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INTERNATIONAL RELATIONS, ECONOMICS AND COMPLIANCE WITH INTERNATIONAL LAW: HARNESSING COMMON RESOURCES TO PROTECT THE ENVIRONMENT AND SOLVE GLOBAL PROBLEMS

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INTRODUCTION

It is believed that States generally comply with the provisions of international agreements to which they are parties.¹ But the existing state of affairs tends to present a somewhat different picture,² suggesting that imple-

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1. LOUIS HENKIN, *HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY* 48-49 (2d ed. 1979). "In less dramatic contexts it is relevant that, despite the continuing temptations in daily intercourse, unnumbered principles of customary law and thousands of treaties are regularly observed." *Id.* at 48; *see also* HANS J. MORGENTHAU, *POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE* 271 (Hans J. Morgenthau & Kenneth W. Thompson eds., 2d ed. 1951). "The great majority of the rules of international law are generally observed by all nations." *Id.*

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

mentation of and compliance with international accords are imperfect and often inadequate.³ A study done in the early part of the last decade by the United States General Accounting Office, which focused on compliance of governments with international environmental treaties, concluded that compliance is poor.⁴ More particularly, in international oil pollution cases, it has been observed that the bane of the legal framework on ship-source oil pollution control has not been the content of the applicable law, but enforcement of the law.⁵ At the moment, the most rigorous effort mounted in the area of enforcement of the provisions of marine pollution conventions is through Port State control.⁶ However, regardless of whatever modest gains are made through the Port State scheme, the problems in implementation, compliance, and enforcement will linger for a long while, unless efforts are directed at the core of the problem.

International scholars and observers of international affairs appear to be united in the belief that “[w]hat is needed now is less the adoption of new instruments than more effective implementation of existing ones.”⁷ The problems of implementation, compliance, and enforcement are linked to the extant system that needs to take into consideration relevant matters that will facilitate treaty implementation and compliance.⁸ This work examines mo-

when they do so, they may not conform to, and comply with, the law.” *Id.* at 819-20.

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

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

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

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

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

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

dalities for improving the effectiveness of international agreements relating to marine environmental protection and intentional oil pollution by ships. This encompasses not only how parties to the treaties can, and could be made to, work toward improved compliance, but also considers ways of enhancing States' assent to these treaties.

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

This work is divided into two major parts. Part I examines international relations theories, especially in relation to ship-source oil pollution control. Part II involves a discussion of the economic dimension of treaty implementation. In particular, the relevance of a fee paying arrangement for use of oceans will be examined, basically as a source of revenue for the execution of projects connected to the preservation and protection of the marine environment. There will also be an exploration of ideas for an international financial mechanism as an appropriate means of influencing States' behavior in this area. The Global Environment Facility, currently being administered by three international institutions, will be discussed.⁹ Thereafter, general conclusions will be drawn, essentially suggesting that an effective way of securing the crucial co-operation of developing countries in the maritime oil pollution crusade is the introduction of a measure of economic motivation for such co-operative ventures. It should be noted that while this discussion is carried on in the context of marine oil pollution, the ideas expressed in this work can go beyond this focal area and can be replicated in, and applied to, virtually any aspect of international law.

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

I. INTERNATIONAL RELATIONS

A. Realism

Realism, which developed after the second World War,¹⁰ thrives on a “rational-actor conception of compliance” premised on a Machiavellian perspective:¹¹ “A wise ruler, therefore, cannot and should not keep his word when such an observance of faith would be to his disadvantage and when the reasons which made him promise are removed.”¹² The realist’s position, therefore, is that States will only keep their bargains when it is in their own individual interest.¹³ Thus, “[r]egardless of their domestic colors, states in the international realm [are] champions only of their own national interest.”¹⁴

A major contention of the realist school of thought is that the international sphere is “anarchic” and that, combined with “the pursuit and use of power . . . are the primary determinants of international behavior.”¹⁵ Under this proposition, international law does not influence States’ behavior but if it does at all, the influence is infinitesimal. “[C]onsiderations of power rather than of law determine compliance” in every significant area.¹⁶ Power, of course, is a manifestation of self-interest.¹⁷ International rules embodied in treaties serve essentially as instruments in the hands of powerful states to accomplish their objective. Identifying one of the major conclusions of this instrumentalist view, political science professor Robert O. Keohane writes: “States use the rules of international law as instruments to attain their inter-

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

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

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

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

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

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

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

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

ests."¹⁸ Treaty making therefore affords a good opportunity for states to promote their own national interests to evade legal obligations that might be harmful to them.¹⁹

A look at a possible scenario in the maritime oil pollution area appears to lend credence to the realist theories, both in the negotiation of treaties and in compliance with treaty provisions. One writer makes the following observation:

A government, recognizing its interest in avoiding oil pollution of the sea, may desire a rule prohibiting it and may believe it to be in its interest to have general compliance with the rule. On the other hand, the same government might permit its ships, when on the far side of the globe, to flush their tanks in violation of the rule when it would save money to do so. The kind of direct self-interest here being considered would tend to cause compliance with the antipollution rule only when a country's ship was anchored off its own public beaches.²⁰

The realist position, however, does not accurately describe reality. It is unlikely that a State would conduct its international affairs solely on short-sighted self-interest. Such an attitude would cost the State a loss of reputation and honor, which are vital in international affairs. Other States would find it increasingly difficult to enter into bargains, bilaterally or multilaterally, with a State that routinely disregards the principle *pacta sunt servanda*, which states that States are bound to keep promises they make, in order to protect its short term interests.²¹ Whatever a State had gained by such an approach to international relations might eventually turn into a loss in the long run, thus amounting to a pyrrhic victory.²²

Furthermore, the realist assertion that national interest is the ultimate motivator and that international law does not play any significant role in influencing state behavior may not represent an accurate depiction of the dynamics of the international arrangement. Opponents argue that there are some fundamental, structural principles of international law, which tend to constrain or qualify the self-interested application of power by States.²³

A State's self-interest may propel it to act in a certain manner. At the same time, its ultimate action is usually taken after considering the probable

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

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

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

21. *Pacta sunt servanda* is considered a fundamental principle of international law. See Abram Chayes & Antonia Handler Chayes, *On Compliance*, 47 INT'L ORG. 175, 185 (1993). The principle is incorporated in article 26 of the Vienna Convention on the Law of Treaties. See Vienna Convention on the Law of Treaties, May 23, 1969, 115 U.N.T.S. 331.

22. "As with Pyrrhus (who is supposed to have said: 'One more such victory over the Romans, and we are utterly undone'), the costs incurred in gaining a desired decision will in some instances outweigh any benefits to be derived from that decision." FISHER, *supra* note 20.

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

chain of events that such a move may trigger within the international community. Thus, under the principle of reciprocity, a State would only act if willing to accord other States the right to act in a similar manner. On the other hand, a State might refrain from a particular course of action, expecting that in the future other States will reciprocate.²⁴ The principle of reciprocity, albeit a general concept in social relations, “also finds expression in a structural principle of international law, whereby in the context of general customary international law any state claiming a *right* under that law has to accord all other States the same right.”²⁵

Contrary to realist theories, therefore, the principle of reciprocity in social relations and international law discussed above seems to influence State behavior, notwithstanding the state’s self-interest and position of power. A clear illustration of this idea in customary international law is the Truman Proclamation in the 1940s on the Continental Shelf.²⁶ In 1945, “the United States proclaimed its continental shelf, which in the case of the eastern seaboard extended to as far as 250 [nautical miles], exclusive for its exploration and exploitation and subject to its jurisdiction and control.”²⁷ By so proclaiming, the United States placed itself in a position in which it was also bound to recognize the rights of other states to avail themselves of the same rule.²⁸ In essence, a “[S]tate will therefore only behave in support of an existing, emerging, or potential customary rule if it is prepared to accept the generalization of that rule.”²⁹

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

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

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

26. Proclamation No. 2667, Policy of the United States with Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf, 10 Fed. Reg. 12,303 (1945), 3 C.F.R. 67 (1943-1948), *reprinted* in 40 AM. J. INT’L L. SUPP. 45 (1946); *see also* Byers, *Custom, Power, and the Power of Rules*, *supra* note 17, at 162.

27. Mafaniso Hara, *Southern African Marine Exclusive Zones: Burdens and Opportunities*, Monograph No. 9, *DIPLOMATS AND DEFENDERS* (Feb. 1997), *available at* <http://www.iss.co.za/Pubs/MONOGRAPHS/NO%209/Hara.html>.

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

29. *Id.* at 162-63.

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

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

The [particular form of] designation of the Paris MOU . . . and the fact that it was

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

Data from a study on tanker fleets world wide at the end of 1991 show that compliance with the above-mentioned equipment requirements had been

concluded among maritime authorities and not states indicates the willingness of the co-operating states to participate in a harmonized system of PSC [(Port State Control)] and exchange information but not to enter into new contractual and binding obligations.

Id. This revealed that European member countries of the 1982 Paris Memorandum on Port State Control did not intend it to be binding on them. *See generally* Memorandum of Understanding on Port State Control in Implementing Agreements on Maritime Safety and Protections of the Marine Environment, Jan. 26, 1982, 21 I.L.M. 1 [hereinafter Paris Port State Control MOU].

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

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

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

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

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

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

impressive.³⁸ “[Approximately] 94 percent of tankers built in 1979 or earlier [had] installed SBT or COW, 98 percent of those built between 1980 and 1982 [had] installed SBT, and 98 percent of those built after June 1982 [had] installed both.”³⁹ This nearly universal adoption has been linked to the influence of MARPOL. “The evidence presented unequivocally demonstrates that governments and private corporations have undertaken a variety of actions involving compliance, monitoring, and enforcement that they would not have taken in the absence of relevant treaty provisions.”⁴⁰

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

The realist theory, therefore, fails to adequately explain States’ behavior. It may be pointed out, however, that when regarding assent to a treaty, the realist theory may well prove valuable. Thus, while States may realize the value of reputation and recognize the “normativity” of international law and conduct themselves accordingly, a State is unlikely to assume obligations under a treaty when it will be inimical to its interests. That apparently explains, for instance, the present position of the 1986 United Nations Convention on Conditions for Registration of Ships.⁴⁵ The Convention occurred in response to the practice of “flags of convenience” shipping, by which some States allow substandard and inadequately manned ships to put to sea, thus endangering the marine environment.⁴⁶ Over ten years after its conclusion, no major maritime power or flags-of-convenience State has become a party to it, creating the impression that the treaty negatively impacts their interests.

Further, although short-term interest may not dictate a State’s general conduct in international circles, a State may resort to short-term interest

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

39. *Id.* at 269.

40. *Id.* at 299.

41. *See id.*

42. *See id.*

43. *Id.*

44. *Id.* at 299-300.

45. United Nations Convention on Conditions for Registration of Ships, Feb. 7, 1986, 26 I.L.M. 1229 (1987).

46. *See* S.G. Sturme, *The United Nations Convention on Conditions for Registration of Ships*, 1987 LLOYD’S MAR. & COM. L.Q. 97.

where it is impossible to act otherwise. While a State may lose face for renegeing on its obligations, it is a well-known fact that a State may be in non-compliance by reason of its incapacity⁴⁷ to abide by its treaty obligations.⁴⁸ In such a case, the issue of reputation does not arise and, even if it does, a State will certainly express a preference for self-preservation at the expense of reputation. It stands to reason, therefore, that developing states, by reason of their sagging economies, may be comfortable with non-compliance with international oil pollution agreements.⁴⁹

B. Regime Theory

Regime theoretic analysis proceeds from an apparent realization that there are "difficulties involved in attempting to explain all relations among states solely on the basis of relative power and short-term calculations of self-interest."⁵⁰ A re-evaluation of realist thinking became inevitable when some of its basic assumptions started faltering.⁵¹ Accordingly, while realists had argued that international institutions had no life of their own but existed only as a corollary of dominant United States power, this argument could not be sustained in an era that marked the relative strength of institutions like the General Agreement on Tariffs and Trade (GATT),⁵² which was replaced by the World Trade Organization⁵³ and the International Monetary Fund (IMF),⁵⁴ at a period of perceived decline of American hegemony.⁵⁵ As a consequence, the impossible task before realists was to either deny that American power was declining or assert that those institutions "were suddenly tottering."⁵⁶

47. See discussion *infra* Part II.A.

48. Oran Young, *The Effectiveness of International Institutions: Hard Cases and Critical Variables*, in GOVERNANCE WITHOUT GOVERNMENT: ORDER AND CHANGE IN WORLD POLITICS 160, 183 (James N. Rosenau & Ernst-Otto Czempiel eds., 1992) [hereinafter Young, *The Effectiveness of International Institutions*]. The writer opines that lack of capacity inhibits or restricts abidance to treaty provisions, especially for developing countries. See *id.*

49. See *id.*

50. Byers, *Custom, Power, and the Power of Rules*, *supra* note 17, at 129.

51. See *id.* at 218.

52. General Trade Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A3, 55 U.N.T.S. 187.

53. General Agreement on Tariffs and Trade—Multilateral Trade Negotiations (the Uruguay Round): Final Act Embodying the Results of the Uruguay Round of Trade Negotiations, Apr. 15, 1994, substantially reprinted in 33 I.L.M. 1 (1994), reprinted in LAW AND PRACTICE OF THE WORLD TRADE ORGANIZATION (Joseph F. Dinnin ed. 1996). The WTO embodies and expands upon the rules of GATT. See Chris Wold, *Multilateral Environmental Agreements and the GATT: Conflict and Resolution?*, 26 ENVTL. L. 841, 842 (1996).

54. Articles of Agreement of the International Monetary Fund, Dec. 27, 1945, 60 Stat. 1401, 2 U.N.T.S. 39, amended May 31, 1968, 20 U.S.T. 2775, 726 U.N.T.S. 266, amended Apr. 30, 1976, 29 U.S.T. 2203, amended June 28, 1990, 31 I.L.M. 1307, available at <http://www.imf.org/external/pubs/ft/aa/index.htm> (last visited April 15, 2001).

55. See Burley, *supra* note 14, at 218.

56. *Id.*

In international relations, consequently, a new line of thinking or a reformulated theory was born as a child of necessity⁵⁷ and centers around regimes, which are “sets of implicit or explicit principles, norms, rules, and decision-making procedures around which actors’ expectations converge in a given area of international relations.”⁵⁸

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

Regimes are also believed to “enhance compliance with international agreements in a variety of ways, [including] reducing incentives to cheat and enhancing the value of reputation.”⁶¹ Discussing the value and *raison d’être* of regimes, Keohane asserts:

They enhance the likelihood of cooperation by reducing the costs of making transactions that are consistent with the principles of the regime. They create the conditions for orderly multilateral negotiations, legitimate and delegitimate different types of [S]tate action, and facilitate linkages among issues within regimes and between regimes. They increase the symmetry and improve the quality of the information that governments receive. By clustering issues together in the same forums over a long period of time, they help to bring governments into continuing interaction with one another, reducing incentives to cheat and enhancing the value of reputation. By establishing legitimate standards of behavior for states to follow and by providing ways to monitor compliance, they create the basis for decentralized enforcement founded on the principle of reciprocity.⁶²

Regime theory appears fascinating and interesting, but it has not escaped criticism. Critics comment that regimes are merely a formula for obfuscating and obscuring the power relationships that are, in their assumption, not only the ultimate, but also the proximate, cause of behavior in the international sphere.⁶³ According to Susan Strange, an international relations scholar, “[a]ll those international arrangements dignified by the label regime are only too easily upset when either the balance of bargaining power or the

57. See ROBERT KEOHANE, *AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY* 245 (1984) [hereinafter KEOHANE, *AFTER HEGEMONY*]. “Realism should not be discarded, since its insights are fundamental to an understanding of world politics, but it does need to be reformulated to reflect the impact of information-providing institutions on state behavior, even when rational egoism persists.” *Id.* at 245-46 (citation omitted).

58. Krasner, *supra* note 24, at 2.

59. Donald J. Puchala & Raymond F. Hopkins, *International Regimes: Lessons From Inductive Analysis*, in *INTERNATIONAL REGIMES*, *supra* note 24, at 61, 86.

60. See *id.* at 62-63.

61. Burley, *supra* note 14, at 219.

62. KEOHANE, *AFTER HEGEMONY*, *supra* note 57, at 244-45.

63. Krasner, *supra* note 24, at 7.

perception of national interest (or both together) change among those states who negotiate them."⁶⁴

Regime theory has metamorphosed into neo-liberal institutionalism,⁶⁵ which is a more general rubric.⁶⁶ Keohane perceives the scope of institutions as larger than that of regimes and incorporates all "persistent and connected sets of rules (formal and informal) that prescribe behavioral roles, constrain activity, and shape expectations."⁶⁷ Institutions, according to Keohane, can be divided into three groups, based on their levels of organization or formality.⁶⁸ The first category encompasses "[f]ormal intergovernmental or cross-national nongovernmental organizations" while the second group contains "international regimes" defined as "institutions with explicit rules, agreed upon by governments, that pertain to particular sets of issues in international relations."⁶⁹ The third class incorporates "conventions" defined as "informal institutions, with implicit rules and understandings, that shape the expectations of actors."⁷⁰

To some scholars, it is an incontrovertible fact that institutions influence States' behavior, even independent of power calculations and self-interest. Scholars state that institutions play an important role in enhancing compliance, arguing that while members of the international system enjoy a latitude in making choices concerning compliance, the actions of institutions such as the United Nations certainly contribute to the choices they make with regard to compliance.⁷¹ A perplexing question, however, has centered on whether this should be taken as an article of faith or demonstrated empirically.⁷² As noted previously, ship design and construction standards represent one area in which it has been empirically and analytically shown that institutions induce or enhance compliance with international law.⁷³ Regime theory in par-

64. Susan Strange, *Cave! Hic Dragones: A Critique of Regime Analysis*, in *THE POLITICS OF GLOBAL GOVERNANCE* 41, 48 (Paul F. Diehl ed. 1997).

65. Byers, *Custom, Power, and the Power of Rules*, *supra* note 17, at 132.

66. See Burley, *supra* note 14, at 206.

67. Robert Keohane, *Neo-Liberal Institutionalism*, in *INTERNATIONAL INSTITUTIONS AND STATE POWER* 1, 3 (1989).

68. *Id.* at 3-4.

69. *Id.* at 4.

70. *Id.*

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

72. Oran Young states:

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

ORAN YOUNG, *INTERNATIONAL COOPERATION: BUILDING REGIMES FOR NATURAL RESOURCES AND THE ENVIRONMENT* 206-07 (Peter J. Katzenstein ed., 1989).

73. See discussion *supra* Part I.A.

ticular, and institutionalism in general, therefore, appear to represent more clearly what occurs in international politics, and seems to be steps ahead of the realist school of thought.

It is pertinent to point out, however, that both theories tend to share some common ground when it comes to the notion of self-interest. To some institutionalists, self-interest is pivotal to the existence of regimes.⁷⁴ States are believed to build those structures essentially as a means of protecting their interests.⁷⁵ This is elaborately conveyed by political science scholar Arthur A. Stein, who posits “that the same forces of autonomously calculated self-interest that lie at the root of the anarchic international system also lay the foundation for international regimes as a form of international order.”⁷⁶ Accordingly, “there are times when rational self-interested calculation leads actors to abandon independent decision making in favor of joint decision making.”⁷⁷

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

Close inspection of one institutional arrangement utilized in oil pollution control matters (namely, reporting requirements) clearly demonstrates the role of such arrangements in influencing States’ conduct and the place of self-interest in the whole scheme. The reporting requirement has been seen as one way of improving treaty effectiveness and at the beginning of the past decade, the Siena Forum on International Law of the Environment foresightedly suggested that the problem of non-compliance should be addressed

74. Krasner, *supra* note 24, at 11.

75. *Id.* “The prevailing explanation for the existence of international regimes is egoistic self-interest.” *Id.*

76. Arthur A. Stein, *Coordination and Collaboration: Regimes in an Anarchic World*, in INTERNATIONAL REGIMES, *supra* note 24, at 115, 132.

77. *Id.*

78. Burley, *supra* note 14, at 208; *see also* William J. Aceves, *Institutionalist Theory and International Legal Scholarship*, 12 AM. U.J. INT’L L. & POL’Y 227 (1997); John K. Setear, *An Iterative Perspective on Treaties: A Synthesis of International Relations Theory and International Law*, 37 HARV. INT’L L.J. 139 (1996).

79. CHAYES & CHAYES, *THE NEW SOVEREIGNTY*, *supra* note 11, at 2 n.3. “Regime theorists find it hard to say the ‘L-word,’ but ‘principles, norms, rules, and decision-making procedures’ are what international law is all about.” *Id.*

80. Michael Byers, *Response: Taking the Law Out of International Law: A Critique of the “Iterative Perspective,”* 38 HARV. INT’L L. J. 201, 201 (1997). Burley, *supra* note 14, at 220, sees the work of the early regime theorists as a reinvention of “international law in rational-choice language.”

through the use of "reporting requirements, special non-compliance procedures and measures, liability provisions, and dispute settlement procedures."⁸¹

The importance of reporting requirements to the effectiveness of an international regulatory arrangement cannot be overemphasized. "Reporting on compliance, enforcement, and other activities related to environmental treaties is often described as essential to treaty success."⁸² Reporting requirements are believed to provide a vehicle for increasing transparency⁸³ and transparency or openness is viewed as the "key to compliance."⁸⁴ It provides a means for identifying States who are or are not fulfilling their obligations, evaluating the rate of compliance, and possibly improving the same.⁸⁵

Reporting requirements have come to characterize a number of international regulatory regimes including those on environmental protection.⁸⁶ International agreements on intentional oil pollution have all incorporated some form of reporting requirements.⁸⁷ The 1954 International Convention for the Prevention of Pollution of the Sea by Oil⁸⁸ required states to provide periodic information to the treaty secretariat on the installation of adequate reception facilities.⁸⁹ The 1962 OILPOL convention did away with the periodic reporting requirement and then approved "a non-binding resolution mandating that the newly established Intergovernmental Maritime Consultative Organization (IMCO) should obtain and publish information 'annually on the progress being made in providing [tanker reception] facilities.'"⁹⁰ However, the 1954 self-reporting requirement regarding available reception facilities was reintroduced by the 1973 MARPOL.⁹¹

Reporting requirements have also involved external reporting by which other States report on the non-availability of reception facilities in other countries.⁹² This was introduced in oil pollution control regulations at the 1962 conference following a U.S. proposal.⁹³ The object of the proposal was to shame countries into providing the needed facilities.⁹⁴ This was to be ac-

81. Conclusions of the Siena Forum on International Law of the Environment, Siena, Italy, Apr. 21 1990, ¶ 12(a), *reprinted in* 1 Y.B. INT'L ENVTL. L. 704, 707 (1990).

82. MITCHELL, *supra* note 10, at 123.

83. Young, *The Effectiveness of International Institutions*, *supra* note 48, at 176-78.

84. CHAYES & CHAYES, *THE NEW SOVEREIGNTY*, *supra* note 11, at 154.

85. *Id.* at 154-55.

86. Chayes & Chayes, *Compliance Without Enforcement*, *supra* note 12, at 323.

87. MITCHELL, *supra* note 10, at 123.

88. 1954 International Convention for the Prevention of Pollution of the Sea by Oil, 327 U.N.T.S. 3 [hereinafter OILPOL].

89. *Id.* art. VIII.

90. MITCHELL, *supra* note 10, at 125 (citing Resolution 6, Inter-governmental Maritime Consultative Organization, *Resolutions Adopted by the International Conference on Prevention of Pollution of the Sea by Oil, 1962* (London: IMCO, 1962)).

91. MARPOL, *supra* note 34, art. 11(d).

92. OILPOL 54/62, *supra* note 88, art. VIII.

93. MITCHELL, *supra* note 10, at 128.

94. *Id.*

complished “by establishing a system for tanker captains, through their governments, to inform IMCO and other governments of absent or inadequate facilities non-compliant nations.”⁹⁵ This was replicated in MARPOL.⁹⁶

States are required not only to report on the availability of reception facilities for oily wastes, but in the case of Flag States, to report on actions taken with respect to alleged violations referred to them by Coastal States.⁹⁷ All States were to provide reports produced in connection with treaty compliance and enforcement.⁹⁸ Under MARPOL, parties are also required to provide an annual statistical report in concordance with requirements of the International Maritime Organization (IMO)⁹⁹ concerning penalties actually imposed for infringement of the Convention.¹⁰⁰

Reporting requirements have also been instituted in regional arrangements for marine environmental protection and oil pollution control starting with the Paris Memorandum of Understanding adopted by some European countries in 1982.¹⁰¹ Under the Memorandum, member States are to inspect twenty-five percent of the foreign ships entering their ports and relay the information regarding these inspections to a centralized computer base on a daily basis through direct computerized input.¹⁰²

The level of compliance with all of these reporting requirements has not met the elaborate provisions mentioned thus far. With the exception of the Paris MOU system, which has enjoyed a considerable measure of cooperation by the members as reflected in “regular, high-quality reporting by all the states involved,”¹⁰³ compliance with the requirements of the international agreements has been less than satisfactory. This is evidenced by the fact that the number of national reports totals less than twenty per year.¹⁰⁴ A Friends of the Earth (FOE) Study in 1992 found that only six contracting parties had submitted reports for each year since MARPOL took effect, and more than thirty contracting parties had never submitted a report to IMO.¹⁰⁵ The other contracting parties had submitted reports, which were often incomplete, for one or a few years only.¹⁰⁶

95. *Id.* (footnote omitted).

96. MARPOL, *supra* note 34, Annex 1, ch. II, Reg. 12(5).

97. International Convention (with annexes) for the Prevention of Pollution of the Sea by Oil, 1954, May 12, 1954, 1959 U.N.T.S. 3. *supra* note 69, art. X(2).

98. *Id.* art. XII. (icppso)

99. The IMO replaced the Inter-governmental Consultative Maritime Organization (IMCO) on Mar. 6, 1948. See <http://www.imo.org/imo/50ann/index.htm> (visited April 15, 2001).

100. MARPOL, *supra* note 34, art. 11(1)(f).

101. Paris Port State Control MOU, *supra* note 31. See generally KASOULIDES, PORT STATE CONTROL, *supra* note 31, 142-82.

102. Paris Port State Control MOU, *supra* note 31, § 4.

103. MITCHELL, *supra* note 10, at 137.

104. *Id.*

105. *Id.* at 134.

106. *Id.*

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

This underscores the point that States are unlikely to perform their treaty obligations when the capacity to do so is nonexistent.¹¹⁰ In such a case, a State would be prepared to place its national interest at the forefront, regardless of the consequences that such action might entail. It is self-evident that in the absence of support, many developing countries will continue to lag behind in compliance and enforcement. Only a few States have large and sophisticated bureaucratic establishments sufficiently equipped to perform the functions of information collection, processing, and assimilation.¹¹¹ In view of that, it is imperative for treaty effectiveness and success to seriously consider providing extensive assistance to developing countries in these areas.

Recent trends in treaty-making indicate a realization of the fact that the process of getting states to implement treaty provisions may involve some form of assistance to facilitate their action in the desired way. A salient ex-

107. CHAYES & CHAYES, *THE NEW SOVEREIGNTY*, *supra* note 11, at 154-57. This does not rule out other contributing factors such as IMO Secretariat's ineffectiveness in facilitating reporting. *Id.* at 155-57.

108. MITCHELL, *supra* note 10, at 137.

109. *Id.* (citing Abram Chayes & Antonia Handler Chayes, *On Compliance*, *supra* note 21). The absence of domestic concern in developing countries is traceable to the sorry state of environmental and human rights groups who would serve as a watchdog and thus galvanise the governments into action. This, in turn, is symptomatic of the species of governance found in many parts of the developing world—a situation where governments are chronically intolerant of opposition. Environmental activists have had experiences ranging from the unpalatable to the fatal. *See, e.g.*, Paul Lewis, *Nigerian Rulers Back Hanging of 9 Members of Opposition*, N.Y. TIMES, Nov. 9, 1995, at A9; Howard W. French, *Nigeria Executes Critic of Regime; Nations Protest*, N.Y. TIMES, Nov. 11, 1995, at 1. These articles discussed a well-known environmental crusader, leader of the Ogoni people of Nigeria, and Nobel Prize nominee, Ken Saro-Wiwa, who was executed in 1995 following a trial, which was hardly satisfactory by civilized standards. *Id.* The focus here however, will not be on the problems occasioned by the absence of domestic concern, but the implication of the lack of financial and administrative capacities in relation to implementation and compliance.

110. International policy makers seem not to have grasped this point yet. "The incidence of reporting requirements is so high that they seem to be included almost pro forma in many agreements, with little concern about cost or implementing capacity." CHAYES & CHAYES, *THE NEW SOVEREIGNTY*, *supra* note 11, at 154.

111. Chayes & Chayes, *Compliance Without Enforcement*, *supra* note 12, at 324.

ample is what has come to be known as “non-compliance procedures.” Non-compliance procedures (NCP), which are instituted as a mechanism for facilitating compliance in a manner that is essentially unconventional, were first introduced as an aspect of the 1987 Protocol on Substances that Deplete the Ozone Layer,¹¹² done at Montreal, and has since been replicated in other international accords.¹¹³

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

One of the NCP’s strong points is that it realizes that non-compliance might be as much a product of a State’s lack of capacity as it might be rooted in a deliberate or negligent disregard of its obligations.¹¹⁷ A State would thus be more comfortable with NCPs than with a procedure that castigates it and “takes it to court” for infractions without considering the possibility that the State may have desired to perform its obligations, but was legitimately unable to do so. Moreover, the knowledge that the cost of compliance is not placed entirely on its shoulders but that other States would be willing to assist is no doubt a refreshing tonic to any state and a strong attraction to compliance. In that connection, therefore, NCP is a recipe for eliciting States’ assent to treaties.

NCP can also facilitate compliance since it creates a congenial atmosphere and an environment that fosters cooperation and respect, as opposed to belligerency and a superior mentality. In such an atmosphere, States can continue to cooperate in ensuring that the treaty regime works instead of abandoning negotiation and resorting to less-friendly means at the conclusion of the convention. As some scholars opine, “negotiation does not end with the conclusion of the treaty, but is a continuous aspect of living under

112. Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, 26 I.L.M. 1541, 1550. The procedure was adopted at the 4th Meeting of the Parties to the Montreal Protocol in Copenhagen, Denmark, November 23-25, 1992. See Decision IV/5, Non-Compliance Procedure, in *Report of the 4th Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer*, U.N. Environment Programme, Dec. IV/5, U.N. Doc. UNEP/OzL.Pro.4/15 (1992), U.N. Doc. UNEP/OZL. Pro. 4/15 (25 November 1992), available at http://www/upep.ch/ozone/4mop_cph.shtml (last visited April 15, 2001) [hereinafter Non-Compliance Procedure].

113. See Gunther Handl, *Compliance Control Mechanisms and International Environmental Obligations*, 5 TUL. J. INT’L & COMP. L. 29, at 32-3 (1997) [hereinafter Handl, *Compliance Control Mechanisms*].

114. See Non-Compliance Procedure, *supra* note 112, ¶ 9.

115. Handl, *Compliance Control Mechanisms*, *supra* note 113, at 34. Traditional Dispute Settlement procedures are indeed not a realistic option, legally or politically, in dealing with some issues of non-implementation and non-compliance. However, NCP does not preclude resort to formal dispute resolution. *Id.*

116. *Id.* at 33-35.

117. See, e.g. *id.* at n.25 (citing Abram Handler Chayes et al., *Active Compliance Management in Environmental Treaties*, in *SUSTAINABLE DEVELOPMENT AND INTERNATIONAL LAW* 75, 80 (W. Lang ed., 1995)).

the agreement.”¹¹⁸ NCP presents a veritable opportunity to ensure successful negotiation. It “epitomize[s] an effort at continued consensus building which may reflect either the (relative) normative weakness of the obligation(s) in issue or the existence of different levels of normativity within the regime. In some respects, therefore, NCPs represent a process that straddles traditional law-making and law-enforcement functions.”¹¹⁹ Without necessarily suggesting the replication of the *structure* of this institutional arrangement *per se*, NCP’s *spirit* of cooperation, non-belligerence, and assistance to less capable parties is strongly recommended for the international policy framework on the protection of the marine environment and prevention and control of operational discharges by ships.

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

II. ECONOMIC ISSUES

Economists tend to perceive and portray environmental pollution as an economic problem: “We are going to make little real progress in solving the problem of pollution until we recognize it for what, primarily, it is: an economic problem, which must be understood in economic terms.”¹²⁰ This section will examine the contribution that economics can make in solving the problems of pollution and inefficient management of the oceans. It should be reiterated, however, that the intention here is not to promote economic models as alternatives to the extant regulatory scheme in international law. This work proceeds on the firm conviction that the law as it currently stands can serve as a useful tool in oil pollution control. What is needed, as this project has constantly and consistently emphasized, is for States to live up to their obligations under the law, and to include states that are not yet parties. This may not be accomplished, however, unless States have an economic motivation to participate or to jettison whatever benefits they are enjoying under the present scheme in order to embrace the requirements of a new arrangement.

There is no doubt that this subject raises a number of important economic issues. To require States to be involved in the implementation of international regulations in relation to pollution by oil tankers is to ask them to make an economic decision. This involves a choice between environmental

118. Chayes & Chayes, *Compliance Without Enforcement*, *supra* note 12, at 313.

119. Gunther Handl, *Controlling Implementation of and Compliance With International Environmental Commitments: The Rocky Road from Rio*, 5 *COLO. J. INT’L ENVTL. L. & POL’Y* 305, 329 (1994) (citations omitted).

120. Larry E. Ruff, *The Economic Common Sense of Pollution*, in *MICROECONOMICS: SELECTED READINGS* 498 (Edwin Mansfield, ed. 1975).

protection and economic development. In the same vein, to demand that States forego revenue-generating practices that are inimical to the environmental well being of the rest of humanity raises the issue of opportunity cost. A price is being exacted by reason of that demand and the responsibility for its payment has to be attached to someone.

Further, if the States that are involved in the foregoing scenario are not interested in paying the price, other States may be enjoined or compelled to do so. In these days of global economic downturn, it is an important economic decision that should not be considered lightly. This work seeks to elicit the assistance of economics in fashioning a system that incorporates the cost of treaty implementation and compliance by States who are unable to do so. This will be approached under two subsections, namely, international economic cooperation and funding.

A. *International Economic Cooperation*

In virtually every consensual arrangement, which international conventional law clearly represents,¹²¹ it is almost invariable that any rational being would hesitate to be involved in that which yields no benefit or which brings harm. States would therefore continue to have an incentive not to obey the rules of international law or to refrain from bringing themselves under the control of any such arrangement.

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

This should not elicit condemnation though, as a similar posture had been adopted by the developed world at some point in time in their development. An illustration is the reaction several countries had to a reception facilities provision proposed at the 1954 OILPOL Convention. During ratification of the Convention, the United States disagreed with the provision "because the government did not want to assume 'any financial responsibility' for building and operating such facilities."¹²³ Britain ultimately proposed

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

122. Jay D. Hair, *A Foreword*, in TRENDS IN INTERNATIONAL ENVIRONMENTAL LAW 1, 3 (1992).

123. MITCHELL, *supra* note 10, at 191 (citations omitted). In 1961, in the process of rati-

the deletion of the 1954 Article VIII reception facility requirement altogether, as several States were threatening not to sign because of its inclusion.¹²⁴ The same position and reasoning illustrated above are arguably available to developing countries today.

Another example can be found in the case of flags-of-convenience States.¹²⁵ The current international legal approach is to make open registries less attractive,¹²⁶ which will invariably rob flags-of-convenience States of much needed revenue. To expect them to join in such efforts is to urge them to self-destruct. They would insist on utilizing the practice as a tool for economic development. An acceptable regime should embrace their concerns out of necessity. One solution could be international economic cooperation measures between the countries of the Northern and Southern hemispheres. Developed countries should assume the responsibility for assisting their developing counterparts technically and financially in order to elicit their cooperation in the crusade against pollution from oil tankers. It would be naïve however, to assume that developed States would jump at this suggestion without any justification for doing so. Nevertheless, a good basis for the suggestion exists.

The first flank of that basis is equity. International oil trade is not a new development but one that has been a longstanding catalyst for the industrialization of the countries of the Northern Hemisphere.¹²⁷ The nationals of these countries also control the oil and shipping industries that invariably contribute to their national economic development.¹²⁸ The price the whole

fying OILPOL 1954, the United States entered a reservation stating:

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

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

124. MITCHELL, *supra* note 10, at 191 (construing SONIA ZAIDE PRITCHARD, OIL POLLUTION CONTROL 128 (1987)).

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

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

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

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

Oil companies, mainly the 'seven majors' based in the United States and the

world has had to pay for such development however, has been the degradation of the marine and coastal environment and destruction of the resources of the commons.¹²⁹ Interestingly, the North is currently at the forefront of the crusade to stem the environmental impact of the international oil business.¹³⁰

The crusade is not necessarily bad. The pertinent question is whether the battle should be pursued and won at the expense of the economic development of the countries on the other side of the world divide, or, the Southern Hemisphere. It hovers around the equity of the North, which fuels economies with oil, dictating to the South not only to refrain from doing that which the North has done and from which it has benefited, but to do so at the risk of economic stagnation. The interest of the South at this stage is to get to the level of development that the North has already attained. This may necessarily imply a sidetracking of environmental concerns, including the international measures on oil pollution from ships. If the North insists that the environment should be accorded priority or that Southern economic development should embrace environmental concerns, which is logical, equity demands that the North should bear much of the expense for that requirement. As one commentator has correctly pointed out:

[T]he debate on the environment has been turned around to try and restrain developing countries, in the name of the common good, from now doing all those things which the developed countries did with such abandon in the past in their efforts to attain their present levels of production and consumption. It is as if a referee has suddenly appeared and decided that all countries should be deemed to be starting from scratch in the race to save the environment, no allowance being made for the head start that some countries had enjoyed and the distance they had already covered. . . . The logic therefore . . . is that there is hardly room for newcomers, and that the poor must remain poor in order to save the planet!¹³¹

It is also consonant with equity that those who are responsible for damage should remedy that damage. The other side of the coin is that it offends every notion of fairness to impose a duty on others to redress that which they

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

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

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

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

131. NASSAU A. ADAMS, *WORLDS APART: THE NORTH-SOUTH DIVIDE AND THE INTERNATIONAL SYSTEM* 204-05 (1993).

did not cause. This parallels the "fault principle," which requires that those who have damaged the environment should bear the responsibility for the damage their activities have caused.¹³² International oil trade has been undertaken by, and for, developed countries for many years. This means that environmental disasters are attributable to them.¹³³ These countries should therefore, logically be prepared to pay an extra cost for correcting the state of affairs. It is a time-honored principle of Anglo-American jurisprudence that the person that takes the benefit should also bear the burden.¹³⁴

Further support for the proposition that the developed countries should bear the cost of measures expected of developing countries regarding marine pollution control can be found in the concept of opportunity cost in economics and the right to compensation in law. Active participation in international measures to control or prevent pollution from oil tankers will no doubt affect developing countries' development aspirations, as they would be required to divert badly needed funds to these measures and restrict or restructure their policies to align with the stipulations of international law.¹³⁵ It follows, therefore, that developing countries "could make a plausible argument for the right to be compensated to the extent that they incur opportunity costs by foregoing development options to preserve environmental resources that are of special interest to the world at large."¹³⁶ The oceans and the resources in them are, doubtless, resources that are of special interest to the world community.¹³⁷

A major objection to the points above is the apparent advantage it tends to confer on developing countries. A number of observers contend that developing countries simply raise these issues as a smokescreen or cloak to force the developed countries to pay for cleanup, which is the responsibility of the developing countries.¹³⁸ This is an unfair attack. In any case, their con-

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

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

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

135. One example is the installation of oily waste reception facilities where it has been estimated that it would have cost \$560 million to install such reception facilities in developing countries during 1993-2000. See generally United Nations, Preparatory Committee for the United Nations Conference on Environment and Development, *Protection of Oceans, all Kinds of Seas Including Enclosed and Semi-Enclosed Seas, Coastal Areas and the Protection, Rational Use and Development of Their Living Resources*, U.N. Doc. A/CONF.151/PC/100/Add.21 (1991).

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

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

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

tention is suspect, as it represents a one-sided observation that questions the entitlement of developing countries to receive financial assistance without addressing the broader issue of the need for those who created a wrong to remedy it. It also fails to consider the fact that there is no moral authority behind any call to others to abstain from that which you wilfully participated in and gained from, without providing them with an alternative course of action.¹³⁹ Building an international system founded on notions of equity and fairness is a better solution for humanity overall.¹⁴⁰

The question of capacity also makes it imperative for developed countries to assist their developing counterparts in order to expect any meaningful progress in treaty implementation. It cannot be gainsaid that in the absence of capacity, there is practically little that a country can do vis-a-vis international treaty requirements.¹⁴¹ As discussed in part I, developed countries have not complied with their responsibility to install reception facilities or to meet reporting requirements primarily due to their lack of capacity.¹⁴² The failure of the richer nations to realize this and address it will continue to plague any efforts aimed at promoting safer ships and cleaner seas.¹⁴³ Scholars have observed it would be futile to design a strategy to address global environmental concerns that do not simultaneously “confront the issues of poverty and economic development, which often seem to make environmental protection a luxury that most nations cannot afford.”¹⁴⁴ While, “[u]ntil recently, these tandem concerns have been compartmentalized and considered separately by agencies and institutions,” the emerging consensus is that the “recognition of the global nature of environmental problems necessarily entails recognition of the global nature of the problems of poverty and de-

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

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

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

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

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

144. Catherine A. O’Neill & Cass R. Sunstein, *Economics and the Environment: Trading Debt and Technology for Nature*, 17 COLUM. J. ENV’T L. 93, 95 (1992).

velopment."¹⁴⁵ Consequently, a formidable challenge confronting international cooperative efforts is to put this recognition into practice.¹⁴⁶ There can be no better way of "putting the recognition into practice" in international oil pollution control than for developed countries to assume binding obligations to assist the developing world and thereby facilitate their accession to and implementation of the numerous international oil pollution control accords.

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

No matter how vigorously marine environmental protection measures are pursued by some countries, their efforts will amount to little in the absence of global cooperation. For instance, there is a consensus of opinion that it is difficult to have a successful and effective oil pollution regime without the provision of adequate reception facilities in ports.¹⁴⁹ In the absence of these facilities, some tankers will continue to discharge oil into the seas thereby thwarting the efforts of those countries that have taken the laudable step of providing such facilities at their ports. Since oil is ambulatory, these discharges may eventually reach those countries, mainly in the developed world, who bear no responsibility for them. In order to protect their own interest, it behoves them to assist other countries to install such facilities for the benefit of all.

The case of flags-of-convenience shipping that is accompanied by serious environmental problems is another example.¹⁵⁰ To safeguard their envi-

145. *Id.* at 95-96.

146. *Id.*

147. Hair, *supra* note 122, at 4.

148. *Id.*

149. In January [1996], the IMO Facilitation Committee recognized that illegal marine pollution may occur, in part, because of the high cost or unavailability of reception facilities. Additionally, the committee noted that many MARPOL states have inadequate reception facilities and requests IMO members to provide options for financing and operation of such facilities. See Lindy S. Johnson, *Vessel Source Pollution* 7 Y.B. INT'L ENVTL. L. 150, 151-52 (1996).

150. See generally Ademuni Odeke, *Port State Control and UK Law*, 28 J. MAR. L. & COM. 657 (1997); L.F.E. Goldie, *Environmental Catastrophes and Flags of Convenience—Does the Present Law Pose Special Liability Issues?*, 3 PACE Y.B. INT'L L. 63 (1991). See

ronment, some developed countries, notably Canada, the United States, and the Paris MOU States, initiated the practice of entrenching a strong Port State control regime aimed at preventing the entrance of substandard ships into their territory.¹⁵¹ This practice has spread to other parts of the world.¹⁵² The vast majority of open registry states are in the developing world and are in the habit of registering some of these substandard ships.¹⁵³ It is expected that strong Port State control will make open registry less attractive and eventually eliminate the operation of these ships.

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

also Sturme, *supra* note 46.

151. KASOULIDES, *supra* note 31, at 151; see also Craig H. Allen, *Federalism in the Era of International Standards: Federal and State Government Regulation of Merchant Vessels in the United States (Part III)*, 30 J. MAR. L. & COM. 85, 119-20 (1999).

152. McDorman, *supra* note 6, at 208-09.

153. The United Nations Conference on Trade and Development, in a 1984 report, identified five countries, mainly from the developing world, as having major open registry fleets: the Bahamas, Bermuda, Cyprus, Liberia, and Panama. See George C. Kasoulides, *The 1986 United Nations Convention on the Conditions for Registration of Vessels and the Question of Open Registry*, 20 OCEAN DEV. & INT'L L. 543, 547 (1989). The table included in Kasoulides' article provides a list of open registry states from 1930-1986. *Id.* It is easier for substandard ships to be registered in flags of convenience States because they operate under extremely liberal laws. See also Edith A. Wittig, *Tanker Fleets and Flags of Convenience: Advantages, Problems, and Dangers*, 14 TEX. INT'L L.J. 115, 119-21 (1979); Goldie, *supra* note 150, at 89. Goldie argues that the registration of ships that might not meet international standards in flags of convenience states "is an inevitable consequence of tanker economics, [because], [a]s ships age they tend to become the property of less scrupulous owners, who . . . make cuts in their ship's maintenance and so in their environmental protection costs." *Id.*

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

155. See generally Clara Nwachukwu, *Nigeria to benefit from Global Environmental Project*, POST EXPRESS, Feb. 11, 1998, available at <http://www.postexpresswired.com/postexpress.nsf/b378f0445ed319398525691a0076c2c6/43f5636dcfc14c3e852565a70066e7cd?OpenDocument> (last visited Sept. 10, 1998).

With no radar, no navigation lights and a useless compass, the crew found their way to Cape Town by asking passing vessels on their VHF radios where they were. On the way, the vessel's engines caught fire seven times, as the pistons have no rings and blowbacks caused small fires throughout the voyage. Of her three generators, only one worked sporadically. The Chief Engineer reported that all the carbon dioxide fire-fighting cylinders were empty and the engine's cooling systems were completely broken down, as water supply pipes had rusted through from the inside. Inside the vessel is constantly dark because all the light bulbs have blown, and there are no spares. The vessel's crew have not been paid for four months, and there is no food on board. The refrigerators are not working . . .¹⁵⁶

One could analogize this issue to crime control. The solution to criminal activity is not necessarily more jails, for example, but instead in poverty, unemployment, and lack of opportunity, which is arguably the root of the problem. It is similarly preferable to solve the problem of ship pollution by dissuading open registries from registering such vessels in the first place.

It is expected that open registry States will respond kindly to any measure that offsets the loss of revenue accruing from the registration of such vessels, especially if it is one that secures their economies. After all, although the current practice provides a measure of benefit to open registries, the overall receipts from ship registration has not been shown to significantly impact the economies of open registry States.¹⁵⁷ Instead, the major beneficiaries are the big corporations that engineer the practice.¹⁵⁸ As one writer observes,

[T]he overall effect of open registries on the economies of developing countries is negative. Developing countries are unable to compete effectively and cultivate their own shipping industries, and vessel owners take advantage of the cheaper labor available in those countries.¹⁵⁹

The implications of this from an economic standpoint are certainly enormous. There is no doubt that "[t]he dependence for carriage of national trade in foreign flags involve[s] not only a drain on the foreign exchange resources of the country, but vitally affect[s] its ability to compete in trade freely with all nations of the world, the terms of trade and the costs of the country's imports and exports."¹⁶⁰ It is inconceivable that a State will insist

156. John Hare, *Port State Control: Strong Medicine to Cure A Sick Industry*, 26 GA. J. INT'L & COMP. L. 571, 589 n.60 (1997) (quoting LLOYD'S LIST AFRICA WEEKLY, May 9, 1997).

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

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

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

160. Anderson, *The Nationality of Ships*, *supra* note 126, at 161 n.145 (quoting NAGENDRA SINGH, *MARITIME FLAG AND INTERNATIONAL LAW* (1978)). But see Gunnar K. Sletmo and Susanne Holste, *Shipping and the Competitive Advantage of Nations: The Role of International Ship Registers*, 20 MAR. POL'Y MGMT. 243 (1993).

on remaining in such an economic state instead of cooperating in some other arrangement that has a better likelihood of improving the State. The next subsection will discuss other ways of raising funds for improving compliance with and implementation of international obligations.

B. Fundraising and Management

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

1. User Fees

The oceans and the resources within them are enjoyed by a plethora of enterprises free of charge. A useful economic device for remedying this state of affairs is the "user pays" principle (UPP).¹⁶¹ This principle, also known as resource pricing, is "a well-known and well-accepted economic principle."¹⁶² The UPP aims at ensuring that the user or polluter pays for the full cost of the resource and its related services.¹⁶³ "The idea behind [the UPP] is to internalize the economic costs of the external effects of production, consumption and disposal."¹⁶⁴

In advocating a user fee for ocean use, the intent here is not to present it as a pollution control device that could be applied in place of the existing regulatory scheme, but instead to utilize it as a tool for the generation of revenue. A "user pays" system is particularly attractive because it is grounded in equity, as "it is only fair that those who benefit from a good or service should pay for that benefit."¹⁶⁵ It is hardly surprising that in today's world, the idea of paying for the use of common resources is gaining in popularity as fewer people believe that all services and facilities should be

161. Ferenc Juhasz, *Guiding Principles of Sustainable Development in the Developing Countries*, in FAIR PRINCIPLES FOR SUSTAINABLE DEVELOPMENT 33, 39 (Edward Dommen ed., 1993).

162. *Id.*

163. Gonzalo Biggs, *Application of the Polluter-Pays Principle in Latin America*, in FAIR PRINCIPLES FOR SUSTAINABLE DEVELOPMENT, *supra* note 161, at 93, 107 n.3.

164. Kirit S. Parikh, *The Polluter-Pays and User-Pays Principles for Developing Countries: Merits, Drawbacks and Feasibility*, in FAIR PRINCIPLES FOR SUSTAINABLE DEVELOPMENT, *supra* note 161, at 81.

165. Edward Dommen, *The Four Principles for Environmental Policy and Sustainable Development: an Overview*, in FAIR PRINCIPLES FOR SUSTAINABLE DEVELOPMENT, *supra* note 161, at 7, 31.

free.¹⁶⁶ Where concern exists at all, it has narrowed to the types of services and facilities for which fees should be levied, and what amount of money can be fairly charged.¹⁶⁷ “The guiding philosophy emerging in the arena of public services is that users should pay more than non-users for the services or facilities they enjoy.”¹⁶⁸

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

[C]onsumptive users may either consume a certain quantity [of water, for example,] or they may reduce its quality by using its absorption capacity to dispose waste and by-products . . . by discharging effluents into a river. [On the other hand,] amenity users neither consume nor pollute the water. [For instance, a]ctive amenity users of a lake may swim or sail [in it while] passive users may simply admire its beauty.¹⁷²

The primary focus here is on the consumptive users of the oceans and the resources contained in them. They include, among others, commercial fishermen, offshore oil explorers, and companies involved in international trade who use it as an avenue for transportation.¹⁷³ Considering the utility of the oceans to this group and the fact that their activities affect the oceans in some way or the other, it is suggested that they be made to pay a “user fee” for their use of the oceans. The fee should be “on fish caught, oil extracted, minerals produced, goods and persons shipped, water desalinated, recreation enjoyed, waste dumped, pipelines laid, and installations built.”¹⁷⁴ Non-commercial uses such as subsistence fishing and marine scientific research could be exempt.¹⁷⁵

What could be realized from a levy on a small percentage of the profits of the enterprises currently utilizing the oceans without any charge is amazing. Available estimates suggest that about two hundred billion pounds of fish are harvested annually.¹⁷⁶ Imposition of a one-half of one percent ocean

166. ROBERT AUKERMAN, *USER PAYS FOR RECREATION RESOURCES* 31 (1987).

167. *Id.*

168. *Id.*

169. Dommen, *supra* note 165, at 24.

170. *Id.*

171. *Id.*

172. *Id.* at 24-25.

173. See, e.g., Andrew Griffin, *MARPOL 73/78 and Vessel Pollution: A Glass Half Full or Half Empty?*, 1 *IND. J. GLOBAL LEGAL STUD.* 489 (1994); see also Christopher D. Stone, *Locale and Legitimacy in International Environmental Law*, 48 *STAN. L. REV.* 1279, 1284-88 (1996).

174. ELISABETH MANN BORGESE, *OCEAN GOVERNANCE AND THE UNITED NATIONS* 90-91 (2d rev. ed. 1996).

175. *Id.* at 91.

176. Christopher D. Stone, *Mending the Seas through a Global Commons Trust Fund*, in *FREEDOM FOR THE SEAS IN THE 21ST CENTURY* 171, 176 (Jon M. Van Dyke et al., eds. 1993) [hereinafter Stone, *Mending the Seas*].

use tax would raise \$250 million.¹⁷⁷ If the same rate were applied to offshore oil and gas, it would produce \$375 million.¹⁷⁸ The dumping of more than 200 million metric tons of sewage sludge, industrial waste, and dredged material are officially reported yearly, as the ocean is, directly and indirectly through the territorial waters, used as the world's sewer.¹⁷⁹ Taxing such use at only \$1 per ton would raise another \$200 million.¹⁸⁰ Levies could also be imposed for "several non-polluting uses of common heritage assets, akin to fishing and oil."¹⁸¹ Further, "[c]onsider royalties for the minerals that will someday be taken from the seabed and fees for the uses of space."¹⁸² Instead of continuing with the current practice of allowing the "first grabbers" to utilize free of charge, "limited resources such as positions for geosynchronous and earth-orbiting satellites and frequencies on the radio spectrum," the world community can sell or lease them. Billions of dollars would at least be realized.¹⁸³

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

Lawyers feel they must solve the problems they are facing now. We must . . . try to solve problems we are going to face in the future. And if we think of the problems of the future, this very radical and revolutionary idea of an ocean development tax is not nearly as futuristic and academic as it now might seem to be.¹⁸⁶

Silviu Brucan, who later played a key role in the anti-communist revolution in Romania in the late 1980s viewed it as "one of those new daring proposals that is bound to gain ground in international life because it is based on the progressive forces at work in world politics and rides the wave of the future."¹⁸⁷

With all of these favorable comments, one would think an ocean tax would already be in place. The truth is that not everybody is favorably disposed toward such a tax, for a variety of reasons. Proposals by Greece and

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. BORGESSE, *supra* note 174, at 90-91.

185. *Id.* at 91 (footnote omitted).

186. *Id.*

187. *Id.* (citation omitted).

France in 1962 for an international tax on oil imports were rejected.¹⁸⁸ Some other attempts, not necessarily limited to ocean matters, have also met with cold reception and have failed outright.

In 1970, United States President Richard Nixon, while proposing an extension of coastal States' administration with respect to their adjacent seabeds, from the 200-meter isobath to the edge of the continental slope, also attached a suggestion for a wealth redistribution fund as part of the package.¹⁸⁹ The proposal was that a percentage of the wealth generated from the extension would be set aside for the benefit of developing countries,¹⁹⁰ which was based on considerations of fairness and as a means of quietening objections by landlocked States.¹⁹¹

In 1989, the late Indian Prime Minister Rajiv Gandhi, proposed a "Planet Protection Fund." If each nation were to contribute a thousandth of its gross national product each year, it would amount to \$18 billion U.S. dollars per year.¹⁹² The fund would have been channelled toward helping developing countries adopt and develop environmentally friendly technologies at no cost to them.¹⁹³ This proposal was considered at the Commonwealth Summit in Malaysia in October 1989 but was opposed by Britain. In its stead, a resolution was passed at the meeting calling for the strengthening of existing institutions.¹⁹⁴

The fee proposed here and the fund into which the proceeds would go, however, present a somewhat different arrangement from some of these failed efforts. It differs from Nixon's proposal in that "it would look to the commons both as the principal source and the principal beneficiary of funds."¹⁹⁵ Unlike Gandhi's proposal, it does not call for the taxing of States *per se* but only those *actually* using the oceans, whether private persons, corporate entities, or public establishments. Moreover, even though it considers the developing countries as a beneficiary, it does so only in the sense of promoting the well being of the commons and the general marine environment. It is also different from the Greek and French proposals because it seeks to universalize the tax instead of restricting it to oil imports. In such a case, the oil importing States would not consider it a discriminatory measure but one that is applied to all for the benefit of all. More importantly, it does not suffer the fate of the others in the sense that they appear to have come before their time.

188. PRITCHARD, *supra* note 124, at 129.

189. Announcement by President Nixon on United States Oceans Policy, May 23, 1970, reprinted in 9 I.L.M. 807, 808 (1970).

190. *Id.*

191. Stone, *Mending the Seas*, *supra* note 176, at 179.

192. *Ghandi Calls for \$18-Billion Fund to Fight Pollution of Atmosphere*, L.A. TIMES, Sept. 6, 1989, pt. 1, at 8.

193. *Id.*

194. *Britain Stands Pat Against Sanctions*, CHI. TRIB., Oct. 22, 1989, at 27.

195. Stone, *Mending the Seas*, *supra* note 176, at 179.

It would be risky to underestimate the degree of opposition that a user fee may elicit, especially from countries that substantially benefit from the current practice of free use of ocean resources. A similar and recent proposal, but in deep sea mining, faced opposition as well, especially from States that had the technology for mining polymetallic nodules of the deep sea bed and who were not willing to share that technology with anyone else or utilize the resources for the common good.¹⁹⁶ While acknowledging the objections that followed the failed “common heritage of humanity” idea leading to the adoption of an Implementation Agreement by the General Assembly on 29 July 1994,¹⁹⁷ it should be pointed out that we cannot continue to countenance such brazen displays of egoism by some states.

Of note is the impact the concept of a common heritage proposed in Part XI of the Law of the Sea Convention 1982 has had. It created a landmark in that it “sets a precedent in international law for the imposition of international taxation.”¹⁹⁸ The Agreement of 1994¹⁹⁹ has not changed this, although the terms are varied, thus illustrating that the world is not entirely averse to the idea of international taxation on the use of common resources for the benefit of all, especially less endowed countries. The international community can now reflect that in more tangible and more refined terms.

With the current state of the global economy, the value of the idea of an ocean use fee cannot be overemphasized. With nations complaining of the scarcity of funds and the strain on existing institutions to meet the myriad of needs confronting the international society,²⁰⁰ it is imperative that we look at alternative sources of funding. According to one commentator, “[i]f sustainable development is not to remain a chimera, new sources of funding must be mobilized . . . One of the obvious candidates is international taxation.”²⁰¹ Law Professor Christopher D. Stone’s sentiments reverberates: “Why should a needy global community give away to the first grabber, rather than sell or lease at auction, limited resources. . . . The current practice is a multibillion-dollar give away.”²⁰² The global community should continue to use what it has to get what it wants while striving to preserve what it already has.

The user fee this article proposes will be based on well-defined terms, such as the tonnage and value of goods transported, or fish and other resources removed, or sewage and other materials dumped. The proceeds will be channelled into an international fund, which will underwrite such things

196. See generally SAID MAHMOUDI, *THE LAW OF DEEP SEA-BED MINING* 119-204 (1987); see also Jonathan I. Charney, *U.S. Provisional Application of the 1994 Deep Seabed Agreement*, 88 AM. J. INT’L L. 705 (1994).

197. Louis B. Sohn, *International Law Implications of the 1994 Agreement*, 88 AM. J. INT’L L. 696 (1994); see also BORGESE, *supra* note 174, at 170.

198. BORGESE, *supra* note 174, at 170.

199. Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, July 28, 1994, 33 I.L.M. 1309.

200. BORGESE, *supra* note 174, at 90.

201. *Id.*

202. Stone, *Mending the Seas*, *supra* note 176, at 176.

as "building and improving ocean services, [for example,] navigational aids, scientific infrastructure, environmental monitoring, search and rescue, and disaster relief."²⁰³ The fund would also finance other measures such as a global environmental patrol force, with the capability to respond quickly to environmental disasters like major oil spills, promoting improved enforcement of treaties, and drafting and lobbying for new international agreements.²⁰⁴ The fund would also assume responsibility for "underwrit[ing] marine research[,] support[ing] forceful monitoring of ocean dumping," and generally combating pollution on the high seas.²⁰⁵

Furthermore, the fund should "also defer the costs of compliance with international regulations designed to remedy the ills of the commons."²⁰⁶ In that connection, the fund will arrange development assistance to developing countries to enable them to participate in the global efforts for safer ships and cleaner seas. It is important to stress at this juncture, however, that some of the activities of the Fund would overlap with measures currently being undertaken by other international institutions such as the International Maritime Organization. This would not result in conflict, as coordination of functions would eliminate overlapping of efforts in certain areas while ensuring all areas are addressed.

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

2. Funds Management

One approach to dealing with the situation of developing countries in relation to international environmental obligations is the creation of financial mechanisms,²⁰⁸ which are created "to oversee and facilitate the flow of funds related to implementation of an agreement."²⁰⁹ An example of a financial mechanism is the Montreal Protocol.²¹⁰ The Montreal Protocol includes a

203. BORGESE, *supra* note 174, at 91.

204. Stone, *Mending the Seas*, *supra* note 176, at 175.

205. *Id.*

206. *Id.*

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

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

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

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

Multilateral Fund and was established to provide financial and technical cooperation, and to meet all agreed incremental costs of developing country parties.²¹¹ Permanent financial mechanisms are also present in the Biological Diversity²¹² and Climate Change Conventions.²¹³ Under the latter two conventions, an institutional arrangement—the Global Environment Facility—is designated as an interim mechanism for the realization of the objectives of the conventions.²¹⁴ Additionally, this article proposes that assistance to developing countries for oil pollution control take the form of a financial mechanism titled the Global Enforcement Fund. The proposed fund will operate under the Global Environment Facility (GEF).²¹⁵

Originally, the GEF was established in 1991 as a pilot project of the World Bank.²¹⁶ Its operation is now governed by an arrangement involving the World Bank,²¹⁷ the United Nations Environment Programme (UNEP)²¹⁸ and the United Nations Development Programme (UNDP).²¹⁹ The realization that no single international agency commands all the skills and experience necessary to implement all the functions of GEF necessitated the tripartite structure.²²⁰ Under this new arrangement, established by representatives from

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

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

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

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

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

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

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

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

219. The UNDP is the central co-ordinating organization for [United Nations] development activities and the world's largest multilateral source of technical assistance for sustainable human development." Zama Coursen-Neff, *Preventive Measures Pertaining to Unconventional Threats to the Peace Such As Natural and Humanitarian Disasters*, 30 N.Y.U. J. INT'L L. & POL. 645, 652 (1998).

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

seventy-three countries at a meeting in Geneva in 1994, GEF was transformed “from an experimental program into a permanent financial mechanism that will provide grants and concessional funds to developing countries for projects and other activities that protect the global environment.”²²¹

The GEF has a mandate that covers four focal areas, namely climate change, biological diversity, international waters, and ozone depletion.²²² It perseveres “to assist in the protection of the global environment and promote environmentally sound and sustainable economic development.”²²³ With regard to the oceans and international river systems, the GEF “is designed to establish programs [intended] to protect both marine and freshwater environments, study and improve deballasting techniques, clean up toxic waste pollution and upgrade contingency planning for oil spills.”²²⁴ This is intended as a continuation of the efforts of the signatories to MARPOL 73/78.²²⁵

GEF is administered through a division of powers between the component institutions.²²⁶ In particular, the World Bank assumes responsibility for administration, trusteeship, and primary implementation of investment projects.²²⁷ It also serves as a repository of the Global Environment Facility Trust Fund (GEF).²²⁸ The World Bank’s headquarters in Washington, D.C. houses the GEF Secretariat, which is in charge of the administration of the GEF’s day to day operations.²²⁹

Member States provide the funding for GEF in the form of grants and co-financing arrangements, though by the Articles of Agreement, GEF expresses a preference for grant funding.²³⁰ GEF funds are primarily utilized for “incremental costs.” These costs are “defined as ‘the difference between the ‘domestic costs’ a country would have to pay to achieve a global environmental benefit and the ‘domestic benefit’ it would receive as a result.”²³¹

221. Nicholas Van Praag, Introductory Note to Instrument Establishing the Global Environment Facility, 33 I.L.M. 1273 (1994).

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

223. *Id.* at 1281.

224. Anderson, *Reforming International Institutions*, *supra* note 8, at 771 nn.55-56. See also Charles E. DiLeva, *The World Bank and Environmental Law: A Post-Rio Summary of Activities*, C883 ALI-ABA 525, 526-28 (Feb. 17, 1994).

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

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

227. Royal C. Gardner, *Exporting American Values: Tenth Amendment Principles and International Environmental Assistance*, 22 HARV. ENVTL. L. REV. 1, 42 n.227 (1998). See also Silard, *supra* note 137, at 634-35.

228. Silard, *supra* note 137, at 635. See also Adam A. Walcoff, *The Restructured Global Environment Facility: A Practical Evaluation for Unleashing the Lending Power of GEF*, 3 WIDENER L. SYMP. J. 485, 488-89 (Fall, 1998).

229. Anderson, *Reforming International Institutions*, *supra* note 8, at 785.

230. World Bank, *supra* note 220, at 1749-50.

231. Anderson, *Reforming International Institutions*, *supra* note 8, at 787 (citations omitted).

GEF therefore does not normally give financial support to projects the host nations are capable of funding unless compelling reasons can be given to show that: (1) the particular operation would not proceed without the involvement of GEF; (2) the regular development aid financing mechanisms were not available; or (3) that GEF funding could provide for additional global environmental benefits which could not be achieved with existing national funding.²³²

Under the restructured GEF, funding is also expected from the private sector. It is submitted that a fee for use of the oceans and the resources contained in them will be a useful way of sourcing funds and ensuring private sector participation in the global march for environmental security. The proceeds will be channelled into the proposed fund under GEF and be particularly designated for the projects listed above.

GEF is especially attractive for this assignment because it would facilitate implementation and compliance with international law. First, GEF obviates the need for the creation of new institutions or bureaucracies, which members of the international community see as money-guzzling and an encroachment on sovereign powers. Indeed this vision was the basis of extensive discussions for the restructuring of GEF: "The lengthy negotiations on restructuring illustrate the determination of governments to avoid the creation of a new bureaucracy."²³³ Second, GEF is not just an existing institution, but is one equipped with the necessary experience and expertise to undertake the task without additional restructuring.²³⁴ Third, GEF is capable of discharging its responsibilities effectively without any major conflict with the notion of national sovereignty that has stood as an albatross to the proper implementation of international rules.²³⁵ Thus, without impinging on the sovereignty of States, it nevertheless presents an international oversight mechanism to monitor compliance with environmental treaties, which unfortunately is one of the major pitfalls of the present structure.²³⁶ Fourth, GEF is an enforcement mechanism in itself because of its involvement with the World Bank. States would want to keep their obligations under the facility to avoid foreclosing opportunities for future assistance by the Bank, a near inevitability in today's world.²³⁷ In other words, the concept of enlightened self-interest will at least compel States to discharge their obligations and act in an environmentally desirable way. Fifth, and perhaps most significantly,

232. World Bank, *supra* note 220, at 1742-43.

233. Van Praag, *supra* note 221, at 1273.

234. Silard, *supra* note 137, at 645.

235. See generally Paul Stephen Dempsey, *Compliance and Enforcement in International Law—Oil Pollution of the Marine Environment by Ocean Vessels*, 6 NW. J. INT'L L. & BUS. 459, 561 (1984).

236. Andrew Watson Samaan, *Enforcement of International Environment Treaties: An Analysis*, 5 FORDHAM ENVTL. L. J. 261, 267 (1993).

237. Ibrahim F. I. Shihata, *Implementation, Enforcement, and Compliance With International Environmental Agreements—Practical Suggestions in Light of World Bank's Experience*, 9 GEO. INT'L ENVTL. L. REV. 37, 48-50 (1996).

GEF has a forward-looking posture. The permanent GEF has been described as an institution intended as more than a channel for project financing. It will also play a crucial role in supporting "global environmental security by integrating the global environment into national development, encouraging the transfer of environmentally sound technology and knowledge, and, crucially, strengthening the capacity of developing countries to play their full part in protecting the global environment."²³⁸ The revised institutional framework signifies a change from the "old style assistance" to "new style cooperation."²³⁹

In furtherance of its objectives, GEF recently identified some projects in West Africa as areas of international significance, and undertook to finance the preservation of their environmental quality.²⁴⁰ It is worth re-emphasizing, therefore, that the marine and coastal resources and environment will be better off under a system comprised of a fusion of legal rules supported by an ocean user fee. The proceeds from such a fee would be managed by the Global Environment Facility. These proceeds would go toward strengthening the capacity of developing countries. Such infusion of energy would in turn enable those states to play their part in global environmental protection measures.

The responsibility for collecting the proposed fees should also be assumed by the GEF. The sheer vastness of the ocean and the volume of activity on the ocean, however, pose problems in application. To ensure against those that will attempt to cheat the system and somehow shirk the responsibility, GEF should align with and seek the support of the various interest groups that exist in the business. Consider, for example, oil companies operating shipping lines (International Shippers Association (INSA)) and independent tanker owner organizations (International Tanker Owners Association (INTERTANKO)); a system could be arranged for the collection of the proposed fees at the same time as any annual membership fees that might be due from members. Additionally, it would behove the GEF to establish a relationship with the major maritime States to explore the possibility of collecting the fees at the time of ship registration, renewal of licensing fees or payment of "tax." Generally, establishing additional offices outside of its secretariat would also assist GEF. This would facilitate revenue collection as well as any other relevant activities.

III. CONCLUSION

Implementation and compliance with international agreements have not occurred in a desirable manner, as the members of the world community might desire. Accordingly, this militates against the effectiveness of interna-

238. Van Praag, *supra* note 221, at 1275.

239. *Id.*

240. Nwachukwu, *supra* note 155.

tional agreements in relation to oil pollution from ships. National interest is believed to be the source of this state of affairs. Exploitation of this notion is therefore a *sine qua non* for the resolution of the problem.

The intent of this article was to go beyond the extant international policy and legal framework for solving the problem, including the latest effort of Port State control. Realistically, the oceans, as a global commons, "can only be protected if the behaviour of the people (i.e. the behaviour of firms, governments, consumers . . .) changes."²⁴¹ Authoritative regulations alone will not effect this change, which requires identifying the reasons behind the behavior leading to pollution and tackling the problem at the root.

The basic reason identified for the behavior is deference to national interest. Accordingly, this article is meant to advocate capacity-building in cases of financially incapacitated countries, and introduces alternatives to environmentally destructive activities. It thus subscribes to the view that "[e]ffective protection of global commons . . . is most likely to develop if capacities for substitution of the polluting activity exist . . ."²⁴² In that connection, it strengthens the regulatory structure by promoting the participation of States that otherwise would be outside the system by encouraging capacity building, which is a prerequisite for such participation.

The concepts of global partnership, international cooperation, and symbiosis in international relations catering to the interests of every side of the world divide must be promoted, as opposed to a system that is partitioned into winners and losers.

This article is intended to suggest an avenue for the productive use of resources commonly owned by the international community for the benefit of all. It also addresses the additional issue of the protection of the oceans and their resources, as well as remedial actions with regard to damage done to them. In that light, this article is intended as a voice for the oceans and marine environment; speaking for them and not just concentrating on pollution prevention and control for the benefit of States only. It does so by holding the corporate sector responsible for their actions and demands that they play a more active and supportive role in international environmental protection efforts.

Current with recent trends, this article is meant to elicit and enhance compliance with international law where some States essentially assume an obligation to defray the cost of compliance expected from other States. This is especially true when the former are responsible for the current state of affairs or where the latter are not in a financial position to be part of the international arrangement, as exemplified by the Substances that Deplete the Ozone Layer²⁴³ and Climate Change Conventions.²⁴⁴ The current state of af-

241. Volker von Prittwitz, *Several Approaches to the Analysis of International Environmental Policy*, in MAINTAINING A SATISFACTORY ENVIRONMENT: AN AGENDA FOR INTERNATIONAL ENVIRONMENTAL POLICY 1, 23 (Nordal Akerman ed., 1990).

242. *Id.* at 22.

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

fairs regarding oil pollution control must change. It is through new international programs as well as reform and enforcement of the current systems that this change can occur.

244. See Convention on Climate Change, *supra* note 213.

