported that "[m]ultinational corporations are important actors on the world stage."[60] If there are any changes in their position since then, it is that this type of corporations have grown even stronger and have become more important actors. A number of developments in recent years have strengthened the case for an increased role and responsibility for multinational corporations in international law. Multinationals have continued to grow in size, economic power and political influence. It is becoming much more unrealistic to keep them at the periphery.

On the other hand, with expansion in corporate power has come an enormous potential for abuse. Large corporations have been implicated in or associated with violations of international law covering such areas as human rights and the environment. In many instances, it has not been possible to hold them liable for these violations. This is partly attributable to the fact that sometimes the States that should hold them accountable are complicit in these wrongful actions. Moreover, developing countries, because of their quest and scramble for economic investments of multinational corporations, end up being too enfeebled to regulate or control the MNCs. In any case, MNCs are more likely to demonstrate a preference for those countries with lax regulations over the business or industrial activities of multinational companies.[61] The absence in developing countries of the technical expertise and legal development that are essential for monitoring or regulating

[60] UNITED NATIONS: THE IMPACT OF MULTINATIONAL CORPORATIONS ON THE DEVELOPMENT PROCESS AND ON INTERNATIONAL RELATIONS, Report of the "Group of Eminent Persons," U.N. Doc. E/5500/Add 1 (1974).

complex activities such as environmental pollution also serve as an impediment against any measures by these countries to bring multinational corporations under control.[62]

Political considerations also play a role. The leaders of government in some of these places are also aware of the enormous influence of these corporations who could engineer their removal if their policies work against them.[63] They are cognizant of the fact that falling out of favor with the powerful corporations could translate into a loss of power. They therefore succumb or go along with the politically expedient thing, which is to play along with these corporations or close their eyes to the corporate excesses. This does not impeach the fact though, that some of these leaders do not have the interests of their citizens at heart and use these giant corporations to consolidate their hold on power.

To exacerbate matters, the international system has not been very active in defending its rules and stipulations against corporate infringers. There is hardly any doubt that these large corporations have gotten beyond the sphere of influence of national governments, conducting their operations in a legal and moral vacuum where individualism is the cardinal rule.[64] One writer sums it up this way:

> Even though the global community is aware of the tremendous power of MNCs, private corporate entities

[61] Matthew Lippman, *Transnational Corporations and repressive regimes: The Ethical Dilemma*, 15 CAL. W. INT'L L.J. 542, 545 (1985).
[62] *Id.*
[63] The United Fruit Company (UFC) (later known as Chiquita Corporation), a United States multinational corporation, fearing that land reforms then going on in Guatemala would jeopardize its interests through expropriation, orchestrated a coup in that country in 1954. See Ariadne K. Sacharoff, *Multinationals in Host Countries: Can They Be Held Liable Under the Alien Tort Claims Act for Human Rights Violations?* 23 Brooklyn J. Int'l L. 927 (1998). The same UFC had earlier engineered an armed invasion of Honduras, run by its hired mercenary, Machine Gun Maloney. THOMAS DONALDSON, THE ETHICS OF INTERNATIONAL BUSINESS 9 (1989).
[64] See Robert J. Fowler, *International Environmental Standards for Transnational Corporations*, 25 ENVTL. L. 1, 2 (1995).

> bear almost no obligations under public international law. . . Furthermore, even in areas where international law has something to say about corporate behavior (for example, basic human rights and environmental protection) its dictates are difficult, if not impossible, to enforce. The transnational activity of corporations implicates a home country and a host country, each with their own interests. These interests, and the legal control of each country over a corporation, are not perfectly aligned, so at times the countries' jurisdictions overlap and there is a jurisdictional lacuna where the corporation is not subject to any law. In the case of many resource-extraction firms, the host government will not upbraid the foreign MNC for actions that the government is involved in, while the MNC's home courts are unlikely to engage in extraterritorial control. In other words, in many instances where a developing host country is eager to attract corporate capital and expertise and, for various reasons, does not (or cannot) subject corporate conduct to judicial scrutiny, a corporation acts without any legal control, domestic or international.[65]

To continue to countenance this state of affairs is clearly unconscionable. There is something wrong with a system that closes its eyes or sits on the sidelines while States shirk their responsibility and multinational corporations escape accountability. It is imperative therefore to erect a fortress to fortify the international legal system and re-orient it to proactively address some of the serious problems plaguing humanity.

However, there are strong arguments against enhancing the status of MNCs in international law. First, opponents argue that granting MNCs "direct participation in the international legal system could create a void if it resulted in a weakening of state regulation of MNCs without a corresponding strengthening of international

[65] Saman Zia-Zarifi, *Suing Multinational Corporations In The U.S. For Violating International Law,* 4 UCLA J. Int'l L. & For. Aff. 81, at 84, 86. (1999). Citations omitted. See also *Henkin*, et al., *supra*

regulation."[66] With such a void, MNCs would be freer and in a better position to pursue the expansion of their economic and political influence world-wide. This may work some great hardship on other actors who hold contrary or competing interests such as national governments, labor, and, arguably, the general public.[67]

A second objection to an expansion of the corporate role is premised on the belief that international law lacks the capability to resolve the most difficult political, military, and economic issues that confront international community[68] and that "only the nation-state and its domestic legal system has been able to do so successfully." Implicit in this argument is the recognition that at present, the nation-State is the only possible juridical entity with enough power to keep the activities of multinational corporations from prejudicing other human interests.[69] It stands to reason therefore that, if MNCs are endowed with significant international legal personality and by reason of that become free from State control, this could lead to a shift in the distribution of world power in ways that many consider to be undesirable.[70]

Finally, there is some reason to believe that if the predominant position that the State holds in the international system is exchanged for the participation of multinational corporations, the effect could be a crippling of international law and relations.[71] Anarchy will follow suit if we go by the verdict of historians: "Historians

note 2, at 369; *Barcelona Traction Case* [1970] I.C.J. 3.
[66] This part of the discussion draws heavily from Charney, *supra* note 1, at 772 -773. Citations omitted.
[67] *Id.*
[68] *Id.*
[69] *Id.*
[70] *Id.*
[71] *Id.*

attribute the anarchy of Western Europe's dark and early middle ages to its surfeit of sovereigns and semi-sovereigns."[72]

These are formidable arguments that should not be dismissed with a wave of hand. Nevertheless, a number of valid reasons exist for re-examining the place of MNCs in international law. First, as earlier stated, multinational corporations, with the exception of a handful of States, are the most powerful and influential actors in the world today. It would be unrealistic therefore not to accord adequate recognition to that fact.[73] Without the operations of multinational corporations and the services that these companies provide, it would be hard to even speak of an international economy.[74]

Moreover, they enjoy a much greater influence than many intergovernmental organizations whose influence depends on the continued financial and political support of nation-state sponsors.[75] Yet, the latter enjoy better recognition in the international scheme of things and are indisputably recognized as subjects of international law. Certainly, the "argument for increased [MNC] participation is further supported by the conclusion . . . that the continued viability of the international system depends upon the close conformity of public international law to international realities."[76] International realities demand that corporations be given more attention

[72] *Id.*
[73] *Id.*, at 768-769.
[74] *Id.*
[75] *Id.*

IV. PROPOSALS FOR REFORM

The practice of invoking domestic judicial remedies to enforce international rules and demand corporate accountability suggests that forces outside the international system are working really hard to ensure the reform of international law. The time is ripe for policy makers in the international arena to take heed and adapt international law to the realities of the modern day. In the case of multinational corporations, this could commence not only through a clear effort to provide clarity as to their real status, but also to proceed to create a new status for them, if it is assumed that they are not international legal persons at the moment.

There is no doubt that corporations deserve an enhanced status. A number of factors also suggest that they require more direct oversight than is currently the case. It will be a worthwhile effort to consider using the model provided by the Alien Tort Claims Act to restructure the international system and re-define the position of the multinational corporation in international law. This will make the remedy available under the ATCA more widely available.

This work proposes some concrete changes in the international legal system to accommodate the growing importance of the multinational corporation and the implication of this for the social and economic well being of humanity. Precisely, corporations should unequivocally be recognized as subjects of international law. Accordingly, their rights under the international system should be spelt out with a high level of clarity. Appropriate duties attaching to them should also be clearly specified.

[76] *Id.*

This would mean the creation of another layer in the international arrangement which will place multinational corporations at a level below States but higher than the position they currently occupy.[77]

In relation to the social and economic impact of multinational corporate operations, an international agreement should be concluded to outline the legal consequences of such conduct. This work recognizes that some other options include a non-binding multilateral instrument and an international charter[78] to regulate corporations under an international companies law.[79] However, especially considering

[77] Shira Pridan-Frank, *Human-Genomics: A Challenge to the Rules of the Game of International Law*, 40 Colum. J. Transnat'l L. 619, 670 (2002).

> The question is whether it is time for international law to develop another tier to the existing international human rights framework, which bypasses state regulation and enforces direct human rights obligations on multinational companies. Such a framework would change quite dramatically the traditional structure of the international community. It would recognize multinational companies as international persons, bearing rights and duties under the international legal system. It would further create horizontal human rights obligations, and in fact, horizontal relationships among different entities comprising the private sector. The main advantage of placing obligations directly on multinational companies is that it would neutralize the influence of multinational companies on their host states, and enable enforcement of the duties irrespective of the host states' willingness or ability.

Citations omitted.

[78] See Sigmund Timberg, *International Combines and National Sovereigns: A Study in Conflict of Laws and Mechanisms*, 95 U. Penn. L. Rev. 575 (1947). Timberg outlines the objective of such charter:

> In addition to imposing obligations, norms, and negative restrictions on corporations, the grant of a charter could serve to confer on the combine legal standing and specific positive rights under international law. This has been suggested in the past, but, it is submitted, to the exclusion of a balancing emphasis on enforcing the correlative duties of corporations. Here, what is needed is a more functional handling of the corporate concept, so that the multi-national corporaation can act out in society its excellent philosophic status as a "right –and-duty bearing unit."

Id., at 611. Citation omitted.

[79] Ball, *Proposal for an International Charter, in* GLOBAL COMPANIES 171 – 172 (Ball, ed. 1975) (proposing the establishment of by treaty of an international companies' law. Under which companies

the problems identified with voluntary initiatives so far[80] and the fact that "[a]n "international companies law" of his kind does not seem likely to be realized in the foreseeable future,"[81] this dissertation expresses a preference for an international agreement. The agreement will not be a soft law document but a binding treaty. The possibility that this far-reaching reform proposal will meet with strong opposition from different quarters is not being glossed over. However, while not discounting any likely objections, more emphasis should be placed on the merit of the suggestion. Accordingly, this work concurs with the International Council for Human Rights when the council states:

> Although there are advantages to soft law standards, a new international treaty would be the surest way to ensure a clear and solid foundation for legal accountability. Even if not widely ratified initially, it would affect the development of customary international law and would likely have an impact in national court proceedings.[82]

The treaty being proposed herein will define the type of conduct that are not permissible and for which a corporation would be held accountable in the event of a breach. A lack of clear definition is an impediment under the ATCA system.[83] It will also obviate the current situation where disparate standards exist among States with corporations racing to the bottom in their bid to maximize profit. The idea that it is sufficient for corporations to follow the laws of their host States is not meaningful,

that meet certain criteria would be chartered. The charter will create rights and duties as well as provide protection and benefits for States and corporations.)

[80] The limitations associated with intergovernmental and other codes are extensively discussed in Chapter 4.

[81] Henkin, *supra* note 2, at 370.

[82] INTERNATIONAL COUNCIL ON HUMAN RIGHTS POLICY, BEYOND VOLUNTARISM: HUMAN RIGHTS AND THE DEVELOPING INTERNATIONAL LEGAL OBLIGATIONS OF COMPANIES 157 (2002).

where there are low or inadequate standards. A clearly defined set of standards would be a giant step forward.

Obviously, human rights abuses will form a significant component of these standards. Egregious environmental misdeeds, not actionable presently under the ATCA will also be included. Where, for instance, a corporation willfully or without adequate consideration for public health and welfare, pollutes the water sources of a community thereby endangering the lives and livelihood of the community members, international law should not continue to turn a blind eye. Such corporation should not leave unscathed.

The treaty will not only define the range of proscribed behavior, it will also make provisions for a mechanism by which the treaty's dictates will be enforced. A foremost authority on corporate groups and corporate accountability, Professor Phillip Blumberg, has observed that "[t]he creation or recognition of legal obligations of multinational corporations, whether under national or international law, is only the first step. Where contested, such obligations must be enforced through the courts."[84] Implementation should not be left in the hands of corporations and home or host States alone. Other interested parties and stakeholders should be empowered to vindicate their rights and demand accountability.

One option for enforcement would be through the establishment of an international court system for that purpose. This is not very attractive as it would amount to exploring some new ground, creating new bureaucracies, and raising

[83] For discussions on this, see Donald J. Kochan, *Constitutional Structure as a Limitation on the Scope of the "Law of Nations" in the Alien Tort Claims Act*, 31 Cornell Int'l L.J. 153 (1998).
[84] Phillip I. Blumberg, *Accountability of Multinational Corporations: The Barriers Presented by Concepts of the Corporate Juridical Entity*, 24 Hastings Int'l & Comp. L. Rev. 297 (2001).

questions of accessibility for millions of victims of corporate abuse scattered all over the world. The fact that some of these victims are quite poor folk who cannot afford the costs of traveling to wherever the court would be situated makes the option even less attractive. Even if the court is decentralized, the problems of new bureaucracy and related matters would still militate against this option. A better option would be to consider what is being used at the moment.

In the same manner that aggrieved parties are allowed under the current wave of international civil litigation to approach a court of law to state their grievances and seek redress, the treaty will ensure the availability of national courts for the enforcement of corporate obligations. However, unlike the current system under which the remedies are only available in a few countries, legal enforcement should be mandated on the national courts of every State party.[85] For instance, it could be stipulated that corporations engaged in human rights breaches and egregious environmental violations, among others, should be liable in any jurisdiction in which their operations extend. It would be up to aggrieved parties to choose the best location for the adjudication of their complaints. This will reduce the burden being borne by the courts of the few countries that are currently the points of action in international corporate accountability litigation.

Some procedural problems inherent in or attendant to the current regime on transnational litigation should also be removed. The doctrine of *forum non conveniens* and other encumbrances encountered by many a plaintiff would either be abolished or

[85] As Professor Beth Stephens has observed: "A coordinated international effort to provide access to national copurts to litigate human rights claims would greatly further efforts to enforce the human rights obligations of transnational corporations." Beth Stephens, *The Amorality of Profit: Transnational Corporations and Human Rights*, 20 Berkeley J. Int'l L. 45 (2002).

streamlined. There are arguments from both angles on the utility or irrelevance of forum non conveniens, for example.[86] Under this proposal, the debate will be moot as factors that make a particular forum attractive over others would have been eliminated or severely diminished. In the *Wiwa Case*, the district court initially dismissed the action, yielding to the defendant's contention that England presented a more appropriate forum for adjudication.[87] The plaintiffs appealed, and after spending a lot of time, resources and energy in court, they prevailed at the appellate level.[88] All

[86] One advantage of *forum non conveniens* and the battle it brews, is that it could have the consequence, albeit mostly unintended, of facilitating the ultimate resolution of the matter in a speedy manner. See ADRIAN BRIGGS, THE CONFLICT OF LAWS (2002).

> A brisk preliminary skirmish on jurisdiction may well allow each side to gauge the strength of the other's case and the stomach each has for the fight. After the issue has been decided, the case may well settle, and if it does, settle on better informed terms than would otherwise have been the case. If this is so, the doctrine of forum non* conveniens also justifies itself as a species of alternative dispute resolution.

Id., at 95.
Nevertheless, there is no doubt that it is viewed as an obstacle to plaintiffs and a shield (if not a sword) for corporations. Thus plaintiffs, especially who have limited resources that are better devoted to the substantive matter, would be happy to see its removal. Exhausting your resources at the preliminary stage could translate into abandoning the case altogether, which is probably what is at the back of the mind of some defendants when they invoke the doctrine. The relevance of the doctrine of *forum non conveniens* in modern times has also been seriously questioned.

> The doctrine of forum non conveniens is obsolete in a world in which markets are global and in which ecology have documented the delicate balance of all life on this planet . . . . [It] enables corporations to evade legal control merely because they are transnational . . . . In the absence of meaningful tort liability in the United States for their actions, some multinational corporations will continue to operate without adequate regard for the human and environmental costs of their actions. This result cannot be allowed to repeat itself for decades to come. As a matter of law and public policy, the doctrine of forum non conveniens should be abolished.

Per Judge Lloyd Dogget in *Dow Chemical Co. v. Castro Alfaro*, 786 S.W. 2d 674, 689 (Tex. 1990).
[87] *Wiwa v. Royal Dutch Petroleum Co.*, No. 96 Civ. 8386, slip op. at 2-3 (S.D.N.Y. Sep. 25, 1998).
[88] The case was dismissed because Shell successfully argued that an adequate alternative forum – England – exists. The appellate court reinstated the case. See *Wiwa v. Royal Dutch Petroleum Co.*, 226 F. 3d 88 (2d Cir. 2000). The United States Supreme Court on March 26, 2002, denied certiorari and thus declined to review the decision of the U.S. Court of Appeals for the 2nd Circuit, thus paving the

the time and expense that went into the fight over forum would have been saved, if the plaintiffs believed that England would afford them the same protection and remedies as the United States. The defendant would also have been deprived of another objection, perhaps intended to buy time, and possibly delay, if not derail, the plaintiffs' march toward justice. Moreover, since the defendants obviously indicated that they were amenable to responding to the complaints against them in England, the appearance of fairness would have been heightened.

Universalizing the ATCA remedy through the proposed treaty will also remove the competitive advantage that corporations from other countries would have over those headquartered in, or associated with, the United States.

V. CONCLUSION

The lack of a clear definition and articulation of the position of the multinational corporation in international law is at the root of some of the difficulty surrounding corporate regulation in international law.

Multinational corporations continue to benefit from this state of affairs. They wield a lot of influence, which hardly makes them amenable to the control of most national governments. At the same time, international law keeps them at an arms length. The result has been that injuries to a lot of victims of human rights violations and environmental abuse go unremedied or inadequately addressed. Clarifying the role of corporations in international law would certainly help. It is also imperative to create an enhanced status for them with attendant rights and responsibilities. A useful

way for the lawsuit to proceed against Shell. See Andrew Buncombe, *US Supreme Court Clears Way for Relatives to Sue Shell over Saro-Wiwa's Death*, INDEPENDENT (UK) March 27, 2001.

model could be that currently in use in the United States under which corporations could be held liable in domestic courts for violations of international law. An adaptation of this model, *mutatis mutandis*, will help in creating a more just world. Changing the structure of international law to reflect new realities is a task that deserves greater attention.

CHAPTER 7

CONCLUSIONS AND RECOMMENDATIONS

There is a general perception and widespread belief that the international legal system is characterized by considerable, if not chronic, weakness in its structure. With no police force, strong military or a mandatory judicial system to ensure the observance of its dictates comparable to what obtains in the domestic setting, this view cannot honestly be charged with an unhealthy detachment from reality. To ensure that its provisions are translated into reality, the international legal system relies extensively on States, the primary subjects of international law. States are expected to implement international rules in domestic legislation, comply with them and ensure that they are enforced. Unfortunately, this has not always worked and the practice does not seem to augur very well for the strength of the international legal system.

In the real world, while States have the obligation to follow international legal provisions, many of the stipulations of international law are more relevant to business enterprises. Unarguably, multinational corporations are major players in the domestic and global economic systems. The activities of these corporations have a huge impact on a vast portion of the society and when international policymakers have established rules to control some harmful effects of human activity, corporations have been the intended, indirect targets.

Perhaps, there are fewer areas where the foregoing observations are truer than in the petroleum industry. Thus, when international regulations relating to oil operations are left unimplemented, the role and responsibility of oil corporations

cannot seriously be ignored. Sadly, the approach of international law till date has been not to get involved in directly holding them accountable. The situation is even worse in cases where there has not been an elaboration of international rules to guide or circumscribe corporate behavior, even when such behavior has or exhibits a tendency to injure many. Such cases foster a regime of *de facto* unaccountability in which the operations of large corporations are hardly scrutinized and their harmful activities sanctioned by any legal or political authority.

This work has examined the operations of multinational corporations in the different aspects of the petroleum industry including exploration and production, refining, distribution and marketing, the various international regulations that have been introduced to minimize their social, economic and environmental impact, and the vacuum that still exists, leading to a weakening of the international system and permitting untold hardship to continue to be visited on powerless and defenceless people, especially in developing countries.

In discussing the prevailing international rules on the environmental aspects of international oil trade and shipping, this dissertation has proceeded 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, the researcher has suggested ways of making the existing international law work better.

It is expected that this thesis will accomplish three major objectives. First, 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. Secondly, it encourages the definition and clarification of the role of the multinational corporation in international law. Thirdly, it seeks to promote corporate accountability in the petroleum industry and galvanize those who are committed to addressing the social, economic and environmental costs of transnational business activity.

In the light of the foregoing, a number of recommendations are made in the following pages with a view to ensuring a better world for us all. The recommendations, are considered as a modest contribution toward the improvement of the existing state of affairs.

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 in that area.

The environmental issues that arise from the 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 will be a mere mirage if other areas are still prone to oil pollution. 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 the 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 to a certain degree at present, will enable key players on the international scene to dedicate considerable energy and resources to making existing laws more effective.

In order to make the current legal framework more productive, international policy should be streamlined to enable States who are willing, but unable, to participate in global efforts against oil pollution 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 still enjoy the economic benefits such shipping brings, the environment continues to suffer. The flags of convenience States who depend on proceeds from ship registration should be assisted economically 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, given that some of the foregone revenue would ordinarily have been channelled into these areas. Accordingly, open registries should not necessarily be abolished, but their services should be restricted to seaworthy vessels whose owners are interested in operating in an atmosphere free from a lot of State control.

Funding the cost of compliance by developing States and "buying out" open registry States require a huge financial commitment. To raise the needed funds, 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 should 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 nations should undertake 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 past activities. It is also imperative for them to help fund marine environmental projects, including those to be undertaken by 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 an international funding facility. This does not necessarily need to be a new agency as existing institutions, such as the Global Environment Facility (GEF), can be harnessed.

The unethical practices of the business community, founded upon an inordinate desire for profit maximization, are at the root of the compliance problem. States are propelled to bow to the wishes of corporations in their disposition toward treaty negotiation, accession, and implementation because of their deference to the interests of the corporations. The industry also ensures the sustenance of open registries, a practice engineered by it without regard to 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. This would be done through the creation of a binding and enforceable international code of behavior. With this in place, the burden on States to enforce international rules will be lessened, as the corporate sector will be forced to behave responsibly.

The structure of the international system itself has stood as a serious impediment to the effectiveness of international law. Because of the principle of State sovereignty, a flag State's jurisdiction over its ships is viewed as being of the utmost importance. But flag States have not been keen to their responsibilities and this has hamstrung international efforts. It is therefore recommended that Flag State jurisdiction should be redefined or de-emphasized. Thus, actions for violations of international rules should be allowed against vessels and corporations in States other than the State of the ship's registry.

Port State control has been immensely important in preventing and controlling oil pollution. Its effectiveness has been most evident through regional arrangements.

The IMO and other relevant agencies should therefore 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 model established by the Paris Memorandum of Understanding (MOU).

The issue of "ports of convenience," that is, situations where shipowners redirect their operations to ports with less stringent requirements, also must be addressed. It is critical that the advantage other States' ports currently enjoy over ports in states like Canada, the United States, Japan, and Paris MOU countries be rectified.

The West African region is an oil tanker route as well as an offshore oil exploration area. However, until recently, when a memorandum on port State control was signed in Nigeria, the countries in the area had not been able to jointly work against the oil pollution problems that may arise from these facilities. 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 United Nations Environment Programme (UNEP) and the International Maritime Organization (IMO) should not relent in their efforts to ensure that pollution in West Africa is kept under control.

It is expected that the newly-introduced regional port State arrangement in the West African region 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 neighboring 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.

In relation to oil exploration and extraction and the social, economic and environmental costs arising therefrom, this work acknowledges the importance of existing measures and instruments. Corporate codes of conduct and other voluntary initiatives serve some useful purpose as corporate accountability tools. However, they are inadequate and largely ineffective and therefore should not be considered a panacea. Public initiatives should be introduced to strengthen or replace self-regulation.

The United Nations should go beyond the Global Compact and ensure the introduction of binding initiatives that place an obligation on multinational corporations to act responsibly toward the society and environment. The UN Commission on Human Rights or its SubCommission on the Promotion and Protection of Human Rights should ensure that its current work results in a mandatory code, binding on all multinational corporations doing business around the globe.

The domestic judicial systems of some countries, notably the United States, Great Britain and France have proven an invaluable resource and provided enormous opportunities for those seeking remedies for corporate abuses. They remain inadequate, nevertheless, and come with enormous disadvantages for those countries and their corporations vis-à-vis companies from countries that do not take corporate accountability with the same level of seriousness. Globalizing the advantages that

these national legal systems offer through an international treaty would be a step in the right direction.

The legal personality of the multinational corporation in international law has been shrouded in controversy. Clarification of the international legal position and status of these corporate entities is imperative, if the goal of addressing the social, economic and environmental costs of international business remains on the radar screen of wellmeaning people all over the world. Multinational corporations should be invested with appropriate rights, with corresponding duties attaching to them in international law.

It is not enough to hold multinational corporations accountable in international law for environmental abuses and human rights violations. Reforms geared toward such, while helpful, would still not address the multifarious needs of people in oil producing communities. Indeed, environmental pollution, degradation and devastation affect the economic wellbeing of some of these communities that are heavily dependent on fishing and farming. Some of the human rights abuses also stem from agitation for better treatment from oil companies, a cessation of economically (as well as ecologically-) harmful activities, and a desire to have a stake in resources that belong to them. Therefore, other social and economic costs of oil operations also need to be addressed.

Some useful measures are hereby recommended. First, where such does not exist, people in the oil producing communities should be given the right to information about facilities sited in their area, the chemicals and other materials used

in their operation and the level of hazard they pose to the community. This should be enshrined in the national laws and also at the international level.

Oil producing States should also ensure that they enunciate and incorporate in their legal framework, the oil producing communities and peoples' right to participation in the formulation and implementation of developmental and environmental decisions that have an impact on them.

There is a great need for communities to be allowed unfettered access to domestic judicial remedies. The right to citizen suits should be entrenched. That way, aggrieved persons would be able to go to court to vindicate their rights and would no longer need to depend on government officials – who may be corrupt or colluding with corporate executives, and thus unreliable.

Since their traditional economies suffer the adverse consequences of oil production, people in oil producing communities should have an alternative economic base fashioned for them. The use of development and conservation trust funds to preserve their resources and build their capacities would be a welcome development. In particular, relevant industries should be sited in their area, while reasonable grants should be made to community members to establish micro-enterprises that would benefit them as well as provide needed jobs for the budding army of jobless youths and others in their areas. Most important, the system of depriving people in the oil producing communities of their property rights in their resources is quite unfair. A system that confers some form of ownership (where outright transfer of control is infeasible) is highly recommended.

This work has taken the innovative and pioneering step of linking the compliance problem in international law with the corporate accountability question. Addressing the latter is tantamount to removing some of the obstacles that impede the achievement of the former, necessitating an approach that takes this linkage as an important issue. This dissertation has also sought to enhance the effectiveness of international rules and supply needed strength to the international legal system by advocating a fuller incorporation of multinational corporations in the international scheme of things.

It is fervently hoped and earnestly expected that the conclusions reached and recommendations made herein would capture the attention of international policy makers and viewed as a modest contribution toward a much needed reform of international law and policy.

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