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

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

I. INTRODUCTION

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

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

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

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

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

II. BACKGROUND

A. The Prestige Incident

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

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

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

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

6. UNCTAD Report, supra note 2, at 41.
15. Lawless Sea: The Story, supra note 3, at 1.
16. Id.
to steer the *Prestige* out to sea and away from Spain to avoid environmental devastation to the Spanish coasts. When captain Mangouras adamantly refused, saying the ship needed to be confined in order to make the repairs necessary to contain the leaking oil, Spain threatened to bring in the Spanish Navy. The *Prestige* was then steered out to sea by Serafin Diaz with the help of the Spanish tugboat, *Ria de Vigo*. After several days of sailing and being towed, the *Prestige* snapped in two, spewing crude oil, and sank 130 miles off the Spanish coast. Captain Mangouras was arrested and charged with negligence.

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

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

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17. *Id.*
18. *Id.* at 1-2.
22. *Id.*
24. Nearly 71,000 tons of oil were spilled by the *Prestige*, 60 percent more than initially estimated, compared with 42,769 tons spilled by the *Exxon Valdez*. Raul Garcia, *The Prestige: One Year On, A Continuing Disaster*, 26 OIL SPILL INTELLIGENCE REP. 6 (2003). The *Exxon Valdez* spill occurred in March of 1989 off the Coast of Alaska by a single hull tanker and is considered the biggest oil spill in that area. See Philip Schabecoff, *Largest U.S. Tanker Spill Spews 270,000 Barrels of Oil Off Alaska*, N.Y. TIMES, Mar. 25, 1989, at 1.
27. *Id.*
all those responsible for the spill.” On the first anniversary of the sinking of the Prestige, 100,000 people from the city of Santiago de Compostela marched in the streets to demonstrate their disdain for the Prestige disaster. A group called Nunca Mais, or “Never Again,” in Gallego, organized the movement.

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

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

30. Id.
31. Id.
32. Id. “[The Prestige] was one of many [tankers] built quickly and cheaply in Japan during the . . . 1970s.” Analysis: Vulnerability of Single Hulls, BBC NEWS ONLINE, Nov. 19, 2002, at http://news.bbc.co.uk/2/hi/europe/2491451.stm [hereinafter Vulnerability of Single Hulls]. When she sank she was 26 years old, considered well past retirement age for a single-hulled tanker. See infra text accompanying notes 115-119. Additionally, the previous captain of the vessel, Esfraitos Kostazos, apparently resigned as captain out of concern that the ship was in unsound condition, and had faxed letters referencing the bad state of the vessel to both the owners and to ABS Shipping Company. See Spain—The Lawless Sea: The Paper Trail—Examining the Case of the Prestige, PBS, at 1, at http://www.pbs.org/frontlineworld/stories/spain/memos.html (last visited Mar. 11, 2005) [hereinafter Lawless Sea: The Paper Trail].
33. See Vulnerability of Single Hulls, supra note 31. The American Bureau of Shipping ordered major repairs for these cracks in 2001, which were welded in China shortly thereafter. Id. Although it is not certain this was the cause of the accident, experts speculate it was. Id.
34. UNCTAD Report, supra note 2, at 41.
35. Lawless Sea: The Story, supra note 3, at 2; see also supra text accompanying notes 9-12.
the costs of the cleanup and other compensations, it is filing a $750 million lawsuit against the ship’s classification society, American Bureau of Shipping (ABS), in New York Federal Court. ABS surveyed the *Prestige* just six months before it sank. Spain is claiming the company acted negligently in not carrying out its responsibilities of inspection of the vessel. The company is counterclaiming, alleging the Spanish Government is responsible for the accident for refusing to let the distressed vessel take refuge in its ports so it could make the necessary repairs.

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

III. LAW

A. International Law’s Flimsy Oversight of the Shipping Industry

1. Shadows on the High Seas

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


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


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

The \textit{Prestige} oil spill is one of numerous casualties that occur on the high seas as a result of this weak international legal status, which fails to control and monitor the activities of vessels.\textsuperscript{48} Much needs to be done to control the activities of vessels, especially the shipping industry.

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

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


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

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

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

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

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

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


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

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


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

56. Id. art. 91.
rather, it is used to define the legal relationship between the Flag State and the ships authorized to fly under its flag.\textsuperscript{57} Under the current international legal framework governing the laws of the seas, the registration of vessels with the Flag State is the primary way in which a State shows the vessels to which it has granted nationality.\textsuperscript{58}

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

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

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

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\item \textsuperscript{57} “[T]he ship, everything on it, and every person involved or interested in its operations are treated as an entity linked to the [F]lag [S]tate. The nationalities of the persons are not relevant.” ITLOS: M/V “Saiga” (No. 2) (Saint Vincent and the Grenadines v. Guinea), 38 I.L.M. 1323, 1347 (1999).
\item \textsuperscript{58} SOHN \& NOYES, supra note 53, at 103.
\item \textsuperscript{59} Id. at III-6 (citing C. JOHN COLOMBOS, THE INTERNATIONAL LAW OF THE SEA 290 (6th rev. ed. 1967)).
\item \textsuperscript{60} UNCLOS, supra note 44, art. 91.
\item \textsuperscript{61} See Lauritzen v. Larsen, 345 U.S. 571, 584 (1953).
\item \textsuperscript{62} SOHN \& NOYES, supra note 53, at 104; see also UNCLOS, supra note 44, art. 94.
\item \textsuperscript{63} SOHN \& NOYES, supra note 53, at 104.
\item \textsuperscript{64} GUIDELINES, supra note 50, at 4.
\item \textsuperscript{65} See infra pp. 221-25.
\end{itemize}
lacks a mechanism for ensuring they carry out their Flag State obligations.

3. Flags of Convenience

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

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

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

67. SOHN & NOYES, supra note 53, at 107. Currently, the six major open registries are: Panama, Liberia, Bahamas, Malta, Cyprus and Bermuda. See UNCTAD Report, supra note 2, at 35.
68. See supra text accompanying notes 58-59.
69. The system of vessel flagging began in the United States in World War II. See NPR broadcast, supra note 44, at 2. The U.S. Government advocated this virtually lawless system before entering World War II in an effort to get around its own neutrality laws. Id. Following the war, the lack of regulations of the oceans increased, catalyzed by free market interests. Id.
70. See Langewiesche, supra note 1, at 1.
71. UNCTAD Report, supra note 2, at 28. Just over forty-eight percent of these ships are oil tankers. Id. at 29. Developing countries have another 25.7% of the world fleet registered in their countries. Id. at 28.
72. Langewiesche, supra note 1, at 1.
73. Id.
74. Id.
75. UNCTAD Report, supra note 2, at 35. For example, in 2002, 70.2% of vessels from
offering flags of convenience are unscrupulous in complying with their obligations to implement and enforce international maritime regulations for ships granted the right to fly their flag.\textsuperscript{76}

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

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

devolved market-economies were registered in foreign registries. \textit{Id.} at 32.

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

\textsuperscript{77} See Lawless Sea: Hiding Behind the Flag, Introduction, supra note 47, at 2.

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

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

\textsuperscript{80} \textit{Id.}, Flag State Performance Table. This table is periodically updated by the Round Table and is available at http://www.marisc.org/flag-performance/ (last visited Mar. 11, 2005). \textit{Id.}
the International Maritime Organization’s white list; and the average age of the vessels that fly the flag of the ship.

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

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

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

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


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


86. Nov. 1, 1974, 32 U.S.T. 47, 14 I.L.M. 959 [hereinafter SOLAS]. SOLAS is the most
lution from Ships (MARPOL). Since the Prestige incident the Bahamas has taken steps to better ensure its maritime security regime.

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

B. International Measures Being Implemented

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


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

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

90. Agreement supra note 5. The Food and Agricultural Organization (FAO) is an intergovernmental, non-profit organization, a specialized agency of the United Nations, whose
though it only applies to fishing vessels, its framework can just as well be applied to other types of vessels that use the high seas.

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

1. Coastal State Measures

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

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

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


93. This is not the first time that countries badly affected by oil spills have sought to implement legislation that would protect their coasts from further devastation. After the Exxon Valdez spill off of the coast of Alaska, the United States planned a phase-out of single hull tankers. The Erika spill led to the creation of the European Maritime Safety Agency and two sets of European reforms. And, since Erika, most big oil companies are shifting away from single-hulled tankers. The first reforms increased controls in ports, tightened up procedures for ship inspections, and accelerated the timetable for eliminating single-hulled tankers. The second tackled longer-term issues like the creation of a compensation fund for victims of oil spills and the creation of a European Maritime-Safety Agency. After the Prestige incident the shipping industry is again raising its standards. See Once More a Breach, THE ECONOMIST (London), Nov. 23, 2002, 2002 WL 724867.
leaders, Spain, France and Portugal, initiated this movement by collectively banning single hull tankers from their 200-mile exclusive economic zones prior to legislation being in place.\textsuperscript{94} The ban was enforced in December 2002, when a Greek tanker carrying 81,000 tons of fuel oil heading for Spain through the Strait of Gibraltar was ordered to keep 200 miles away from the coasts of France and Spain.\textsuperscript{95} Also, three Maltese-flagged vessels have been escorted out of the French, Spanish and Portuguese exclusive economic zones.\textsuperscript{96} However, according to the International Chamber of Shipping (ICS), the actions taken by these countries are clearly in violation of Articles 56, 211 and 220 of UNCLOS.\textsuperscript{97} The Convention offers the right of freedom of navigation to ships traveling through Coastal States’ exclusive economic zones.\textsuperscript{98}

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

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

\textsuperscript{95} Lowry, supra note 20, at 1.

\textsuperscript{96} Id.

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

\textsuperscript{98} UNCLOS, supra note 44, arts. 58 (1)-(2).

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

\textsuperscript{100} See Press Release, European Commission, The Commission proposes Criminal Sanctions for Polluting Ships IP/03/316 (Mar. 5, 2003). This plan is consistent with UNCLOS Article 218 (1), which allows States to investigate and prosecute discharge offences in the high seas. See UNCLOS, supra note 44.
enacted a regulation banning single-hull oil tankers from European ports.\textsuperscript{101}

2. Port State Measures

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

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

\begin{itemize}
  \item \textsuperscript{101} See generally Regulation of the European Parliament and of the Council, July 22, 2003, (EC) No. 1726/2003, O.J. (L 249/1) [hereinafter EC Regulation].
  \item \textsuperscript{102} Doris König, \textit{Port State Control: An Assessment of European Practice, in Marine Issues from a Scientific, Political and Legal Perspective} 37, 37 (Peter Ehlers et al. eds., 2002).
  \item \textsuperscript{104} See Paris Memorandum of Understanding on Port State Control, at http://www.parismou.org/ (last visited Jan. 20, 2005). This Agreement applies to the waters of the Coastal States of Europe, as well as the North Atlantic Basin from North America. See \textit{id}. The MOU sets forth criteria that ships must meet in order to pass into Paris MOU Ports without being detained. If a ship is detained multiple times it is considered a banned ship and will be refused access to ports that belong to any region of the Memorandum. See Paris Memorandum of Understanding on Port State Control in Implementing Agreements on Maritime Safety and the Protection of the Marine Environment, Jan. 26, 1982, sec. 3, 21 I.L.M. 1, 4-6.
  \item \textsuperscript{105} \textit{GUIDELINES}, supra note 50, at 10. There are a total of eight regional port State control regimes worldwide; the other five authorities are: Viña del Mar MOU (1992); Caribbean MOU (1996); Mediterranean MOU (1997); Indian Ocean MOU (1998); Abuja (West and Central African) MOU (1999); and the Black Sea MOU (2000). These regimes are consistent with the LOS Convention. König, supra note 102, at 39.
  \item \textsuperscript{106} See \textit{GUIDELINES}, supra note 50, at 10.
  \item \textsuperscript{107} König supra note 102, at 37.
\end{itemize}
Under international law, as codified in UNCLOS, port states can prescribe national rules and standards to apply to foreign vessels that wish to enter the internal waters, offshore terminals and ports of the State.\textsuperscript{108} Port states are also granted the authority to enforce relevant international rules and standards that relate to the seaworthiness of the ships, if they wish.\textsuperscript{109} They are limited however, to permitting vessels in violation of the law to sail to the "nearest appropriate repair yard and, upon removal of the causes of the violation, [the port state] shall permit the vessel to continue immediately."\textsuperscript{110} But because the various international conventions, and the individual state and regional authorities apply different rules and standards, port state control is not as effective as it could be both as a deterrent and control mechanism.

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

3. \textit{Vessel Construction Measures}

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

\textsuperscript{108} UNCLOS, \textit{supra} note 44, art. 211(3).
\textsuperscript{109} \textit{Id.} art. 219; see also \textit{id.} art. 218.
\textsuperscript{110} \textit{Id.} art. 219.
\textsuperscript{111} \textit{Vulnerability of Single Hulls, supra} note 32, at 2.
\textsuperscript{112} \textit{See, e.g.,} Case C-315/98, Commission of the European Communities v. Italian Republic, 1999 E.C.R. I-8001 (addressing infringement procedures against Italy for not transposing the PSC-Directive into national legislation).
\textsuperscript{113} \textit{König, supra} note 102, at 47.
\textsuperscript{114} \textit{See UNCTAD Report, supra} note 2, at 41.
\textsuperscript{115} \textit{See EC Regulation, supra} note 101, para. 1. This Regulation amends a previous Regulation that establishes an accelerated phase-in scheme with design requirements for single hull tankers. Regulation of the European Parliament and of the Council, Nov. 29, 2002, EC 417/2002, O.J. (L 64) 1.
ciently stringent. Particularly in the wake of the shipwreck of the . . . ‘Prestige’ of the same age as ‘Erika’ (26 years) those age limits should be further lowered.”

Hence single-hull oil tankers may no longer be used to carry heavy grades of oil to or from EU Ports, all oil tankers more than 23 years old were banned immediately, and tankers 15 years old or older must undergo exhaustive technical inspections referred to as a condition assessment scheme. The IMO, prompted by Europe, is supporting the movement for the phase-out of single-hull oil tankers. It proposed a stricter timetable for the phasing-out of single-hull tankers, which was then implemented by amending 13G of Annex I of the MARPOL Convention in December of 2003. The previous IMO Plan under the MARPOL Convention also sought to eventually phase out these tankers but was “too slow and staggered.” The new phase-out timetable is much more simplified and accelerated. Under this new scheme, single-hull tankers will still be allowed to use the high seas to trade until 2005. And, “the last phase-out date for all single-hulled oil tankers is 2010 instead of 2015, with the oldest, built in 1977 and earlier, to be taken out of service in April 2005.”

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

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116. EC Regulation, supra note 101, para. 3.
117. Id. art. 1(4)(d).
118. Id. art. 1(4)(a).
119. Id. arts. 1(5) & 1(6).
120. See supra, note 5.
121. See supra, note 6.
122. See supra, note 7.
123. See supra, note 8.
124. See supra, note 9.
125. See supra, note 10.
126. See supra, note 11.
127. See supra, note 12."
4. Flag State Measures

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

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

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

\textsuperscript{126} See GUIDELINES, supra note 50, at 3.
\textsuperscript{127} Id. at 1.
\textsuperscript{128} Id. at 5.
\textsuperscript{129} Id. at 1.
\textsuperscript{130} See id.
\textsuperscript{131} GUIDELINES, supra note 50, at 6.
\textsuperscript{132} Id. at 6-8.
Another effort aimed at improving Flag State performance is the Model Audit Scheme approved by the IMO in 2003. It is designed to promote maritime safety and environmental protection by determining the extent to which its Flag State Parties are implementing and enforcing IMO instruments.\(^\text{133}\) Under the Model Audit Scheme, vessels will be subject to external audit as of 2005.\(^\text{134}\) The IMO will provide Member States with assistance through its Integrated Technical Cooperation Programme, and will provide feedback and advice concerning the Member Flag States’ performance and shortcomings.\(^\text{135}\) The scheme is to be on a voluntary basis\(^\text{136}\) and is fully supported by the shipping industry.\(^\text{137}\)

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

C. FAO Flag State Compliance Agreement

The FAO Flag State Compliance Agreement was approved by the Food and Agriculture Organization Conference at its Twenty-Seventh Session on November 24, 1993.\(^\text{138}\) The purpose of the Agreement is to develop management measures for the conservation of living resources on the high seas.\(^\text{139}\) It is “designed to strengthen enforcement

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


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


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

139. Id. at pmbl. The FAO compliance Agreement is intended to be an integral part of the
of high seas conservation obligations arising under [UNC]LOS [] by elaborating on flag state duties . . . ."140 It entered into force on April 23, 2003 when the Republic of Korea, the 25th country to accept the Agreement, deposited its acceptance instrument as required by provision XI.1 of the Agreement.141

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

1. Flag State Responsibilities

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

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

142. Agreement, supra note 5, art. III(1)(a).
capable of effectively exercising its responsibilities under the Agreement in light of the "links" that exist between it and the vessel. In the event a Flag State grants exemptions to vessels pursuant to the Agreement, the Flag State must ensure the spirit of the Convention is still carried out with respect to the vessels.

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

The Agreement also calls for international cooperation among Member Flag States that allows them to control vessels on the high seas. According to the Agreement, Parties should work together to exchange information relating to the activities of vessels of Member and non-Member States in order to help them identify vessels that might be engaging in operations that threaten to undermine the goals of the Agreement. Furthermore, if a vessel is voluntarily in the port of a Party, and the Party has "reasonable grounds for believing [] the fishing vessel has been used for an activity that undermines the effectiveness of international conservation and management measures, [it] 143. *Id.* art. III(3). The links referred to in this article most likely concern the relationship of the vessels to the Flag State. If the vessels are owned and operated by non-nationals there is a greater responsibility on the Flag State to ensure they can oversee the vessels activities.

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

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

146. *Id.*

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

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

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

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

151. *Id.* art. V(1).
shall promptly notify the [vessel’s] flag state . . . ."\textsuperscript{152} The Parties can then take measures to establish an investigatory strategy to confirm or dispel the suspicion.\textsuperscript{153} The Parties should also exchange information amongst themselves that relate to the activities of vessels flying the flags of non-Parties, and that might undermine the effectiveness of the international conservation and management measures.\textsuperscript{154} These provisions ensure all vessels on the high seas are monitored by the network of Member Flag States.

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

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

\textbf{2. Food and Agriculture Organization}

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

\textsuperscript{152} Id. art. V(2).
\textsuperscript{153} Id.
\textsuperscript{154} Id. art. VIII(3).
\textsuperscript{155} Id. art. III(8).
\textsuperscript{156} Id. arts. VIII(1), (2).
\textsuperscript{157} Id. art. VII.
For example, the Agreement has extensive requirements governing the exchange of information between the Parties and the FAO. The Parties to the Agreement are required to make readily available to the FAO the following information regarding each vessel flying its flag: the name of the vessel, its registration number, its port of registry, any previously known names of the vessels, if it had a previous flag, the International Radio Call Sign, if applicable, the name and addresses of owners, and the length and type of the vessel.158

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

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

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

158. Id. arts. VI(1)(a)–(g).
159. Id. arts. VI(2)(a), (c)–(f).
160. Id. arts. VI(5)(a), (b) & VI(6).
161. Id. art. VI(8)(a).
162. Id. art. VI(8)(b).
163. Id. art. VI(4).
Published by CWSL Scholarly Commons, 2005
its cracking in half and sinking. There are other defective vessels that freely roam the oceans, many of which carry toxic cargo, and can potentially cause massive environmental disasters like the *Prestige* oil spill.

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

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

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

171. See König, supra note 102, at 46.
173. For example, “60 out of 77 tanker casualties between 1992 and 1999 were over 20 years of age.” König, supra note 102, at 46. See also EC Regulation, supra note 101, para. 6 (discussing the phasing out of tankers over 15 years old).
174. See König, supra note 102, at 46.
175. See id.
176. See id.
177. See id.
178. See id. at 47.
guidelines and information that they will need to be able to oversee the vessels' physical condition.

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

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

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

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

\textsuperscript{179} Agreement, supra note 5, arts. VI(2)(a), (c), (e), (f).
\textsuperscript{180} Id. art. III(5)(a).
\textsuperscript{181} Id. art. III(6).
\textsuperscript{182} Id. art. III(7).
\textsuperscript{183} Id. art. III(8).
\textsuperscript{184} Id.
sistent with it. According to the Agreement, Parties should attempt to persuade non-Parties to “accept [the] Agreement and [] to adopt laws and regulations consistent with [it]”.185

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

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

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

185. Id. art. VIII(1).
186. Id. art. VIII(2).
187. Id. art. VII.
188. The Prestige accident might have been avoided had there been a better system in place to facilitate the collection and dissemination of information of vessels on the high seas. The Prestige had major structural deficiencies, and had been registered as unacceptable for navigation in the ship registry of the Norwegian Oil Company Statoil due to its age and company policy. See Críticas, Responsabilidades y Culpas en el Desastre del ‘Prestige,’ supra note 37. Had there been a system in place, which encourages the reporting and sharing of information regarding sea bound vessels, the accident could have been prevented. See Annual Report 2002—Theme: Demanding Trade—Strict Controls, STATOIL, at http://www.statoil.com (last visited Mar. 11, 2005).
189. Id. art. V(1).
190. Id. art. V(2).
in order to confirm or dispel the suspicion.\textsuperscript{191} The Parties should also exchange information amongst themselves that relate to the activities of vessels flying the flags of non-Parties, which might be of a similar threat.\textsuperscript{192}

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

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

\textit{B. Implementing a Model FAO Agreement: Problems and Considerations}

1. \textit{Using the FAO for Non-Fishing Vessels}

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

\textsuperscript{191} \textit{Id.}

\textsuperscript{192} \textit{Id.} art. VIII(3).

\textsuperscript{193} \textit{Id.} art. III(2).

\textsuperscript{194} The implementation of a model Compliance Agreement would also help to facilitate the efforts to combat marine terrorism. The collection and dissemination of information pertaining to vessels as provided for in the Agreement would enable States and the governing body to monitor the activities of all vessels on the high seas.
FAO provisions addressed in this article could remain the same, but become applicable instead to commercial shipping vessels.

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

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

2. Encouraging Flag States to Join the Agreement

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

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

196. See Legal Office Treaties, supra note 141 and accompanying text.
197. See id.
198. See FAO Code of Conduct, supra note 164; HSVAR supra note 165.
Flag States would become members to the Agreement there would be universal standards, eliminating flags of convenience whereby ships with bad compliance records could no longer shop around.

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

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

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

199. See Odessey, supra note 195.
201. See Odesssy, supra note 195.
202. GUIDELINES, supra note 50, at 5.
203. Id.
204. See, e.g., THOMAS DONALDSON & THOMAS W. DUNFEE, TIES THAT BIND: A SOCIAL CONTRACTS APPROACH TO BUSINESS ETHICS (1999).
206. Id. at 1849.
business and will therefore honor their international commitments because it is in their own future interests.

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

3. Into the Future: A Global Registry?

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

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

\(^{207}\) See HSVAR, supra note 165.

\(^{208}\) For more information on the growing levels of demand for the use of our oceans, see MTS Report, Ch. 3, Trends and Competitive Pressures.
Furthermore, a Global Registry would require an information bank like the High Seas Vessels Authorization Record, developed under the FAO Agreement. Such a database would enable all States (and especially Coastal States) to access data pertaining to all vessels using the seas, allowing them to keep watch of the oceans in their best interest. Like the HSVAR, it could contain information such as the distinctive characteristics that identify vessels, and provide information on the registration, authorization, history, condition and infringements of each vessel registered.

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

V. CONCLUSION

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

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

A model FAO Compliance Agreement that applies to the shipping industry in its entirety would be a significant step towards controlling Flag States and vessels, making our oceans more secure. The Agreement builds on the current legal framework, governs both vessels and Flag States, establishes a much-needed global information bank and system for information exchange, and contains compliance-inducing mechanisms. It is global in scope and has provisions that encourage States to be bound by the Agreement and to cause other States to accede to and be bound by it as well. As such, its provisions adequately
address the problem of marine pollution. A Model Agreement might also serve as an appropriate interim step in the creation of a Global Registry, which would ultimately be a significant contribution to controlling the seas.