

VESSELS ON THE HIGH SEAS: USING A MODEL FLAG STATE COMPLIANCE AGREEMENT TO CONTROL MARINE POLLUTION

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[S]hips themselves . . . truly embody the anarchy of the open ocean: they are possibly the most independent objects on earth, many of them without allegiances of any kind, frequently changing their identity, and assuming whatever nationality . . . allows them to sail as they please.¹

I. INTRODUCTION

The *Prestige* oil tanker currently lies on the bottom of the ocean off the Spanish *Costa de la Muerte* in the Atlantic, and still contains about 53,000 metric tons of toxic crude oil.² Meanwhile the Government of Spain has spent \$2 billion dollars cleaning up what is considered one of the world's worst environmental disasters, and has no one from whom to recover the costs.³ The incident strikes at the heart of the weaknesses of the international shipping industry: the lack of a comprehensive legal framework that oversees and enforces the rule of law over Flag States, vessels and vessel operators in international waters.

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1. William Langewiesche, *Anarchy at Sea*, ATLANTIC MONTHLY, Sept. 2003, at 1, <http://www.wesjones.com/anarchy.htm>.

2. *Review of Maritime Transport, 2003, Report by the UNCTAD Secretariat*, U.N. Conference on Trade and Development, at 41, U.N. Doc. UNCTAD/RMT/2003 (2003) [hereinafter *UNCTAD Report*].

3. *Spain—The Lawless Sea: The Story*, PBS, at 2, at <http://www.pbs.org/frontline-world/stories/spain/thestory.html> (last visited Mar. 11, 2005) [hereinafter *Lawless Sea: The Story*].

The *Prestige* disaster, one of many environmental catastrophes that has occurred on the high seas, highlights the need for many changes in the current international legal framework governing vessels. The current international laws of the seas regulating vessels are dangerously deficient as they are based on the concept of *mare liberum*, or freedom of the seas.⁴ In our current day and age, there is a compelling need to protect the fragile marine environment, which is increasingly threatened by marine pollution and over-fishing. Therefore, a reconfiguration of the law of the sea framework and the implementation of solid and comprehensive legal guidelines with respect to Flag States and vessels is essential.

Part II of this article gives an overview of the *Prestige* oil spill that occurred off the coast of Spain in 2002. It explains the events that led up to the incident, how the lawless nature of the shipping industry was a major cause of the accident and the resulting environmental devastation. Part III explains how current international laws that govern vessels on the oceans are inadequate, having been unsuccessful in gaining control of the seas. It then sets forth some of the international community's responses to the lawless nature of the seas, including: increased restrictions on vessels traversing waterways; the creation of national and regional port authorities; the prohibition and phasing out the use of single hull tankers; amendments to existing international treaties concerning marine pollution; and voluntary schemes for Flag States and vessel owners, all aimed at controlling vessels on the high seas.

Part IV provides an overview of the recently entered into force Food and Agriculture Organization's Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas,⁵ and explains how the Agreement is a considerably important development that could serve as a model agreement to govern other types of vessels, particularly, merchant vessels. Part IV also highlights how the use of structurally deficient aging tankers among the world merchant fleet, and the lack of an adequate legal regime to control these vessels, create a threat to the global marine environment. It explains how a model Compliance Agreement, if drafted to apply to vessels that use the high seas for shipping, would be a sensible solution to these problems. The article concludes

4. See generally HUGO GROTIUS, THE FREEDOM OF THE SEAS vii (Ralph Van Deman Magoffin trans. & James B. Scott ed., 1916) (1608).

5. Food and Agriculture Organization: Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, 33 I.L.M. 968 (1994) (entered into force Apr. 24, 2003) [hereinafter Agreement].

by proposing the idea of the eventual creation of a Global Registry, and shows how a model Compliance Agreement could serve as an appropriate interim step for such a development.

II. BACKGROUND

A. *The Prestige Incident*

The Aframax *Prestige* Tanker began her journey in Latvia, destined for Singapore, and stopped in St. Petersburg, Russia where she loaded up with 77,000 metric tons of crude oil.⁶ Her journey ended tragically on November 19, 2002, when she broke in half on the high seas and sank off the Spanish *Costa de la Muerte*, or Coast of the Dead.⁷ She is now on the seabed of the Atlantic Ocean, 12,000 feet deep.⁸ The resulting oil spill is considered one of the worst oil spills in history.⁹

The *Prestige* Tanker was owned by a Greek company, Mare Shipping, and operated by Swiss-based Crown Resources.¹⁰ She was registered in Liberia as a way of limiting taxes and liabilities.¹¹ She flew the flag of the Bahamas.¹² Her captain, Apostolos Mangouras, is Greek and her crew, Filipino.¹³

As she approached the Spanish *Costa de la Muerte*, about 25 miles off the Coast of Galicia in Northwest Spain, the *Prestige* encountered a windstorm with twenty-foot waves that punctured a hole in her starboard side tank.¹⁴ Her captain called for help, whereby rescue helicopters from Spain evacuated the crew.¹⁵ The *Prestige* began to leak crude oil and drifted within four miles of the Spanish Coast.¹⁶

Due to the severity of the accident, the Spanish Government ordered Serafin Diaz, a veteran Captain, dispatched to the scene in order

6. UNCTAD Report, *supra* note 2, at 41.

7. *Lawless Sea: The Story*, *supra* note 3, at 1-2.

8. Alexandra Fouché, *Analysis: Salvaging the Prestige*, BBC NEWS ONLINE, Dec. 11, 2002, at <http://news.bbc.co.uk/2/hi/europe/2566303.stm>.

9. *Lawless Sea: The Story*, *supra* note 3, at 1.

10. Paul Reynolds, *Analysis: Tightening Rules on Tankers*, BBC NEWS ONLINE, at 2, Nov. 19, 2002, at <http://news.bbc.co.uk/2/hi/europe/2491699.stm>.

11. *Lawless Sea: The Story*, *supra* note 3, at 1.

12. Press Release, American Bureau of Shipping, *Prestige Casualty—Information Update No. 3*, at 1 (Nov. 20, 2002), available at <http://www.eagle.org/news/press/nov202002.html> [hereinafter ABS Press Release].

13. *Lawless Sea: The Story*, *supra* note 3, at 1.

14. See ABS Press Release, *supra* note 11, at 4.

15. *Lawless Sea: The Story*, *supra* note 3, at 1.

16. *Id.*

to steer the *Prestige* out to sea and away from Spain to avoid environmental devastation to the Spanish coasts.¹⁷ When captain Mangouras adamantly refused, saying the ship needed to be confined in order to make the repairs necessary to contain the leaking oil, Spain threatened to bring in the Spanish Navy.¹⁸ The *Prestige* was then steered out to sea by Serafin Diaz¹⁹ with the help of the Spanish tugboat, *Ria de Vigo*.²⁰ After several days of sailing and being towed, the *Prestige* snapped in two, spewing crude oil, and sank 130 miles off the Spanish coast.²¹ Captain Mangouras was arrested and charged with negligence.²²

The accident produced black tides of oil that swept the northern coast of Spain, and parts of France, killing millions of fish, birds and other species.²³ The tide contaminated 350 miles of coastline with almost twice the oil from the *Exxon Valdez* spill in Alaska.²⁴ On some parts of the Spanish coast the oil was one meter thick.²⁵ Spain imposed a six-month ban on fishing in Galicia, a Spanish region whose economy is heavily dependent on the fishing sector.²⁶ The cleanup took approximately 6 months and cost an estimated \$2 billion.²⁷ It will take decades for the Galician marine ecosystem to recover.²⁸

The local people affected by the incident reacted with intolerance. The mayor of the coastal town Concurbion in Galicia, which was badly damaged by the oil, called the incident “an act of terror, a criminal act” and said “[w]e need an international tribunal to judge . . .

17. *Id.*

18. *Id.* at 1-2.

19. *Spain—The Lawless Sea: Interview with Mark Schapiro: Troubled Waters*, PBS, at 4, at <http://www.pbs.org/frontlineworld/stories/spain/schapiro.html> (last visited Mar. 11, 2005) [hereinafter *Schapiro Interview*].

20. Nigel Lowry et al., *Safety—Alofouzos Leads Owner Fightback on Hull Ban*, LLOYD’S LIST INT., Dec. 6, 2002, at 2.

21. *Lawless Sea: The Story*, *supra* note 3, at 2.

22. *Id.*

23. *UNCTAD Report*, *supra* note 2, at 41.

24. Nearly 71,000 tons of oil were spilled by the *Prestige*, 60 percent more than initially estimated, compared with 42,769 tons spilled by the *Exxon Valdez*. Raul Garcia, *The Prestige: One Year On, A Continuing Disaster*, 26 OIL SPILL INTELLIGENCE REP. 6 (2003). The *Exxon Valdez* spill occurred in March of 1989 off of the Coast of Alaska by a single hull tanker and is considered the biggest oil spill in that area. See Philip Schabecoff, *Largest U.S. Tanker Spill Spews 270,000 Barrels of Oil Off Alaska*, N.Y. TIMES, Mar. 25, 1989, at 1.

25. Begoña P. Ramírez, *Carnota, ni Marisco ni Alemanes*, EL MUNDO (Spain), Nov. 23, 2003, available at <http://www.elmundo.es/elmundo/2003/11/13/ciencia/1068754586.html>.

26. *Lawless Sea: The Story*, *supra* note 3, at 2.

27. *Id.*

28. *Schapiro Interview*, *supra* note 19, at 5.

all those responsible for the spill.”²⁹ On the first anniversary of the sinking of the *Prestige*, 100,000 people from the city of Santiago de Compostela marched in the streets to demonstrate their disdain for the *Prestige* disaster.³⁰ A group called *Nunca Mais*, or “Never Again,” in Gallego, organized the movement.³¹

“The Spanish government [later] recovered documents from the *Prestige* indicating the ship never should have been allowed to go to sea.”³² The vessel was not seaworthy because it had cracks in sections of its hull that had been insufficiently welded,³³ and it had not undergone a port inspection in the twelve months prior to the accident, “in spite of visiting several ports for bunkering”³⁴ Moreover, it was very difficult to locate the actual owners of the ship because there was a network of front companies set up.³⁵ The company that owned the *Prestige* is based in Liberia and owned by the Coulouthros family, and the ship is the company’s sole asset.³⁶ Therefore, Spain is unable to recover.³⁷

Aside from the cleanup costs spent by the Spanish Government, it has also paid \$208 million in compensation to Regional Governments.³⁸ Because Spain has been unable to seek indemnification for

29. *Lawless Sea: The Story*, *supra* note 3, at 2.

30. *Id.*

31. *Id.*

32. *Id.* “[The *Prestige*] was one of many [tankers] built quickly and cheaply in Japan during the . . . 1970s.” *Analysis: Vulnerability of Single Hulls*, BBC NEWS ONLINE, Nov. 19, 2002, at <http://news.bbc.co.uk/2/hi/europe/2491451.stm> [hereinafter *Vulnerability of Single Hulls*]. When she sank she was 26 years old, considered well past retirement age for a single-hulled tanker. See *infra* text accompanying notes 115-119. Additionally, the previous captain of the vessel, Esfraitos Kostazos, apparently resigned as captain out of concern that the ship was in unsound condition, and had faxed letters referencing the bad state of the vessel to both the owners and to ABS Shipping Company. See *Spain—The Lawless Sea: The Paper Trail—Examining the Case of the Prestige*, PBS, at 1, at <http://www.pbs.org/frontlineworld/stories/spain/memos.html> (last visited Mar. 11, 2005) [hereinafter *Lawless Sea: The Paper Trail*].

33. See *Vulnerability of Single Hulls*, *supra* note 31. The American Bureau of Shipping ordered major repairs for these cracks in 2001, which were welded in China shortly thereafter. *Id.* Although it is not certain this was the cause of the accident, experts speculate it was. *Id.*

34. *UNCTAD Report*, *supra* note 2, at 41.

35. *Lawless Sea: The Story*, *supra* note 3, at 2; see also *supra* text accompanying notes 9-12.

36. *Lawless Sea: The Story*, *supra* note 3, at 2.

37. *Id.* Spain cannot go after Swiss Crown Resources, the ship’s operator, due to an agreement between Swiss Crown Resources and its owners, putting liability on the owner of the ship. See *Críticas, Responsabilidades y Culpas en el Desastre del ‘Prestige,’* EL MUNDO (Spain), Nov. 21, 2002, available at <http://www.elmundo.es/elmundo/2002/11/19/ciencia/1037742422.html>.

38. *La Comisión del Prestige Cree que 160 Millones de Euros para Indemnizaciones son ‘Suficientes,’* EL MUNDO (Spain), Aug. 3, 2003, available at <http://www.elmundo.es/elmundo/2003/08/02/ciencia/1059833591.html>. Fifteen percent of the costs suffered by locals

the costs of the cleanup and other compensations, it is filing a \$750 million lawsuit against the ship's classification society, American Bureau of Shipping (ABS), in New York Federal Court.³⁹ ABS surveyed the *Prestige* just six months before it sank.⁴⁰ Spain is claiming the company acted negligently in not carrying out its responsibilities of inspection of the vessel.⁴¹ The company is counterclaiming, alleging the Spanish Government is responsible for the accident for refusing to let the distressed vessel take refuge in its ports so it could make the necessary repairs.⁴²

Maritime union officials say Captain Mangouras, who is currently on "trial in Spain, is a "scapegoat" for an "out-of-control international system . . ." that allows broken-down, sea unworthy vessels to roam the seas.⁴³ Who is really responsible for this and the numerous other high profile disasters occurring on the high seas? How can these casualties be avoided in the future? The following sections address and attempt to answer these questions.

III. LAW

A. *International Law's Flimsy Oversight of the Shipping Industry*

1. *Shadows on the High Seas*

The oceans are a "world of shadows wild and chaotic and increasingly beyond government control."⁴⁴ This is because the predominate legal paradigm governing the laws of the seas is *mare liberum*, or

will be paid by the International Oil Pollution Compensation Fund for damages caused by pollution by hydrocarbons. *Id.* The EU has also given Spain 344.5 million euros for the total clean up and indemnifications. *De Palacio: "España ha Obtenido de la UE 110 Millones y Francia, tras Hundirse el 'Erika', Sólo 10,"* EL MUNDO (Spain), Jan. 13, 2003, available at <http://www.elmundo.es/elmundo/2003/01/12/ciencia/1042407352.html>.

39. *Lawless Sea: The Story*, *supra* note 3, at 2; see also *Lawless Sea: The Paper Trail*, *supra* note 32, at 1.

40. *Lawless Sea: The Story*, *supra* note 3, at 2.

41. See *Spain—The Lawless Sea: The Paper Trail—Examining the Case of the Prestige: The Company View: Response from ABS to Frontline/World*, at 3-4, available at <http://www.pbs.org/frontlineworld/stories/spain/response.html> (last visited Mar. 11, 2005) [hereinafter *Lawless Sea: Company View*].

42. *Id.* ABS is claiming, among other things, that Spain is liable under both applicable Spanish law and International Conventions that impose duties on States to minimize pollution. See *id.* at 4.

43. *Lawless Sea: The Story*, *supra* note 3, at 3.

44. William Langewiesche *Discusses the Difficulties in Policing Ships Sailing the Oceans* (NPR radio broadcast Aug. 11, 2003) available at <http://www.npr.org/templates/story/story.php?storyId=1392315> [hereinafter NPR broadcast].

freedom of the high seas.⁴⁵ The concept of *mare liberum*, established by Hugo Grotius in the 17th century, is based on the notion the seas are a space common to all mankind, and therefore cannot be exclusively owned by anyone, but are to be used by everyone.⁴⁶ The persistence of this doctrine has resulted in irresolute laws, whereby shipping remains one of the world's least regulated activities.⁴⁷

The *Prestige* oil spill is one of numerous casualties that occur on the high seas as a result of this weak international legal status, which fails to control and monitor the activities of vessels.⁴⁸ Much needs to be done to gain control of the world's oceans. In order to ensure safe, secure and environmentally sound shipping operations, it is vital there be a solid legal framework to oversee vessels, especially the shipping industry.

45. These freedoms, however, are not absolute. See United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 3, 21 I.L.M. 1261 (entered into force Nov. 16, 1994) [hereinafter UNCLOS]. This recent Convention has established zones such as the Exclusive Economic Zone and Continental Shelf and navigational rights, pollution control, marine scientific research, and fisheries regulation, establishing State authority over certain areas of the seas. See generally *id.*

46. See GROTIUS, *supra* note 4, at 24. Hugo Grotius was a lawyer for the Dutch who wrote the essay *Freedom of the Seas* in order to defend interests of the Dutch on the high seas against the claims of Spain, Portugal, and Britain. He advocated that all nations should have free and equal access to the seas and argued "the sea is common to all, because it is so limitless that it cannot become a possession of any one." *Id.* at 28.

47. Spain—*The Lawless Sea: Hiding Behind the Flag: Introduction*, PBS, at 1, at <http://www.pbs.org/frontlineworld/stories/spain/flags1.html> (last visited Mar. 11, 2005) [hereinafter *Lawless Sea: Hiding Behind the Flag: Introduction*].

48. Beyond the scope of this article, but of increasing concern to the global community, is the growing threat of marine terrorism. Terrorists are making use of the shipping industry to carry out their terrorist activities. Vice Admiral Timothy Keating Briefing via Satellite-Teleconference from Bahrain (Dept. of Defense briefing, Apr. 12, 2003), at <http://www.defense.gov/transcripts/2003/tr20030412-0092.html> (last visited Mar. 11, 2005). On October 12, 2000 al-Qaeda terrorists attacked the U.S. Navy destroyer U.S.S. Cole in the Yemeni port of Aden, killing seventeen crewmembers and injuring many others. E.g., William Branigin, *Two Sentenced to Die for USS Cole Attack*, WASH. POST, Sept. 30, 2004, at A18. Also there have been recent discoveries that al-Qaeda is using marine transport to traffic drugs in order to raise money for terrorist activities. E.g., Rowan Scarborough, *Drug Money Sustains al-Qaeda; Cut-off Needed to Strangle Cells*, WASH. TIMES, Dec. 29, 2003, at A1. In mid December of 2003 the US Navy seized three ships in the Arabian Gulf that were linked to al-Qaeda. *Id.*; *Afghanistan Drugs and Terrorism and U.S. Security Policy, Hearing Before the House Comm. on Int'l Relations*, 108th Cong., 2d Sess., 26, 29 (2004), available at http://www.house.gov/international_relations/108/91798.pdf (last visited Mar. 11, 2005). The United States is particularly vulnerable to terrorist attacks carried out in its Marine Transport System. See Report of the Interagency Commission on Crime and Security in U.S. Seaports, Fall 2000, available at <http://www.securitymanagement.com/library/seaport1200.pdf> (last visited Mar. 11, 2005).

2. *International Law Endows Flag States with Ultimate Responsibility of Vessels*

The existing laws and regulations that govern vessels on the high seas vary from state to state and by agreement, and there exists an overall lack of compliance-inducing mechanisms.⁴⁹ The current framework governing vessels provides Flag States ultimate authority over vessels.⁵⁰ Vessels only answer to the Flag States, who need not, and often do not, comply with international laws and norms respecting safety on the high seas. As a result, the shipping industry fleet, transporting 80% of the world's goods, including toxic cargo, is able to use Flag States to escape complying with internationally accepted norms and standards for vessels.⁵¹

International Law has attempted to address the absolute chaos to which the absence of any authority over vessels sailing in international waters would lead. Currently, every ship on the high seas must fly a flag of a nation.⁵² Under the United Nations Convention on the Law of the Sea (UNCLOS), which is the predominant convention codifying the laws of the seas, if a vessel is not flying the flag of a nation while on the high seas, any State can board the ship.⁵³ Therefore, "a stateless vessel[] . . . may not claim the protection of international law and does not have the right to travel the high seas with impunity."⁵⁴

According to UNCLOS, for a vessel to sail under the flag of a Flag State there must be a "genuine link" between the vessel and the issuing State.⁵⁵ The genuine link requirement is met if the vessel's nationality is the same as the State under whose flag it flies.⁵⁶ The term "nationality" in this context is not the same as nationality of citizens;

49. William Langewiesche, a critic of the current legal framework of the laws of the seas, refers to it as a "fantasy floating free of the realities at sea." Langewiesche, *supra* note 1, at 9. He uses the example of the International Maritime Organization, which he calls a "typically idealistic construct" because the IMO itself does not have any enforcement powers, and the 162 member states do not have the expertise or inclination to enforce their own powers. *See id.*

50. "The common legal understanding of 'flag state' is the administration or the government of the 'state' whose flag the ship is entitled to fly." ROUND TABLE OF SHIPPING INDUSTRY ORGANIZATIONS, SHIPPING INDUSTRY GUIDELINES ON FLAG STATE PERFORMANCE 3 (2003) [hereinafter GUIDELINES].

51. *See Lawless Sea: Hiding Behind the Flag, Introduction, supra* note 47, at 1.

52. UNCLOS, *supra* note 45, art. 110 (1)(d).

53. *Id.* art. 110(1)(d). For example "in enforcing the U.S. maritime drug laws, the United States not only boarded, but seized, stateless vessels. LOUIS B. SOHN & JOHN E. NOYES, CASES AND MATERIAL ON THE LAW OF THE SEA 105 (2004) (internal citation omitted).

54. *United States v. Pinto-Mejia*, 720 F.2d 248, 260 (2d Cir. 1983).

55. UNCLOS, *supra* note 44, art. 91(1).

56. *Id.* art. 91.

rather, it is used to define the legal relationship between the Flag State and the ships authorized to fly under its flag.⁵⁷ Under the current international legal framework governing the laws of the seas, the registration of vessels with the Flag State is the primary way in which a State shows the vessels to which it has granted nationality.⁵⁸

Aside from this tenuous link requirement, the Convention imposes no limits on the State's authority to determine on its own the conditions under which to grant nationality to vessels.⁵⁹ Article 91 of UNCLOS provides, "[e]very State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag."⁶⁰ Because Flag States determine for themselves the conditions under which to grant nationality to vessels, they accept responsibility for the ship and acquire authority over it.⁶¹

Thus, issuing Flag States have ultimate authority and responsibility over vessels flying under their flag. They also have complete jurisdiction over these ships on the high seas and are "obligated to enforce rules regarding navigation, safety, and administrative, technical and social matters."⁶² This principle of Flag State control and ultimate authority determines the freedoms of vessels, which would be undercut if any State could legally interfere with them while on the high seas.⁶³

Due to the virtually absolute nature of its authority, it is the Flag State that plays the critical role with respect to safety of life at sea, security, protection of the marine environment and even good employment conditions for seafarers.⁶⁴ Yet oftentimes the Flag State that grants its nationality to ships does not enforce these rules.⁶⁵ In fact, there are a handful of countries that capitalize on the existing legal framework allowing them to grant nationality to any vessel, and which

57. "[T]he ship, everything on it, and every person involved or interested in its operations are treated as an entity linked to the [F]lag [S]tate. The nationalities of the persons are not relevant." ITLOS: *M/V "Saiga" (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, 38 I.L.M. 1323, 1347 (1999).

58. SOHN & NOYES, *supra* note 53, at 103.

59. *Id.* at III-6 (citing C. JOHN COLOMBOS, *THE INTERNATIONAL LAW OF THE SEA* 290 (6th rev. ed. 1967)).

60. UNCLOS, *supra* note 44, art. 91.

61. *See Lauritzen v. Larsen*, 345 U.S. 571, 584 (1953).

62. SOHN & NOYES, *supra* note 53, at 104; *see also* UNCLOS, *supra* note 44, art. 94.

63. SOHN & NOYES, *supra* note 53, at 104.

64. GUIDELINES, *supra* note 50, at 4.

65. *See infra* pp. 221-25.

lacks a mechanism for ensuring they carry out their Flag State obligations.

3. *Flags of Convenience*

Substantial regulation of the international shipping industry is prevented in part by the ability of shipowners to get “flagged” in foreign countries that may have far less stringent safety and labor requirements than those of their home country.⁶⁶ These ship registries, known as “open registry,” or by critics as “flags of convenience,” offer registry of vessels under their flags while maintaining minimum requirements such as low taxes, low fees, no requirement of national ownership or control of the vessels, and no requirements regarding national crews, officers or build.⁶⁷ It is not even necessary the country have a coastline to grant its flag.⁶⁸

This system, although created during World War II,⁶⁹ expanded enormously in the 1990s as a direct result of the international community’s attempts to regulate vessels on the high seas.⁷⁰ By the end of 2002, 47.2 percent of the world fleet was registered in major open-registries.⁷¹ The system of open registries reflects “free enterprise at its freest,”⁷² where vessel owners and operators see it as a means of “law shopping” and Flag States compete for the vessels’ business, by lowering their standards.⁷³

“[A] mockery of national conceits,”⁷⁴ the current registry system has resulted in the majority of shipowners, who are from major maritime powers such as the United States, China, Greece, Norway, Britain and Japan, registering their vessels in countries like Panama, Liberia, the Bahamas, Malta, Cyprus and Bermuda.⁷⁵ Some of the States

66. See *Lawless Sea: Hiding Behind the Flag, Introduction*, *supra* note 47, at 1-2.

67. SOHN & NOYES, *supra* note 53, at 107. Currently, the six major open registries are: Panama, Liberia, Bahamas, Malta, Cyprus and Bermuda. See *UNCTAD Report*, *supra* note 2, at 35.

68. See *supra* text accompanying notes 58-59.

69. The system of vessel flagging began in the United States in World War II. See NPR broadcast, *supra* note 44, at 2. The U.S. Government advocated this virtually lawless system before entering World War II in an effort to get around its own neutrality laws. *Id.* Following the war, the lack of regulations of the oceans increased, catalyzed by free market interests. *Id.*

70. See Langewiesche, *supra* note 1, at 1.

71. *UNCTAD Report*, *supra* note 2, at 28. Just over forty-eight percent of these ships are oil tankers. *Id.* at 29. Developing countries have another 25.7% of the world fleet registered in their countries. *Id.* at 28.

72. Langewiesche, *supra* note 1, at 1.

73. *Id.*

74. *Id.*

75. *UNCTAD Report*, *supra* note 2, at 35. For example, in 2002, 70.2% of vessels from

offering flags of convenience are unscrupulous in complying with their obligations to implement and enforce international maritime regulations for ships granted the right to fly their flag.⁷⁶

Furthermore, “[o]ffshore front companies. . . obscure the identity of ship owners making it difficult and time-consuming to hold [them] legally or financially accountable for damage caused by their ships.”⁷⁷ As noted by the Secretariat of the United Nations Convention on Trade and Development, “open registries enable shipowners from developed countries to relocate their activities without losing any control over them and create an artificial competitiveness by avoiding rules and regulations established in the countries of beneficial ownership, as well as permitting uncontrolled employment of low-cost, ship-board labour from developing countries.”⁷⁸ Therefore sub-standard operators can get away with sub-standard practices, which are ultimately detrimental to the shipping industry and the international community as a whole.

According to the Flag State Performance Table, compiled by the Round Table of Shipping Industry Organizations,⁷⁹ the following Flag States have significant negative performance indicators: Albania, Belize, Bolivia, Cambodia, Costa Rica, Democratic Republic of Congo, Honduras, Jordan, Madagascar, Sao Tome & Principe, Suriname and the Syrian Arab Republic.⁸⁰ These indicators are derived from various factors and include *inter alia*: whether the Flag State is on an association’s port state control black list (a list of ships that are considered a threat to ports and therefore have restricted access); low or no attendance at International Maritime Organization meetings; non-ratification of international conventions; failure to achieve a place on

developed market-economies were registered in foreign registries. *Id.* at 32.

76. Of course, not all open registries are unscrupulous in their international obligations. GUIDELINES, *supra* note 50, at 5. Furthermore, it is the small minority of ship owners and operators who are non-compliant. *Id.* Many ships that are compliant have legitimate reasons to fly the flag of less scrupulous Flag States. *Id.* For example, the Flag State might be “the country in which the company is located, there may be implications for the employment of certain nationalities of seafarers, or else the use of particular flags could be determined by the terms of a ship’s charter.” *Id.*

77. See *Lawless Sea: Hiding Behind the Flag*, Introduction, *supra* note 47, at 2.

78. SOHN & NOYES, *supra* note 53, at 117 (quoting U.N. Doc. TD/B/1013, at 23 (1984)).

79. The Round Table consists of the International Chamber of Shipping, International Shipping Federation, BIMCO, Intercargo and Intertanko. GUIDELINES, *supra* note 50, at 1.

80. *Id.*, Flag State Performance Table. This table is periodically updated by the Round Table and is available at <http://www.marisec.org/flag-performance/> (last visited Mar. 11, 2005). *Id.*

the International Maritime Organization's white list,⁸¹ and the average age of the vessels that fly the flag of the ship.⁸²

The Bahamas, under whose flag the *Prestige* flew, is considered to be a flag of convenience. It is the world's largest cruise registry and is criticized for attracting cruise lines from around the world that seek to avoid the more stringent labor requirements that would apply if they were registered in their home country.⁸³ Among the major cruise lines registered under the Bahamian flag are Carnival, Disney and Norwegian Cruise Lines.⁸⁴

The *Prestige* was flying the Bahamian Flag when she sank, despite the fact that the Bahamas is a party to numerous international conventions aimed at preventing catastrophes on the high seas.⁸⁵ Among the more important conventions to which the Bahamas is a party are the International Convention for the Safety of Life at Sea (SOLAS)⁸⁶ and the International Convention for the Prevention of Pol-

81. The IMO's White List is a list intended to reveal Parties who give full effect to the 1995 amendments to the International Convention on Standards of Training, Certification and Watch Keeping for Seafarers, July 7, 1978, S. Exec. Doc. EE, 96-1 (1980), 1361 U.N.T.S. 190 [hereinafter STCW]. The amendments completely revised the convention to make it more uniform, efficient and enforceable. To be placed on the White list Parties to STCW have to submit to the IMO Secretary-General information to show that they are giving full and complete effect to the Convention, which is then handed over for evaluation to panels. Countries not on the white list are increasingly targeted by Port State Control inspectors and Flag States that are Parties to the White List can elect to not accept seafarers who carry certificates issued by non White List countries for service on its ships. See International Convention on Standards of Training, Certification and Watch keeping for Seafarers, 1978, http://www.imo.org/Conventions/contents.asp?doc_id=651&topic_id=257 (last visited Mar. 11, 2005).

82. GUIDELINES, *supra* note 50, Flag State Performance Table.

83. See *Spain—The Lawless Sea: Hiding Behind the Flag: Bahamas: Cruising a Sea of Labor Complaints*, PBS, at 1, at <http://www.pbs.org/frontlineworld/stories/spain/bahamas.html> (last visited Mar. 11, 2005) [hereinafter *Lawless Sea: Hiding Behind the Flag: Bahamas*].

84. According to the International Transport Workers' Federation, more than a third of workers on cruise ships flying the Bahamian flag work 10- to 12-hour days seven days a week. *Id.*

85. See IMO Statement, *The Prestige*, at www.imo.org/Newsroom/mainframe.asp?topic_id=583&doc_id=2583 (last visited Mar. 11, 2005). The Bahamas is also a member to the following conventions: IMO convention (1948), IMO Amendments (1991, 1993), SOLAS Protocols (1978, 1998), Load Lines Convention (1966), Load Lines Protocol (1988), Tonnage Convention (1969), COLREG Convention (1972), CSC Convention (1978), STCW Convention (1978), INMARSAT Convention (1976), Inmarsat OA (1976), INMARST Amendments (1998), FACILITATION Convention (1965), MARPOL Annexes I/II, III, V (1973, 1978), MARPOL Protocol Annex VI (1997), INTERVENION Convention (1969), INTERVENTION Protocol (1973), CLC Protocol (1976), CLC Protocol (1992), FUND Protocol (1976), PAL Convention (1974), PAL Protocol (1976), LLMC Convention (1976), and the OPRC Convention (1990). See IMO, *Status of Conventions—Complete List*, http://www.imo.org/includes/blastDataOnly.asp/data_id%3D8711/status.xls (last visited Feb. 22, 2005).

86. Nov. 1, 1974, 32 U.S.T. 47, 14 I.L.M. 959 [hereinafter SOLAS]. SOLAS is the most

lution from Ships (MARPOL).⁸⁷ Since the *Prestige* incident the Bahamas has taken steps to better ensure its maritime security regime.⁸⁸

Yet under the current international legal framework, the only State that can challenge the validity of the registration of vessels with all Flag States, is the registering State.⁸⁹ Therefore there is no effective audit or enforcement mechanism other than the Flag States themselves, of which many have proved to be unworthy. This major deficiency in the law of the sea framework, and its resulting effects, e.g. the sinking of the *Prestige*, are being brought to the attention of the international community and are being challenged. Currently guidelines and laws aimed at strengthening the legal system governing the shipping industry are being developed and implemented in an attempt to address the existing problems.

B. International Measures Being Implemented

The need for better Flag State and vessel owner and operator accountability is evident. The Food and Agriculture Organization's Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (also known as the FAO Compliance Agreement) is an attempt to address the current problems of unscrupulous vessels, operators and Flag States, who are an increasing threat to the marine environment.⁹⁰ Al-

important international Convention that deals with the Safety of Life at Sea. *International Convention for the Safety of Life at Sea (SOLAS), 1974*, INTERNATIONAL MARITIME ORGANIZATION, at http://www.imo.org/Conventions/contents.asp?topic_id=257&doc_id=647 (last visited Mar. 11, 2005).

87. Nov. 2, 1973, 1313 U.N.T.S. 3, 12 I.L.M. 1319 (entered into force Oct. 2, 1983), *modified*, Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, Feb. 17, 1978, 1340 U.N.T.S. 184, 17 I.L.M. 546 (entered into force Oct. 2, 1983) [hereinafter MARPOL]. The MARPOL Convention is the main international convention governing the prevention of pollution of the marine environment by vessels caused by operation or accidents. It consists of two treaties adopted in 1973 and 1978 and has been updated by amendments through the years. *International Convention for the Pollution from Ships*, INTERNATIONAL MARITIME ORGANIZATION, at http://www.imo.org/conventions/contents.asp?doc_id=678&topic_id=258 (last visited Mar. 11, 2005).

88. Mike Corkhill, *Special Report - Ship Registers: Bahamas Consolidates Place on Maritime Safety Podium*, LLOYD'S LIST INT'L, Sept. 5, 2003, at 14. The Bahamas has been criticized because under these conventions it is the Flag State's duty to carry out a post-accident investigation and issue a report to the IMO as to the causes of the incident (see MARPOL, *supra* note 87, art. 12, 12 I.L.M. at 1327), which the Bahamas has not yet done. See Brian Reyes, *MEP Sterckx Calls for States to Resist Criminalising Seafarers: Industry Welcomes Draft Report from European Parliament*, LLOYD'S LIST INT'L, Mar. 3, 2004, at 1.

89. See *Lauritzen v. Larsen*, 345 U.S. 571, 584 (1953) (demonstrating that the United States has firmly and successfully insisted on this policy).

90. Agreement *supra* note 5. The Food and Agricultural Organization (FAO) is an inter-governmental, non-profit organization, a specialized agency of the United Nations, whose

though it only applies to fishing vessels, its framework can just as well be applied to other types of vessels that use the high seas.

Many other commendable efforts by the international shipping industry, coastal states, and related organizations have been attempted or are underway, as explained below. The FAO Compliance Agreement, in particular, is a thorough and comprehensive response, and would serve as an excellent model for the enforcement and oversight of all vessels and Flag States.

1. Coastal State Measures

The sinking of the *Prestige* was an incident too large to be ignored. European nations, especially Spain and France with strong fishing sectors, are demanding fundamental changes be undertaken that will ensure an environmental disaster of such a magnitude never again devastates Europe's coasts and waters. Following the catastrophe, Jacques Chirac, the Prime Minister of France, demanded draconian measures be implemented.⁹¹ Loyola de Palacio, Vice-President of the European Commission in charge of transport and energy, expressed the importance of re-examining "the international rules concerning the law of the sea" in order to "address questions related to the protection of [coastal] States to regulate maritime safety and pollution prevention adequately."⁹² This backlash has manifested itself in a number of ways, including prompting the implementation of coastal state measures to regulate vessels.

The European Union has since taken measures to prevent laden vessels, and especially tankers, from traversing EU waters.⁹³ The

mission is to facilitate and secure the long-term sustainable development and utilization of the world's fisheries and aquaculture; *About Us*, FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS, at http://www.fao.org/UNFAO/about/index_en.html (last visited Mar. 11, 2005). For more information on the FAO, see <http://www.fao.org>.

91. See *An Accident at Sea Creates Much Froth*, THE ECONOMIST (London), Nov. 23, 2002, available at 2002 WL 7248261.

92. See Press Release, European Commission, Commission Proposes to Strengthen Security in European Ports IP.03/135 (Feb. 17, 2004), available at <http://europa.eu.int>.

93. This is not the first time that countries badly affected by oil spills have sought to implement legislation that would protect their coasts from further devastation. After the *Exxon Valdez* spill off the coast of Alaska, the United States planned a phase-out of single hull tankers. The *Erika* spill led to the creation of the European Maritime Safety Agency and two sets of European reforms. And, since *Erika*, most big oil companies are shifting away from single-hulled tankers. The first reforms increased controls in ports, tightened up procedures for ship inspections, and accelerated the timetable for eliminating shingle-hulled tankers. The second tackled longer-term issues like the creation of a compensation fund for victims of oil spills and the creation of a European Maritime-Safety Agency. After the *Prestige* incident the shipping industry is again raising its standards. See *Once More a Breach*, THE ECONOMIST (London), Nov. 23, 2002, 2002 WL 724867.

leaders, Spain, France and Portugal, initiated this movement by collectively banning single hull tankers from their 200-mile exclusive economic zones prior to legislation being in place.⁹⁴ The ban was enforced in December 2002, when a Greek tanker carrying 81,000 tons of fuel oil heading for Spain through the Strait of Gibraltar was ordered to keep 200 miles away from the coasts of France and Spain.⁹⁵ Also, three Maltese-flagged vessels have been escorted out of the French, Spanish and Portuguese exclusive economic zones.⁹⁶ However, according to the International Chamber of Shipping (ICS), the actions taken by these countries are clearly in violation of Articles 56, 211 and 220 of UNCLOS.⁹⁷ The Convention offers the right of freedom of navigation to ships traveling through Coastal States' exclusive economic zones.⁹⁸

In addition, the EU itself is taking steps to rid its waters of substandard vessels. It has published a list of more than 66 ships that it considers to be suspect and that would have been banned if new European maritime safety rules had been in force at the time.⁹⁹ It has also adopted a proposal that will lead to the imposition of criminal sanctions for those who cause pollution from vessels.¹⁰⁰ And, it recently

94. See *UNCTAD Report*, *supra* note 2, at 41. The Exclusive Economic Zone is the 200-mile contiguous zone of water around a State's coast. Its concept was codified in international law at the Third United Nations Conference on the Law of the Sea. See UNCLOS, *supra* note 45, arts. 55, 57.

95. Lowry, *supra* note 20, at 1.

96. *Id.*

97. *Id.* Article 56 covers rights and duties and jurisdictions of coastal States of the corresponding exclusive economic zone, providing "the coastal State [] have due regard to the rights and duties of other States . . ." UNCLOS, *supra* note 45. Article 211 sets forth that no state can adopt regulations, which relate to design, construction, manning or equipment standards other than generally accepted international standards, even if they are acting through the relevant International Body, the International Maritime Organization (IMO). *Id.* Article 220 describes the steps coastal states may take if they find a vessel in their exclusive economic zone is violating a law. In accordance with this article coastal states are authorized to require the vessel to give information regarding its identity and port of registry and under some circumstances can undertake physical inspection of the vessel and institute proceedings including detaining the vessel. *Id.*

98. UNCLOS, *supra* note 44, arts. 58 (1)-(2).

99. See Press Release, European Commission, The European Commission Takes Steps to Ban Substandard Oil Tankers from European Waters IP/02/1791 (Dec. 3, 2002), available at <http://europa.eu.int>. This list of ships is based on Article 7(b) of Directive 95/21/EC on Port State Control. The ships come from the following countries: Turkey, St. Vincent & Grenadines, Cambodia, Algeria, Panama, Sao Tome and Principe, Bolivia, Egypt, Romania, Honduras, Lebanon, Morocco, and the Syrian Arab Republic. Eight of these ships are oil tankers. *Id.*

100. See Press Release, European Commission, The Commission proposes Criminal Sanctions for Polluting Ships IP/03/316 (Mar. 5, 2003). This plan is consistent with UNCLOS Article 218 (1), which allows States to investigate and prosecute discharge offences in the high seas. See UNCLOS, *supra* note 44.

enacted a regulation banning single-hull oil tankers from European ports.¹⁰¹

2. Port State Measures

Another response to the increasing problems on the high seas has been a global trend in the development of Port State Authorities, which seek to improve, among other things, the elimination of substandard ships by the enforcement of internationally accepted minimum standards on the construction, design, equipment and manning of vessels.¹⁰² Many countries are not satisfied that the existing current international regulations are being enforced and regional groupings are being formed to carry out checks themselves.¹⁰³ In Europe and North America, for example, 20 maritime administrations have joined the Paris Memorandum, which initiates about 18,000 checks a year.¹⁰⁴

There are currently three principal regional Port State Control authorities that target particular flags on vessels on the basis of deficiencies and detentions recorded for ships flying that particular flag.¹⁰⁵ They are the Paris Memorandum of Understanding (1982), the Tokyo Memorandum (1993) of Understanding, and the United States.¹⁰⁶ Europe has, in addition to the Paris MOU, adopted a Directive on Port State Control that is currently being reviewed to improve measures against substandard shipping.¹⁰⁷

101. See generally Regulation of the European Parliament and of the Council, July 22, 2003, (EC) No. 1726/2003, O.J. (L 249/1) [hereinafter EC Regulation].

102. Doris König, *Port State Control: An Assessment of European Practice*, in MARINE ISSUES FROM A SCIENTIFIC, POLITICAL AND LEGAL PERSPECTIVE 37, 37 (Peter Ehelers et al. eds., 2002).

103. Paul Reynolds, *Analysis: Tightening Rules on Tankers*, BBC NEWS ONLINE, at 2, Nov. 19, 2002, at <http://news.bbc.co.uk/2/hi/europe/2491699.stm>.

104. See Paris Memorandum of Understanding on Port State Control, at <http://www.parismou.org/> (last visited Jan. 20, 2005). This Agreement applies to the waters of the Coastal States of Europe, as well as the North Atlantic Basin from North America. See *id.* The MOU sets forth criteria that ships must meet in order to pass into Paris MOU Ports without being detained. If a ship is detained multiple times it is considered a banned ship and will be refused access to ports that belong to any region of the Memorandum. See Paris Memorandum of Understanding on Port State Control in Implementing Agreements on Maritime Safety and the Protection of the Marine Environment, Jan. 26, 1982, sec. 3, 21 I.L.M. 1, 4-6.

105. GUIDELINES, *supra* note 50, at 10. There are a total of eight regional port State control regimes worldwide; the other five authorities are: Viña del Mar MOU (1992); Caribbean MOU (1996); Mediterranean MOU (1997); Indian Ocean MOU (1998); Abuja (West and Central African) MOU (1999); and the Black Sea MOU (2000). These regimes are consistent with the LOS Convention. KÖNIG, *supra* note 102, at 39.

106. See GUIDELINES, *supra* note 50, at 10.

107. KÖNIG *supra* note 102, at 37.

Under international law, as codified in UNCLOS, port states can prescribe national rules and standards to apply to foreign vessels that wish to enter the internal waters, offshore terminals and ports of the State.¹⁰⁸ Port states are also granted the authority to enforce relevant international rules and standards that relate to the seaworthiness of the ships, if they wish.¹⁰⁹ They are limited however, to permitting vessels in violation of the law to sail to the “nearest appropriate repair yard and, upon removal of the causes of the violation, [the port state] shall permit the vessel to continue immediately.”¹¹⁰ But because the various international conventions, and the individual state and regional authorities apply different rules and standards, port state control is not as effective as it could be both as a deterrent and control mechanism.

The “varying regulations and levels of implementation [among the conventions and state and regional authorities] creates the opportunity for ships to “slip through the net.”¹¹¹ Furthermore some port states show little interest in improving inspection and control.¹¹² And, as there is often a shortage of qualified inspectors, some authorities select well-maintained ships to inspect so as to minimize time spent on the inspections.¹¹³ The fact the *Prestige* had visited several ports without being inspected prior to her accident emphasizes the low rate of inspection practiced by some port states.¹¹⁴

3. Vessel Construction Measures

The European Union has led the way to reforms for the phase out of single hull tankers, which have since been adopted by the International Maritime Organization. It recently enacted a Regulation that accelerates the pre-existing phasing-out requirements on single-hull oil tankers and phasing-in of double-hull tankers.¹¹⁵ The Regulation states the European Community “is seriously concerned that the age limits for the operation of single-hull oil tankers . . . are not suffi-

108. UNCLOS, *supra* note 44, art. 211(3).

109. *Id.* art. 219; *see also id.* art. 218.

110. *Id.* art. 219.

111. *Vulnerability of Single Hulls, supra* note 32, at 2.

112. *See, e.g.,* Case C-315/98, Commission of the European Communities v. Italian Republic, 1999 E.C.R. I-8001 (addressing infringement procedures against Italy for not transposing the PSC-Directive into national legislation).

113. KÖNIG, *supra* note 102, at 47.

114. *See UNCTAD Report, supra* note 2, at 41.

115. *See* EC Regulation, *supra* note 101, para. 1. This Regulation amends a previous Regulation that establishes an accelerated phase-in scheme with design requirements for single hull tankers. Regulation of the European Parliament and of the Council, Nov. 29, 2002, EC 417/2002, O.J. (L 64) 1.

ciently stringent. Particularly in the wake of the shipwreck of the . . . 'Prestige' of the same age as 'Erika' (26 years) those age limits should be further lowered."¹¹⁶ Hence single-hull oil tankers may no longer be used to carry heavy grades of oil to or from EU Ports,¹¹⁷ all oil tankers more than 23 years old were banned immediately,¹¹⁸ and tankers 15 years old or older must undergo exhaustive technical inspections referred to as a condition assessment scheme.¹¹⁹

The IMO, prompted by Europe, is supporting the movement for the phase-out of single-hull oil tankers.¹²⁰ It proposed a stricter timetable for the phasing-out of single-hull tankers, which was then implemented by amending 13G of Annex I of the MARPOL Convention in December of 2003.¹²¹ The previous IMO Plan under the MARPOL Convention also sought to eventually phase out these tankers but was "too slow and staggered."¹²² The new phase-out timetable is much more simplified and accelerated. Under this new scheme, single-hull tankers will still be allowed to use the high seas to trade until 2005.¹²³ And, "the last phase-out date for all single-hulled oil tankers is 2010 instead of 2015, with the oldest, built in 1977 and earlier, to be taken out of service in April 2005."¹²⁴

However, the IMO has made some compromises to the timetable. For example Flag States can, in some circumstances, allow the operation of single-hull tankers until 2015 or the 25th anniversary of build if they pass a strict scrutinization to assure they are seaworthy and present no safety or environmental hazards.¹²⁵

116. EC Regulation, *supra* note 101, para. 3.

117. *Id.* art. 1(4)(d).

118. *Id.* art. 1(4)(a).

119. *Id.* arts. 1(5) & 1(6).

120. See Marine Environment Protection Committee, *IMO Meeting Adopts Accelerated Single-hull Tanker Phase-out, New Regulation on Carriage of Heavy Fuel Oil, 50th session*, Dec. 1 & 4, 2003, available at http://www.imo.org/Newsroom/mainframe.asp?topic_id=758&doc_id=3341 (last visited Mar. 11, 2005).

121. See MARPOL, *supra* note 87, at 12.

122. See Stefano Ambroggi, Reuters, *Update 2-UN Brings Forward Global Single Hull Tanker Ban*, Dec. 5, 2003, at <http://www.forbes.com/newswire/2003/12/05/rtr1171146.html>.

123. See MARPOL, *supra* note 87, at 12. The amendments entered into force on April 5, 2005. Even prior to entry into force, the IMO urged Parties to MARPOL to "seriously . . . consider the application of the amendments as soon as possible to ships entitled to fly their flag, without waiting for the amendments to enter into force and to communicate this action to the Organization[]" and to "implement the aforesaid amendments to Annex I of MARPOL 73/78 effectively as soon as possible." *Id.* at 13.

124. Ambroggi, *supra* note 122, at 2.

125. *Id.*

4. Flag State Measures

The Round Table of shipping industry organizations, comprised of the International Chamber of Shipping, International Shipping Federation, Baltic and International Marine Council (BIMCO), Intercargo and Intertanko, have recently drafted Guidelines for ship operators to encourage them to examine whether a flag has substance before using it, and to put pressure on the Flag State to effect any improvements that might be necessary.¹²⁶ The Roundtable believes that “it is essential that standards of safety, environmental and social performance are maintained and enforced by flag states, in full compliance with international maritime regulations.”¹²⁷ Ultimately, it seeks to promote high performing Flag States because they are less likely to tolerate sub-standard operators.¹²⁸

The Guidelines list the responsibilities that a shipping company should reasonably expect of a Flag State, and contain a Flag State performance table, which summarizes factual information on the performance of Flag States per the criteria of the Round Table. The Guidelines are also intended to be used by policy makers who are involved in maritime safety and flag administrations.¹²⁹ Although the Guidelines are thorough, they are only recommendatory and are therefore not binding.¹³⁰

The Guidelines provide, *inter alia*, that a Flag State should have sufficient infrastructure, “should endeavor to ratify principal international maritime treaties”¹³¹ and implement and enforce the detailed requirements of the treaties; should establish appropriate controls over organizations who will conduct statutory surveys of ships on their behalf; should approve safe manning levels for ships on their flag and issue safe manning documents in accordance with the provisions of the IMO; should carry out investigations of any serious casualty occurring to its ships as soon as practicable after the casualty; only accept ships transferring their flag when it is satisfied that it is in compliance with international requirements; should conduct self assessment of functions related to safety of life at sea; and should attend IMO meetings.¹³²

126. See GUIDELINES, *supra* note 50, at 3.

127. *Id.* at 1.

128. *Id.* at 5.

129. *Id.* at 1.

130. See *id.*

131. GUIDELINES, *supra* note 50, at 6.

132. *Id.* at 6-8.

Another effort aimed at improving Flag State performance is the Model Audit Scheme approved by the IMO in 2003. It is designed to promote maritime safety and environmental protection by determining the extent to which its Flag State Parties are implementing and enforcing IMO instruments.¹³³ Under the Model Audit Scheme, vessels will be subject to external audit as of 2005.¹³⁴ The IMO will provide Member States with assistance through its Integrated Technical Cooperation Programme, and will provide feedback and advice concerning the Member Flag States' performance and shortcomings.¹³⁵ The scheme is to be on a voluntary basis¹³⁶ and is fully supported by the shipping industry.¹³⁷

While the international community is reacting to the need for a more comprehensive legal framework in order to protect our oceans, the recent developments mentioned above are not entirely global in nature and do not hold the Flag States accountable for the actions of vessels flying their flags. For these reasons the implementation of a Model Flag State Compliance Agreement would be a sensible step in the creation of a truly global legal framework that would ensure compliance by vessel owners, operators, and Flag States.

C. FAO Flag State Compliance Agreement

The FAO Flag State Compliance Agreement was approved by the Food and Agriculture Organization Conference at its Twenty-Seventh Session on November 24, 1993.¹³⁸ The purpose of the Agreement is to develop management measures for the conservation of living resources on the high seas.¹³⁹ It is "designed to strengthen enforcement

133. See *Voluntary IMO Member State Audit Scheme*, IMO Assembly Res. A.946(23) (June 16-20, 2003) [hereinafter IMO Assembly Res.].

134. *IMO Model Audit Scheme Gains Momentum*, IMO Council, 89th Sess., Nov. 25-29, 2002, available at http://www.imo.org/InfoResource/mainframe.asp?topic_id=114&doc_id=2429.

135. See *IMO Member State Audit Scheme is Tool to Eliminate Sub-Standard Shipping, Says IMO Secretary-General*, IMO, Mar. 3, 2004, http://www.imo.org/newsroom/mainframe.asp?topic_id=848&doc_id=3534.

136. See IMO Assembly Res., *supra* note 133.

137. Press Release, Maritime International Secretariat Services, *Shipping Industry Launches Guidelines on Flag State Performance*, Nov. 24, 2003, available at <http://www.marisec.org/news/pressrel.htm#24%20November%2004>.

138. Agreement, *supra* note 5. The Agreement applies to all fishing vessels that are used or intended for fishing on the high seas. *Id.* art. 2(1). For the purpose of this paper, and to show how the Agreement can serve as a model, not just for the governance of Fishing vessels but also for all commercial vessels on the high seas that register with Flag States, I will omit the term "fishing" from the text of the Agreement.

139. *Id.* at pmb1. The FAO compliance Agreement is intended to be an integral part of the

of high seas conservation obligations arising under [UNC]LOS [] by elaborating on flag state duties”¹⁴⁰ It entered into force on April 23, 2003 when the Republic of Korea, the 25th country to accept the Agreement, deposited its acceptance instrument as required by provision XI.1 of the Agreement.¹⁴¹

The FAO Compliance Agreement is comprehensive and wide reaching in nature because it addresses a variety of critical areas with respect to the governance of vessels by Flag States. Amongst the more important areas the Agreement touches on are the following: the responsibility of Flag States to consider the past history of vessels and the vessels’ past relationships with other Flag States; national enforcement mechanisms against non-compliant vessels including possible sanctions; the marking of vessels for identification purposes; international cooperation among Flag States; the duty of parties to the Agreement to persuade non-Members to accept the Agreement; assistance to developing countries provided by developed member states and the FAO; the oversight of the system by the FAO who plays a critical administrative role; and the establishment of a much needed information bank, or global registry. These highlighted themes are discussed below in greater detail.

1. Flag State Responsibilities

The FAO Agreement primarily addresses a Flag State’s responsibilities in governing vessels that fly its flag. For example, it provides generally “that “[e]ach Party shall take measures as may be necessary to ensure that . . . vessels entitled to fly its flag do not engage in any activity that undermines the effectiveness of international conservation and management measures.”¹⁴² The Flag State must ensure it is

Code of Conduct for Responsible Fisheries, which is a voluntary Code adopted by the 170 members of the FAO and is being disseminated throughout the world. For more information on the Code, see FOOD AND AGRICULTURE ORGANIZATION OF THE U.N., WHAT IS THE CODE OF CONDUCT FOR RESPONSIBLE FISHERIES? (2001), available at <http://www.fao.org/DOCREP/003/X9066E/X9066E00.HTM> (last visited Mar. 11, 2005).

140. Bernard H. Oxman, *Complementary Agreements and Compulsory Jurisdiction*, 95 AM. J. INT’L L. 277, 307 n.135 (2001).

141. See Legal Office Treaties, Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, tbl. 1, at <http://www.fao.org/Legal/treaties/012s-e.htm> (last visited Mar. 11, 2005) [hereinafter Legal Office Treaties]. The other countries that have accepted the Agreement are: Argentina, Barbados, Benin, Canada, Chile, Cyprus, Egypt, The European Community, Georgia, Ghana, Japan, Madagascar, Mauritius, Mexico, Morocco, Myanmar, Namibia, Norway, Peru, St. Kitts & Nevis, St. Lucia, Seychelles, Sweden, Tanzania, The United States of America, and Uruguay. See *id.*

142. Agreement, *supra* note 5, art. III(1)(a).

capable of effectively exercising its responsibilities under the Agreement in light of the “links”¹⁴³ that exist between it and the vessel. In the event a Flag State grants exemptions to vessels pursuant to the Agreement, the Flag State must ensure the spirit of the Convention is still carried out with respect to the vessels.¹⁴⁴

More specifically, the Agreement governs Flag State responsibilities on the registration and authorization of vessels.¹⁴⁵ It puts the Flag State in charge of authorizing every vessel that seeks to fish on the high seas using its flag.¹⁴⁶ All vessels must fulfill specified conditions, both under the Agreement and those specified by the Flag State, in order to receive the authorization.¹⁴⁷ For instance, the Agreement precludes a Flag State from authorizing a vessel that had previously flown the flag of another Party and who acted contrary to the Agreement’s objectives.¹⁴⁸ Also, the Parties must ensure that all vessels that fly its flag are marked in such a way that they can be “readily identified in accordance with generally accepted standards.”¹⁴⁹ Vessels must further provide their Flag State with information on their operations so the Party can fulfill its obligations under the Agreement.¹⁵⁰

The Agreement also calls for international cooperation among Member Flag States that allows them to control vessels on the high seas. According to the Agreement, Parties should work together to exchange information relating to the activities of vessels of Member and non-Member States in order to help them identify vessels that might be engaging in operations that threaten to undermine the goals of the Agreement.¹⁵¹ Furthermore, if a vessel is voluntarily in the port of a Party, and the Party has “reasonable grounds for believing [] the fishing vessel has been used for an activity that undermines the effectiveness of international conservation and management measures, [it]

143. *Id.* art. III(3). The links referred to in this article most likely concern the relationship of the vessels to the Flag State. If the vessels are owned and operated by non-nationals there is a greater responsibility on the Flag State to ensure they can oversee the vessels activities.

144. *Id.* art. III(1)(b).

145. The Agreement refers to “authorization” as authorization to fish on the high seas. *Id.* art. III(2). However, I will refer to authorization generally which, for purposes of this article, can imply authorization to use the high seas for commerce purposes.

146. *Id.*

147. *Id.* art. III(6).

148. *Id.* art. III(5)(a). This provision also applies to Flag States that are not Parties to the Agreement, if there is sufficient information available to the Party concerning the circumstances of suspended or withdrawn authorization. *Id.* art. III(5)(b).

149. *Id.* art. III(6).

150. *Id.* arts. III(6), (7).

151. *Id.* art. V(1).

shall promptly notify the [vessel's] flag state"¹⁵² The Parties can then take measures to establish an investigatory strategy to confirm or dispel the suspicion.¹⁵³ The Parties should also exchange information amongst themselves that relate to the activities of vessels flying the flags of non-Parties, and that might undermine the effectiveness of the international conservation and management measures.¹⁵⁴ These provisions ensure all vessels on the high seas are monitored by the network of Member Flag States.

The Agreement allocates the task of developing compliance-inducing mechanisms for non-compliant vessels to the Flag States in an effort to make lax Flag States become more responsible for vessels flying their flags. It asks its Parties to implement appropriate national enforcement measures for vessels that do not comply with the objectives set forth in the Agreement. These measures can include making such violations an offense under the Flag State's national laws, the application of sanctions to the vessel owner or operator, and withdrawal or suspension of authorization to sail under the flag.¹⁵⁵

The Agreement considers that some States will not wish to adopt the Agreement, while some States who adopt it will be unable to carry out the provisions for lack of technology or resources. It therefore places additional duties on Flag States to persuade non-Parties to join the Agreement and to adopt national laws that are consistent with it, and to ensure non-Parties do not engage in activities that could undermine the effectiveness of the Agreement.¹⁵⁶ And, interestingly, this Agreement encourages its Parties to provide assistance (which specifically includes technical assistance) to developing countries that are also Parties to the Agreement, to help them to fulfill their obligations under it. The FAO and other international or regional organizations should also support this endeavor.¹⁵⁷

2. Food and Agriculture Organization

Under the Compliance Agreement the Food and Agriculture Organization plays a critical role as administrator and overseer. In this capacity, the FAO is in charge of collecting and organizing information relevant to the Agreement provided by the Member Flag States.

152. *Id.* art. V(2).

153. *Id.*

154. *Id.* art. VIII(3).

155. *Id.* art. III(8).

156. *Id.* arts. VIII(1), (2).

157. *Id.* art. VII.

For example, the Agreement has extensive requirements governing the exchange of information between the Parties and the FAO. The Parties to the Agreement are required to make readily available to the FAO the following information regarding each vessel flying its flag: the name of the vessel, its registration number, its port of registry, any previously known names of the vessels, if it had a previous flag, the International Radio Call Sign, if applicable, the name and addresses of owners, and the length and type of the vessel.¹⁵⁸

The Parties are also required to provide the vessel operators' names and addresses and the vessel's molded depth, beam, gross register tonnage, main engine power, as possible.¹⁵⁹ In addition, the Parties to the Agreement are required to promptly inform the FAO if there are changes to the record, for any reason, including vessels no longer permitted to fly the flag, fishing authorizations relinquished or not renewed by owners, authorizations withdrawn for legal violations, and vessels lost, decommissioned, or scrapped.¹⁶⁰

Each Party is further required to notify the FAO of "activities of fishing vessels flying its flag that undermine the effectiveness of international conservation and management measures"¹⁶¹ And if a Party has a suspicion that a vessel flying the flag of a different Flag State is engaging in these types of activities, it must advise the Flag State of the vessel and can also advise the FAO.¹⁶²

The FAO, in turn, periodically distributes selected information provided by the Flag States regarding vessels flying under their flag to all of the Parties and, upon request, to any individual Party or fisheries organization.¹⁶³ In a Circular State Letter sent in October 1995, the FAO asked Flag States that had accepted the Agreement to submit information concerning vessel authorizations to the FAO information bank.¹⁶⁴ This database, called the High Seas Vessel Authorization Record (HSVAR), is currently available online to those Member Parties who have contributed information.¹⁶⁵ "It allows [the Member Flag

158. *Id.* arts. VI(1)(a)–(g).

159. *Id.* arts. VI(2)(a), (c)–(f).

160. *Id.* arts. VI(5)(a), (b) & VI(6).

161. *Id.* art. VI(8)(a).

162. *Id.* art. VI(8)(b).

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

164. FAO, Code of Conduct for Responsible Fisheries: Introduction to the Code, at <http://www.fao.org/fi/agreem/codecond/codecon.asp#AGREEM> (last visited Mar. 11, 2005) [hereinafter FAO Code of Conduct].

165. *See id.* The Parties that can access the database are: "Canada, the United States, Japan, Norway and 13 European Union countries" FAO, *HSVAR: High Seas Vessels Authorization Record*, at <http://www.fao.org/figis/hsvar/index.jsp> (last visited Mar. 11, 2005)

States] to identify . . . vessels with a number of distinctive identifiers, and consult information on [the vessels'] registration, authorization, and infringements, etc."¹⁶⁶ To date there are 5,517 records in the database.¹⁶⁷

IV. ANALYSIS: A MODEL FAO FLAG STATE COMPLIANCE AGREEMENT AS APPLIED TO THE PRESTIGE AND OTHER SHIPPING VESSELS

The use of the seas by the international shipping industry cannot be underestimated in importance to the world economy.¹⁶⁸ The importance of the shipping industry increases with globalization and rising demands in international commerce. Therefore it is critical that the industry itself is well controlled, secure, and therefore effective. This section explains how a Model FAO Compliance Agreement, as applied to the shipping industry, would further these goals.

A. *Need for Measures: Vessel Structure and the Environment*

Environmental oil-tanker disasters come from lack of maintenance of vessels, which leads to structural deficiencies such as corrosion, deformation, and poor operation. Therefore it is important that vessels on the high seas, and especially those carrying thousands of tons of toxic cargo, are in seaworthy condition. Under the current laws of the seas, if Flag States do not oversee the structure and maintenance of the tankers and enforce internationally accepted standards, no one will. It is essential then that Flag States be encouraged to oversee the structure and condition of all vessels flying their flag and to enforce necessary measures against non-compliant vessels.

The *Prestige* had major structural failures leading to her demise off the *Costa del Muerte*.¹⁶⁹ So did the *Erika*, which also resulted in

[hereinafter *HSVAR*].

166. *Id.*

167. *Id.*

168. For example, in 2002 the world merchant fleet was at 844.2 million deadweight tons, and there were 5.88 billion tons of seaborne goods traded. *UNCTAD Report, supra* note 2, at x. Of this trade, 36.1% constituted tanker cargoes, 76.8% of which were crude oil. *Id.* at 6.

169. See *El FIDAC Atribuye a un "fallo estructural" de los Tanques de Lastre el Accidente del 'Prestige,' EL MUNDO* (Spain), May 8, 2003, available at <http://www.elmundo.es/elmundo/2003/05/08/ciencia/1052406288.html>. According to a report by the International Fund for Indemnification for harm due to Hydrocaruros Pollution, the structural failures of the tanks came from a loss of localized resistance due to a deformation, loosening or fracture of the longitudinal side supports. *Id.*

its cracking in half and sinking.¹⁷⁰ There are other defective vessels that freely roam the oceans, many of which carry toxic cargo, and can potentially cause massive environmental disasters like the *Prestige* oil spill.

The older the ship, the more likely it is to have a structural deficiency, and therefore, an accident.¹⁷¹ In 2003, 28.1 percent of the world's fleet was 20 years old and older.¹⁷² For the life of a ship, this is considered very old.¹⁷³ Therefore there should be incentives on Flag States to ensure that vessels flying their flags are in good condition, and they should further be encouraged to scrap older vessels to lower the average age of the fleet.

The problem of aging fleets roaming the ocean is aggravated by the fact that the oil transport market has become highly competitive.¹⁷⁴ Oil companies have disposed of most of their older tanker fleets, where many small independent tanker owners have come forward to fill this gap in the market.¹⁷⁵ Additionally tanker owners are becoming autonomized, whereby they split their fleet into a few single-ship companies that are registered in offshore locations, helping them to reduce financial risks.¹⁷⁶ This process makes it difficult to determine the true financial owners and those who are responsible for the safe operations of the vessel.¹⁷⁷ As a result "low-cost operators gain market shares at the expense of traditional companies with a decent safety record."¹⁷⁸ Measures to improve and effectively control maintenance and operational safety on-board ships are urgently needed.

A model FAO-type agreement applicable to vessels other than fishing vessels, would help to monitor the structure and condition of vessels. The FAO Agreement, like the existing legal framework, relies on the responsibility of the Flag States as the main mechanism for compliance and enforcement of the Agreement. Flag States are in a better position to know the conditions of the vessels flying their flag, than any international organization, for which the responsibility and amount of information is too vast. It provides the Flag States with the

170. *After Erika: European OPA?* 105 MARINE LOG, 2, 39, Feb. 1, 2000.

171. *See* König, *supra* note 102, at 46.

172. *UNCTAD Report*, *supra* note 2, at 2.

173. For example, "60 out of 77 tanker casualties between 1992 and 1999 were over 20 years of age." König, *supra* note 102, at 46. *See also* EC Regulation, *supra* note 101, para. 6 (discussing the phasing out of tankers over 15 years old).

174. *See* König, *supra* note 102, at 46.

175. *See id.*

176. *See id.*

177. *See id.*

178. *See id.* at 47.

guidelines and information that they will need to be able to oversee the vessels' physical condition.

Under the Agreement Flag States must provide the FAO with detailed information on each vessel that flies its flag. They are obligated to provide the name and address of the operators of the vessels, the molded depth, beam gross register tonnage and power of main engines of the vessel.¹⁷⁹ The Flag States have to keep the FAO informed of any changes in this information.

The Agreement precludes a Flag State from authorizing a vessel that was once previously registered with another Party to the Agreement, but that had undermined the effectiveness of international conservation and management measures.¹⁸⁰ Therefore, if a vessel is disallowed to fly the flag of one Flag State due to its structure or age, all other Flag States must be made aware and deny registry to the vessel. The Agreement also asks the Parties to ensure all vessels that fly its flag are marked in such a way that they can be readily identified.¹⁸¹ This helps the Flag State and FAO keep track of vessels. Furthermore, the vessels must provide the Flag States with information on their operations, which in the case of a structural deficiency problem, like the crack in the starboard of the *Prestige*, the Flag State becomes immediately aware and can take action.¹⁸²

The Agreement also contains a much needed compliance-inducement mechanism. It provides that Parties must implement national enforcement measures for vessels not complying with the rules set forth in the Agreement.¹⁸³ In accordance with this provision, Flag States could apply monetary sanctions to the vessel operator or suspend or withdraw the authorization to fly its flag if the problem is not fixed.¹⁸⁴ This provision would further encourage ship owners and operators registering their vessels with Flag States to ensure their vessels are seaworthy.

The key purpose of the Agreement is that all Flag States ensure all vessels flying their flags are in safe condition to go to sea. If some Flag States do not enforce these norms, there will continue to be accidents on the high seas that impact concerned States who are compliant. Therefore, it is in the interest of the Parties to the Agreement that all Flag States join the Agreement and adopt laws and provisions con-

179. Agreement, *supra* note 5, arts. VI(2)(a), (c), (e), (f).

180. *Id.* art. III(5)(a).

181. *Id.* art. III(6).

182. *Id.* art. III(7).

183. *Id.* art. III(8).

184. *Id.*

sistent with it. According to the Agreement, Parties should attempt to persuade non-Parties to “accept [the] Agreement and [] to adopt laws and regulations consistent with [it]”.¹⁸⁵

Furthermore, they should act in such a manner, consistent with the Agreement and international law, to ensure that non-Parties do not engage in activities that could undermine the effectiveness of the Agreement.¹⁸⁶ The need to have participation and compliance by all Flag States and vessels is addressed by the provision of the Agreement, which encourages its Parties, the IMO, and other international and regional organizations to provide assistance (including technical assistance) to developing countries that are Parties to the Agreement, in order to help them to fulfill their obligations under the Agreement.¹⁸⁷ This not only encourages developing countries to accede to the Agreement, but it makes sure these countries have the necessary infrastructure to monitor their vessels and exchange information.

In order to create a system that ensures all vessels on our seas are seaworthy, the exchange of information among countries and organizations is vital, as the seas are vast and vessels are numerous. The proposed Model Agreement calls for much needed international cooperation among Flag States.¹⁸⁸ According to the Agreement, Parties should work together to exchange information relating to the activities of vessels that help Flag States to identify those vessels which might be engaging in operations that threaten to undermine international conservation and management.¹⁸⁹ Clearly, structurally deficient vessels would be covered by this provision.

Furthermore, if a vessel is voluntarily at the port of a Party, the Party should promptly notify the Flag State if it has reasonable grounds for believing the vessel poses a threat to international conservation.¹⁹⁰ The Parties can then take measures to investigate the vessel

185. *Id.* art. VIII(1).

186. *Id.* art. VIII(2).

187. *Id.* art. VII.

188. The *Prestige* accident might have been avoided had there been a better system in place to facilitate the collection and dissemination of information of vessels on the high seas. The *Prestige* had major structural deficiencies, and had been registered as unacceptable for navigation in the ship registry of the Norwegian Oil Company Statoil due to its age and company policy. See *Críticas, Responsabilidades y Culpas en el Desastre del ‘Prestige,’ supra* note 37. Had there been a system in place, which encourages the reporting and sharing of information regarding sea bound vessels, the accident could have been prevented. See *Annual Report 2002—Theme: Demanding Trade—Strict Controls*, STATOIL, at <http://www.statoil.com> (last visited Mar. 11, 2005).

189. *Id.* art. V(1).

190. *Id.* art. V(2).

in order to confirm or dispel the suspicion.¹⁹¹ The Parties should also exchange information amongst themselves that relate to the activities of vessels flying the flags of non-Parties, which might be of a similar threat.¹⁹²

Also, under the FAO Compliance Agreement, Flag States must implement a licensing program or require some form of authorization for vessels to fish on the high seas.¹⁹³ They can only grant this authorization if they can truly and effectively exercise their responsibilities under the Agreement with respect to each vessel. These requirements could be extended to the shipping industry and require that Flag States, aside from the registration requirement, issue a license for commerce on the high seas. The granting of the license could be conditioned on the vessels' sound structure and seaworthy condition. The Flag State would then be limited to issuing these licenses only if it is able to effectively oversee and exercise their responsibilities over the vessels.

By encouraging Flag States to keep track of the structure and condition of vessels flying their flag, to implement national enforcement measures, to cause other Flag States to join the Agreement, to assist developing Flag States to do the same, to share in the dissemination of information, and to work jointly with other Flag States and the FAO, the FAO Compliance Agreement serves as a exemplary model Agreement for the shipping industry and would effectively control the conditions of vessels on the high seas.¹⁹⁴

B. Implementing a Model FAO Agreement: Problems and Considerations

1. Using the FAO for Non-Fishing Vessels

Once the FAO Compliance Agreement has proven effective in preventing over-fishing of the seas, it should be extended to, or used as a model for, shipping vessels as well. The merchant fleet dominates the seas carrying thousands of tons of cargo, and therefore merchant vessels are most likely to cause pollution accidents. If a Model Agreement was instituted to apply to the shipping industry most of the

191. *Id.*

192. *Id.* art. VIII(3).

193. *Id.* art. III(2).

194. The implementation of a model Compliance Agreement would also help to facilitate the efforts to combat marine terrorism. The collection and dissemination of information pertaining to vessels as provided for in the Agreement would enable States and the governing body to monitor the activities of all vessels on the high seas.

FAO provisions addressed in this article could remain the same, but become applicable instead to commercial shipping vessels.

Further, the scope and purpose of Agreement could be expanded under a Model Agreement to not only include conservation of living resources on the high seas but the conservation of coastal environments as well as safety and security. The system of vessel authorization by the Flag State required for fishing could also be applied to merchant ships, whereby the vessels would need to obtain some type of license or authorization to carry out shipping activities on the high seas.

The biggest consideration for establishing a model Compliance Agreement to govern the shipping industry is discerning which international body is most appropriate to oversee the Agreement. Although this issue is beyond the scope of this article, it should be mentioned that an undertaking of this magnitude would best be governed by a significant organization such as the International Maritime Organization, or another United Nations body, where the FAO is more limited in scope.

2. *Encouraging Flag States to Join the Agreement*

When the FAO Compliance Agreement was initially drafted and presented to Flag States, there was a very pessimistic reaction by the international community.¹⁹⁵ In fact it took ten years for the Agreement to enter into force.¹⁹⁶ Nonetheless the Agreement is currently in force, with 27 members,¹⁹⁷ and because of it a global database has been developed containing information on thousands of vessels, which is available on line for participating countries to access.¹⁹⁸ This is an encouraging development and demonstrates the ability of Flag States to address international concerns regarding the regulation of the environment and the management of the seas.

The Agreement contains provisions, discussed above, that encourage Members to persuade non-Members to join the Agreement. It is very important that all Flag States offering registry services are parties to the Agreement. This should therefore be one of the main focuses of the Agreement, the Flag States and relevant governing body. If all

195. See, e.g., Bruce Odessey, *Hard Fought Fishing Agreements Languish Years without Force*, USIS WASH. FILE, Feb. 3, 1999, <http://canberra.usembassy.gov/hyper/WF990203/epf306.htm>.

196. See Legal Office Treaties, *supra* note 141 and accompanying text.

197. See *id.*

198. See FAO Code of Conduct, *supra* note 164; *HSVAR supra* note 165.

Flag States would become members to the Agreement there would be universal standards, eliminating flags of convenience whereby ships with bad compliance records could no longer shop around.

But because of industry interests and short-term profits many Agreements like the Compliance Agreement have been blocked by a number of countries.¹⁹⁹ Therefore international community pressure is the best means of enforcing the Agreement.²⁰⁰ Again, as provided for in the Agreement, Member States along with the international community will have to take measures to cause non-Member Flag States to accede to the Agreement.²⁰¹

Furthermore, it is in the Flag State and shipping companies' interests to have a good compliance record. For example vessels who fly the flags of Flag States with a higher than average record of "non-compliance during port state control inspections are generally subject to special port state control targeting" and more inspections.²⁰² This is inefficient for ship operators. Also companies who are registered with unscrupulous Flag States will develop a bad reputation.²⁰³ Furthermore, where there is trend toward corporate social responsibility, many companies are shying away from practices that could give way to public scrutiny.²⁰⁴

Under a Model FAO type Agreement, Flag States themselves will have more pressure to comply with, and cause their vessels to comply with international law. The "reputation model of compliance" of international law is based on the theory that international law affects state behavior and causes states to comply with laws out of concern of developing an adverse reputation which results from violations of international laws and norms.²⁰⁵ A state's reputation has value and provides a country with benefits by promoting "long-term relationships with other cooperative states, provid[ing] a greater ability to make binding promises, and reduc[ing] the perceived need for monitoring and verification."²⁰⁶ Therefore, Flags States that seek to have a positive reputation in the global community for purposes of politics and

199. See Odessey, *supra* note 195.

200. See Richard J. Silk, Jr., Note: *Nonbinding Dispute Resolution Processes in Fisheries Conflicts: Fish Out of Water?*, 16 OHIO ST. J. ON DISP. RESOL. 791, 794 (2001).

201. See Odessey, *supra* note 195.

202. GUIDELINES, *supra* note 50, at 5.

203. *Id.*

204. See, e.g., THOMAS DONALDSON & THOMAS W. DUNFEE, *TIES THAT BIND: A SOCIAL CONTRACTS APPROACH TO BUSINESS ETHICS* (1999).

205. See Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CAL. L. REV. 1823 (2002).

206. *Id.* at 1849.

business and will therefore honor their international commitments because it is in their own future interests.

The Model Agreement could establish additional incentives for poor-performing Flag States. A global database, much like the High Seas Vessel Authorization Record that already exists,²⁰⁷ could be created but accessible to the entire international community much like the black lists currently compiled by the EU and Port State Authorities. The governing body could issue ratings and give points to Flag States for measures taken toward implementing the Agreement and carrying out the Agreement's goals. These points, aside from giving the Flag State approval of its practices, could also add up to give the Flag State perks like freedom from port inspections, or publicity in a well circulated periodical.

3. *Into the Future: A Global Registry?*

Given that all of the land on earth is inhabited or claimed by Mankind, and the oceans continue to belong to everyone in a state of anarchy, the demand for its use and the resulting problems will persist into the future.²⁰⁸ It is clear drastic measures must be taken to address these issues. While a model Compliance Agreement would be a significant advancement in controlling vessels on the shadowy oceans, the possibility of establishing a Global Registry with a supranational body to oversee it might ultimately be the answer to the lawless seas. A model Compliance Agreement could therefore be used as an interim step in the creation of a Global Registry for vessels.

If a Model Agreement were adopted it is possible it could evolve into a Global Registry for shipping vessels. Such a Global Registry would require all commercial vessels seeking to traverse the high seas register with it and/or obtain an authorization or license to conduct commerce by way of the high seas. And, like the current law of the sea framework, if a vessel were not authorized by the Global Registry, it could not sail with impunity and could be boarded by any State at any time while on the high seas. It would also be necessary to establish a Global Registry Agreement that would contain minimum standards for vessels, like the Compliance Agreement. These provisions could be even further refined, to target specific problem areas such as vessel age and structure.

207. See HSVAR, *supra* note 165.

208. For more information on the growing levels of demand for the use of our oceans, see MTS Report, Ch. 3, *Trends and Competitive Pressures*.

Furthermore, a Global Registry would require an information bank like the High Seas Vessels Authorization Record, developed under the FAO Agreement. Such a database would enable all States (and especially Coastal States) to access data pertaining to all vessels using the seas, allowing them to keep watch of the oceans in their best interest. Like the HSVAR, it could contain information such as the distinctive characteristics that identify vessels, and provide information on the registration, authorization, history, condition and infringements of each vessel registered.

A model Compliance Agreement could therefore serve as an interim step in the development of a Global Registry because it already has thorough provisions that establish uniform standards, cooperation among States, incentives for non-Party States to become members, and most importantly, the creation of a global information database on vessels.

V. CONCLUSION

The evolution of international laws of the seas has created a legal system of *mare liberum*. This system is increasingly less compatible with globalization, which is demanding domination of the seas for commerce, causing serious global problems such as marine pollution. Despite numerous international efforts to address these emerging problems, including the implementation of many international and regional agreements, and the creation of international organizations dedicated to addressing the issues, we continue to experience large-scale problems like the sinking of the *Prestige* oil tanker.

It is crucial that our competing interests on the high seas—the importance of the shipping industry to the world economy, the protection of the marine environment, and state autonomy—be reconciled with one another. The sinking of the *Prestige* is just one more reminder that the need for effective oversight, accountability and regulation of the shipping industry has never been greater.

A model FAO Compliance Agreement that applies to the shipping industry in its entirety would be a significant step towards controlling Flag States and vessels, making our oceans more secure. The Agreement builds on the current legal framework, governs both vessels and Flag States, establishes a much-needed global information bank and system for information exchange, and contains compliance-inducing mechanisms. It is global in scope and has provisions that encourage States to be bound by the Agreement and to cause other States to accede to and be bound by it as well. As such, its provisions adequately

address the problem of marine pollution. A Model Agreement might also serve as an appropriate interim step in the creation of a Global Registry, which would ultimately be a significant contribution to controlling the seas.