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Ph.D. THESIS

VESSEL SOURCE POLLUTION

and

KEY INTERNATIONAL CONVENTIONS:

A CASE FOR CHANGE

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ABSTRACT

Pollution from vessels cannot be controlled effectively without the involvement of flag States. They have the primary responsibility for ensuring that the vessels which fly their flags comply with all applicable international rules and standards relating to vessel source pollution. Compliance with such rules and standards involves additional operating costs for ship-owners. Thus, in the highly competitive international maritime transport industry, there are many incentives for flag States not to prejudice their pursuit of comparative advantage by ensuring that their flag vessels comply with the applicable rules and standards. Enforcing their flag vessels to comply is not a rational choice. Accordingly, flag States must be given reasons to ensure that their flag vessels do comply with pollution control rules and standards if the problem of vessel source pollution is to be resolved. Neither of the two international Conventions which regulate the control of vessel source pollution, namely MARPOL and UNCLOS III, gives flag States reasons to ensure the compliant operation of their flag vessels. For that reason, neither Convention can claim to be an effective means for controlling pollution from vessels. There is, however, emerging evidence of flag State commitment to the control of vessel source pollution in response to the application of regional Port State Control measures. From the perspective of flag States, one aspect of the application of the concept of Port State Control is of concern - that is the legal basis of the control measures which are being taken against their flag vessels for violations of MARPOL's rules and standards.
INTRODUCTION
TO THE THESIS

"The debris from ships from hundreds of miles around was piled high on this beach - mountains of sea-washed boxes and crates, logs and lumber, great whitened piles of it, mixed in with bottles and cans and pieces of clothing. It is the termination of some great sweeping in the Pacific."\(^1\)

"The human populations of the Earth may be bound together in a common fate, but parochial tribalism continues to sustain a fragmented international order more relevant to the seventeenth century than to the late twentieth century."\(^2\)

"Modest increases in energy efficiency investments or family planning budgets will not suffice. Getting on such a path depends on a wholesale re-ordering of priorities, a fundamental restructuring of the global economy, and a quantum leap in international cooperation on the scale that occurred after World War II."\(^3\)

At the International Maritime Organisation (the IMO) in 1999, the flag State\(^4\) Liberia, with the support of several other delegations, made certain submissions in which it objected to the IMO proposition that the enforcement authorities created by Part XII of UNCLOS\(^5\) should be used to enforce MARPOL's\(^6\) rules and standards on vessel source pollution.\(^7\) With a supporting opinion from

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1 Steinbeck (1958), 203.
2 Sprout (1971), 401.
4 A flag State is the state under whose authority a ship is operating and whose flag that ship is entitled to fly.
the Secretariat of the Legal Office of the United Nations, the Legal Division of the IMO dismissed Liberia's objection.⁸ That dismissal was not justified. There was considerable merit in the flag State's objection.

If that objection had been more comprehensively argued the limitations of MARPOL and UNCLOS in controlling vessel source pollution would have been recognised. It would have been seen that neither Convention gives flag States a reason to ensure that their flag vessels comply with MARPOL's rules and standards. An opportunity was therefore missed to review the performance of the two Conventions in controlling pollution from vessels.

Why should the fact of that missed opportunity be a matter of any concern? After all, there can be no argument that the volume of pollutants entering the marine environment from land-based sources is significantly greater than that from vessels. Such being the case, it might be thought that there can be no justification for devoting any attention to the legal issues relating to vessel source pollution control. Arguably, the comparative lack of recently published academic material dealing with such issues could be said to attest to their relative insignificance within the wider discipline of international environmental law.

However, to dismiss as unwarranted an investigation into the issues to which the Liberian objection drew attention would be misconceived.

First, there is the need to protect and preserve the marine environment from all sources of pollution. It is well recognised that the oceans have a life-supporting function within the biosphere. The burden of all pollutants entering the marine environment is a threat to that function.

Secondly, there is recent evidence of increasing volumes of vessel source pollution.⁹ The evidence suggests that MARPOL and UNCLOS are not effectively controlling that problem. Given the volume of maritime transport and its impact, both actual and potential, on the marine environment,¹⁰ there is every reason to re-focus attention on these two Conventions. Furthermore, there is presently a higher risk than in the recent past that this impact will increase. The intensely competitive nature of the economic environment in which the maritime transport industry is currently operating¹¹ provides much incentive for flag States and their merchant fleets to simply disregard MARPOL's rules and standards in the pursuit of comparative advantage. The operation of sub-standard shipping as a response to competition within the industry is a well recognised problem.¹² One of

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⁷ IMO Doc. MEPC 43/12/2 14.5.1999.
⁹ See, for example, IMO Doc. MEPC 43/INF.18 28.4.1999 and IMO MEPC 46/INF.8 19.1.2001.
¹⁰ The IMO advises that although there is no official number of ships to which SOLAS Regulation XI/3 applies (i.e. Passenger Ships of 100 GT and upwards and cargo ships of 300 GT and upwards) because of the uncertainty based on the "international voyage" criterion, there are approximately 60,000 to 70,000 ships in that category world-wide - personal communication from Brice Martin-Castex, IMO, London, 31st January 2002.
¹¹ Seet-Cheng (2000); Hayashi (2001), 503.
¹² "Despite extensive internationally agreed rules to promote safety of life at sea, on-board living and working conditions and protection of the marine environment, and although world shipping is generally
the more recent initiatives to address this problem was the International Commission on Shipping established towards the end of 1999.\textsuperscript{13}

Thirdly, there is the matter of inter-state environmental cooperation. Such cooperation has long been recognised as essential to international efforts to protect and preserve the marine environment. In 1991, the Group of Experts on the Scientific Aspects of Marine Pollution, commonly known by the acronym GESAMP,\textsuperscript{14} concluded that international cooperation and three other principles would, in combination, provide a rational basis for marine environmental protection and management. More than thirty years after "the international community recognised [this] need for cooperative action in preventing marine pollution",\textsuperscript{15} GESAMP, had been requested by the Consultative Meeting of the Contracting Parties to the London Dumping Convention\textsuperscript{16} "to examine regulatory approaches to, and environmental assessments of, the disposal of wastes in the marine environment and to identify opportunities for developing a comprehensive and holistic approach for the regulation of dumping at sea."\textsuperscript{17}

In discharging this assignment, GESAMP's approach was to attempt to derive the elements of pollution control strategies "from a careful analysis of the underlying principles of environmental protection."\textsuperscript{18} To that end it enumerated four principles, namely, sustainable development,\textsuperscript{19} prevention of harm,\textsuperscript{20} holistic considerations,\textsuperscript{21} and international cooperation\textsuperscript{22} which it stated would "provide a rational basis for protection and management of the marine environment".\textsuperscript{23}

\textsuperscript{13} The International Commission on Shipping was established to investigate current governmental and industry practices to achieve compliance with international safety, environmental and social requirements, to examine whether such practices complied with international law, particularly UNCLOS, and to recommend appropriate strategies for compliance and enforcement. In March 2001 the Commission completed its report entitled "Enquiry into Ship Safety: Ships, Slaves and Competition". Charlestown, NSW, Australia (2001).

\textsuperscript{14} GESAMP is an advisory body consisting of specialised experts nominated by the Sponsoring Agencies - IMO, FAO, UNESCO, WMO, WHO, IAEA, UN, UNEP. Its principal task is to provide scientific advice on marine pollution problems to the Sponsoring Agencies and to the Inter-governmental Oceanographic Commission (IOC).

\textsuperscript{15} GESAMP (1991), 2.


\textsuperscript{17} GESAMP (1991), 1.

\textsuperscript{18} Ibid, 4.

\textsuperscript{19} "Sustainable development: Social and economic development must be pursued in a manner that does not prejudice options available to future generations for the use of the sea and its amenities." - GESAMP (1991), 9.

\textsuperscript{20} "Prevention of harm: All practical steps shall be taken to prevent, and correct, the harmful effects of anthropogenic activities on human health, on living resources, marine life, marine amenities and other legitimate uses of the sea." - GESAMP (1991), 9.

\textsuperscript{21} "Holistic considerations: Action shall be taken to ensure that measures taken to mitigate harm, or to reduce the risks of harm, to the marine environment do not result in the transfer, directly or indirectly, of damage or hazards to other sectors of the environment, viz. land, air or fresh water." - GESAMP (1991), 9.

\textsuperscript{22} "International cooperation: Cooperation among States, including the harmonisation of protection measures, mutual exchange of information, coordination of monitoring and the provision of technical and financial assistance, is essential for achieving regional and global objectives to the preservation and protection of the marine environment." - GESAMP (1991), 9.
The rationale for the inclusion of international cooperation within the principles enumerated, is derived from the collective nature of the problem of marine pollution. Although pollutants enter the marine environment from innumerable sources, the environmental damage which is caused by such entry is ultimately indivisible and hence demands to be approached as such. When introduced into the marine environment, pollutants are no respecters of state boundaries – they spread in a medium well recognised for its dispersive properties, carrying with them the potential to cause damage far from the point of introduction. Accordingly, action to control pollution in the marine environment by one state alone or by some but not all states will not effectively protect that environment. As long as there are states which do not engage in the required collective action, the effects of polluting activity permitted by such states will impact on all states whose natural resources will be diminished. Thus, it has been well said by many, in diverse ways, that international cooperation is an essential prerequisite to an effective resolution of the problem of marine pollution.

In the matter of vessel source pollution control, it is the cooperation of flag States which must be sought. Without their cooperation in creating and adopting environmental regulations, environmentally conscious coastal States would experience some difficulty in their efforts to protect and preserve the coastal marine environment. However, typically flag States are reluctant to cooperate in setting rules and standards to control vessel source pollution. This reluctance is...

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24 One author has described the problem of marine pollution as "a unitary one [which] in its fundamental aspects at least, should be dealt with as such." - Teclaff (1972), 563.
25 Dinstein (1972), 365 - citing Jacques Cousteau who in the New York Times of 8th November 1970 was reported as having said that forty percent of the world sea life had by then disappeared.
26 See, for example, Legault (1971), 220; Parf (1984), 16; Abecassis (1985), 8; Caldwell (1990), 290; Joyner and Frew (1991), 40; Maingi (1991), 483; Kiss and Shelton (2000), 75. It should be understood, however, that within the current inter-state system "[w]hile cooperation among nation-states is obviously necessary to address many trans-boundary and common property problems, virtually all policies must be implemented at the national or local level. There are no international governments, laws, or courts that can enforce binding decisions on sovereign nations (with the partial exception of the European Union ...). But equally important, actions taken by individual states (or by actors within individual countries) can have major international implications. For example, states may engage in activities that cause trans-boundary pollution, seriously deplete scarce resources or biodiversity, or threaten the atmosphere or other parts of the 'global commons'. Multi-national corporations and international financial institutions may also be deeply involved in such 'national' projects. The growing interaction between national and international actors and levels of governance is thus an increasingly important aspect of international environmental policy." - Vig (1999), 2-3.
27 "The principal responsibility for ensuring that owners comply with international regulations rests with flag States." - ICONS Report (2001), 87; "The primary responsibility to safeguard against substandard ships lies with flag States." - Ozcyar (2001), 1; "Flag States have the primary responsibility to ensure that ships flying their flag comply with regulations on vessel source pollution." - Molenaar (1998), 25.

In practical terms, however, it is not only the cooperation of flag States which is required. "Effective national and international environmental policies demand cooperation or at least compliance of important non-state actors ... [i.e.] companies and ship owners, the environmental movement, the insurance industry, and classification societies." - Molenaar (1998), 15.

28 For example, in the current negotiations on the Draft International Convention on the Control of Harmful Anti-Fouling Systems, flag States "with large fleets have been reluctant to recognise the harmful effects of [the anti-fouling biocide tributyltin] and to admit that alternatives do exist" - de La Fayette (2001), 168; flag State reluctance to admit the existence of a problem and a safe and fully effective solution is also hampering negotiations on a draft legally binding instrument to control the spread of alien organisms and pathogens in ships' ballast water - de La Fayette (2001), 173-182.
despite an obligation which all States Parties to UNCLOS\textsuperscript{29} have assumed. The obligation is the one which engages the Convention's States Parties to cooperate in formulating and elaborating international rules, standards and recommended practices and procedures for the protection and preservation of the marine environment.\textsuperscript{30} In the case of flag States, commercial considerations temper their willingness to discharge this obligation to cooperate.

"Not unexpectedly, states with large fleets are frequently reluctant to move quickly to adopt environmental regulations which ship-owners fear will be expensive, either because they will hamper navigation, or because they will require extensive refitting of existing ships. Consequently, one of the greatest challenges for environmentally conscious coastal States is to persuade recalcitrant flag States to adopt and to implement measures to protect their marine environment."\textsuperscript{31}

For the purposes of understanding the position of flag States and thus the challenges confronting coastal States when these latter states seek to create and adopt international vessel source pollution controls, the 1973 MARPOL Conference is particularly instructive. This is one Conference at which international cooperation was expected. After all, it is said that "oil pollution from ships is something which governments think they find easy to understand - and it has a more natural appeal to them than, say, cleaning up one's rivers from land based discharges or preventing lead discharges from motor vehicle exhausts" and that "ship owners and oil companies, being inherently international industries, are considered more legitimate targets for regulations which will cost them money more than obviously domestic industry".\textsuperscript{32}

Thus it was that some delegates came to the 1973 MARPOL Conference with the expectation that cooperation would define the proceedings. In the events, however, that expectation was not realised. Concerns over sovereign rights emerged to produce conflicts between the maritime and coastal State blocs represented at the Conference.\textsuperscript{33}

\textsuperscript{29} Most of the major flag States, with the notable exception of Liberia, are parties to UNCLOS. Since its entry into force on 16th November 1994, "we have seen a remarkable increase in the number of States parties to UNCLOS ... According to one UN analysis, these developments clearly reflect an overall trend towards universal participation in and adherence to the legal regime established by UNCLOS." - Park Hee Kwon (2000), 1-2.

\textsuperscript{30} UNCLOS Article 197

"Cooperation on a global or regional basis - States shall cooperate on a global basis and, as appropriate, on a regional basis, directly or through competent international organisations, in formulating and elaborating international rules, standards and recommended practices and procedures consistent with this Convention, for the protection and preservation of the marine environment, taking into account characteristic regional features."

\textsuperscript{31} de La Fayette (2001), 165.

\textsuperscript{32} Abecassis (1985), 3.

\textsuperscript{33} "The traditional conflict between coastal and maritime States cannot by analysed without first explaining what is meant by the terms 'coastal' and 'maritime'. Obviously, a geographical interpretation does not really contribute to a distinction since most States have coastlines. Arguably, a long, environmentally fragile coastline, proximity to major [oil] transportation routes and the absence of ports regularly used by relevant ships are factors that have an impact on national policies for vessel-source pollution, and makes States more 'coastal' in character.

States which can be characterised as 'maritime' commonly have large merchant fleets. The ships of which these fleets consist are often also registered in that State, in which case that State is the flag State with respect to that ship. Alternatively, and this explains the difference between 'flag' and 'maritime' States, ships are registered in another State (in so-called 'open registers' or 'flags of convenience') while the controlling interest of the vessel is located in the maritime State. Those in control of a vessel may exert influence not only on the flag State administration, but also that of the maritime
For the maritime States, their principal concern was to retain jurisdictional primacy over the operation of their merchant fleets.\textsuperscript{34} To that end, they were particularly unreceptive to any proposal to extend coastal State jurisdiction in a manner which would empower coastal State interference with shipping. This concern of maritime States still manifests today, as is evident from the fact that Liberia, one of the major open registry flag States, has not become a party to UNCLOS. By remaining outside the Convention, Liberia has the ability to maintain a measure of legal control over its merchant fleet, which it would not have if it became a party to the Convention.\textsuperscript{35} For their part, coastal States sought increased jurisdictional authority over shipping as the means by which to protect their coastal waters from vessel source pollution.

At the MARPOL Conference, there was the underlying threat that if the maritime States did not concede increased coastal State authority, then they might have to contend with disruptive unilateral coastal State action against their merchant fleets.\textsuperscript{36} This so concerned the maritime States that they did make some concessions in response to coastal State demands. However, those concessions were very limited. By successfully arguing that the contentious issue of jurisdiction should be deferred to the then impending Third United Nations Law of the Sea State. In addition to having large merchant fleets, maritime States may also have interests in the shipping industry as a whole, including [oil] companies, ship owners and operators, and ship builders. ... It is clear that while some states have predominately or exclusively either coastal or maritime characteristics, most will have both. Coastal States favour, in general, the extension of their prescriptive and enforcement powers over vessel source pollution. Maritime States, on the other hand, promote the freedom of navigation in general and, with respect to vessel source pollution, stress the importance of the primacy of flag State enforcement and uniformity of regulation, preferably established at the international level. It is has to be admitted that these positions are simplifications and ignore many policy gradations. Coastal States often prefer international above national regulation and flag States have regularly taken "typical" coastal State policies after experiencing the severe effects of environmental disasters. States with both coastal and maritime interests accompanied by influential lobbies, are more prone to internal struggles which cause them to either change policies more often or to simultaneously adopt conflicting policies."


\textsuperscript{34} "Historically, vessels were subject to the control of the flag State (and only the flag State) in almost every respect." - Clarke (1994), 202. Sir Anthony Clarke was the Admiralty Judge in England in 1994.

\textsuperscript{35} See Part III below.

\textsuperscript{36} International law defines unilateralism "as the display of a State will to carry out certain legal acts, generating standards that form part of the legal system and produce limited effects. ... [I]f often takes the form of regulations ... emanating from national legislative or regulatory authorities. ... The most important unilateral regulatory move, by its content and international repercussions, remains the Oil Pollution Act (OPA), passed by the United States in August 1991, and which came into permanent effect in December 1994. ... OPA opens the door to a perilous fragmentation of maritime law. It could spawn a myriad different systems, established by national law makers leading a crusade against polluters, and anxious to appease public opinion, unaware of the real conditions of sea borne transport. ... There have been frequent declarations about the dangers of unilateralism. Maritime safety regulations drawn up outside multilateral conventions signed within the framework of international organisations, become a source of legal uncertainty and arbitrariness. Because of the complexity of the motivations that lead to individual initiatives, there is always the risk of deviating from the goals. Safety problems cannot be settled in a piecemeal way; nor can they apply to only part of the world. Prevention of ecological damage cannot make progress through unilateral actions; a coastal State wishing to protect its shores by banning ships that fail to meet its standards from its territorial sea would merely shift the problem elsewhere. Such ships would be encouraged to frequent the coastal waters of other countries, which would inevitably have to take similar measures. The result would be a proliferation of unilateral actions, more or less overlapping, and 'protection would quickly become protectionism'." - Boisson (1999), 177-194 - footnotes omitted.
Conference, the maritime States were largely able to ensure that their jurisdictional primacy would be preserved in the MARPOL Convention.

Also instructive with respect to international cooperation is the work undertaken by the IMO. By its Convention, the IMO is charged with the responsibility of providing the machinery for cooperation among governments on the issues of maritime safety and vessel source marine pollution control. It is currently responsible for some forty Conventions and Protocols, "most of which have been amended on several occasions to ensure that they have kept up with changes taking place in world shipping." With respect to the MARPOL Convention, the IMO has a role in its administration, in its amendment procedure and in the promotion of the technical cooperation which it prescribes. "These numerous functions can be regrouped under three headings: Managing the Convention, gathering and diffusing information, and supervising enforcement of the Convention's norms by states parties."

Finally, there is the matter of compliance. It is well recognised and frequently reiterated that the primary responsibility for the effective application of vessel safety and environmental standards laid down in international instruments rests with flag States. They have an obligation to ensure that their flag vessels comply with the applicable international rules and standards relating to vessel safety and pollution control. However, flag States "are very jealous of what they consider to be their 'sovereignty'." Their concerns to protect their maritime sovereignty, the physical difficulty of enforcing vessel source pollution rules and standards, the fact that violations of such rules and standards generally have no adverse impact on flag States and the fact that enforcing their flag vessels to comply with such rules and standards can involve a loss of comparative advantage for their registry businesses, mean that flag States have very little incentive to discharge this obligation. They have few reasons to ensure that their flag vessels operate in compliance with applicable international maritime safety and pollution rules and standards.

In opposing the IMO's position on the use of the enforcement authorities in Part XII of UNCLOS to enforce MARPOL's rules and standards, Liberia effectively invited consideration of the wider issue of

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38 Kiss and Shelton (2000), 99.
39 MARPOL Articles 13-19.
41 The issue of compliance with international norms is one of the three related issues addressed in Shelton (2000). The other two issues are "the nature of international law" and "the role of legally non-binding norms or 'soft' law in the international system" - Shelton (2000), 1; see also Raustiala (2000).
42 See, for example, IMO Doc. MEPC 46/14 19.1.2001, page 5, paragraph 2.9.
43 de La Fayette (2001), 223.
44 Flag States have onerous obligations with respect to their vessels under UNCLOS and related international instruments. "The problem is, however, that many flag States do not have the resources or technical capability to carry out such obligations. Some of them even lack administrative infrastructure essential for operating a ship register. There are, moreover, less responsible states which have little intention of fulfilling their responsibilities. Many FOC (flag of convenience) registers are among such groups of states." - Hayashi (2001), 507.
flag State compliance generally. The purpose here, then, is to address that wider issue. In so doing, the objective will be to seek to demonstrate the following:

- That neither MARPOL nor UNCLOS gives flag States reasons to ensure that their flag vessels comply with MARPOL's rules and standards.
- That the IMO is incorrect in advocating the use of the enforcement authorities in Part XII of UNCLOS to enforce MARPOL's rules and standards against foreign vessels.
- That as it is evolving, the concept of Port State Control potentially gives flag States a reason to ensure that their flag vessels do comply with MARPOL's rules and standards.
- That flag States should be concerned over the legal basis of the Port State Control measures which Maritime Authorities participating in regional Memoranda of Understanding on Port State Control are taking against their flag vessels not only for violations of MARPOL's rules and standards but also generally in the control of sub-standard shipping.

OUTLINE
The thesis is divided into four Parts. The first Part provides a general background, with commentary on the maritime transport industry and on the issues of sovereignty and international law. In Part II MARPOL is examined. Part III deals with the vessel source pollution regime in UNCLOS. A brief history of the International Maritime Organisation is offered in Part IV. This Part also examines the concept of Port State Control and the IMO's role in promoting that concept.

SUMMARY OF CHAPTERS

CHAPTER 1

This chapter will provide a background to the examination of international vessel source pollution controls by briefly describing the commercial environment of international maritime transport. It will first explain how in the highly competitive nature of international maritime transport the

45 Competition in the international maritime transport industry is intense. "Over-capacity and thinning profit margins have driven shipping companies into mergers and global alliances or consortia to reap the benefits of economies of scale in a bid to reduce operating cost. Shipping lines are also facing demand for further improvement in their services at lower freight rates by shippers." - Seet-Cheng (2000), 9.

"The Commission heard many claims that quality in shipping does not pay. One of the underlying problems is that the economic rationality of today's shipping market does not encourage quality. The industry and its related sources are under extreme commercial pressure and in an over-competitive environment some are tempted to cut corners in an irresponsible way. Unless able to operate in a competitive and profitable environment, the lure for reducing operational costs to make a reasonable
pursuit of comparative advantage encourages ship operators to continue using certain vessel operating procedures which discharge polluting wastes into the marine environment at no cost to themselves. It will detail the effects which such pollutants have on the marine environment. In doing so it will identify the basis for coastal State concerns over the issue of vessel source pollution. The chapter will then conclude by explaining these operating procedures in terms of Garrett Hardin’s "Tragedy of the Commons" and by categorising the problem of controlling such procedures as a large-scale social dilemma.

CHAPTER 2

This chapter will complete the background description which was commenced in Chapter 1. It will provide a general description of the international legal environment in which flag States seek to conduct their ship registry businesses. Most of the flag States of influence are developing states which operate open registries. In seeking to develop, maintain and protect these businesses, flag States jealously guard their sovereignty. Typically, they seek to retain exclusive sovereign control over their flag vessels. Against such claims, coastal States argue that they have a sovereign right to protect their coastal marine environments and that the exercise of such right necessarily involves them having control over foreign-flagged vessels. With sovereignty issues being of such influence in the conflict between flag and coastal States on the issue of vessel source pollution, this chapter will examine sovereignty and its role in international law generally. It will address compliance issues and explain how it is that despite binding treaty arrangements, "[c]ases remain where capable states willfully flaut international rules, such as ... Greek practices in licensing ships". It will conclude that in the international legal environment flag States encounter conditions which are not necessarily unfavourable if they do not discharge their obligations to ensure that their flag vessels comply with all applicable international safety and pollution rules and standards.

profit will make even a conscientious ship owner at times bring down the standard of their ships. The market forces which suit users of shipping, and the countervailing forces which should allow the cost of safe operations to be absorbed by providers of shipping, are, if not mutually exclusive, at least incompatible."


46 Hardin (1968), 1243.

47 The concerns of developing states are promoted in the context of vessel source pollution control, as will be seen in IMO Doc. MEPC 45/7/19 1.9.2000. On developing state concerns generally, reference will be made to, inter alia, Friedheim (2000), and Kiss and Shelton (2000).

48 The issue of open registries will be fully examined in Chapter 4 below. In the meantime, it suffices to note that "many of the sub-standard vessels are registered in open registries or flags of convenience states, who are also believed to be apathetic in enforcing international oil pollution rules, ostensibly in exchange for the business. However, these states generally are poor states who are in that business as a way of augmenting their economies." - Duruigbo (2000), 83-84 - footnotes omitted.

49 de La Fayette (2001), 223.

50 Haas (2000), 46.

51 "... states choose which treaty obligations they will assume and there is no supranational authority to compel them act otherwise. Respect for the notion of state sovereignty also makes it difficult to hold states accountable when they fail to perform." - Duruigbo (2000), 82 - footnotes omitted.
CHAPTER 3

This chapter will examine the historical background against which the MARPOL Convention was adopted. Then, in describing the 1973 Conference negotiations, the chapter will demonstrate how the conflict between maritime and coastal States over sovereignty issues ultimately influenced the content of the Convention adopted. In seeking to protect their maritime sovereignty interests, the maritime States at the Conference successfully argued that the contentious jurisdiction issues should be deferred to the then impending Third United Nations Law of the Sea Conference.

CHAPTER 4

In this chapter, the jurisdictional regimes in MARPOL will be analysed. It will be argued that these regimes defer to maritime sovereignty and in so doing preserve the primacy of flag State control over their flag vessels. Although MARPOL does confer upon coastal States a concurrent enforcement authority, this authority has neither certainty nor immediacy of exercise. The fact that this is so is largely the result of the manner in which the maritime States succeeded in having the 1973 Conference defer the jurisdiction issues. Hence, the coastal State authority which MARPOL does prescribe is not a viable corrective to inadequate flag State control of shipping. It therefore does not encourage flag States to discharge their obligations to ensure that their merchant fleets comply with MARPOL's rules and standards.52

CHAPTER 5

This chapter will detail those aspects within and surrounding MARPOL which work against its effective enforcement. Within the Convention itself, there is the obligation for coastal States to provide port waste reception facilities. It will be argued that the costs of constructing such facilities and the problems of waste disposal mean that there is a general world-wide shortage of such facilities.53 Currently there are 151 coastal States54 of which the majority are developing states.55 Many of these states do not have the resources to construct and operate port waste reception facilities. Next within the Convention are the Discharge Regulations. It will be argued that the costs and technical requirements involved in effectively monitoring violations of MARPOL's rules and standards means that many coastal States do not maintain effective surveillance systems. For flag States, then, the risks of detection are relatively low. Even if a violation is detected, the high

52 For the view that coastal State authority operates as an incentive to encourage flag States to comply with their obligations, see, for example, Boyle (1985), 362 and Molenaar (1998), 399.
54 Park Hee Kwon (2000), 1.
evidential threshold required for a successful prosecution provides ship operators with a significant measure of protection. Finally within the Convention are the Design Regulations. It will be argued that although the Design Regulations do not present the same opportunities as do the Discharge Regulations for undetected violations, compliance with the Design Regulations has been unsatisfactory. The chapter will argue that unevenness in implementation and disparities in enforcement have contributed to this situation. Resource inadequacies, differing standards in the competence brought to the inspection process, limited detention authority and competition between port States have all contributed to the unsatisfactory level of compliance. Then, in the wider social, political and economic climate in which MARPOL is intended to operate the chapter will identify the many constraints to its accession, implementation and enforcement. It will demonstrate that among these constraints are the prioritisation of development over environmental protection, the insufficiency of financial and resource capacity and the perceived lack of justification in controlling vessel source pollution when there are no controls on land-based pollution.\textsuperscript{56}

\textbf{CHAPTER 6}

This chapter will begin with a brief background to UNCLOS. It will explain the nature of the Convention and the manner in which it was negotiated. It will then examine some of the Articles in Part XII of the Convention. One of the Articles examined is Article 194. In this Article States are obliged to, \textit{inter alia}, take measures designed to minimise "to the fullest possible extent" pollution from vessels. The legislative indeterminancy with which this Article has been drawn enables flag States to adopt very flexible standards by which to measure compliance. The chapter will conclude that the Articles examined have been drawn with such studied ambiguity that they arguably do not reflect common or shared commitment, understandings and expectations. Insofar as states generally regard ambiguous rules as having no force,\textsuperscript{57} it can be concluded that the Articles examined exert at best a very weak compliance pull.

\textbf{CHAPTER 7}

This chapter will examine the prescriptive regime in Part XII of UNCLOS for flag, port and coastal States respectively. It will conclude that the prescriptive regime has largely entrenched the primacy held by flag States under pre-existing norms of customary international law and under the MARPOL Convention. It will be argued that as a consequence, the coastal States' rights to enact and promulgate international standards are unlikely to provide an incentive for flag States to exercise more effective control over their ships than in the past.

\textsuperscript{56} Alam (2000), 41 \textit{et seq.}

\textsuperscript{57} Faure and Lefevre (1999), 145; and Cooper (1986), 252.
CHAPTER 8

This chapter will examine the flag, port and coastal State enforcement regimes created by Part XII of UNCLOS. It will argue that the primacy of flag State control over vessels is reinforced within these regimes.58 In practical terms, the theoretical potential of the port and coastal State regimes to be employed as a corrective to inadequate flag State performance is not realised. The chapter will argue that there are significant disincentives to the exercise of port State enforcement authority. First there are the practical difficulties involved in port States investigating and prosecuting discharge violations. Then there is the fact that the interests of the port State are not engaged. Accordingly, it will be submitted that port States have few reasons to institute proceedings against foreign-flagged vessels in respect of violations of the applicable international discharge rules and standards. With respect to the port State detention rights in Article 219, the chapter will explain that these rights apply only to vessels which do not comply with applicable international rules and standards relating to seaworthiness and argue that CDEM59 standards relating to pollution control are not included within the expression "rules and standards relating to seaworthiness" as it appears in the Article. The chapter will also argue that coastal State enforcement authority has only a modest impact on maritime sovereignty. In practice, therefore, the enforcement regime provides little reason for flag States to ensure that their vessels comply with the relevant applicable international rules and standards relating to pollution control. Finally, the chapter will argue that the safeguard provisions in Part XII remove any doubt that the weighting of the balance of interests in UNCLOS is in favour of maritime sovereignty. The result is that the enforcement regime does not contain any checks and balances which would provide a reason for flag States to discharge their responsibilities to ensure that their flag vessels comply with relevant vessel source pollution rules and standards.

CHAPTER 9

This chapter will examine the position of the IMO on the use of the enforcement authorities in Part XII of UNCLOS to enforce MARPOL's rules and standards. It will detail the arguments which the IMO has advanced to justify its opinion that the enforcement regime in UNCLOS should be employed by coastal States to enforce MARPOL's rules and standards against foreign-flagged vessels.60 The chapter will also summarise the arguments which were advanced by Liberia in 1999 in opposition to the position taken by the IMO on this issue.61 The chapter will elaborate those

58 "Although some expansion of coastal and port State jurisdiction has been made under the UNCLOS, the primacy of flag State jurisdiction has been preserved." - Ozçayır (2001), 64.
59 CDEM is the acronym commonly used to refer to vessel construction, design, equipment and manning standards.
61 IMO Doc. MEPC 43/12/2 14.5.1999.
arguments and conclude that on the issue of enforcement jurisdiction the intersection between UNCLOS and MARPOL is disjunctive and that the enforcement authorities in UNCLOS cannot be used with respect to violations by foreign-flagged vessels of MARPOL's rules and standards.

CHAPTER 10

This chapter will investigate whether the compulsory dispute procedures entailing binding decisions in UNCLOS and MARPOL have the effect of inducing flag States to conform to the substantive rules of the Conventions. The chapter will detail the reasons for the inclusion in UNCLOS of the compulsory dispute settlement regime. It will consider the question of whether or not that regime will apply to disputes between MARPOL States Parties which may arise in consequence of violations of that Convention's rules and standards. Drawing upon the authority of the Arbitral Tribunal's decision in the Southern Bluefin Tuna Case the chapter will submit that the hearing and determination of any such disputes would not fall within the UNCLOS compulsory dispute settlement regime. It will then argue that with the emerging tendency to link the enjoyment of rights to the performance of related duties, coastal States may well be reluctant to bring actions against flag States in respect of the latters' failure to ensure that their flag vessels comply with MARPOL's rules and standards. Accordingly, it is unlikely that the existence of either Part XV of UNCLOS or Article 10 of MARPOL will provide reasons for flag States to conform to the substantive rules of the Conventions.

CHAPTER 11

This chapter will briefly outline the establishment and structure of the International Maritime Organisation. It will conclude that despite financial constraints, the Organisation has been influential in encouraging its Member States to adopt and implement those Conventions which fall within the Organisation's mandate.

63 Oxman (2001), 287.
65 Oxman and Bantz (2000), 149; see also IMO Doc. MEPC 43/7 31.3.1999.
66 On World Maritime Day in 1996, the current Director of the IMO, Mr William O'Neil, spoke of the Organisation's role in the following terms: "Shipping is an international industry which is proud of its tradition of freedom of the seas, but that does not mean that ships can sail wherever they like regardless of their condition. The maritime world has the right to expect that ships of all nations meet the levels of safety and environmental protection which have been internationally agreed upon. It is up to ship-owners to make sure that their ships are safe, properly manned and do not pollute the seas and it is the duty of governments to make sure that ships which fly their flag comply with the standards laid down in the IMO Treaties which they have ratified. If they fail to do so, then IMO - which has the stewardship of these standards - has not only the right but the obligation to take further action."
- quoted from Hare (1997), 576-577.
CHAPTER 12

This chapter will examine the concept of Port State Control. It will begin by recording the origins of the concept. It will then detail the role which the IMO has played in the progressive regional adoption of the concept. It will argue that the role of the IMO in promoting the concept and facilitating its ongoing application has been and continues to be significant. The chapter will examine the Tokyo Memorandum of Understanding on Port State Control in the Asia-Pacific region as an example of the application of the Port State Control concept. It will suggest that each regional MOU establishes a dynamic regional administrative regime which is based upon trans-national cooperation between the Maritime Authorities participating in each MOU. It will conclude that the almost global coverage of these regimes is encouraging flag States, through the application of Port State Control measures, to comply with their obligations to ensure that their flag vessels comply with MARPOL's rules and standards. However, the chapter will conclude with an argument that the exercise of Port State Control measures with respect to the violation of MARPOL's rules and standards may exceed, in some instances, the enforcement authority allowed to port States. There is evidence of an emerging trend in which the use of enforcement measures, not prescribed by the Convention, is being sanctioned under the banner of Port State Control. That evidence can be found in the texts of the Regional Memoranda of Understanding on Port State Control, an IMO Resolution, the IMO's expressed opinions on the enforcement measures exercisable by inspecting port States, the recommendations of the International Commission on Shipping with respect to Port State Control and the European Union Directive on Port State Control.

In the context of the control of substandard shipping generally, it has been recognised that Port State Control "can increase the risk of unilateral measures, as certain authorities are tempted to give preference to application of their own national standards, rather than those contained in international Conventions". That same risk inheres when groups of states apply agreed regional standards and enforcement measures instead of those contained in the international Conventions on ship safety and vessel source pollution control. It is frequently said that such measures are disruptive to shipping. In the context of Port State Control, however, unilateral measures may well prove more than disruptive. Long term, they may facilitate a move in the effective control of

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67 Memoranda of Understanding on Port State Control
"are not legally binding agreements; yet they could be effective in controlling substandard ships if managed properly. There is no doubt that [Port State Control] systems have had an important role in combating and reducing substandard shipping, and that it now constitutes an indispensable means for ship safety regulation." - Hayashi (2001), 509.

68 For an analysis of dynamic international regimes, see Gehring (1994).

69 "[S]tates are increasingly disaggregated into their functional parts cooperating with their counterparts in other states, 'creating a dense web of relations that constitutes a new trans-governmental order'." - Reinicke and Witte (2000), 99 - footnote omitted.

70 Boisson (1999), 468.
shipping from flag States to port States.\textsuperscript{71} This is a move which could occur if flag States become marginalised as a result of being no longer relevant to ship owners and charterers for the setting of international control measures and for the protection of their legal interests in the application of those measures by port States.

In its practical application, Port State Control is a system in which a lack of skill or a mistaken belief as to the powers exercisable can result in unlawful and abusive practices by port authorities against foreign-flagged vessels. Such practices may also be the deliberate result of local political pressures, the need for tax revenues, or corruption rather than genuine concerns for safety and pollution control.\textsuperscript{72} In light of the "spectacular growth in Port State Control and inspection of ships since the early Eighties"\textsuperscript{73} flag States should be more proactive than many appear to be in offering the technical and legal services necessary to ensure that the legal rights of their ship owners and charterers are fully protected against the application of unlawful and abusive Port State Control measures. Ship owners and charterers may well find that the costs of intervention by the flag State are less than the costs of being subjected to such practices. If flag States do not offer the necessary services, they could not only lose business to other flag States which do offer such services, but more importantly, they could find that by default, the effective control of shipping eventually passes to port States. Leaving their ship owners and charterers to deal with Port State Control issues would not assist flag States in retaining their primacy of control over shipping. If they are to remain relevant participants in the control of shipping, flag States must not only be proactive as a group in establishing international standards but also they must uphold those standards. To that end, they must protect the legal interests of their ship owners and charterers by ensuring that Port State Control measures conform to the established international standards.

\section*{CONCLUSION}

From the analyses undertaken and the arguments advanced in the four Parts, the following conclusions will be offered, namely:

\textsuperscript{71} For example, Port State Control on operational requirements has been challenged on the grounds that it changes the balance of jurisdiction as laid down in the regulatory Conventions, such as MARPOL, and in UNCLOS - see Molenaar (1999), 473.

\textsuperscript{72} As to corrupt practices, Ozzayr writes that "[I]n one case Gabonese port officials at Port Gentil levied a fine of US $4000 for alleged violations regarding the ship's certificates. These were the absence of photos and stamps on the master's and officers' certificates (even though these certificates were in accordance with STCW requirements) and the absence of the original P & I insurance policy on board. Although the initial fine against the ship was stated as US $4000, the master was informed that the matter could be resolved 'unofficially' with a cash payment of US $2000. As there was a danger of detention of the ship, the owners approved the 'unofficial' solution. Discussions with the P & I Club's local representative and the port agents revealed that such incidents are common at the port." - Ozzayr (2001), 2-3 - citing Bimco, "Fines at Port Gentil" Home: Press Room: News Archive: 11-00: Fines at Port Gentil http://www.Bimco.org.

For an example of a genuine but mistaken belief in the powers exercisable by a port State, see the New Zealand Court of Appeal Case of Sellers v. Maritime Safety Inspector [1999], 2NZLR, 44.

\textsuperscript{73} Boisson (1999), 451.
• That neither MARPOL nor UNCLOS gives flag States reasons to ensure that their flag vessels comply with MARPOL's rules and standards.

• That the IMO is incorrect in advocating that coastal States use the enforcement authorities prescribed by Part XII of UNCLOS to enforce MARPOL's rules and standards against foreign-flagged vessels.

• That as it is evolving, the concept of Port State Control potentially gives flag States a reason to ensure that their flag vessels do comply with MARPOL's rules and standards.

• That flag States should be concerned over the legal basis of the Port State Control measures which Maritime Authorities participating in regional Memoranda of Understanding on Port State Control are taking against their flag vessels not only for violations of MARPOL's rules and standards but also generally in the control of sub-standard shipping.
PART I

BACKGROUND - MARITIME TRANSPORT AND INTERNATIONAL LAW

INTRODUCTION TO PART I

In this part, a brief background description of the international commercial environment in which the maritime transport industry operates will be offered. This description will explain why ship operators continue to employ certain vessel operating procedures which discharge polluting wastes into the marine environment. The effects of this free use of the environment will be detailed. The detail of these effects will serve to explain the basis of coastal State concerns to control vessel source pollution.

This part will then complete the background to the arguments in the ensuing Parts II, III and IV by giving an insight into the international legal environment in which vessel source pollution is regulated. It will explain how flag States, in developing, maintaining and protecting their ship registry businesses, seek to retain exclusive sovereign control over their flag vessels. It will also acknowledge the sovereignty-based claims of coastal States to protect their marine environments and to exercise control over foreign-flagged vessels for the purpose of doing so. Since sovereignty issues so feature in the tensions between flag and coastal States respectively, this part will examine the concept of sovereignty and its role in international law. It will also address compliance and enforcement issues. The part will conclude that conditions in the international legal environment are not necessarily unfavourable to flag States which are reluctant to cooperate in creating vessel source pollution controls and then to enforce such controls against their flag vessels.
CHAPTER 1

MARITIME TRANSPORT

1.1 INTERNATIONAL TRADE AND MARITIME TRANSPORT

The pursuit of international trade has been a preoccupation of most state societies since ancient times. For example, the discovery of Roman coins in the ruins of ancient Indian cities suggests that trade relations must have existed between the Roman Empire and India. More cogent evidence, if such be needed, comes from the thirteenth century, when trade between China and Europe began with the opening of the Silk Route by Marco Polo. Societal involvement in international trade is explained by the benefits to be derived therefrom. On a relatively simplistic analysis, societal gains from international trade are created by opportunity cost differentials and comparative advantages. Thus, a society which can import goods from another society at a lower opportunity cost than that attaching to the domestic production of those goods, gains. Societal gains in such importation manifest both in the potential to consume outside production possibilities and, not infrequently, in lower consumer costs. Equally, a society which can produce goods in which it has a comparative advantage derives gains by the export of those goods to other societies. Those gains range from pure financial returns to the ability to import goods which are outside its production possibilities.

For most states, being competitive in international trade has significance far beyond the trading activity itself. This is because a state's competitiveness invariably is reflected in the quality of life which it can offer its citizens. In turn, this has implications for the political elites of states. These elites hold a tenure which is not infrequently related to their ability to engender, over a period, economic growth\(^1\) of the type that is only possible through competing successfully in international trade. Thus, there is a direct link between economic growth and that all-consuming interest in maintaining power which is shared by the politically relevant elites in the inter-state system.\(^2\) When viewed from this perspective, then, it becomes easier to appreciate the almost universal commitment of national governments to the promotion of economic growth\(^3\) focused upon the needs of their own constituents.\(^4\) However, the retention of power is not the only dimension to economic growth, for it has a certain moral facet when it is considered as a means towards development. Here development is intended to refer to "a comprehensive economic, cultural and political process which aims at constant improvement of the wellbeing of the entire

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\(^1\) Gellner (1997), 25.
\(^2\) Reisman (1988), 376.
\(^3\) Caldwell (1990), 183.
\(^4\) Aman (1993), 2109.
population [of a state] and of all the individuals on the basis of their active, free and meaningful participation in development and the fair distribution of benefits resulting therefrom". Sound economic growth is said to induce to the "social tranquillity" that is so essential to development as understood in the wider sense just conveyed. At the state level, economic hardship and insecurity emanating from a lack of economic growth tend to induce social dislocations and political instability which in turn combine to create a social environment that stifles development. At the inter-state level, orderly relations between states are imperilled by a lack of development.

The potential to gain from international trade and thereby promote development is open to all states within the inter-state system. However, the realisation of that gain involves competition with other states, competition in which one of the cost variables is that presented by maritime transport.

Such transport has been an integral part of global trade since the time of the Phoenicians, when oared galleys were regularly engaged in coastal voyaging. With the advent of the mariner's compass, ocean voyages became possible from about the fourteenth century. This was the era which heralded in the development of fleets of large sailing ships that plied international waters in trade. During the time of the Roman Empire the busiest shipping routes were in the Mediterranean, routes which linked Rome with such places as Gades, Tarraco, Massilia, Carthage and Alexandria. Later, in the Middle Ages, the centre of the Mediterranean shipping routes shifted from Rome to Venice, while in the northern seas the shipping routes radiated from the Hanse towns. In 1492 Columbus opened the route to America, and six years later Vasco da Gama secured the subsequently long held Portuguese domination of the shipping routes to the Far East.

From such early beginnings the incidence of sea borne trade steadily rose. Today, despite competition from air transportation, it is still increasingly employed in the international carriage of goods, as can be appreciated from the statistics compiled by Drewry Shipping Consultants. According to their statistics, world container traffic grew by 10 percent per annum from 1990 (87.4 million TEUs) to 1997 (170.3 million TEUs) and was thereafter projected to grow by 6.1 percent per annum from 179.4 million TEUs in 1998 to 271.3 million TEUs in 2005 - an increase of more than 50 percent.

To meet the increasing demand for sea transport, the ship building industry has over recent decades responded by producing a range of vessels capable of transporting volumes of cargo well beyond the capacity of older, conventional vessels. First, the supertankers, then, the very large crude carriers and finally the ultra large crude carriers. These ships are designed to

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5 Shelton (1985), 525.
7 Donnelly (1985), 478; Young (1985), 448-449.
8 Parkin (1994), 963.
9 Drewry (1998); one author has recently written that "over ninety percent of the goods traded globally are shipped by ocean carriers ..." - Allen (2000), 63.
10 VLCC - 120,000-200,000 tonnes.
11 ULCC - over 200,000 tonnes.
carry vast quantities of crude oil, thereby generating enormous profits for oil companies and ship owners alike. Such are the economics of operating these vessels that ship owners are often able to recover the acquisition costs of a VLCC in only one or two high revenue voyages. Then there are the LNG carriers, technically innovative and very expensive vessels dedicated to the transport of liquid natural gas. For general cargo, large, fast, inexpensive cellular container vessels have been developed together with such variants as the lighter on board ship (LASH), the larger roll on-roll off (RoRo) vessel and the super car carrier. Paralleling these developments have been those in the ancillary vessel sector - in particular the construction of more sophisticated ferries to meet the needs of coastal and island states for efficient passenger/cargo services that stimulate their communication and economic systems.

All these innovations were designed towards the end of reducing the costs of maritime transport, an end which the dictates of the economics of competition in international trade essentially created. Also focused towards the same end are certain vessel operating procedures which have traditionally made "free" use of the marine environment. These are the routine discharges of polluting wastes into the sea. They are made in a range of operating procedures which are essential for the safe and efficient operation of ships. The procedures concerned have been adopted in preference to more environmentally sympathetic waste retention strategies which would otherwise involve both inconvenience and, more importantly, increased vessel operating costs.

12 Gold (1989), 433.
13 Ibid.
14 Ibid, 435.
15 In economic behaviour, cost minimisation is understood as "an attempt to achieve any goal, whether it be the production or consumption of any specific quantity of goods, for the least sacrifice of resources." - Victor (1972), 37. In recent years, cost minimisation in the international maritime transport industry has manifested in shipping company mergers and the formation of global alliances or consortia.

"Over-capacity and thinning profit margins have driven shipping companies into mergers and global alliances or consortia to reap the benefits of economy of scale in a bid to reduce operating cost. Shipping lines are also facing demand for further improvement in their services at lower freight rates by shippers. By operating as part of alliances or consortia, shipping companies are able to rationalise and maintain services globally with higher sailing schedules, port coverage and fleet deployment." - Seet-Cheng (2000), 9-10.

Cost minimisation also manifests in sub-standard shipping. "When it comes to operating costs, sub-standard operators enjoy a substantial advantage over operators who meet the international standards in force." - ICONS Report (2001), 72-73;

"The shipping industry, battered by the recession since the mid-Seventies, offers a picture of ruthless competition. Serious over-tonnaging, responsible for a steady decline in freight rates, has led operators to resort to every means to cut their operating costs. Use of old ships, trimming of maintenance costs to the strict minimum, and the recruitment of cheap labour to man them have been the main manifestations of this frantic search to save money. The crisis has affected the whole industry, creating commercial pressures that it is well-nigh impossible to reconcile with strict safety management." - Boisson (1999), 42 - footnote omitted.

16 This "free" use of the environment is defined in economic terms as "an externality" created in the pursuit of cost minimisation. "An externality is a cost or benefit arising from an economic transaction that falls on a third party and that is not taken into account by those who undertook the transaction." - Parkin (1994), 525. In the case of the vessel operating procedures, the cost is to society in the form of a degraded marine environment.

"The main concerns of companies and ship owners in relation to vessel source pollution are clearly economic in nature. Environmental and safety regulations are often expensive and usually have repercussions on competitiveness. ... Tanker owners ... have no direct incentives to reduce discharges as they are usually paid for cargo loaded, not cargo delivered. Moreover, the acquisition and operation costs of discharge reduction equipment [have] to be borne by them as well." - Molenaar (1998), 32-33 - footnotes omitted.
In percentage terms, operational discharges account for most of the pollutants entering the marine environment from vessels. Although the statistics are now somewhat dated and relate only to oil, those taken from the 1973 Report to the National Academy of Sciences in the United States provide graphic evidence of the extent of the problem. In that report it was recorded that about 1,370,000 tons of oil were being discharged into the sea annually as operational pollution in contrast to the 350,000 tons released accidentally. Two years after that report, another study found that 85.9 percent of all vessel source oil pollution in 1973 was attributable to operational discharges, contributed in the proportion of 23.5 percent by non-tankers and 62.4 percent by tankers respectively. Then, in 2000 Kiss and Shelton wrote that an estimated 1.6 million tons of oil was being discharged annually into the marine environment by shipping, both as a result of vessel operating procedures and accidents.

Before describing the vessel operating procedures in question it is appropriate to first detail the effects of oil in the sea. The purpose of doing so is to convey the reason why so many coastal States are concerned to protect their marine environments from vessel source pollution.

Comparatively little is known about the effects of oil upon fish. Most of that which is known has been obtained from laboratory studies. These studies indicate that fish are affected by oil through direct intake, the ingestion of contaminated prey, and the intake of dissolved oil compounds through the gills. Fish eggs and larval survival are affected. Ecological changes caused by oil pollution also affect fish. "[F]luctuations in salinity, temperature, food abundance, disease and parasites and competitive or augmentive stress from other pollutants, may reduce the ability of fish to tolerate petroleum." From the evidence available, there does not appear to be any increased accumulation of oil pollutants in the higher members of the food chain. Accordingly, consumption of oil-polluted fish is not a widespread problem, although it may occur in individual areas.

The effects of oil upon sea mammals include the contamination of fur and the consequent loss of its insulating quality, leading to death. Also it has adverse effects upon the digestive, nerve and circulatory systems. In addition, eye irritations, and lethal damage to intestines, the liver and lungs have been recorded. It is thus generally accepted that the various species of sea mammals are "highly vulnerable to oil pollution at sea."

However, the most vulnerable of all marine species to the effects of oil pollution are marine birds. This is due to the fact that they live most of their lives on, and obtain all of their food from, the sea.

"Both marine birds and oil spills are sea-surface phenomenon (sic), which means that the probability of birds coming into contact with the spill is quite large if the spill is in one of the

20 Kiss and Shelton (2000), 457.
21 The following description of the effects of oil in the marine environment is summarised from Brubaker (1993), 17-33.
22 Ibid, 18.
heavily populated areas. Some geographical areas are so important to marine bird populations that if a single large oil spill occurred, it could have disastrous results."²⁴

Contact with oil damages the waterproofing and insulating qualities of feathers. The loss of waterproofing means that the feathers absorb water with the result that birds sink and drown. Loss of insulation causes increased metabolism to maintain body temperature. This in turn leads to death as a result of the exhaustion of fat and muscular energy reserves. In addition to these lethal effects, there are a number of sub-lethal effects. These include "abnormalities in the lungs, adrenals, kidneys, liver, nasal salt gland, gastro-intestinal tract, and a reduction in white blood cell count. Physiological changes occur as well including retardation of weight gain in young birds, induction of hepatic enzymes, a temporary depression of egg-laying and reduction of hatching success of laid eggs."²⁵

Finally, oil affects marine bacteria, phytoplankton and invertebrates. Following an oil spill, the numbers of oil-degrading bacteria increase, feeding on the dissolved oil and on oil droplets. Although less sensitive to oil pollution than other micro-organisms and small animals, phytoplankton are also affected. This micro-organism is at the bottom of the marine food chain and through photosynthesis is the basis of all life in the sea. While the different species exhibit different toleration levels, it can generally be expected that growth reduction will occur in all species as a result of exposure to oil.

"Light was found to be of importance for the toxic effect. It was also found that oil pollution which was too weak to affect algae directly may nevertheless inhibit the regeneration of nitrogen salts, because it is capable of affecting the more sensitive animal plankton, and thereby reduce the growth of the algae through lack of these salts."²⁶

Although a generalisation concerning the effects of oil on individual vertebrates, it is recognised that oil pollution can upset entire vertebrate populations. "Recruitment problems, variation in isozyme patterns, imbalance in genetic patterns and low population densities are some of the problems involved."²⁷

As indicated above, oil enters the marine environment to produce the effects described in consequence of vessel operating procedures and accidents. Of these two sources, vessel operating procedures account for the greater quantity of oil which enters the marine environment annually.

In the case of oil tankers, the first routine operation which contributes to the burden of marine oil pollution is ballasting. After discharging its cargo, a tanker will ride high in the water. In this condition the vessel cannot put to sea because of the attendant stability and propulsion problems.²⁸ To restore the vessel to a safe operating level in the water, seawater is pumped into a bunker or cargo tank as ballast. Under normal sailing conditions, the amount of ballast required is one quarter to one third of the vessel's total cargo capacity. This amount can

²⁶ Ibid, 29.
²⁷ Ibid.
In varying amounts, typically measured in thousands of tons, 

"...ballast is used on all types of ships to achieve satisfactory bending moments, limit shear forces, and control trim and stability. Container ships [also] use ballast ... to maintain an upright position during asymmetric loading and/or discharge to allow shore cranes to plumb

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29 Pritchard (1978), 189.  
30 Curtis (1985), 682.  
31 Ibid, 682-683 - "An example of this risk materialised in 1976 when the oil tanker San Sinena (71,763 DWT) the sister ship of the Torrey Canyon, exploded and sank in Los Angeles Harbour. Excess hydrocarbon build-up caused the explosion, resulting in the loss of nine lives" – 683, footnote 15.  
cell guides vertically. On tank vessels, ballast must be discharged before and/or during cargo loading to allow sufficient space/draught for cargo.\(^{33}\)

For reasons of safety, ballasting, deballasting and reballasting are operations which would normally be carried out in port waters. These operations, if carried out at sea, would not only place the vessel at risk of capsize, but would also compromise hull integrity by reason of the additional structural stresses to which vessels are subjected by such operations. Further, ballast exchanges at sea would inevitably increase both crew fatigue and vessel operating costs,\(^{34}\) the former particularly being very relevant to vessel safety.

Thus it is that ballast water taken on in one port will eventually be discharged into the waters of another port. In the course of this process, there is a risk that any bacteria, plants and animals which may have been in the ballast water pumped on board at one port could survive the journey and be discharged in viable form into the waters of the receiving port. While it has been said that "[t]he odds that a vessel will bring an organism on board during the ballast exchange, that the organism will survive the voyage, and that it then successfully will populate a new (and perhaps hostile) environment, are remarkably slim",\(^{35}\) the fact remains that such can and does occur, as was formally recognised by the Marine Environment Protection Committee of the International Maritime Organisation in July 1991, in the following Resolution:

"Studies carried out in several countries have shown that many species of bacteria, plants and animals can survive in a viable form in the ballast water and sediment carried in ships, even after journeys of several weeks’ duration. Subsequent discharge of contaminated ballast water or sediment into the waters of port States, may result in the establishment of unwanted species which can seriously upset the existing ecological balance. Although other media have been identified for transferring organisms between geographically separated water bodies, ballast water discharge from ships appears to have been amongst the most prominent. The introduction of disease may also arise as a result of port State waters being inoculated with large quantities of ballast water containing viruses or bacteria, thereby posing health threats to indigenous human, animal and plant life."\(^{36}\)

Although doubts have been entertained that the inadvertent introduction of aquatic non-indigenous species and pathogens is captured within the standard international definitions of marine pollution\(^{37}\) and although those doubts may still be appropriate, there can be little or no

\(^{33}\) Bederman (1991), 684, footnote 36.

\(^{34}\) Ibid, 686.

\(^{35}\) Ibid, 684.

\(^{36}\) Resolution MEPC 50 (31) adopted 4th July 1991 Annex para 1 and the MEPC Publication: "International Guidelines for Preventing the Introduction of Unwanted Aquatic Organisms and Pathogens from Ships, Ballast Water and Sediment Discharges".

\(^{37}\) Bederman (1991), 687 et seq. See also de La Lafayette (2001) - "On a close reading of the LOS Convention, one could argue that the limitations on coastal State prescriptive and enforcement jurisdiction in Arts 211 and 217 in relation to 'pollution' do not apply to alien organisms. First, 'pollution' is defined in Art. 1 as the deleterious effects of substances or energy introduced by man into the sea. According to the Oxford Concise Dictionary, the ordinary meaning of the word 'substance' is a particular kind of material or matter - not a living organism. In particular, substance has a connotation of inert, non-living matter, while organisms are alive and can reproduce and spread over a large area of their own accord. Furthermore, Art. 196 underlines the different nature of alien organisms and the difference in the means of control by providing, in its para. 2, that the Article 'does not affect the application of th[es]e Convention regarding the prevention, reduction and control of pollution of the environment' (emphasis added). This appears to indicate that alien organisms are not a kind of pollution, but a different
argument that there are on record instances where such introductions have recognisably had an incalculable impact on the receiving ecosystems, e.g. the accidental introduction of the zebra mussel (Dreissena Polymorpha) into the North American Great Lakes.38 Thus, definitional issues aside, there is ample justification for treating the problem of ballast water as yet another manifestation of marine pollution, thereby expanding the perspective on an activity to which a measure of accountability for the state of the marine environment must be ascribed.

Before concluding this survey of the activity of marine transport and its role in the context of marine pollution, reference to two further routine vessel operating procedures must be made, namely the disposal of sewage and garbage. The discharge into the sea of crew-generated wastes is a practice which dates back to the first ships. This is a practice which is usually justified by the principal considerations of practicality, convenience and perhaps more latterly, economics. On one contemporary view, "the disposal of sewage and garbage from ships and boats is of local concern where there is a concentration of vessels",39 a fact which cannot, of course, be denied. However, to the extent to which this view seems to suggest that the disposal of these crew-generated wastes is a relative problem rather than an absolute problem, it is misleading, particularly in the case of garbage.

Crew-generated wastes which fall into the category of garbage are typically of glass, metal, paper, wood, cloth or plastic composition and include food packaging, containers for household items used at sea, six pack rings, eating utensils, plates and cups.40 These wastes are generated in volume, as is evidenced by a sampling of statistics taken from the nineteen-eighties. In a 1987 publication41 it was recorded that annually the crews of merchant ships generate about six million metric tonnes of solid waste and that daily, personnel on U.S. Naval vessels are responsible for more than 850,000 lbs of waste, of which as much as 2850 lbs is of plastic material. An earlier article from the same decade42 put the number of plastic containers disposed of at sea by merchant vessels at 639,000 per day. It is the fact of this plastic content of crew-generated garbage which renders the practice of discharging garbage into the sea a problem that should be viewed in absolute rather than relative terms. The reason for this is that even the smallest quantity of plastic discharged into the marine environment constitutes a threat. The threat which plastics pose to the marine environment first gained recognition in the mid-nineteen sixties43 when the incidence and effects of entanglement and ingestion on marine life came to be observed. Monofilament line, nets and six pack holder rings were all found to be ensnaring seabirds, typically with fatal results.44 Discarded gill net pieces and plastic strapping bands were shown to be fatally entangling seals45 and whales were discovered to be at risk from

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genre of environmental problem that today would be referred to as a threat to biodiversity. In consequence, one could argue that the provisions of Arts 211 and 217 do not apply to alien organisms, and that states negotiating the Draft Ballast Water Convention are free to allocate jurisdiction in the manner they deem most effective to achieve the goal of preventing harmful changes to ecosystems in the EEZ, the territorial sea and internal waters.46

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38 Hart (1990), 81-82.
40 Baur and Iudicello (1990), 78.
43 Wehle and Coleman (1983) (B), 22.
light translucent fishing nets which they could neither see nor detect by sonar - entanglement in such nets would so impede the whales as to inhibit their ability to catch prey.46

Equally harmful to marine life is the ingestion of plastic, which has been demonstrated by research to have a number of potential effects. First, it was noted that plastic could not only damage digestive tract linings but could also inhibit the sensation of hunger, thereby depressing the urge to feed.47 Secondly, it was found that toxic chemicals could bind to plastic and hence be ingested along with the plastic, thereby providing two sources of potentially harmful effects, one the chemicals and the other the plastic itself.48 Finally, chemicals in the plastic were shown to be capable of causing toxic damage in marine life generally as well as eggshell thinning in sea turtles in particular.49

1.2 CONTROLLING VESSEL SOURCE POLLUTION - A LARGE-SCALE SOCIAL DILEMMA

The operating procedures described above are at the very heart of the problem to which the argument in this thesis is addressed. In fact, they place Garrett Hardin's "Tragedy of the Commons"50 into a practical context. In a frequently cited article, Garrett Hardin argues that the over-grazing of common pasture, the over-fishing of the oceans and the over-burdening of air and water with pollutants in the pursuit of own best interest will inevitably bring ruin to all. The relevance of Hardin's thesis to seagoing vessel operations is relatively clear - the oceanic environment covers some seventy percent of the earth's surface and accounts for ninety seven percent of its biosphere. Of the earth's water, a not so coincidental ninety seven percent is ocean. Described as humankind's "most vital wellspring, our planet's indispensable filtration plant",51 the ocean regulates weather and climate by stabilising temperatures and by releasing moisture through a process of evaporation. That moisture eventually re-emerges as the rain which replenishes the earth's fresh water in lakes, rivers and streams - the fresh water that is so vital to life. Each litre of unpolluted seawater can carry up to a thousand million living bacterial cells and a million bacteria-consuming microorganisms, the different populations of which transfer energy, sunlight or organic material to the food chains of higher marine animals. At the base of these marine food chains is a microorganism called phytoplankton, which creates carbohydrates in its chlorophyll-containing cells from atmospheric carbon dioxide and aquatic hydrogen. As well as being the initial link in the marine food chain, the same micro-organism in the upper layers generates up to one half of atmospheric oxygen available to terrestrial forms of life. The pollutants discharged into the marine environment by the vessel operating procedures

47 Ibid.
48 Ibid.
50 Hardin (1968), 1243.
described have the potential to compromise this life supporting role of the oceans.\textsuperscript{52} Thus, although justifiable as a means by which comparative advantage might be achieved, the unregulated employment of these procedures by all vessel operators may eventually bring ruin to all. To avoid such ruin, there must be controls to regulate these polluting procedures.

In the twentieth century, a few concerned coastal States began to call for such controls. Driven by concerns over the damage being caused to the marine environment, they sought the cooperation of maritime States and other coastal States in the formulation and adoption of appropriate international controls.\textsuperscript{53} To appreciate the problems which they were to face in this endeavour, it is instructive to conceptualise the problem of control as a large scale social dilemma. "In social dilemmas, people are faced with a conflict between pursuit of their own individual outcomes and the pursuit of collective outcomes"\textsuperscript{54} in circumstances where:

- The pursuit of individual outcomes yields higher individual gains than those yielded from the pursuit of collective outcomes, but such individual gains are achieved at some cost to others; and

- The pursuit of collective outcomes yields individual gains which are lower than those yielded from the pursuit of individual outcomes and so involve some cost to self, but such individual gains are higher if all pursue the collective outcome than if all do not.

The essence of the problem which inheres in the social dilemma type situation is captured in the following definition: A social dilemma is "a situation in which two or more persons receive a higher pay-off for a competitive choice than for a cooperative choice - no matter what the other members choose - but all members are better off if all cooperate than if all compete."\textsuperscript{55}

Thus, when confronted with such dilemmas, it is said that individuals must resolve a conflict between "short term self-interest" on the one hand and "long term collective interest" on the other.\textsuperscript{56} It is, of course, the long term collective interest which demands cooperation.

In the context of the inter-state control of vessel source pollution, there are two orders of social dilemma which are particularly relevant. The first order dilemma emanates from the general issue of whether or not such pollution should be prevented and controlled. As will become apparent in Chapter 3 below, states did resolve that issue in favour of eliminating vessel source pollution. They did agree to "reduce the discharge of oil from ships into the sea with a view to the complete elimination of intentional pollution ...".\textsuperscript{57} The cooperation which states engaged in to reach that resolution is termed "elementary cooperation", that is, cooperation which was


\textsuperscript{53} The reasons for, and the steps in, the internationalisation of maritime regulations during the twentieth century are explained in Boisson (1999), 52-55.

\textsuperscript{54} Von Lange (1992), 133.

\textsuperscript{55} Dawe (1980), 169-193.

\textsuperscript{56} Rapoport, Budescu, Suleiman and Weg (1992), 43.

\textsuperscript{57} Resolution 3 of the Resolutions Adopted by the International Conference on Marine Pollution, 1973.
motivated by a common desire to protect and preserve the marine environment from a particular source of pollution. Past experience has shown, however, that the motivating goal of environmental protection normally would not be sufficient for cooperation to occur in actual practice — that is, the goal would not of itself ensure that all parties which initially agreed to eliminate vessel source pollution would actively pursue and achieve that goal pursuant to the agreement reached. The problem here is the influence of systemic countervailing forces which, as previously noted, include cost minimisation in the pursuit of comparative advantage. The very existence of these countervailing forces would naturally cause each party to the agreement to harbour the suspicion that its cooperation might be exploited by others. In the context of the international maritime transport industry, such a harbouring is an all too natural incident of the competition within that industry. Too easily, then, that suspicion becomes belief, and that belief so very often eventually becomes self-justification for defection from the original agreement. The project, then, is to allay such suspicion and in so doing, reduce the potential for defection. The objective of this project, which constitutes the second order dilemma, translates into the need to formulate arrangements whereby the continued cooperation of all parties to the agreement can be assured. "This assurance, that cannot be provided through strategically oriented elementary cooperation, could be provided through instrumental cooperation introducing a change in the dilemma structure."58 The most obvious change would consist in the provision of a social collective solution through "[f]or example, the introduction of an effective monitoring-sanctioning system which rewards cooperators and punishes the defectors [thereby altering] the incentive structure of the [first order] dilemma".59 That much is, of course, quite unexceptional. It regularly manifests in intra-state legal systems in the form of proscriptions and sanctions for breach. In the inter-state system, however, the problem is far more complex. This is a system in which obligations that can be enforced by legal process tend to be the exception rather than the rule.60 It is also a system in which institutionalised conflict stabilisation mechanisms are not only relatively rare but, more significantly, are predominantly consensual — this in the sense that states typically have the right to refuse to participate in formal dispute resolution processes.

These incidents of the inter-state system suggest that the greatest challenge confronting the project to internationally control vessel source pollution is to create reasons which not only will compel those responsible for the problem to comply with the agreed controls but also will induce in them the expectation that others equally responsible will similarly comply.61

58 Toshio Yamanishi (1992), 270.
59 Ibid. 268.
60 South West Africa Cases, ICJ Reports (1966), 9, 46; see also Bosselmann (1995), 78 - "in the inter-state system there are very few legal principles and regulations which states are able to enforce in concrete ways."
61 Expectation of others' cooperation has been shown to be of influence in promoting cooperation. On this and other factors which predispose to cooperation, see von Lange, Liebrand, Messick and Wilke (1992), 13-21. See also Gehring who writes that "[i]n cooperative situations the behaviour of an actor is closely related to his expectations about action of his counterparts and their response to his own action. In an assurance game, an actor chooses cooperation only if he expects his counterparts to choose cooperation as well. In a medium-sized group an actor will abstain from free riding only if he expects his co-actors to stop their cooperative behaviour. Accordingly, cooperation can be reinforced by the development of mutual expectations in the framework of an existing structurally determined conflict. In the case of appropriately structured conflicts, shaping and stabilising expectations of behaviour becomes a task of international politics. This, however, is nothing else than establishing norms, albeit avoiding their frequently implied moral connotation. Accordingly, an important task of international regimes is the provision of secure normative expectations about the behaviour of
In the next chapter, the incidents of the inter-state system to which this challenge is referable will be examined in more detail.

Individual actors, that is, expectations of how actors ought to behave to achieve cooperation in the interests of the group at large and of its members separately. Gehring (1994), 42 – footnotes omitted; emphasis in original. See also Haas (2000) who writes that: 
"[c]ompliance choices seldom are based solely on domestic considerations. States' choices are strategic, contingent on expectation of others' independent behaviour." Haas (2000), 49.
CHAPTER 2

SOVEREIGNTY
AND
INTERNATIONAL LAW

2.1 INDEPENDENCE AND THE EQUALITY OF STATES

At the present stage of its evolutionary development, the inter-state system remains, as it has for some centuries, "organised on the basis of the coexistence of states". Described as the "highest centre of human authority" and "for practical purposes the chief end of man" the state is the repository of legitimated authority over people and territory. In a world comprised of many individual states, all possessing a uniform legal personality, each state is in a relationship with its congeners. That relationship is one which is systemically characterised by the concept of sovereignty and the principle of equality. It was from this relationship perspective that sovereignty came to be defined by Max Huber in the Island of Palmas Case as independence: "Sovereignty in the relation between states signifies independence. Independence in respect to a portion of the globe is the right to exercise therein, to the exclusion of any other state, the functions of a state."

The fact that sovereignty could be a feature of inter-state relations, did not begin to be widely understood, it would seem, until about the eighteenth century. That understanding was derived from the essence of the internal political theory, which held the authority of each sovereign within its state to be supreme and independent. Also, it was derived from the doctrine of the equality of states.

Introduced into the theory of international law by Vattel (1714-1769), the doctrine of the equality of states privileges political liberty in inter-societal relations. It is a doctrine which was based on yet another doctrine, namely that of the state of nature - "nations being composed of men naturally free and independent, and who before the establishment of civil societies lived together in the state of nature; nations or sovereign states must be regarded as so many free persons living together in the state of nature; and

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1 Jessup (1948), 17.
2 Corbett (1959), 273-274.
3 Friedman (1964), 213.
4 Brownlie (1990), 287.
5 Island of Palmas Case, 875.
since men are naturally equal, so are states ... a small republic is no less a sovereign state than the most powerful kingdom."\(^6\). In 1825 in *The Antelope\(^7\)* the doctrine of the equality of states was judicially recognised in ringing terms: "No principle of general law is more universally acknowledged than the perfect equality of nations."\(^8\) This emphasis upon the freedom and independence of sovereign states was revisited and reinforced on the theoretical level in the nineteenth century by Austin in his lectures on jurisprudence. In detailing the distinction between positive law and morality, Austin explicitly recognised the fact of the equality of sovereign states when he wrote: "... no supreme government is in a state of subjection to another"\(^9\). Then, on the definition of sovereignty, he expanded further on the issue of equality between independent political societies. "A natural society, or a society in a state of nature, is composed of persons who are connected by mutual intercourse, but are not members sovereign or subject, of any society political."\(^10\) According to Austin, those who live in such a society do not live in a positive state, that being a state of subjection, but in a negative state which is a state of independence. After acknowledging the commonly held belief that a group of independent political societies is in a state of nature when considered both as an entire community and from the perspective of inter-societal relations, Austin then proceeded to reconstruct that belief based on the distinction previously drawn between positive and negative states. For him, each independent political society could not be in a state of nature since the members thereof formed a society political – they lived in a positive state. Nor, for that matter, could the community formed by the mutual intercourse of the independent political societies be termed a natural society. "Speaking strictly, the sovereign and subject members of each of the related societies form a society political; but the sovereign portion of each of the related societies lives in a negative condition which is styled a state of independence"\(^11\).

### 2.2 RELATIVE SOVEREIGNTY

In mutual intercourse between states, the influence of sovereignty is all-pervasive, often perceived as being invoked more recognisably "in terms of supreme power ... than of rights recognised by law".\(^12\) A common circumstance in which sovereignty assumes high visibility in inter-state relations is when the political elite rely upon it to resist attempts by other states and organisations to influence matters which that elite considers to be exclusively within its own prerogative.\(^13\) In such circumstances, it is more often than not a question of the retention and continued exercise of power, a basic human failing as some would have it, by political elites jealously guarding the status and privilege which power so often confers. Viewing sovereignty from such a perspective sees the concept located in terms of supreme power relations which are

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\(^{6}\) Brierly (1963), 37 - quoting Vattel (1758) "Introduction".

\(^{7}\) The Antelope (1925), 23 US (10 Wheat.) 66.

\(^{8}\) Ibid, 122.

\(^{9}\) Austin (1885) – quoted from Lloyd (1959), 143

\(^{10}\) Ibid, quoted from Lloyd (1959), 148.

\(^{11}\) Ibid, quoted from Lloyd (1959), 149.

\(^{12}\) Jenks (1969), 133.

\(^{13}\) Palmer (1992) (8), 271.
not infrequently traceable ultimately to the ambitions of individuals as opposed to those of societies. For example, Jenks being one who so locates sovereignty, has described its invocation by governments
"as a determined, unreasoning and at times highly emotional rejection of any external restraint or criticism. They have not substituted a rational or a traditional ideology of sovereignty. They mean red blooded, and all too often, red clawed, sovereignty, sanctified lawlessness, a juristic monstrosity and immoral enormity.".14

While there can be little serious argument that history provides any number of examples where such an emotive description as that offered by Jenks can be justified, sovereignty at the beginning of the twenty-first century no longer has only the power-hungry profile drawn by Jenks. On the contrary, in its evolution, sovereignty has had to become a more pliable concept to meet the demands of inter-state intercourse in a political environment of ever increasing complexity and subtlety. A multitude of factors, ranging from the purely economic to the social, have progressively impacted on inter-state relations in a way which has forced states to disregard Jenks’s absolutist version of sovereignty in favour of a relativistic notion. Historically, the process began in the eighteenth century with the coining of the consent theory, one of the earliest versions of which was developed by Vattel.15 By the following century, the consent theory had achieved wide currency. In essence, it was a theory which had it that a sovereign state could only become subject to external authority if that state itself resolved so to do. Perhaps the best articulation of the theory is that made by Chief Justice Marshall in the Schooner Exchange v. McFadden:

"The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its own sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction."16

As an explanation of the subordination of states to external authority, the consent theory was found wanting.17 Notwithstanding, it did for a time provide a certain logic to the fact of state subordination to international rules of order. In so doing, it facilitated the next stage in the evolution of the concept of sovereignty. That stage was marked by the development of the doctrine of "relative sovereignty" in the first quarter of the twentieth century. Once again, the nature of the doctrine is captured in a judicial pronouncement:

"The function of sovereignty in a state is neither unrestricted nor unlimited. It extends so far as the sovereign rights of other states ... a state may not claim more than such independence

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14 Jenks (1969), 133.
15 Vattel (1758).
16 The Schooner Exchange v. McFadden, 11 US (7 Cranch), 116 at 156 (1812).
17 Summarised, the many criticisms of the consent theory reduce to the following:
(a) Affirmative consent to the minutiae of modern international rules is simply not plausible;
(b) The consent theory fails to explain the consensus as to the incapacity of states to withdraw consent; and
(c) States in practice adhere to law not out of a specific will to do so but out of a perception of its inherently obligatory character.
- refer Larson and Jenks (1965), 336.
and liberty as is compatible with the necessary organisation of humanity, with the independence of other states, and with the ties that bind states together.\textsuperscript{18}

This is, of course, a concept of sovereignty which is a far cry from the supreme power described by Jenks in 1969. It is one which suggests a maturity in inter-state relations that the Jenks version implicitly denies. When viewed from a contemporary perspective of state practice, there is more than a grain of truth in the statement that "no state is entitled to invoke the plenitude of its internal sovereignty ... as the basis for freedom of action, unrestrained by law, in the international arena. By the very nature of international society, by the mere fact that no state is entire of itself, by the interdependence which is as inherent in the coexistence of states as it is in the social nature of man, every state is bound by the law of nations ...".\textsuperscript{19}

Understood in the relativist terms of its current manifestation, sovereignty has acquired a fluidity which enables it to adapt and change to the varied exigencies of inter-state intercourse. One definition which captures this quality is that contained in Brierley: "[Sovereignty] is merely a term which designates an aggregate of particular and very extensive claims that states habitually make for themselves in their relations with other states".\textsuperscript{20} It may well be that when originally written, the reference in this definition to "particular and very extensive claims" was intended to encompass a well settled range of claims which were recognisably an accepted feature of inter-state relations. However, at the beginning of the twenty-first century it cannot be said that from inter-state relations there can be distilled a set of particular and extensive claims habitually made. On the contrary, in some spheres of inter-state intercourse, states have selectively subordinated portions of their internal authority to external standards or control. The result of such subordination is that the concept of sovereignty can no longer be seen in the relatively absolute form in which it was originally conceived. An instance of this subordination appears in some of the General Agreement for Trades and Tariffs (GATT) documents: For example, the GATT agreement creating the World Trade Organisation which, by Article XVI (4), requires each member to "ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements".\textsuperscript{21} On one perspective, such a requirement amounts to a surrender of a substantial portion of sovereign control by those states which are party to the agreements.\textsuperscript{22} Accepting for the moment that this is so, then the utility of Brierly's definition of sovereignty can be clearly demonstrated. Without any modification it can tolerate a sovereignty which in scope does not include the power to enact laws and regulations and adopt administrative procedures that are inconsistent with an obligation assumed in inter-state relations. The aggregate of the particular and extensive claims habitually made simply no longer includes those expressly excluded by the GATT agreement. There is, of course, one obvious difficulty in interpreting the provisions of the GATT agreement as implicating a surrender of sovereignty \textit{simpliciter}. This is a difficulty which emanates from the

\textsuperscript{18}El Salvador v. Nicaragua (Central American Court of Justice) (1917) 11 American Journal of International Law, 674, 718.
\textsuperscript{19}Larson and Jenks (1965), 11.
\textsuperscript{20}Brierly (1963), 47.
\textsuperscript{21}Reprinted in (1994), 33 International Legal Materials, 1144.
\textsuperscript{22}Taylor (1998), 114.
fact that it is possible to construe a state's entry into an international arrangement such as the GATT agreement as involving no diminution of sovereignty "because states freely join such cooperative arrangements and ultimate authority remains in the hands of each state".23 Drawing attention to this difficulty suggests that perhaps the nature of the particular and expansive claims by which the parameters of sovereign control are set may be less legal than political. It also draws attention to the fact that it is possible to define sovereignty in terms of legal authority or constitutional independence on the one hand and then, on the other, in terms of legitimacy and patterns of governance.

The former definition emphasises the five elements of sovereignty which international law is said to promote. These elements have been identified as24 "State 'independence', 25 "State 'equality', 26 "State 'autonomy', 27 "State 'impermeability', 28 and "State commitment to its national interest".29 While doubts have been expressed over whether sovereignty is a sufficiently coherent concept to admit definition,30 there can be no doubt that in practice these five constitutive elements determine the fundamental notion of sovereignty.

The latter definition emphasises the operational aspects of sovereignty, that is, the exercise and practices of sovereignty wherein the claims which states make for themselves in their relations with other states are changed and adapted as the circumstances of inter-state relations warrant. Thus, it is in this operational dimension of sovereignty that its relativisation occurs.

2.3 SOVEREIGNTY AND THE REGULATION OF INTER-STATE RELATIONS

As noted in the previous section, sovereignty is a relative concept. Despite its relativity, however, sovereignty does favour state autonomy in the context of environmental issues.31 As such, it does present a challenge to the adoption and implementation of international environmental controls. In the context of the adoption and implementation of vessel source

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25 "An entity that is not separated from, independent of, every other State is not a State." - ibid 130.
26 "The equality of States - equality of status and of rights and duties - is an axiom of the State system and of international law." - ibid 130.
27 "Law recognises, respects and promotes a State's authority to make decisions without external constraint or limitation, except those to which it has consented. International law itself is a limitation on State autonomy, a limitation to which the State has consented." - ibid. Where a state acts in disregard of international rules, it implicitly asserts an autonomy which it considers to be not limited in the manner described.
28 "The law requires other States in the international system to relate to the State as a whole, as a monolith. Except as the State has agreed otherwise, other States may not penetrate its territory, its society, its political-legal system." - ibid 131.
29 That is, national interest "as the State sees it. State autonomy and impermeability imply the right of a State (not of others) to determine its national interest; to further that interest, not the interests of other States; to promote its own values as it determines them, not the values of other States or values determined by other States." - ibid.
31 See Section 2.4 below.
pollution controls, that challenge frequently is referable to the reluctance of flag States to cooperate in setting rules and standards to control such pollution.\textsuperscript{32} To understand the force of that challenge it is instructive to now examine sovereignty from a legal perspective, and to begin the examination with four basic propositions concerning sovereignty which provoke little, if any, serious argument:

1. Sovereignty is the right of a state "freely and at its own discretion to decide its internal and external affairs without violating the rights of other states or the principles and rules of international law.

2. "A sovereign state must not in its international relations behave in an arbitrary fashion, without taking into account the generally recognised principles of international law and the international undertakings which it has voluntarily assumed. To do so would violate the principle of sovereign equality of all the members of the international community. It would undermine the international community and lead to unlimited rule of force and violence.

3. "Entry into an international organisation or the conclusion of a treaty" involves "certain obligations which are to an extent a restriction" on sovereignty.

4. "The violation or arbitrary unilateral repudiation of freely assumed undertakings cannot be justified by reference to sovereignty."\textsuperscript{33}

From these propositions, with their unmistakable emphasis on international law, sovereignty presents as a concept which is both constituted, reinforced\textsuperscript{34} and limited by that law.\textsuperscript{35} Thus subordinate to law, sovereignty assumes a status quite different from the notion of supremacy normally suggested by the terms "sovereign" and "sovereignty". No longer on this perspective an absolute construct in inter-state relations, sovereignty becomes a more variable element. Its profile is dependent upon the nature and extent of the obligations undertaken by states from time to time within international law. It is this lack of supremacy over international law\textsuperscript{36} which conduces to a notion of sovereignty that is relative – this in the sense that of necessity there must be in orderly inter-state relations "reciprocal limits to sovereign rights in a society of sovereigns"\textsuperscript{37} and that these limits must be determined by international law. Such a conception of sovereignty raises a number of fundamental questions about international law, in particular,

\textsuperscript{32} de La Fayette (2001), 156.
\textsuperscript{33} Kojachevnikov (Ed.) "International Law" Institute of Law of the Academy of Sciences of the USSR - quoted from Jenks (1967), 5.
\textsuperscript{34} See Litfin (1998) who wrote that

"legal sovereignty, a key element of external sovereignty, is paradoxically reinforced by international law, including environmental treaties, even as states' autonomy of action is circumscribed, because only states can be parties to treaties. In legal terms, then, every international environmental agreement simply fortifies and reproduces the constitutive principle of sovereignty - 5-6.
\textsuperscript{35} See also Kingsbury (1994), 37.
\textsuperscript{36} Charney (1993), 540.
\textsuperscript{37} Smith (1988), 70.
questions relating to its community, its sources and its effectiveness. It is in answering these questions that a perspective on international law's influence on inter-state relations is revealed.

From the outset it should be made clear that the three separate questions referred to all connect to the concept of system in inter-state relations and in so doing bring to the fore the notion of community to which the first question is specifically directed.

What, then, is law's community in inter-state relations? Is it a cohesive association of equal but politically autonomous states all seeking to regulate themselves by law, or is it a number of equal but politically autonomous states attempting, with varying degrees of commitment, to create a cohesive association through the regulatory control of law? Intuitively, it would seem that the latter of the two alternatives offers a more realistic conception of law's community in inter-state relations.

Historically, the international legal system emerged from pre-existing factual relationships between states which, as centres of power, had tended "to see will and force as the natural poles of their struggle to survive". This tendency predisposed to a certain instability and unpredictability in inter-state relations. The effects of this instability and unpredictability over time compelled states to seek to devise a means whereby restraint could be introduced into their relationships with each other. It was in this communality of interest in mutual restraint to reduce conflict and promote order that the international legal system had its beginning. Thus, within the inter-state system, law evolved more as "a restraint upon authority, rather than the command of authority; its purpose and function [was] to limit rather than to reinforce political and economic power". However, in such evolution, common interest in mutual restraint proved to be a less compelling influence than that of sovereignty conceived in terms of power, control, authority, territoriality, autonomy, non-intervention and recognition and hence as a source of rights and entitlements.

Originally, the system was constructed on the basis of horizontal relationships between sovereign states which were at once the creators of law and the addressees of that law. As a system, then, emanating from the free will of states, its development and preservation depended to a very large extent upon the common interest which states had in maintaining order through its instrumentality. Consistent with the fundamental notion of the sovereignty of each state, equality would subsist between states in their relations with each other. Hence, order would be maintained not in the vertical dimension, as in the case of individual states, but through voluntary participation and restraint on the part of states entering the system. The evolution of the system in this manner has led to the view that the international community is a man made construction, that is, it is a community solely by reason of the fact of its regulation through the system which has been developed. Obedience to the norms and rules of the system, even though that obedience might be voluntary, is said to constitute evidence of the existence of an

40 Jenks (1957), 4-5.
42 Tomuschat (1993), 234-236.
organised community.\textsuperscript{43} Such a community is, of course, quite distinguishable from "an organic community"\textsuperscript{44} in which the primary identity of the members is with one another as a social unit rather than as autonomous personalities.\textsuperscript{45}

How, then, are the norms and rules of the system created, and how are they engaged to "maintain order, prevent and resolve conflicts, and assure justice in the distribution and use of resources"\textsuperscript{46} between their creators and addressees?

2.3.1 The International Legal System

The mechanisms by which the norms and rules of the system are created are commonly referred to as the "sources of law".\textsuperscript{47} These sources extend, by virtue of Article 38 of the Statute of the International Court of Justice, from international Conventions and international custom through the general principles of law recognised by civilised nations, to judicial decisions and the teachings of publicists. Of these sources, the first two are particularly relevant to the present discussion. Their relevance lies in the methods by which they are created.

However, before embarking on an examination of the methods by which international custom and international Conventions are created, it is necessary to clarify an issue which relates to differences between developed states and developing states. On the matter of environment and development, developed states and developing states typically hold opposing views. That such is the case is significant, both with respect to state attitudes towards sovereignty, and to the creation of the system’s environmental norms and rules generally. Also, it is particularly significant in the context of vessel source pollution control. As indicated above, most of the flag States with the largest fleets are developing states.\textsuperscript{48}

2.3.1.1 Developed and Developing States

For developing states, accelerated development is almost universally held to be an imperative, in the execution of which autonomous control is a core demand.\textsuperscript{49} It was just this demand which

\begin{itemize}
  \item \textsuperscript{43} Franck (1988), 711.
  \item \textsuperscript{44} League of Nations O.J. Spec. Supp. 120 at 23 (1933).
  \item \textsuperscript{45} Morgan (1988), 364.
  \item \textsuperscript{46} Shelton (2000), 7.
  \item \textsuperscript{47} For example, Brownlie (1990).
  \item \textsuperscript{48} See the Introduction to the thesis above.
  \item \textsuperscript{49} Friedheim (2000) - "...for most of the developing World, their priority for the 21st century will remain what it has been for the twentieth century - development. Leaders (sometimes in misguided ways) and the peoples of developing countries desire the material benefits enjoyed by the developed: typically they seek to achieve those benefits while hoping to hold onto the core of their own distinctive beliefs and practices. This will mean more extraction of resources from the natural world to be devoted to human welfare. It will mean more land degradation, more (and more intensive) uses of the oceans, more forests reduced, more urbanisation. It also means more people, as populations rise after improvements in public health measures." - 290-291.
\end{itemize}
was to emerge as a major concern of developing states at the 1992 United Nations Conference on the Environment and Development (UNCED) held at Rio de Janeiro. Here the fear articulated by developing states was that their control, not only over resources, but also over development efforts, could be lost. "This fear was inspired by UNCED's acceptance of sustainable development which, although not a clearly defined legal concept, could be construed to have certain legal implications, such as subjecting national development activities to international scrutiny." 

This demand for autonomous control over development collides head on with efforts to rehabilitate, protect and preserve the marine environment. This collision is caused from a belief, widely held by developing states, that the environmental concerns pressed by developed states constitute a potential threat to their sovereignty and to their growth and development aspirations. Thus, proposals to address the environmental concerns of developed states are viewed with intense suspicion, not only because of the cost-driven curtailment of economic development seemingly implicit therein, or the neo-imperialist gloss placed thereon, but perhaps also because they are seen as a deliberate renunciation of maximum economic progress in order to attain a [now] different view of the ends of human life to which [all societies] should

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50 It should be noted that in the international negotiating process, developing states are generally at a disadvantage in securing support. The reasons for this include insufficiencies in resources, expertise, organisational structure, administrative support and political influence - Molenaar (1998), 29-30.

51 Schally (1993), 41.

52 Friedheim (2000) - "But from the first UN Law of the Sea Conference in 1958, Third World Governments have made it clear that they see some developed-state environmental thrusts as threats to their sovereignty and resources and are determined not to have a fundamentally developed-state approach to environmental issues create obligations for them. They have fiercely defended their right to the exploitation of their resources in substantive provisions of agreements such as the Law of the Sea Convention ... This North-South dimension can be expected to be a subtext, at least, and perhaps at the very center of most environmental interactions in the first third of the twenty-first century." - 292-293. Flag States, especially those which are developing states, "are very jealous of what they consider to be their 'sovereignty'" - de La Fayette (2001), 223.

53 Leonard and Morell (1981), 283 - citing "Development in Environment", A Report and Working Paper Submitted by a Panel of Experts Convened by the Secretary General of the United Nations Conference on the Human Environment at Founex, Switzerland, June 4-12 1972, which recorded third world concerns as follows: 1. That their trade would be adversely affected as developed countries adopted lead and sulphur standards for fuel, and purity standards for a whole host of other products; 2. That the high cost of environmental clean-up and protection programmes in the developed countries might significantly reduce the amount of aid available for development assistance; 3. That the capital costs of development would increase as developed countries established new standards for practices and technology being transferred to the developing world; and 4. That the infusion of sophisticated pollution control technologies would not only add to development costs but would worsen the problem of inappropriate technology already facing them - 11-12; See also Caldwell (1990) - "Because environmental concern was strongest among the more developed nations, suspicion arose among third world or less developed countries that the [environmental] movement concealed a neo-imperialistic scheme to retard their economic growth and to keep them subservient suppliers of underpriced raw materials and consumers of the industrial output of North America, Western Europe and Japan." - 48. See also Kiss and Shelton (2000) - "Developing countries often see increased efforts to implement stringent environmental safeguards across boundaries as creating new non-tariff trade barriers or at least as imposing significant costs and constraints on production processes or products, resulting in a loss of competitive advantage." - 628.

54 Prior to the Stockholm Conference in 1972, many developing states considered that environmental degredation and its remediation were largely the responsibility of rich, industrialised countries. At Stockholm the environmental costs of industrialisation were ignored by those developing states which were intent on becoming industrialised. Such states "also suspected that wealthy nations of the north subordinated foreign economic development to environmental protection, considering the former less urgent than pollution and nature protection. Some feared that funds previously dedicated to development would be diverted to fight environmental deterioration". - Kiss and Shelton (2000), 624.
that excluded the states and states.

disparities of economic order, reserved by redistributive capacity; that there is that increasing, between developed and developing states and those in developing states.

Popularly referred to as "the north-south conflict", the tensions between developed and developing states can be interpreted as a conflict between environmental values on the one hand and development values on the other. Such an interpretation, however, does little to suggest the merit, depth and complexity of the issues involved. Briefly stated, the position of developing states is that the broad disparities are inherently unjust and inequitable; that justice and equity can only be achieved if wealth, income and power are redistributed in their favour; that the international economic system does not promote equality of opportunity and does not have redistributive capacity; that there is extreme injustice in the fact that a desirable quality of life is reserved for but a small fraction of the world's population while the vast majority endure the privation and hardship of a poor quality of life; that such injustice is made all the more abhorrent by the fact that the quality of life enjoyed by the few has been achieved at the direct expense of the many; that under the present system the disparities are increasing rather than diminishing; that the system, in particular the market forces that are a part of the system, do not operate in the same manner for both developed and developing states; that developing states are largely excluded from international economic decision making; that the system, which is seen as being primarily the creation of Western developed states, sustains the injustice and inequity; that in consequence thereof a new system must be designed and implemented—a new international economic order.

For their part, the developed states accept that the disparities are undesirable and that some redistribution of wealth, income and power is merited. That, however, is as far as agreement between the developed states and the developing states extends. There are few, if any, points of agreement with respect to the causes of the disparities and the means whereby greater equity

55 Stewart (1977), 1217.
57 Caldwell (1990), 56. Recent evidence of the continuing existence of this conflict can be found in the response of Brazil to the proposal by Belgium, France, Germany and Spain to amend MARPOL consequent upon the sinking of the oil tanker Erika in 1999. The amendments as proposed would impose considerable expense upon flag States operating oil tanker fleets. Although the extremely adverse impacts on the marine environment caused by the oil tanker Erika incident were acknowledged, it was the prospect of such expense which moved Brazil to raise "a concern about the necessity of not imposing losses to the developing countries oil tanker fleets, or transferring excessive economic impacts to their society". - IMO Doc. MEPC 45/7/19 1.9.2000, page 2, para 5.

58 An insight into the extent of these disparities is given in Kiss and Shelton (2000) - "Developing countries contain more than three-quarters of the World's population, and 90 per cent of the estimated population increase during the next quarter-century is projected to occur in the urban centres of the World's poorest countries. At the same time, developing countries account for only 30 per cent of the World income and the income gap continues to widen. Over half the developing countries experienced declines in per capita gross domestic product during the early 1980s, with an overall decline of 10 per cent occurring during the decade. Average per capita income fell by 3 per cent per year in the sub-Saharan Africa or as much as 25 per cent over the decade, while Latin America suffered a loss of over 10 per cent. The polarisation of rich and poor increased, with a number of absolutely poor, those 'too poor to obtain a calorie-adequate diet,' increasing to over one billion; one out of every four or five persons in the World struggles to
might be achieved. Justifying their more fortunate circumstances on such qualities as their enterprise, organisation, skill and technology and on the free market system, developed states reject the exploitation argument advanced by developing states. From their perspective, no change is required to the system. Instead, the solution lies in the developing states, with some assistance, pursuing economic growth in a manner more or less consistent with that which enabled the developed states to achieve their more fortunate circumstances. In the view of the developed states, this necessarily involves societal reorganisation in developing states since it is considered that their current social organisation obstructs rather than facilitates economic growth. As to the system itself, developed states believe in the maintenance of existing international legal and institutional arrangements – this on the basis that it was these arrangements which assisted their economic growth and accordingly these same arrangements should do likewise for developing states. Interference with the system and its free market principles courts the risk that the overall situation will deteriorate rather than improve.69

Against that background, then, it should come as no surprise that relationships between states are generally coloured in some measure by "suspicion, nationalism, fear, pride, aggression and ignorance of ... others' motives" – hardly a recipe for cooperation on environmental issues, particularly when account is taken of the pursuit of comparative advantage in the interests of development.62 With states geared towards individual economic gain in an intensely competitive environment in which capital mobility is a defining feature, the pursuit of economic self-interest and strategic advantage is the dominant, if not the only, rational tactic, tempting, if not encouraging, states to "make environmental standards a possible element of comparative advantage".64 In the case of some flag States which also are developing States, environmental standards have been made an element of comparative advantage in their attempts to attract vessel registrations and to optimise the foreign exchange income which such registrations generate.

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62 In economics, one definition of comparative advantage is as follows:

"Comparative advantage A person has a comparative advantage in producing a good if he or she can produce that good at a lower opportunity cost than any one else. A country has a comparative advantage in producing a good if it can produce that good at a lower opportunity cost than any other country" - Parkin (1994), 1059.

63 Weiss (1993) (B), 2124.

64 Stewart (1993), 2061. This is a tactic which cultivates mutual antagonisms and conflicts in interstate relations, and relegates environmental cooperation to the status of an exception - Hurrell and Kingsbury (1992), 4-11.
With these insights, then, it is now appropriate to examine the methods by which customary rules and treaties are respectively created.

2.3.1.2 The Customary Rules

The customary rules of international law are rules which evolve through the practices and usages of states. That which differentiates a mere practice or usage from customary law is "a general recognition among states of a certain practice as obligatory". Whether a practice or usage attains the status of a customary rule is usually determined by reference to certain criteria, namely, duration, uniformity and consistency of practice, generality of practice and, finally, opinio juris sive necessitatis. As to the first of these criteria, it suffices to say that there is no definitive time threshold which must be crossed before a particular practice or usage becomes customary law.

The second criterion, namely uniformity and consistency of practice, requires that the practice or usage must be constantly and uniformly practiced by the states in question. This does not mean that there must be complete uniformity – substantial uniformity will suffice.

Next, the generality of practice, a criterion which in effect complements that of consistency, requires not that the practice be universal, but that it be widely and generally accepted.

Finally, the criterion of opinio juris requires that the practice or usage be motivated by a sense of legal obligation and not merely of comity, by a "conviction that the [recurrent practice or usage] is the result of a compulsory rule". This criterion is subjective, a psychological element that involves a belief on the part of the states concerned that conformity with the practice or usage "is rendered obligatory by the existence of a rule of law requiring it".

In the view of many authors, one consequence of a practice or usage having become a rule of customary international law is that it will bind all states irrespective of whether or not they have expressly or impliedly consented to the rule. The argument is that once customary rules come into existence, states must be bound "and even more strongly than by treaty [since] the generality of customary law makes it nearly impossible for a state or a group of states to repudiate completely an existing custom which binds other states". This is not, however, an argument which is uncontested.

65 Brierly (1963), 61.
66 Brownlie (1990), 5.
67 Colombian-Peruvian Asylum Case (1950), ICJ Reports 266, 276-277.
68 Brownlie (1990), 5.
69 Ibid, 6.
71 Birnie and Boyle (1992), 15.
72 Judge Negulesco of the Permanent Court of International Justice, Pub. PCIJ (1927), Series 13, No. 14 at page 105.
73 North Sea Continental Shelf Cases (1969) ICJ Reports 3, 44.
75 Pellet (1992), 38.
Traditionally, customary rules have emerged through a formative process which does not claim to be inclusive, but purports to create an outcome which is claimed to be inclusive. Thus, in creating a customary rule of international law, the process does not require that all states actively and knowingly participate. On the contrary, customary law is most commonly made by a few interested states for all states.\textsuperscript{76} There is no requirement, either in principle or in practice, that customary rules require the consent or acceptance of all those intended to be bound thereby.\textsuperscript{77} The only acceptance which is required is that of "the international community".\textsuperscript{78} The necessity for such acceptance raises a number of issues.

The process by which customary law is made is generally said to be opaque.\textsuperscript{79} It is a process in which custom is transformed into law "silently, unconsciously and without proclamation".\textsuperscript{80} Not signalled by any formalised procedures but emerging from an accumulation of largely similar acts,\textsuperscript{81} customary law is created in a process which is exclusively reserved to states. If, as is claimed, the process of creating universally binding customary law is based on a principle of majoritarianism, then it would be reasonable to assume that states would accept without dissent the mechanics of the creative process. This would be so even though episodic issue might be taken from time to time with specific customary rules and despite the occasional breach of such rules. The problem, however, is that this is not the case.

As might be expected, the dissent which states articulate revolves around the issues of consent and participation seen against a background of the sovereign equality of states. On the consent issue, there is a view, of which the Soviet theory of international law was perhaps the best representation, that a rule of international law "can only result from a consensus or agreement among states".\textsuperscript{82} Although this view was subsequently modified by the elimination of any reference to agreement, substituting instead the requirement of "individuopio juris"\textsuperscript{83} the end effect in Soviet theory remained the same, namely "that a state, in order to be bound, must have given its individual consent".\textsuperscript{84} While justification for the argument that customary law should be binding on all states irrespective of consent can be found in the need for order and predictability in inter-state relations, the consent theory is equally not without merit. Aside from the principle of sovereign equality, to which recourse is commonly had to support the consent theory, political considerations offer what might be an even more compelling basis for the theory. These considerations derive not so much from the day-to-day vagaries and perceived necessities of intra- and inter-state politics but more from the actual origins of customary law in which two aspects, particularly relevant to the present argument, inhere. The first is that customary law originates from practices and usages. The second is the matter of participation to which a prefatory reference has already been made.

\textsuperscript{76} Charney (1993), 538.
\textsuperscript{77} Tomuschat (1993), 277.
\textsuperscript{78} Restatement (Third) Paragraph 102 (1) of the Foreign Relations Law of the United States (1987) which describes international law as "accepted ... by the international community of states".
\textsuperscript{79} Henkin (1989), 60-61; Schachter (1982), 35-36.
\textsuperscript{80} Fischer Williams (1939), 44 - quoted from Starke (1963), 37.
\textsuperscript{81} Tomuschat (1993), 284.
\textsuperscript{82} Danilenko (1988), 11.
\textsuperscript{83} Danilenko (1993), 103-109.
\textsuperscript{84} Tomuschat (1993), 283.
Practices and usages are generally driven not by legal imperatives but by considerations which are essentially political. Similarly, their conversion into law also requires political mediation — this particularly in the requirement of *opinio juris sive necissitatis*. With political influence so permeating origination and transition into law, logically it would seem to follow that any state should have an equal political right to insist that its consent be required before it can be held bound to any given rule of customary international law. Support for this approach can be found not only in the International Court of Justice but also in the work of publicists, and in the Restatement (Third) of the Foreign Relations Law of the United States. This support has crystallised into what has been termed the persistent objector rule. This is a rule which, as expressed in the Restatement, has it that "[i]n principle, a state that indicates that it dissents from a practice while the law is still in the process of development is not bound by that rule, even after it matures". According to Brownlie, this rule "is well recognised by international tribunals, and in the practice of states" and that "[g]iven the majoritarian tendency of international relations, the principle is likely to have increased prominence". Of course, the rule is not without its detractors. However, the mere fact that it is recognised and can be asserted provides clear evidence of a measure of opposition to any mechanism which purports to create universally binding rules. In allowing states to opt out of rules, even where those rules have been created by a majority, the system reinforces sovereign autonomy. As will be seen in Part III below, this right of objection is particularly relevant to the position taken by Liberia on the matter of the enforcement authorities in Part XII of UNCLOS. In Part III it will be demonstrated that, in response to the claim made at the IMO that these enforcement authorities now have the status of customary law, it is open to Liberia to argue, on the basis of the persistent objector rule, that they are not opposable to it.

The second matter, namely participation, is a vexed issue, given that it has both historical and contemporary implications. On a contemporary perspective, participation not only interfaces directly with the consent issue, but it also involves a physical numbers dimension in which principle and practice seem to diverge. Based on judicial statements of principle, it would seem that the level of participation necessary for the creation of rules of customary law should be fairly extensive. For example, in West Rand Central Goldming Co. v. R., the Court stated that the level of acceptance to establish a rule of customary law must be so wide and general that repudiation by any civilised state could hardly be supposed. Then later, on the same issue, the International Court of Justice in the North Sea Continental Shelf Case noted that "state practice, including that of states whose interests are specifically affected, should have been both extensive and virtually uniform". The clear import of these statements is that in principle the elevation of a factual practice or usage to a rule of customary law requires a wide and

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85 For example, Colombian-Peruvian Asylum Case (1950), ICJ Reports 266; Anglo-Norwegian Fisheries Case (1951), ICJ Reports 116; Fisheries Jurisdiction Case (UK v. Iceland) (1974), ICJ Reports 3; and (Federal Republic of Germany v. Iceland) (1974) ICJ Reports 175.
86 Wolfke (1993), 66.
87 Brownlie (1990), 10.
88 Restatement (Third), 26, Comment on Para. 102 (2).
89 Brownlie (1990), 10, footnotes omitted.
90 For example, Charney (1993), 538-542.
92 West Rand Central Goldming Co. v. R., [1905], 2 K.B. 391.
93 Ibid, 407.
94 (1969), ICJ Reports 3.
95 Ibid, 43.
representative participation amongst those states on which the prospective rule would be binding.

From this principle, however, practice diverges. Given the essential nature of customary law, it matters enormously how the nations whose activities would be under the regime of a normative precept behave whilst that precept is developing through the factual phenomenon of practice.\footnote{Tomuschat (1993), 280.} Thus, logically it could be expected that the behaviour of all states affected would be immediately relevant to the project of establishing whether a practice had become law. This expectation is not, in fact, met in practice, since authorities, when examining the evidence necessary to establish customary law "consider [the] actions of a limited number of states, often only the largest, most prominent, or most interested among them. The awareness and opinions of other states that take no overt position are rarely considered."\footnote{Charney (1993), 537.} This state of affairs has led to the perception that customary law is law made for all states by a few established interested states.\footnote{Ibid., 538.} On this issue, the claim of customary law status for the enforcement authorities in Part XII of UNCLOS is a relevant example. In Part III below, it will be seen that this claim has been made without taking account of the views of Liberia. As one of the largest of the flag States, Liberia has a particular interest in whether these enforcement authorities should be regarded as customary law. It is not a party to UNCLOS. Accordingly, it contends that its flag vessels should not be subjected to the enforcement authorities contained in Part XII of that Convention. However, in an attempt to ensure that Liberian-registered vessels are subjected to these enforcement authorities, customary law status for them has been claimed at the IMO. That such a claim is not sustainable will be argued in Part III below.

When participation is viewed from the historical perspective, the full extent of the difficulties associated with it becomes apparent. Despite the fact that the rules of customary law are characterised by a high degree of generality which predispose to a certain fluidity in their scope of application,\footnote{Tomuschat (1993), 277.} many developing nations refuse to consider themselves bound by such rules.\footnote{"Developments" (1991), 1505.} They regard customary law as a product of the power which developed states have been able to exercise in inter-state relations.\footnote{Reisman (1988), 377.} More particularly, they consider such rules "as relics inherited from the wealthy, powerful states of a bygone era of colonialism and imperialism".\footnote{"Developments" (1991), 105 - citing Chen (1989), 406.} This perception, when coupled to the fact of non-participation, provides the foundation for the position taken by developing states on the matter of compliance with customary law. Built upon this foundation, particularly in the context of international environmental customary law, is the suppression issue. Developing states consider that the application of customary law to the problem of trans-boundary pollution inhibits their industrial growth. Thus, when developed states seek to apply customary law to such problems, their attempts in that regard are interpreted by developing states as being directed to the suppression of economic growth and hence to the continued subjugation of the developing world. This interpretation leads developing
states to assert their own sovereignty as a dominant strategy and to emphasise "the importance of persistent objection in preventing the crystallisation and application of particular customary rules".\textsuperscript{103} In the case of Liberia, assertions of sovereignty and persistent objection are particularly relevant to its response to the claim of customary law status for the enforcement authorities in Part XII of UNCLOS.

Against this background, to insist that customary rules of international law either are or should be binding reinforces sovereignty as a source of rights and entitlements, especially the right and entitlement for states to be "free to act as they find necessary, unrestrained by any external authority or rules".\textsuperscript{104} to be immunised "against domination or influence by outside cultural, economic, or political forces ...".\textsuperscript{105} In consequence of this reinforcement, the notion that states should have responsibilities towards each other within the system becomes submerged. Further, an insistence on the binding nature of the customary rules of international law courts the risk of sustaining the division between developed and developing states.

### 2.3.1.3 Treaties

This division spills over into the arena of treaty making where opposing blocs, assisted by the conception of sovereignty as a source of rights and entitlements and by the mechanics of the treaty making process itself, invariably reinforce and sustain their differences.

Treaties are said to be "[e]ssentially ... agreements in whatever form between states, or between states and international organisations, governed by international law".\textsuperscript{106} They are the products of a voluntary process, driven throughout by the unrestrained political discretion of each sovereign state participant. Such discretion, being an incident of the sovereign equality of states, translates into the reality that at all stages of the treaty making process, a state's actions are free from any form of external control or review. A state may, or not, as it alone decides, enter into treaty negotiations, become a signatory to the treaty concluded, subsequently ratify or accede to that treaty, or even denounce a treaty validly entered into. Thus far, no mechanism has been developed within the inter-state system to moderate this discretion. The result is that it is still the case that no state can be compelled to engage in the treaty making process or join a treaty regime unless it actually consents to do so.\textsuperscript{107} As indicated above, to date, Liberia has not become a party to UNCLOS and it cannot be compelled to do so.

That this unrestrained political discretion should prove to be a major obstacle to the construction of binding treaty arrangements should hardly be surprising, particularly when the proposed arrangements are intended to constrain the environmental impact of the economic activities of states. Given the wealth disparity between developed and developing states and the perception

\textsuperscript{103} Birnie and Boyle (1992), 15.
\textsuperscript{104} Faure and Lefevere (1999), 140.
\textsuperscript{105} Deudney (1998), 301.
\textsuperscript{106} Birnie and Boyle (1992), 11.
\textsuperscript{107} Tomuschat (1993), 242.
of developing states that environmental regulation subverts their economic growth objectives, the core protective issues involved in environmental treaty negotiations frequently become submerged by the issues of equity which developing states understandably seek to promote.\textsuperscript{108} These highly charged equity issues, on which the developed and developing states typically take opposing and largely irreconcilable positions, often produce conflict and polarisation. Even when such intense conflict does not manifest in the treaty negotiations, the products of those negotiations sometimes promote conflict.

Although the relativisation of sovereignty is a consequence of the equality which dominates inter-state relations, in the sense that states which are equal must respect each other's rights,\textsuperscript{109} within the treaty making process that equality in practice has the effect of minimising the relativity of sovereignty. That this is so can be seen in the fact that by entering into binding treaty arrangements, states assume, to a certain extent, restrictions upon their sovereign autonomy.\textsuperscript{110} Such assumption of restrictions is generally approached somewhat hesitantly, with the result that only rarely do states enter into treaties which create objectively definitive binding obligations suitable for effective third party adjudication.\textsuperscript{111} More commonly, the preferred approach is to be creatively ambiguous, thereby allowing scope for rational interpretive dissent with the objective of avoiding the imposition of strict obligations.\textsuperscript{112} As will be seen in Part III below, some of the Articles in Part XII of UNCLOS are notable for their creative ambiguity. The reason for such an approach, it is said, is that, typically, government officials harbour a jealous desire to maximise their state's autonomy.\textsuperscript{113} This desire is not, however, a complete explanation for ambiguity in treaties. In negotiating a treaty, state representatives can find themselves caught between two opposing forces. On the one hand, they perceive a need to strive for harmony in their relationships with the representatives of other states with whom they must continue dealing on an ongoing basis.\textsuperscript{114} On the other, their consuming interest in maintaining power\textsuperscript{115} makes them very mindful of the goals and aspirations of their own state constituents.\textsuperscript{116} As has been astutely noted, "[t]he ultimate actor is always the individual human being who may act alone or through any organisation".\textsuperscript{117} In the case of treaty negotiations, particularly those which may possibly have an adverse effect on the economic wellbeing of constituents, the ultimate actors' political instincts may dictate flexibility born of uncertainty. They may therefore reject binding positions which eventually may prove incompatible with more powerful domestic forces that impact on political tenure.\textsuperscript{118} The middle ground between those two opposing forces is often the strategy of being seen to be doing something as opposed to

\begin{footnotesize}\begin{enumerate}
\item[108] For equity as a source of conflict, see Weiss (1993) (A), 702-707.
\item[109] Tomuschat (1993), 237.
\item[110] Jenks (1967), 24.
\item[111] Palmer (1995), 179.
\item[113] Charney (1993), 543.
\item[114] Palmer (1992) (B), 269.
\item[115] Reisman (1988), 376.
\item[116] Aman (1993), 2109; Palmer (1992) (B), 263.
\item[118] This reality has been explained by Robert Putnam in his two level game theory. This is a theory which has it that a state is engaged in separate games at both the international and national levels with the games at each level influencing the other.
\end{enumerate}\end{footnotesize}
actually doing it - "doing nothing is a policy that succeeds more than most". The result, then, is that treaties can often reflect the conflicts which were left unresolved in the process of their creation. In Part II below, it will be argued that such occurred with respect to the jurisdiction provisions in the MARPOL Convention.

2.3.2 Enforcement, Dispute Settlement and Compliance

Despite their conflictual dimensions, customary law and treaties represent the hard core of binding obligations in international law. That being so, it is appropriate to address issues of enforcement and compliance. By addressing such issues, it should be possible to gain an insight into the capacity of the international law to regulate inter-state relations. Does it give reasons for states to comply with its rules of obligations and does it induce in states the expectation that others similarly bound to the rules of obligation will also comply? The significance of this latter issue resides in the fact that state compliance choices are seldom based on solely domestic considerations. They are more often strategic choices contingent upon an expectation of others' independent behaviour.

The relevance of enforcement to inter-state relations cannot be under-estimated "since sovereignty, even equal sovereignty, includes the power not to cooperate with every other state in all circumstances". Thus, the question of whether the system can enforce states to comply with those obligations which they have voluntarily assumed is of particular interest in the present context. Can the system enforce flag States to ensure that their flag vessels comply with the applicable international rules and standards relating to vessel source pollution?

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119 Palmer (1992) (B), 274.
120 Enforcement can be seen in terms of instrumental cooperation. According to Yamagishi, instrumental cooperation provides the means by which cooperation to achieve an agreed objective, such as the elimination of vessel source pollution, might be encouraged. That agreed objective he terms as "elementary cooperation" and argues that the "emergence and maintenance of cooperation among 'nervous' or 'reluctant' cooperators in large groups requires that other members' cooperation be assured in some way other than strategically oriented elementary cooperation. This assurance, that cannot be provided through strategically oriented elementary cooperation, could be provided through instrumental cooperation for introducing a change in the dilemma structure. For example, fear of being exploited by others can be eliminated if a sanctioning system that discourages defection is introduced into the dilemma structure" - Yamagishi (1992), 270. He then argues that the principle purpose of such a sanctioning system is to provide an assurance that those who cooperate will not be exploited by others, rather than to force defectors into cooperation. The former he describes as the indirect effect of the sanctioning system, and the latter its direct effect - Yamagishi (1992), 270.

121 "Compliance includes implementation [i.e. the incorporation of international norms into domestic law through legislation, judicial decision, executive decree, or other process] but is broader, concerned with factual matching of state behaviour and international norms: 'Compliance refers to whether countries in fact adhere to the provisions of the accord and to the implementing measures they have instituted'." - Shelton (2000), 5 - emphasis in original - footnote omitted. "Compliance generally refers to a state of conformity or identity between an actor's behaviour and specified rule. In the international context, compliance is often specified as 'an actor's behaviour that conforms to a treaty's explicit rules'." - Raustiala (2000), 392 - footnotes omitted.
122 Haas (2000), 49.
123 Riphagen (1987), 98.
It is claimed that "the crucible of law, the test of its reality" is enforcement. However, it is a characteristic of international law that it contains very few principles and regulations which states are able to enforce in concrete ways. Known as "lex imperfecta" because of the absence of sanctions, international law, including the so-called hard rules, namely, customary law and treaties, is constructed of obligations which, as a rule rather than as an exception, cannot in the last resort be enforced by any legal process. Such want of remedy for the enforcement of obligations freely undertaken in a sense devalues those obligations. The lack of enforcement mechanisms facilitates the ability of states to formally commit to goals of general benefit when they are in their "Sunday mood", that is, when they ostensibly sacrifice national interest in favour of objectives which are of wider import in inter-state relations. At the same time, there is an awareness that those commitments and the laws in which they are embodied, at least in theory if not in practice, are quite fragile. Made in the knowledge that they can be resiled from with relative impunity, they are in effect "of the moment", susceptible to breach if and when domestic considerations should come to demand. This susceptibility to remediless breach does not, of course, deny the quality of law to those obligations entered into and described as international law. Having said that, however, it must be acknowledged that there are arguments both for and against the proposition that unenforceable rules can properly be regarded as law. Without discussing the respective merits of those arguments, for they are not material in the present context, the rules of international law are accepted for present purposes as possessing the quality of law. Possessing such quality, they are said to exercise "a pull toward compliance by [their] very nature."

Notwithstanding these claims as to the unenforceability of international law, however, the interstate system does have certain mechanisms through which it attempts to promote and maintain state compliance with the law. The mechanisms used in the context of international environmental law are of particular interest for present purposes. However, before reviewing those mechanisms it is appropriate to record the limitations of reciprocity in international environmental regulation and to acknowledge the preventive emphasis which now inheres in such regulation.

It has been said that

"[i]n an international society without institutional strength, bilateral reciprocity has provided an essential guarantee of respect for obligations undertaken, due to the implicit threat of

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125 Bosselmann (1995), 78.
126 Mikus (1988), 394; see also Duruigbo who writes that
"[i]t is a trite fact that international law is chronically weak on enforcement. Speaking in 1924, James Brierly made the following observation that reverberates seven decades later and still has relevance: 'The world regards international law today as a need of rehabilitation ... a prime cause of its weakness is the absence of an effective sanction by which rules can be enforced.'"
127 South-West Africa Cases (1966) ICJ Reports 9, 46.
128 Tomuschat (1993), 238.
129 See, for example, Slaughter Burley (1993).
"The legal status of rules also may influence compliance with them. That is, there may be a powerful norm in favour of compliance with the law because it is law. The status of a commitment as law may implicate norms of obligation flowing from the special role of law as an ordering principle within contemporary societies."
sanctions imposed in the event obligations are breached. With an agreement that contains reciprocal rights and duties, a state violating the treaty rights of another state risks losing benefits under the same agreement." \(^{131}\) Reciprocity as a means by which to induce compliance is not, however, appropriate in the case of treaty regimes designed to protect and preserve the environment. For example, "pollution of the sea ... cannot be sanctioned by reciprocal pollution". \(^{132}\) Thus, in the case of MARPOL, state compliance cannot be secured by suspending or terminating the treaty in the case of material breach, as is envisaged by Article 60 the Vienna Convention on Treaties. Such suspension or termination "would primarily harm the international community, not the defaulting state, and would run counter to a policy of ensuring the widest possible participation in such agreements". \(^{133}\)

As to the matter of preventive emphasis, it is the case that "international environmental law is no longer primarily concerned with reparation for environmental injury but now requires measures to ensure the control and prevention of environmental harm". \(^{134}\) This emphasis, together with the limited role of reciprocity, is reflected in the compliance mechanisms which the inter-state system has adopted with respect to international environmental law.

"It has been asserted that '[the] normal way of inducement of compliance with legal obligations is ... to submit allegations of non-compliance to a Court". \(^{135}\) Thus, the inter-state system offers states the opportunity of referring their environmental disputes to the International Court of Justice, to ad hoc arbitration, \(^{136}\) or, in the case of the marine environment, to the International Tribunal for the Law of the Sea. However, states rarely resort to adjudication as a means of compelling compliance with environmental treaty obligations. \(^{137}\) The reasons for this include: The "multi-lateral character of many environmental problems"; \(^{138}\) a reluctance on the part of injured states to court the risk of creating a "normative boomerang"; \(^{139}\) the fact that judicial proceedings may adversely affect relations between the states involved; and that in any event such proceedings are likely to be complex, lengthy and expensive, involving difficulties of proof by reason of the technical character of many environmental problems and inhering unpredictable outcomes due to the unsettled character of much of international environmental law. \(^{140}\) Instead of adjudication, states prefer "to settle environmental disputes with devices such as friendly settlements which do not attribute responsibility". \(^{141}\) Also of influence with respect to adjudication is the fact that in international law there is no general obligation upon states to settle disputes and that dispute resolution procedures are in any event purely consensual

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\(^{131}\) Kiss and Shelton (2000), 27.
\(^{132}\) Ibid.
\(^{133}\) Birnie and Boyle (1992), 162-163 - footnote omitted.
\(^{134}\) Ibid, 137.
\(^{136}\) Birnie and Boyle (1992), 86.
\(^{137}\) Ibid, 86 and 180. See also Charney (2000), 116.
\(^{138}\) Birnie and Boyle (1992), 86.
\(^{139}\) Brownlie (1991), 123 - given the fact that there are few, if any, states which can deny contribution to the burden of marine pollution, the pursuit of a claim by one state against another, particularly in circumstances where the claimant state is not too dissimilarly situated from the respondent state with respect to sources of marine pollution, may potentially entail the creation of a "normative boomerang" which might at a future date return to expose the claimant state to liability. Understandably, then, states do not readily pursue claims, even in the face of seemingly overwhelming justification.
\(^{140}\) Birnie and Boyle (1992), 136.
\(^{141}\) Kiss and Shelton (2000), 588.
affairs. In the case of the International Court of Justice, for example, states are not bound to accept its jurisdiction as a matter of course. Finally, the latitude given to states to justify breach of obligation makes adjudication a wholly inadequate means of inducing state compliance.

There can be no clearer evidence of this than in the grounds which the International Law Commission has proposed should preclude wrongfulness on the part of a state alleged to have been in breach of an obligation. These grounds are: Consent, force majeur and fortuitous event, distress, counter measures in respect of an internationally wrongful act, state of necessity and self-defence. Subject to the specific terms of each of these grounds "they would be available to justify otherwise unlawful behaviour in all circumstances". These proffered grounds, particularly the latter three, provide a wide latitude for a state, in breach of an obligation, to exculpate itself. By virtue of their intended general application and their inherent scope, these grounds collectively have the potential to neutralise any compliance pull that obligations to which states have engaged themselves may otherwise have had. That such is the case will be demonstrated by a brief analysis of the latter three.

First, counter measures, which the International Law Commission defines as measures "legitimate under international law against another state, in consequence of an international wrongful act of that other state": This ground would elevate retaliation to the status of a legitimate strategy in inter-state relations. Retaliation is a self-help remedy of the very type which is generally controlled by law in a regulated system. Admittedly, the Draft Article does provide that to fall within it, a counter measure is required to be "legitimate under international law". From the perspective of pure logic, this requirement, however, clouds rather than clarifies. The ground is intended to exculpate a state which has committed a wrongful act in direct response to the internationally wrongful act of another state. Given that, the requirement that the retaliatory act must be legitimate under international law would seem to be somewhat illogical on the argument that if the retaliatory act were legitimate, then it could hardly be characterised as wrongful and so necessitate recourse to the exculpatory ground. But even this qualification, as confusing as it is, cannot disguise the fact that retaliation is here being mandated.

Next, state of necessity, the defining and limiting characteristics of which are that "the act was the only means of safeguarding an essential interest of the state against a grave and imminent peril" and "the act did not seriously impair an essential interest of the state towards which the obligation existed". This ground would effectively empower states to disregard obligations in the face of exceptional circumstances. As with counter measures, state of necessity undermines

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142 Brownlie (1990), 708.
143 Glennon (1992), 754-755.
146 Draft Article 30 in the Report, page 33 of the reprint.
147 Draft Article 33 in the Report, page 33 of the reprint.
the sense of an obligation to comply. That it does so, is in no small measure attributable to the essentially problematic nature of necessity, particularly economic necessity. This is an issue over which there is considerable uncertainty and controversy. Both of these qualities facilitate diverse recourse to the ground of state necessity in much the same way as indeterminancy in rules admits divergent application.

Finally, self-defence: This ground, while well recognised in municipal legal systems, would in its International Law Commission conception deny community to inter-state relations. Self-defence, when tied strictly to self-preservation in circumstances where immediate recourse to the protective shield of law is not possible, can be justified and is clearly compatible with community. On the other hand, self-defence which can be employed to excuse self-help measures taken contrary to obligation to protect interests other than self-preservation is hardly conducive to compliance.

Thus it is that instead of adjudication on environmental issues states prefer "mechanisms and procedures that are non-coercive or non-contentions [to the end of preventing] any violation of an environmental norm and [assuring] its respect and promotion". This, then, raises the issue of the nature of those mechanisms and procedures.

One such mechanism is referred to as the institutional model. The strength of this model is said to reside in the opportunity which it affords "for the multilateral resolution of disputes and the negotiated application and development of international legal standards. It emphasises international cooperation, not confrontation, and gives states a fiduciary or custodial role in the protection of the environment". Facilitating that role, international institutions are designed to observe the behaviours of states parties as their primary function, and as a secondary function to resolve complaints through discussion and negotiation. A basic objective of the model is to create accountability between states parties through "a form of collective or community supervision". The strategies employed in the model "to induce compliance and maintain cooperation involve: (1) Improving dispute resolution procedures, (2) Technical and financial assistance and (3) Increasing transparency.". As will be seen in Part IV below, the

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148 Brownlie (1990), 466.
149 Draft Article 34 in the Report, page 33 of the reprint.
150 Kiss and Shelton (2000), 589.
151 International institutions have been defined as "persistent and connected sets of rules (formal and informal) that prescribe behavioural roles, constrain activity and shape expectations" - Keohane: "International Institutions and State Power" (1989), 3 - quoted by Haas (2000), 52-53.
152 "Neo-liberal institutionalists and similarly inclined international lawyers seek to design institutions to perform functions that may induce states to comply. There is a strong ceteris paribus basis to the research from which these propositions are drawn. Most neo-liberal institutionalist analysts presume that states already desire to cooperate (or comply) and merely require reinforcement to indulge their initial inclinations. Institutions serve a therapeutic role in encouraging compliance and deterring non-compliance by eliminating barriers to self-interested compliance. However, there may not exercise a direct influence on state preferences that were formed previously" - Haas (2000), 53.
153 Birnie and Boyle (1992), 138.
155 Birnie and Boyle (1992), 161.
156 Downs, Rocke and Barsoom (1996), 381. The essence of the strategies employed has developed a prominent theory of compliance with international commitments that is largely norm-driven ... Starting from an assumption of state compliance as a norm, managerialists argue that efforts to create punitive enforcement mechanisms ... are generally misplaced, rarely available, and sometimes counter-productive. Managerialists argue that non-compliance is typically non-volitional: The result of a lack of administrative or financial capacity,
International Maritime Organisation is one institution to which these general observations are applicable.

In addition, to effectively supervise the implementation and operation of a treaty regime, international institutions require adequate information.\textsuperscript{156} This they typically obtain through the exercise of fact finding powers, inspection rights and the ability to require states parties to report on matters relevant to the implementation and operation of the particular regime. In this latter regard, it might be thought that states parties required to report on their conduct would be inclined to be "less than forthcoming about problems and defects";\textsuperscript{157} thereby compromising the effectiveness of the system. Against that, however, it has been noted "the strength of the system is both psychological and political. States may not always protect the environment as they should but they seek to maintain a good reputation in a field where public opinion is particularly sensitive. Thus, they make efforts to avoid or mitigate damage that could result in condemnation or criticism during review of their reports."	extsuperscript{158}

But the strength of the reporting system has in practice been compromised by use so widespread that problems of capacity have arisen. Many states have fallen behind in reporting, thereby impeding the supervision of implementation.\textsuperscript{159}

However, it is not only problems with the reporting regime which have raised questions over the effectiveness of the institutional model. Birnie and Boyle have identified a number of factors which in practice account for inadequacies in the performance of that model. On an operational level, these include remits which are not wide enough and resources which are insufficient.\textsuperscript{160} Then, on a more fundamental level, they identify inadequacy in the fact that institutions "are no more than the expression of their members' willingness or unwillingness to act".\textsuperscript{161} Accordingly, they are not able to "reach agreement on difficult issues or ... ensure the full participation of all states most closely concerned. Moreover, even where adequate participation is achieved, such bodies are often open to the criticism that their decisions represent only the lowest common denominator of agreement, and result in weak standards of environmental protection."\textsuperscript{162}

\textsuperscript{155}Raustalia (2000), 408 - footnotes omitted.
\textsuperscript{156}Birnie and Boyle (1992), 166.
\textsuperscript{157}Ibid and Shelton (2000), 591.
\textsuperscript{158}Ibid. See also Palmer, who refers to the politics of shame - "few nations like to be regarded as international pariahs and shame as a sanction ought not to be under-estimated" - Palmer (1992) (B), 281.
\textsuperscript{159}Kiss and Shelton (2000), 592. Compliance with the mandatory reporting requirements of MARPOL is proving less than satisfactory - see Part IV below.
\textsuperscript{160}In the case of the IMO, insufficiency of resources, or more accurately, insufficiency of funding, is an issue - see de La Fayette (2001), 184 and Part IV below.
\textsuperscript{161}Birnie and Boyle (1992), 139.
\textsuperscript{162}Ibid.
As well as the mechanisms and procedures just described, there are other factors within the inter-state system which have been identified as explaining why most states, without being motivated by coercive authority, "observe systemic rules much of the time in their relations with other states ... . This unenforced rule system can obligate states to profess, if not always to manifest, a significant level of day-to-day compliance even, at times, when that is not in their short term self-interest."\textsuperscript{163} Such factors are many and varied. One is comity which is said to motivate compliance "by the predictable operation of social, political, economic, moral (in both virtue and custom senses), and possibly other pressures ...".\textsuperscript{164} Other factors predisposing to voluntary compliance have been identified as follows:\textsuperscript{165}

- Country characteristics - these include domestic interests, cultural traditions, political system (many features of democracies enhance the chances of compliance), administrative capacities, and economic resources, as well as relationships with other treaty partners.

- NGOs - NGO activity by influencing public opinion can increase the probability of compliance.

- Number of states and the "international environment" - non-compliance by an individual state is less likely where international public opinion, as evidenced by a large number of states having ratified and implemented a given treaty, favours compliance with that treaty. Compliance may also be induced through the influence exerted by more powerful states over weaker states. Further, where states encounter each other repeatedly through a range of treaties the probability of individual state compliance with any given treaty in the range is enhanced - this on the principles involved in repeat player games.

- Primary rule system - "[t]he most important factor determining the likelihood of compliance is probably the primary rule system",\textsuperscript{166} in other words, the operative provisions in the treaty. The extent to which these provisions require behavioural change as opposed to merely mandating existing behaviours will affect rates of compliance. Such rates will also be affected by the precision with which the treaty provisions have been drafted. "States can facilitate their own compliance by negotiating vague and ambiguous rules, for example, if they agree to provisions that seem to be in the environmental interest on paper but are sufficiently vague to allow business as usual"\textsuperscript{167} - the greater the scope for rational interpretative dissent, the more difficult it is to judge compliance and hence the easier it is for states to proclaim compliance. On the other hand, rules drafted with precision can enhance compliance "by reducing the uncertainty about what states need to do to comply".\textsuperscript{168} Compliance may also be encouraged by primary rules which differentiate

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\textsuperscript{163} Franck (1988), 705. \\
\textsuperscript{164} Rubin (1993), 160. \\
\textsuperscript{165} Summarised from Faure and Lefevere (1999), 141-150 - end notes omitted. \\
\textsuperscript{166} Ibid, 144. \\
\textsuperscript{167} Ibid, 145. \\
\textsuperscript{168} Ibid. See also Cooper (1986) who asserts that States tend to regard ambiguous rules as having no force – 252; and Bilder (2000) who, writing from the perspective of the foreign office policy process, suggests that it views "issues of compliance with and breach of international norms in much more murky, flexible and unruly ways than conventional international law, international relations analysis, and other 'compliance' analysis based on analogies with national law seem to assume.... [I]n making decisions about the formation, interpretation, or implementation of norms, officials will experience a continuing tension between their desire to maintain their own flexibility and freedom of manoeuvre to cope
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between, and make allowance for, the ability of individual states to comply on the basis of their available means.

These factors were considered to be relevant in explaining why states comply with the hard rules of international law. Although they suggest that attempting to predict state compliance is a complex matter, notwithstanding that the rules concerned are the hard, binding rules of international law, the full extent of the complexity of the issue of state compliance becomes more fully revealed when the question of why states comply with so-called "soft law" is considered.

The category of soft law is said to embrace those instruments which are intended to be non-binding as well as provisions in treaties which are characterised as "soft obligations, such as undertakings to endeavour to cooperate". 169

The fact that soft law is used within the inter-state system has been explained from different perspectives. On the one hand, there are those who see it being used simply because it is more politically attractive than customary law and binding law created by convention. 170 By embracing ambiguity at the expense of the rigidity and compulsion associated with "hard law" 171 and by being substantially subjective, 172 soft law in effect empowers rather than constrains the political elite of states. It leaves large amounts of discretion to state governments through standards which are formulated with studied imprecision. 173

On the other hand, there are those who see its use as being of more positive value in inter-state relations. 174 On this view, soft law is characterised as a foil to the consent requirement upon which treaty law is so completely dependent. 175 Past experience demonstrates that the consent requirement has not infrequently been the one insurmountable obstacle to the resolution of politically or economically mediated deadlocks in treaty negotiations. Within the inter-state system, the withholding of consent is recognised as quite legitimate. No state's consent to treaty obligations can be forced. In fact, the system provides that where a state's consent to be

with changing circumstances and their desire for certainty and predictability on the part of relevant foreign officials and other international actors... [O]fficials typically see international norms not simply as instruments for creating commitments and obligations, but rather as multi-purpose policy tools that may be used to accomplish broader objectives. Of course, in many cases officials are principally interested in establishing relatively firm and clear expectations as to other nations' or other international actors' behaviour upon which they can justifiably rely and plan. The very purpose of norms is to affect human behaviour. Unless norms are capable of having such effects, and of permitting at least some level of prediction as to how other individuals, groups, or political actors such as states will behave there is little reason to bother adopting them." - 66-67.

170 Palmer (1992) (B), 269.
171 Dupuy (1988), 382.
172 Chinkin (1989), 862.
174 For example, it has been said that "Non-binding commitments are likely to be particularly useful when states are unsure about what they can feasibly implement. When such 'implementation uncertainty' is high - as it often is in environmental cooperation - the benefits of non-binding commitments are particularly evident. In such situations, ... the concern with compliance leads states to negotiate treaties with unchallenging rules and standards, with a large margin of error built in. Rather than address uncertainty by weakening the regulatory framework, non-binding instruments provide flexibility in the face of uncertain means and costs ...",
bound by a treaty has been procured by the coercion of its representative, that consent shall be without legal effect.\textsuperscript{176} Equally, a treaty procured by the threat or use of force in violation of the Charter of the United Nation is absolutely void.\textsuperscript{177} To ameliorate the rigours of the consent requirement and overcome deadlocks between "states pursuing conflicting ideology and/or economic aims"\textsuperscript{178} recourse has been had to soft law. Seen from this perspective, soft law is the deadlock-breaking compromise between "those who wish to have an instrument in hard law form and those who probably would have preferred to have no instrument at all, but will accept it as a minimum in soft law form".\textsuperscript{179} Such soft law solutions are thus claimed to effect change in the political thinking on issues occurring "where international law and international politics combine to build new norms".\textsuperscript{180}

A more detailed explanation for the use of soft law has been offered by Shelton\textsuperscript{181} who suggests the following seven possible reasons why soft law is chosen over hard law:

"(1) Bureaucratisation of international institutions has led to law that is 'deformalised' through programmes of action and other policy instruments ..."

"(2) The choice of non-binding norms and instruments may reflect respect for hard law, which states and other actors view cautiously ...

"(3) Soft law instruments may be intended to induce states to participate or to pressure non-consenting states to conform ...

"(4) Soft law also may be emerging due to a growing strength and maturity of the international system ...

"(5) Legally binding norms may be inappropriate when the issue or the effective response is not yet clearly identified, due to scientific uncertainty or other causes, but there is an urgent requirement to take some action ...

"(6) Soft law allows for more active participation of non-state actors ...

"(7) Soft law generally can be adopted more rapidly because it is non-binding\textsuperscript{182}

The fact that states choose the soft law option as a means to structure certain of their obligations within the inter-state system raises the question of why, when they clearly intend such obligations to be legally non-binding, would they voluntarily discharge them. Considerable research has been undertaken over the past two decades in an attempt to understand this

\textsuperscript{177} Article 52, ibid.
\textsuperscript{178} Pellet (1992), 47.
\textsuperscript{179} Chinkin (1988), 390.
\textsuperscript{180} Palmer (1992) (B), 269.
\textsuperscript{182} Ibid.
phenomenon. One contribution to this research, published in 2000, succinctly conveys the complexity of the issue of state compliance with soft law. In this contribution, certain factors are said to be relevant to compliance, namely:

- The engagement of states and other actors to a process which requires continuous interaction over time and in which group pressures, rather than legal sanctions, provide the primary motivation for those involved to discharge their undertakings.

- The desire to maintain a good reputation: This factor can be relevant when the merits of discharging a particular obligation are generally accepted and there is a credible risk that a failure to discharge will be detected with consequent loss of reputation. Thus, reputation may create a preference for a non-binding agreement in circumstances where non-compliance with a binding agreement would damage reputation. A non-binding agreement may also be preferred on the basis that voluntary compliance with obligations which do not bind will enhance reputation.

- The existence of a consensus on the underlying norm: Consensus on the norms incorporated into non-binding international instruments is an essential prerequisite to compliance.

- A common goal of welfare maximisation and increased efficiency: The mutual pursuit of welfare maximisation and increased efficiency can predispose to agreement on equitable informal social norms and cost-effective approaches to the maintenance of compliance with those norms.

- The credible threat of sanctions, although in the inter-state system the credibility of that threat is often open to doubt.

- The institutional setting in which the informal social norms are located: In the inter-state system non-governmental organisations and global civil society, both a part of the institutional context, can influence compliance with international soft law.

- The characteristics of the regulated activity: Fewer numbers of actors involved may make for easier regulation and a more positive effect on the cost-benefit ratio of complying.

- The characteristics of the international instrument: Compliance is more likely where states perceive the obligations to be equitable. Also a factor is the complexity of obligation. It is generally easier to comply with obligations which are precise and relatively simple than with those that are precise and complicated. On the other hand, the precise expression of obligations cannot neutralise other factors which might predispose to non-compliance. Instruments which structure effective supervisory mechanisms to monitor, supervise and evaluate compliance tend to promote compliance, as do those which establish secretariats.

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183 See, for example, the contributions referred to by Weiss (2000), 546, footnote 24; see also the contributions detailed by Downs, Rocke and Barsoom (1996), 379 footnote. 1.

184 Summarised from Weiss (2000), 539-553.
include incentives, particularly financial, provide for technical assistance and training and prescribe sanctions.

- The international environment, which includes such international organisations as NGOs and financial institutions, international conferences and global media and public opinion: In explaining the acceleration in the secular trend towards improved implementation of and compliance with international environmental law during the late nineteen-eighties and early nineteen-nineties, it is said that the international environment may well have been the most important factor. Also important in the negotiation of and compliance with international agreements are leader countries which, possessing more resources than other countries, are able to act as catalysts in the process.

- National characteristics which include, in addition to those mentioned above, prior record with respect to the regulated activities, history, political size and variation, number of neighbouring countries, attitudes and values, leadership, NGOs and knowledge and information.

- National intent and capacity: Related to national characteristics, both of these factors are important determinants of compliance. Over time both can change for any given state with respect to any given international agreement. Intent to comply may be affected by the binding or non-binding nature of the agreement. Without excluding the possibility that in some cases intent to comply may be stronger for a non-binding agreement than for one which is binding, research demonstrates that governments generally perceive binding obligations or links to binding obligations to be preferable to non-binding agreements for inducing behavioural change. This perception can mean that states are more likely to expect compliance by other states when the agreement is binding than when it is not. Intent to comply can also be affected by capacity. Effective compliance with international agreements often requires significant resources. If a state does not have those resources, then compliance may not be possible without external aid. When the necessary aid is provided, not only will a state's capacity to comply be increased, but its intent to comply will also be strengthened.

The nature of these factors and those of the mechanisms and procedures described above, suggest that the issue of state compliance with international law is highly complex, making for difficulties and uncertainties in any assessments of state compliance. In fact, it has been claimed that "[t]he lawyers' dictum that 'most treaties are complied with most of the time' is surely premature, and probably exaggerated". More significantly, however, with so many variables affecting compliance in the inter-state system, in which sovereignty and the power

185 See footnote 164.
186 Haas (2000), 44. Haas asserts that "[v]ery little is known about the degree to which states comply with international commitments and empirical studies suggest that national compliance is uneven at best. Even in the E.U., where compliance with environmental directives should be strongest because of overriding public concern combined with strong international institutions, implementation varies by country. Moreover, George Downs and others argue that estimations of compliance with international injunctions are systemically over-stated because instances where states comply in the absence of strong incentives for non-compliance are less important to signal state willingness to comply than is compliance in the face of material incentives for violations." - Haas (2000), 44.
associated therewith dominate inter-state relations, it is clear that the future behaviour of states cannot be predicted with any assurance. This has implications for the expectations of compliance which might be formed by states,\textsuperscript{187} implications which can adversely affect their own willingness to comply. Reference to the principle \textit{pacta sunt servanda} does not materially alter the uncertainties inherent in this situation, for although the principle demands that states obey commitments in good faith,\textsuperscript{188} "\textit{[c]ases remain where capable states wilfully flaunt international rules, such as Norwegian and Japanese whaling practices, and Greek practices in licensing ships}".\textsuperscript{189} In such cases, states exercise a power which is reserved to all states, namely "the power (not the right) to act contrary to [their] treaty obligations or in violation of customary norms, and suffer the consequences".\textsuperscript{190} When compliance with international legal obligations so yields to national interest, perhaps because of "the magnitude of expected reaction at home or because the state lacks the political wherewithal to induce behavioural change by its citizenry",\textsuperscript{191} or, in the case of flag States, the economic consequences of compliance, it is the elements of sovereignty asserted as legal authority or constitutional independence which empower and justify the election not to comply.

These elements are not only relevant to inter-state relations generally, and to compliance issues in particular, but also to the relationship between sovereignty and the environment.

### 2.4 SOVEREIGNTY AND THE ENVIRONMENT

From the perspective of the adoption and implementation of inter-state environmental controls, the sovereignty of states in their mutual relations has been and continues to be a dominant influence since states remain "the principal players in environmental policy".\textsuperscript{192} This is so, despite the fact that there are many other stakeholders in the environment. In the marine environment for example, these other stakeholders include the maritime transport industry, the fishing industry, oil and gas interests, research organisations, and recreational users, to name but a few. Both in international environmental policy framing and law making, states have demonstrated a marked reluctance to relinquish their privileged status. In addition, and perhaps more significantly, they have been motivated to keep alive the concept of sovereignty. It is through this concept that they can guarantee their continued physical integrity and political existence, both of which are fundamental objectives in their relations with other states.\textsuperscript{193} Then, with respect to the marine environment, states maintain a focus on sovereignty through their ongoing concerns over jurisdiction,\textsuperscript{194} that being the "\textit{subordinate instrument}"\textsuperscript{195} through which they can exercise their sovereignty. That this preoccupation with sovereignty has been a

\textsuperscript{187} ibid, 49.
\textsuperscript{188} Article 26, Convention on the Law of Treaties (Vienna), (1969) - in force 27th January 1980 - reprinted in (1969), 8 International Legal Materials, 679. 23rd May 1969. Article 26 provides that "every treaty in force is binding upon the parties to it and must be performed by them in good faith."
\textsuperscript{189} Haas (2000), 46.
\textsuperscript{190} Henkin (1980), 97.
\textsuperscript{191} Haas (2000), 46.
\textsuperscript{192} Hahn and Richards (1989), 423.
\textsuperscript{193} Waltz (1979), 91-92.
\textsuperscript{194} The extent and nature of those concerns will be detailed in Parts II and III below.
\textsuperscript{195} Mann (1973), 3.
constant feature in international environmental fora can be demonstrated through a brief survey of major conferences and conventions.\textsuperscript{196}

At the Stockholm Conference in 1972, representatives of Third World States "\textit{repeatedly emphasised the absolute sovereign discretion of their governments in disposing of their natural resources in whatever way they chose}".\textsuperscript{197} It was this insistence upon sovereign rights which infused the sentiments of the Brazilian delegate in his memorable argument "\textit{that poor unpolluted countries should have the right to do some polluting of their own for the sake of benefits that industry has already brought to rich, polluted countries}".\textsuperscript{198} It should not be thought, however, that assertions of national sovereignty over natural resources were limited to Third World countries. In fact, such assertions were (and continue to be) harbouried, if not expressed, by all nations. Reflecting this, Principle 21 of the Stockholm Declaration affirms that all states have "\textit{the sovereign right to exploit their own resources pursuant to their own environmental policies}". This is an affirmation which comes quite close to declaring that states have unlimited sovereignty over their respective environments.\textsuperscript{199} From the perspective of engaging inter-state cooperation to the cause of environmental protection, this affirmation set an unfortunate precedent which time and again would be relied upon in the creation of environmental regulation within the inter-state system. The precedent is unfortunate in the sense that the affirmation "\textit{had the effect of reinforcing the natural separation of political units rather than fostering mutual and respectful relationships between them}".\textsuperscript{200} Such relationships are necessary if the level of inter-state cooperation required to deliver effective protection to the environment is to be achieved.

Sovereignty is also accorded respect in Principle 24. After urging all states to engage in a cooperative spirit with respect to international matters concerning the protection and improvement of the environment, this Principle proclaims that "\textit{[c]ooperation through multilateral or bilateral arrangement or other appropriate means is essential to effectively control, prevent, reduce and eliminate adverse environmental effects resulting from activities conducted in all spheres, in such a way that due account is taken of the sovereignty and interests of all States}".

Ten years after Stockholm, the World Charter for Nature\textsuperscript{201} was put to the vote in the General Assembly of the United Nations. Among the eighteen abstentions were eight South American

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\textsuperscript{196} It should be noted that evidence of this pre-occupation with sovereignty is not limited to conferences and conventions. On the contrary, evidence could be found throughout the inter-state system. For example, in 1999 the Commission on Sustainable Development in its Final Report of the Seventh Session made explicit reference to sovereignty in the section on the Oceans and Seas in the following terms:

\textit{"Following the 1998 International Year of the Ocean the Commission emphasises the importance of International Cooperation, within the framework of UNCLOS and Agenda 21, in ensuring that the oceans and seas remain sustainable through integrated management, and that while respecting the sovereignty, jurisdiction and sovereign rights of coastal States and recalling their rights and obligations in relation to the protection of the marine environment, all States can benefit from the sustainable use of the oceans and seas".}

\textsuperscript{197} Caldwell (1990), 198.
\textsuperscript{198} "Developments" (1991), 1505, footnote 82.
\textsuperscript{199} Goih (1973), 491, et seq.
\textsuperscript{200} Lipschutz (1998), 129.
Nations which collectively promoted the same nationalistic position with respect to permanent and exclusive sovereignty over natural resources advanced in the Stockholm negotiations. In the same year, Article 193 of UNCLOS reconfirmed the sovereign right of each state to exploit natural resources pursuant to its own environmental policies. Of this Convention, it has been said that the dominant element of the mind set brought to its creation was "the concept of sovereign entitlement. All of the jurisdictional regime-building entrusted to the Second Committee pivoted on the idea that the chief obligation of the Conference was to contribute to national development through the elaboration of 'sovereign entitlement zones' in a variety of technical modes.".

On 22nd December 1989, Paragraph 4 of the United Nations General Assembly Resolution 44/207 on Protection of the Global Climate for Present and Future Generations of Mankind reiterated and reinforced the privileged position of sovereignty by reaffirming "that states have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies ...".

Finally, twenty years after Stockholm, sovereignty was to emerge yet again on the international stage in the context of environmental policy and law, this time at the United Nations Conference on the Environment and Development held at Rio de Janeiro in June 1992 (UNCED). The states attending this conference, as is evidenced by the documents produced, fervently reaffirmed the existing order of sovereign states and rights. For example, although the Biodiversity Convention opens with the statement that the conservation of biological diversity is a common concern of humankind, it then largely neutralises the force and implications of that statement by reasserting the sovereign rights of each state over its own biological resources. Similarly, Principle 21 of the Stockholm Declaration re-emerges in both the Climate Change Convention.

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202 Brazil, Bolivia, Colombia, Ecuador, Guyana, Peru, Surinam and Venezuela.
203 UNCLOS.
204 Johnston (1996), 12-13 - "The state authority confirmed, extended, or created at UNCLOS covered: Sovereignty (internal waters) - [sovereignty over internal waters rests on customary international law, although it might be inferred from Articles 2 and 8 of UNCLOS]; sovereignty subject only to the rights of innocent passage (territorial sea - Articles 2 and 17-32); exclusive functional control (contiguous zone - Article 33); sovereignty subject only to the right of archipelagic sea lanes passage (archipelagic waters - Articles 2 and 46-54); sovereign rights to resources beyond the territorial sea (exclusive economic zone - Articles 56 (1) (a) and 57-75); special functional jurisdiction (exclusive economic zone - Article 56 (1) (b)); sovereign rights to designated natural resources beyond the exclusive economic zone (continental shelf - Articles 77 and 78); sovereignty over islands, and rocks which can sustain human habitation or economic life of their own, and derivative rights in surrounding waters (regime of islands - Article 121); sovereignty or special jurisdiction in designated transit waters subject to the right of transit passage (straits used for international navigation - Articles 34-45); and special prescriptive or enforcement authority in designated circumstances (e.g. ice covered areas of the exclusive economic zone - Article 234); special areas of the exclusive economic zone - Article 211 (6) (a); and special enforcement authority vested in port states - Article 218 - and coastal states - Article 220."
205 Taylor (1998), 117.
and the Rio Declaration on Environment and Development.\textsuperscript{208} In the latter document, the acknowledgement that states have the right to exploit their own resources pursuant not only to their environmental policies but also to their developmental policies represents, in theory at least, a reaffirmation of one aspect of the particular and expansive claims which are generically described as sovereign control.\textsuperscript{209} Then, in the former document, Principle 21 is incorporated in the Preamble where it is in effect reinforced by the use of the words "reaffirming the principle of sovereignty of states in international cooperation to address climate change".\textsuperscript{210}

Summarising the tenor of the negotiations at Rio, Taylor describes the conference as "yet another arena for the flexing of sovereign muscle and the pursuit and protection of self-interest".\textsuperscript{211} She cites the position adopted by the United States of America towards both the Climate Change and the Biodiversity Conventions as most dramatically illustrative of such behaviour. By threatening to boycott the Conference if concessions were not made, the United States secured a significant dilution of the obligations originally proposed for inclusion in the Climate Change Convention.\textsuperscript{212} As to the Biodiversity Convention, the United States refused to become a signatory, and in so doing clearly signalled to the world that even in the face of an overwhelming sentiment of global common concern, sovereignty was still available as a systemically legitimate excuse for a refusal to cooperate. Thus, neither the conference process itself nor the outcomes thereof provided any challenge to sovereignty as one of the privileged pillars of the current paradigm in inter-state relations.

This is not to suggest, however, that states have not come to recognise the challenges which some environmental problems raise for the application of state sovereignty. In particular, environmental problems which are not confined within territorial boundaries, such as pollution of the oceans, "can lead to conflicts between sovereign rights that can only be solved by international law".\textsuperscript{213} In solving problems such as these, states are invariably required to accept limitations on the exercise of their sovereignty. Typically, flag States eventually accept such limitations with some reluctance. They are generally more inclined to jealously guard their sovereignty when confronted with proposals which involve the acceptance of limitations.\textsuperscript{214} The necessity to accept such limitations gave rise to the "erosion of sovereignty" thesis as an interpretation of the environment/sovereignty nexus.\textsuperscript{215}

This thesis was based on the premise that nature is a "seamless web" which stands "in apparent contradiction to the man-made patchwork system of nation-states".\textsuperscript{216} Within that seamless web, environmental problems occur which do not respect the boundaries of nation states. On

\begin{itemize}
\item \textsuperscript{209} Rio Declaration - Principle 2 - "the sovereign right to exploit their own resources pursuant to their own environmental and developmental polices."
\item \textsuperscript{210} Climate Change Convention Preamble.
\item \textsuperscript{211} Taylor (1998), 332.
\item \textsuperscript{212} Palmer (1992) (A), 1021.
\item \textsuperscript{213} Kiss and Shelton (2000), 259.
\item \textsuperscript{214} de La Fayette (2001), 165 and 223.
\item \textsuperscript{215} Litfin (1998), 3.
\item \textsuperscript{216} Ibid.
\end{itemize}
the occurrence of such problems the necessary trans-boundary remediation efforts can be construed as a challenge to state sovereignty. "Since sovereignty, the constitutive principle of the nation-state system, is premised upon territorial exclusivity, it is surmised that trans-boundary environmental problems necessarily undermine state sovereignty."

The recognition of trans-national environmental interdependence prompted predictions that the state system would eventually be replaced by a supra-national system or alternatively, that sovereignty would be eroded from below, "with power and authority devolving from the state to local communities whose identities and livelihoods are more entwined with specific ecosystems". Much of the appeal of this thesis resided in the argued incompatibility between ecological holism and territorial exclusivity. It also had appeal on the view which attributes to states much of the responsibility for environmental degradation.

That this thesis does not fully explain the nature of the environment/sovereignty nexus can be demonstrated by approaching the matter from the perspective of the five constitutive elements of sovereignty. Reinforcing this approach will be an initial brief examination, for comparative purposes, of the impact on sovereignty said to be attributable to economic globalisation.

Globalisation "represents the emergence of a single integrated economic space, cutting across political spaces and driven by the organisational logic of corporate industrial networks and their financial relationships". It is a process in which the principal drivers are mostly private actors. In the economic sphere, these private actors are corporations which operate at a micro-economic level integrating a "cross-national dimension into their organisational structure and strategic behaviour". Global corporate networks thus constructed pose challenges "to a state's internal sovereignty by altering the spatial relationship between private and public sectors. The organisational logic of globalisation induces corporations to seek the fusion of multiple, formerly segmented national markets into a single whole that subsumes multiple political geographies. As a result, governments no longer have a monopoly of the legitimate power of their territory, undermining the operability of internal sovereignty."

The response of governments to this process of globalisation has been to treat the same "as an unproblematic extension of international law whereby states voluntarily concede the reduction of their autonomy, but claim their sovereignty remains inviolate". For some governments, this response translates into attempts to regain control over their economic and social environment by adopting interventionist strategies which re-emphasise the territoriality of state jurisdiction. For others, it involves doing no more than relying "on existing structures and processes of

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217 Ibid.
218 Ibid - end notes omitted.
219 Ibid.
221 Private actors not only comprise corporations, but also interest groups, NGOs and knowledge institutions that have begun to reorganise themselves on a trans-national scale - Ibid, 78, footnote 15.
222 Ibid, 76.
223 Ibid, 78 - footnote omitted.
224 Ibid, 82. See also Miller (1998) - "Trans-national corporations can significantly reduce a state's control of activities within their own territory" - 174.
225 Kelsey (1999), 536. According to Kelsey, another "less orthodox approach heralds globalisation as a catalyst for the emergence of a pluralistic and non-state-centred system of global governance (in the case of James Rosenau) or global law (Gunther Teubner)" - 536.
international cooperation, including the use of international law, as practised when managing external sovereignty".226

Such a response clearly signals the unwillingness of states to make any concessions with respect to sovereignty as legal authority or constitutional independence, characterised by the five elements referred to above. On the other hand, the response does suggest that states are willing to accept limitations on their operational sovereignty when they consider that circumstances so demand. For present purposes, the interest of the response resides in the fact that even when confronted with the acknowledged capacity of global capital to impose real constraints on state power through the use of economic retaliation227 states steadfastly claim a sovereignty of an inviolate nature. On this basis, then, it is reasonable to assume that in the context of environmental issues which do not hold the same threat of constraint, states would make the same claim. If this assumption holds good, then it is only from the perspective of operational sovereignty that the environment/sovereignty nexus can be explained.

To explain the environment/sovereignty nexus from this perspective means that despite arguments to the contrary, the environment does not ultimately pose a serious problem for sovereignty.228 In becoming a member of an international institution or regime addressed to environmental issues, the state does so voluntarily and without in any way diminishing its legal authority or constitutional independence. It does, however, adjust the manner in which it exercises and practices its sovereignty.

"Fully autonomous and self-determining, ... states have the sovereign authority to confer on other actors or agencies the right to exercise some of their powers. Equally the self-determining state can renege on international commitments, refuse to accept international rulings and withdraw from any agreement at any time on its own terms. It cannot be forced to comply."229

The first sentence of the passage just quoted captures the essence of the operational dimension of sovereignty, while the last two sentences refer to sovereignty defined in terms of legal authority or constitutional independence.

It is sovereignty in this latter dimension which is typically relied upon by countries when faced with external pressure to adopt particular courses of action on environmental and resource issues. Examples of such external pressure have included calls for China not to develop its coal resources, for Kenya to protect the rhino, and for tropical countries to prevent rain forest destruction.230

"The Brazilian Government, for instance, complained in the late 1980s that foreign television broadcasts on tropical deforestation were part of 'an orchestrated campaign for the internationalisation of the Amazon'. Similarly, governments in developing countries often...

227 Kelsey (1999), 555.
228 "In the late twentieth century, with the rise of 'global environmental crises', environment has been argued to pose a serious problem for sovereignty" - Kuehls (1998), 31.
229 Kelsey (1999), 536.
claim that the activity of foreign-based NGOs violate their sovereignty, particularly when their environmental work is tied to human rights advocacy."\(^\text{231}\)

Thus it is that any state which does not wish to change environmental practices within its territory "can call on national sovereignty for protection".\(^\text{232}\) As will be seen in the next chapter, this ability to call on national sovereignty can exert a considerable influence in the rule-making process, an influence which can directly affect the outcome of that process. That it has this potential was clearly demonstrated by the United States in 1992 during the Climate Change Convention negotiations, and again in 2001 in the context of the Kyoto Protocol.\(^\text{233}\) Then, with respect to the marine environment, a pertinent example is the refusal of the United States to become a party to UNCLOS. This is a refusal which it has so far explicitly justified on the sovereignty-embedded grounds of national interest.

### 2.5 SOVEREIGNTY AND THE MARINE ENVIRONMENT

For centuries, national interest has been employed by states to justify many exclusive, non-cooperative claims in the context of the marine environment. Foremost among them have been the claims to sovereignty control over the seas or parts of them. Such claims have been the cause of an ongoing conflict between flag States and coastal States. This conflict, which has waxed and waned over hundreds of years, \(^\text{234}\) began during the time of the Roman Empire. Claiming exclusive jurisdiction\(^\text{235}\) over vast areas of the sea, "[t]he Roman Emperors styled themselves 'King of the Ocean'".\(^\text{236}\) Between the fall of the Roman Empire and the Renaissance, many other claims to exclusive use, including the right to deny access to foreign vessels, were made and recognised.\(^\text{237}\) However, it was not until 1493 that the most extensive claims were made. Basing their claims on the Papal Bulls of Pope Alexander VI, which were given legal effect by the Treaty of Tordesillas in 1494, Spain and Portugal between them claimed sovereignty over the Indian and Pacific Oceans, the Gulf of Mexico and the western and southern Atlantic. They claimed the right to exclude foreign vessels from or control foreign navigation in those sea areas, thus giving them absolute commercial monopolies. "It was precisely this intolerable economic fact that precipitated the first and aggressive theoretical attack on the doctrinal basis of the claims to exclusive and unqualified authority over the

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\(^{231}\) Ibid - end note omitted.  
\(^{232}\) Lipschutz (1998), 132. In the context of treaty ratification, this ability to call upon national sovereignty has been described in the following terms: "Ratification requires the active acceptance of a treaty by any single state while exit may be chosen tacitly and does not have to be justified". – Gehring (1994), 424 – footnote omitted and emphasis in original.  
\(^{233}\) Protocol to the United Nations Framework Convention on Climate Change (Kyoto) EMuT 992: 35/A.  
\(^{234}\) O'Connell (1984), 1.  
\(^{235}\) "Jurisdiction is an aspect of sovereignty, it is coextensive with and, indeed, incidental to, but also limited by, the State's sovereignty. The term 'jurisdiction' can have a variety of meanings, but is generally a more active and narrower concept than 'sovereignty'," - Molenaar (1998), 75 - footnotes omitted.  
\(^{236}\) Dean (1960), 757.  
\(^{237}\) Some of the claims were as follows: England - the Channel, the North Sea and parts of the Atlantic. Venice - the Adriatic, Genoa and Ligurian. Denmark/Norway - the northern seas. Sweden - the Baltic.
seas."²³⁸ That attack came in 1609. "[T]o counter the supposed pretension of the Portuguese in the East Indies"²³⁹ Grotius, in "Mare Liberum"²⁴⁰ argued that the open seas could not be so possessed as to absolutely exclude similar possession by another and thereby become the property of the possessor, and that without rights of property in the open seas, no authority could be exercised over them.²⁴¹ Despite the many influential criticisms which were levelled at Grotius's argument for the "freedom of the seas", that notion soon became the norm.²⁴²

Grotius did, however, recognise one exception to his doctrine of the inappropriability of the seas. That exception was the right of coastal States to "effectively possess a narrow adjacent sea".²⁴³ In more recent times, this exception was to become the source of much conflict between flag and coastal States. The reason for this conflict was that by its terms, the exception allowed to coastal States the freedom "to exercise the unfettered prerogatives of sovereignty ... including the discretion to deny or condition the passage of foreign vessels."²⁴⁴

Prior to 1840, flag States' claims to a right of passage for their vessels through this narrow adjacent sea, the coastal State's territorial sea, were generally denied. Almost all of the eighteenth century authors had upheld the right of coastal States to exclude foreign shipping from their territorial seas.²⁴⁵ However, after 1840, a right of innocent passage in the territorial sea was articulated. "The practical catalyst to the assertion and acknowledgement of a right of passage by 19th century States is patent: The proliferation of economies reliant on the process of maritime trade."²⁴⁶ For those who argued that flag States did have such a right, it was inconceivable that any authority could be given to coastal States to interfere with the navigation of vessels exercising that right.²⁴⁷ Thus it was that the scene was set for an intense debate over the juridical nature of the territorial sea and the notion of innocent passage. This debate finally ended in the late nineteen-twenties, when an accommodation of the competing flag State and coastal State interests was achieved. That accommodation resulted from the articulation by Jessup of a definition of the territorial sea which achieved the objectives sought by both sides to the debate. According to Jessup, within its territorial sea,

"a state may, under international law, exercise any jurisdiction and do any act which it may lawfully do upon its own land territory. Exception must be made to this general statement only in favour of the servitude known as the right of innocent passage ... [T]he existence of such a servitude is not inconsistent with sovereignty ... international law itself is a restriction upon a denial of absolute sovereignty".²⁴⁸

Thus, within the narrow territorial sea, coastal States would have plenary authority to protect their varied interests. They would be "authorised to assert authority over ships of other states for the protection of their exclusive interests".²⁴⁹ However, that authority was to be qualified

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²³⁸ Smith (1982), 54 - footnote omitted.
²⁴⁰ Grotius (Scott Ed.), (1916).
²⁴² Martens (1976), 332.
²⁴³ Smith (1982), 55.
²⁴⁴ Ibid.
²⁴⁶ Smith (1982), 55 - emphasis in original.
²⁴⁷ Ibid, 56 - footnote omitted.
²⁴⁹ McDougal, Burke and Vlasic (1960), 27.
with a right of innocent passage.\textsuperscript{250} So long as passage was innocent, coastal State authority was circumscribed. To the flag States which had ascribed their national character to ships exercising innocent passage there would be conceded "a limited concurrent jurisdiction for the protection of their interests."\textsuperscript{251}

This accommodation of interests did not, however, bring closure to all issues relating to sovereign authority within the territorial sea. In the years since the nineteen-twenties, sovereignty issues such as the breadth of the territorial sea, the right to exploit living and non-living resources in coastal waters and the right to impose conditions and restrictions, including vessel source pollution controls, on ships exercising the right of innocent passage have generated protracted conflict between flag and coastal States. In Parts II, III and IV below the attempts which have so far been made to resolve the issue of pollution control will be examined.

However, before these attempts are examined, it is necessary to briefly consider the respective positions on the issue of regulation generally taken by flag States and coastal States in their conflict over the control of shipping.\textsuperscript{252} To do so will provide a necessary background to understanding the dimensions of this conflict in the contemporary context of the promotion and evolution of Port State Control measures to combat sub-standard shipping.\textsuperscript{253}

For flag States, the adoption of international regulations has been the preferred method to control shipping. The reasons for this preference can be explained in terms of uniformity and certainty, both of which have historical origins.

First, there was the problem of the regulation of vessel traffic on the high seas, where the principle of freedom of navigation prevailed. Given the practical difficulties which this freedom from control generated for vessel movements, "[i]t was very soon realised that it was in everyone's interest to agree on a minimum of rules to be respected, for both signals and traffic.

\textsuperscript{250} Smith (1982), 58.
\textsuperscript{251} McDougal, Burke and Vlasic (1960), 27. Concurrent jurisdiction is apt to produce conflicts of jurisdiction. Within the territorial sea, for example, the concurrent jurisdiction of flag States and coastal States often comes into econometrically mediated conflict despite the fact that in international law the concept of jurisdiction is designed to avoid such conflict. In UNCLOS, the navigation/environment balance was crafted to avoid conflicts of jurisdiction. Writing on this issue, Molenaar records that 

"[g]eneral international law has largely been unable to develop priority rules to deal with conflicts of jurisdiction. Agreement on a distribution of jurisdiction within the ambit of a treaty is more widespread and [UNCLOS] is of course a good example. Coastal State jurisdiction over vessel-source pollution always involves a situation of conflict of jurisdiction, viz. with the flag State. Other approaches to avoid conflict of jurisdiction include consultation procedures, unilateral restraint (expressed by comity, reasonableness, or balancing interests), and harmonisation of laws."

"In certain circumstances it may also be helpful to resort to certain general rules or presumptions. One of these is that territorial jurisdiction would generally override jurisdiction under another basis. Presumably, therefore, territorial jurisdiction overrides flag State jurisdiction over vessels navigating in the territorial sea. Admittedly, the regime of innocent passage and the elaborations thereof would have to be taken into account before such a presumption can be applied. Jurisdiction over vessel-source pollution within the EEZ does not point to a presumption in favour of either the flag or the coastal State. On the high seas the primacy of flag State jurisdiction is in principle free from restrictions, unless international law explicitly provides therefore." - Molenaar (1998), 87 - footnotes omitted - emphasis in original.

\textsuperscript{252} From a practical perspective, the observations which follow are necessarily generalisations - see Introduction above, footnote 33.
\textsuperscript{253} See Chapter 12 below.
These came to form the 'common law of the sea', covering rules for navigation, rescue and collisions.\textsuperscript{254}

Secondly, there was the matter of the control of ships in port. By the early years of the twentieth century there was considerable regulatory and administrative diversity in the controls applied by states to ships coming into their ports. So diverse were the provisions that uncertainty and confusion reigned. Often, ships visiting ports in several states were "required to meet contradictory safety conditions".\textsuperscript{255}

Thirdly, there was the matter of competition. Repeated maritime disasters, which were explained in terms of unsafe fleet operations that had been adopted as a result of economic pressures, suggested that controls were needed to avoid maritime transport from slipping irretrievably into disrepute. "It was realised that only an agreement among States, laying down minimum standards to be met by a particular ship performing a particular service, could offer a satisfactory long-term solution."\textsuperscript{256} What was important here was not so much the content of the controls, but their internationalisation which would "prevent less scrupulous countries from obtaining a competitive edge by introducing deliberately indulgent legislation".\textsuperscript{257}

In addition to these historical origins, it has been suggested that flag State preference for international regulation can be explained not only in terms of its uniformity, but also by the fact that it is "less stringent and slower in becoming effective in comparison with unilateral [coastal State] regulation."\textsuperscript{258}

Flag States generally take the view that regulations adopted internationally have the effect of limiting the ability of coastal States to legislate on those matters which are the subject of such international regulation. In principle, there is nothing to prevent coastal States from voluntarily restricting their prescriptive and enforcement jurisdiction by becoming parties to regulatory Conventions.\textsuperscript{259} As indicated above in this chapter, this involves a limitation on the functional or operational dimension of their sovereignty which does not at the same time affect their sovereignty in the sense of legal authority or constitutional independence. Flag States generally consider that when coastal States become parties to a regulatory Convention on a particular matter, they bind themselves, with respect to that matter, to prescribing and enforcing only those standards to which the flag States Parties themselves must conform under the same regime.\textsuperscript{260} In the 1974 SOLAS Convention that limitation is implicit in Article VI (d) which provides that "all matters which are not expressly provided for in the present Convention

\textsuperscript{254} Boisson (1999), 52 - footnote omitted.
\textsuperscript{255} Ibid.
\textsuperscript{256} Ibid, 53. Boisson illustrates this with an example from freeboard legislation. "Two identical vessels, but of different nationalities, frequently come into competition on the same route. If one of them is more heavily loaded than the other, the ship owner will earn a higher profit, but will expose his ships to greater dangers, and a correspondingly lower level of safety. If the same freeboard is displayed on the hulls of both ships, by means of a load line, overloading, will no longer be an acceptable commercial tactic." - Boisson (1999), 53.
\textsuperscript{257} Ibid. See also Molenaar (1998), who writes that "... uniformity in the regulation of international shipping is of paramount importance for avoiding competitive disadvantages" - 27.
\textsuperscript{258} Molenaar (1998), 32-33.
\textsuperscript{259} Ibid, 112.
\textsuperscript{260} Ibid, 114.
remain subject to the legislation of the contracting governments".\textsuperscript{261} Flag States generally argue that they "possess the general right to demand that other states act in conformity with [international rules] when they take measures against their vessels".\textsuperscript{262} As will be found in Part III below, the flag State preference for international regulation to control shipping is evident in UNCLOS, especially in Article 211 (1), which reinforces the preeminence of international rules and standards in the regulation of vessel source pollution.

The perspective of coastal States is quite different from that of flag States just described. Coastal States argue that by entering into regulatory Conventions they do not restrict their jurisdiction with respect to those matters covered by the Conventions. This argument appears to be premised on the concept of sovereignty as legal authority and constitutional independence. On this perspective, coastal States do not regard the regulatory Conventions as package deals in which their interests are balanced against those of flag States. For them, limitations on the functional or operational dimension of their sovereignty are not an issue. Instead, they consider that they are still entitled to take an occasional unilateral course even though they are parties to such Conventions. They take the position that being party to a Convention does not involve a commitment to a maximum level of prescriptive jurisdiction. The unrestricted sovereignty guaranteed in UNCLOS and in general international law to coastal States permits them, on their argument, to "resort to yet more stringent measures which, of course, could be applied to the ships of the other Contracting Parties, as well".\textsuperscript{263}

One author who supports the coastal State perspective is Molenaar. He argues the legitimacy of coastal (and port) State unilateral prescription and enforcement, despite membership of regulatory Conventions, as follows:\textsuperscript{264}

- That regulatory Conventions are predominantly concerned with specific 'technical' standards and the obligations associated therewith rather than with jurisdictional matters.
- That at issue is whether or not the technical standards contained in regulatory Conventions should be regarded as minima or maxima, and, consequently, allow no exercise of prescriptive jurisdiction deviating from those minima or maxima. This issue is referable to the regulatory regime in UNCLOS which seeks to achieve a uniform level for the exercise of

\textsuperscript{261} The limitation is also implicit in the Preamble to UNCLOS which records, inter alia, "that matters not regulated by this Convention continue to be governed by the rules and principles of general international law." See also Article V (3) in the 1978 STCW Convention. Molenaar concedes that Article VI (d) of SOLAS 74 and Article V (3) of STCW 78 "could be interpreted as implying an exclusion of full residual jurisdiction". However, he then argues, on the grounds that "similar provisions have not been embodied in other regulatory conventions, and formulations such as 'expressly provided for' give States ample interpretative (sic) leeway to prescribe their own standards" that "ultimately such an approach could be practically identical to allowing full residual jurisdiction". - Molenaar (1998), 112-113. While the formulation "expressly provided for" may, on occasion, invite interpretative dissent over what matters are or are not regulated by a given Convention, it is difficult to imagine how the potential for such dissent could be so construed as to allow "full residual jurisdiction" in the manner claimed by Molenaar. Contrary to his argument, it is submitted that the potential for interpretive dissent is limited to inviting argument over whether or not a given matter is expressly provided for in a particular Convention. If the matter is not expressly provided for, then States Parties to the Convention have full legislative freedom with respect thereto. Such freedom can be distinguished from the full residual jurisdiction which Molenaar argues.

\textsuperscript{262} Ibid, 97. See also Boisson (1999), 170.


\textsuperscript{264} Summarised from Molenaar (1998), 110-119.
precriptive jurisdiction. "In most cases this level constitutes at the same time a minimum for flag States and a maximum for coastal States, but does not apply to port States."265

- That regulatory Conventions are aimed at flag States and thus create a minimum level to which flag States must conform. There is nothing to prevent flag States from adopting more stringent measures than those contained in the regulatory Conventions to which they are party.

- That the question of whether port and coastal States have voluntarily excluded so-called "residual" prescriptive jurisdiction by becoming parties to regulatory Conventions is not clear.

- Guidance on this question is provided by Article 9 (2) of MARPOL. This Article can be interpreted as providing that MARPOL should not be construed as regulating jurisdictional matters and further that any jurisdictional uncertainties in the context of MARPOL should be dealt with under general international law and more specifically under UNCLOS.

- That neither UNCLOS nor general international law prevents port States from prescribing standards which go beyond the regulatory Conventions.

- That accordingly, the issue is whether or not the regulatory Conventions contain limitations on this unfettered prescriptive jurisdiction.

- That where the possibility of residual port State jurisdiction under regulatory Conventions is open to doubt, there should be a presumption in favour of jurisdictional rights under general international law and UNCLOS and that such a presumption is consistent with the intention behind Article 9 (2) of MARPOL.

- That with respect to port States this implies a presumption of unrestricted sovereignty reflected in unlimited residual jurisdiction.

- That unlimited residual jurisdiction is also seen to exist when the issue is approached from the "object and purpose" of regulatory Conventions. The two objectives of regulatory Conventions are the protection of the marine environment and uniformity in the regulation of international shipping.

- That these two objectives do not represent a quid pro quo relationship between flag States and port States.

- That while flag States have committed themselves to a minimum level of mandatory jurisdiction, port States have not, in return, voluntarily restricted their jurisdiction in these matters.

265 Ibid, 111.
• That whereas the multilateral approach is in general a preferable one, it does not exclude an occasional unilateral course.

• That taken together with the in principle unrestricted sovereignty in UNCLOS and general international law, the conclusion seems justified that port States have not, by becoming parties to the regulatory Conventions, committed themselves to a maximum level of prescriptive jurisdiction.

• That additional support for this conclusion can be derived from the circumstance that regulatory Conventions contain opting out provisions in relation to amendments. The faculty of opting out could therefore be regarded as confirming the existence of residual jurisdiction.

• That when account is taken of state practice, the existence of port State residual jurisdiction can be seen in the enactment of the 1990 Oil Pollution Act in the United States. While objections to this resort to unilateralism certainly abounded, the fact the United States had a right under international law to do this seemed uncontested.

It is submitted that in his efforts to argue the existence of residual prescriptive jurisdiction to justify port State regulations in excess of the controls permitted in Conventions to which such port States are party, Molenaar seems to rely more heavily than is justified on the concept of sovereignty as legal authority and constitutional independence. His argument that neither UNCLOS nor general international law prevents port States from prescribing standards that go beyond the regulatory Conventions is not entirely correct. It fails to acknowledge that when states become parties to a regulatory Convention, irrespective of whether they are flag States, coastal States or port States, the functional or operational dimension of their sovereignty with respect to those matters to which the Convention relates is determined by the provisions of that Convention. If it were otherwise, the Convention would not achieve its most basic of purposes, namely that of regulating with certainty the relations between its States Parties on the subject matter to which it is directed.

Beyond this generalised response to Molenaar's argument, the specifics of his line of reasoning warrant the following responses in the context of MARPOL:

• That in MARPOL the obligation to prescribe for all States Parties is limited to prohibiting violations of its technical standards - accordingly, there is no basis admitted by the Convention for unilateral prescriptive jurisdiction with respect to those standards.

• That on the matter of its enforcement, MARPOL does prescribe the authorities and measures which a State Party is entitled to exercise in port against the ships of other States Parties.

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266 As Chapter 12 below will demonstrate, such excessive regulation is beginning to become more frequent in the context of Port State Control.
• That the records of the MARPOL Conference clearly disclose the purpose of Article 9 (2). Its purpose was to record that nothing in the Conference nor in its outcome should be taken to prejudice the then impending Law of the Sea Conference with respect to issues of jurisdiction.267

• That the term "jurisdiction" as used in MARPOL is employed in its geographic dimension.268

• That for States Parties to MARPOL, the Convention provides a prescriptive and enforcement regime which is complete aside only for the necessity to establish its geographical dimensions by reference to international law.269

• That by becoming Parties to MARPOL, states limit, with respect to the matters regulated, the scope of their prescriptive and enforcement jurisdiction to that permitted by the Convention. With respect to matters not regulated by MARPOL, the jurisdiction of States Parties is not affected.270

• That the characterisation of States Parties to MARPOL as port, coastal or flag States does not of itself have the effect of mediating the extent to which they are bound to the Convention. All States Parties are bound. The distinction between port, coastal and flag States Parties does, however, have two dimensions. The first is a legal dimension which is referable to the different competences which each State Party is entitled to exercise. The second is a relationship dimension which identifies the status of each State Party with respect to other States Parties in the implementation of the rules and standards of the Convention.

• That rather than confirming the existence of "residual jurisdiction", the faculty of opting out of amendments supports the construction that with respect to the matters regulated, States Parties do not have competences beyond those contained in the Convention. If it were otherwise, the faculty of opting out would serve no purpose. States Parties could simply justify the adoption of rules and standards which derogate from those contained in MARPOL on the basis of "residual jurisdiction".

• That the enactment of the Oil Pollution Act 1990 by the United States does not establish the existence of "residual jurisdiction". The Oil Pollution Act is an Act which "does not endorse or implement any international regime, Convention or protocol".271 Although Title III

267 See Chapter 3 below.
268 See Chapter 9 below.
269 Ibid.
270 "Parties to the 1973 MARPOL Convention ... are obliged by its Article 4 (2) to prohibit violation of the Convention by vessels within their jurisdiction, but they are not debarred from adopting stricter standards." - Boyle (1985), 359, footnote 71. This assertion is made by Boyle as a footnote to his commentary on Article 211 (4) of UNCLOS. With respect to Article 211 (4), Boyle states that it retains the basic preference for national rules and standards in the territorial sea, but in effect allows the coastal State to adopt its own pollution discharge rules for foreign vessels. There is no requirement that these conform to international standards, whether such standards are contained in MARPOL or otherwise. While there can be no argument that Article 211 (4) does empower coastal States to adopt national rules and standards to apply within the territorial sea, it is submitted that coastal States which are party to MARPOL cannot enforce those national rules and standards against vessels which fly the flag of other States Parties to MARPOL unless they give effect to that Convention's rules and standards.
271 Wagner (1990), 580.
contains an acknowledgement by the United States Congress that "it is in the best interests" of the United States to participate in an international regime which is "as least as effective" as Federal and State oil pollution controls, the Oil Pollution Act unilaterally imposed more stringent standards than were prescribed at the time by MARPOL. One author to criticise this example of unilateralism by the United States was Gold who wrote in 1991 that "[i]n the ship-source marine pollution area, the United States has today manoeuvred itself into a very difficult position, both nationally as well as internationally, through the actions of a rather strange combination of bedfellows - the environmental movement and a group of Federal politicians interested in protecting State rights. As a result, the United States, always at the forefront of developing new principles of international behaviour, but also often very reluctant to implement such principles, has, once again, turned its back on the international community on a rather crucial issue."272

The Oil Pollution Act was not, however, the first occasion on which the United States had acted unilaterally with respect to vessel source pollution. In 1978 the United States Congress passed the Port Safety and Tank Vessel Safety Act. The debate in Congress during the passage of this Act made it clear that Congress intended to impose vessel construction standards in excess of the international standards then set by MARPOL.273 That the United States had legal authority to do so in 1978 is without doubt.274 At that time, the United States had not adopted MARPOL and was accordingly not bound to the international standards established in that Convention. However, by 1990 the United States had adopted MARPOL.275 Thus, the enactment of the Oil Pollution Act in 1990 conflicted with the obligations which the United States had by then assumed as a State Party to MARPOL. In 1992 Alcock wrote with respect to the Oil Pollution Act that "the United States is not prohibited by any international law or agreement from unilaterally imposing more stringent standards for ships entering U.S. ports or U.S.-flag ships".276 As authority, Alcock cited Meese (1982) at page 97. However, as indicated in the text above, when Meese justified US unilateral action in the enactment of the Port Safety and Tank Vessel Safety Act in 1978, the United States was not then a Party to MARPOL. By 1992, that had changed. Thus, although the United States was not prohibited in 1990 from unilaterally imposing standards more stringent than those set by MARPOL on its own flag ships, it was not legally entitled to enforce such standards on the ships of other States Parties to MARPOL. There can be no argument that the United States as a State Party to MARPOL unquestionably has the power to impose on the vessels of other MARPOL States Parties more exacting requirements than those prescribed by the Convention itself. However, it does not follow that it also has the

273 "The issue of whether to require or allow the adoption of stricter standards than those agreed to internationally was a heavily debated issue. '[T]he United States simply cannot urge the world community to adopt tougher anti-pollution measures, get most of what it wants through international agreement, ... and then return home and pass unilaterally the few things it was unable to get at the international conference." (H.R. Rep. No. 1384, 95th Cong., 2d Sess., pt. 1, at 79, reprinted in 1978 U.S.C.A.N. 3270, 3317 (Comments of Rep. Paul McCloskey). The problem was that the US would lose credibility in the world community and would be unable in future international gatherings to get stricter vessel safety measures passed. The issue of unilateral versus international action was raised again during the debate over the Oil Pollution Act of 1990." - Alcock (1992), 129-130, footnote 228.
274 "As a matter of law, neither current international law nor any international agreement to which the United States is a party prohibits the United States from unilaterally establishing more stringent standards for ships entering U.S. ports." - Meese (1982), 97.
276 Alcock (1992), 129-130.
right to do so. The consequences of acting unilaterally without disengaging from MARPOL, include damage to the credibility of the United States, at least at the level of the International Maritime Organisation. In addition to damage to its credibility, the United States created a situation in which it would be in breach of its international obligations under MARPOL on each occasion it attempted to enforce the more stringent construction standards contained in the Oil Pollution Act against the vessels of other States Parties to MARPOL. Enforcement action taken against a vessel of a State Party to MARPOL which complied with MARPOL but which did not comply with the Oil Pollution Act would create a situation similar to that which occurred in the 1906 case of Mortensen v. Peters. The exercise of diplomatic protection by flag States in the circumstances contemplated would appear to be justified. When municipal courts enforce legislation which is alleged to conflict with international law, the state of the national against whom such law is being enforced, has a right to "[espouse] the complaint of the individual that international law has been breached". In taking up such a case, the state is not asserting the rights of the individual but its own rights which were challenged by the state taking the enforcement action. In those circumstances, the state exercising diplomatic protection "is said to have suffered an 'indirect wrong' in such circumstances. When the dispute is taken up by the individual's national state in this way, the dispute becomes one between two states: The one exercising diplomatic protection and the one whose actions are challenged. For example, the United Kingdom took up the cases of British trawler owners denied access to or arrested in 'Icelandic' fishing grounds during their successive 'cod wars' of 1958-76 against Iceland." Similarly, flag States which are parties to MARPOL are entitled to exercise diplomatic protection in respect of the enforcement by other States Parties of rules and standards against their flag vessels which exceed those contained in MARPOL.

As suggested above, much of the conflict between flag States and coastal States with respect to control over shipping has been driven by sovereignty claims to protect national interests. For flag States, national interest demanded that they have primacy of control over shipping and

277 "... like every State, the United States has the power (not the right) to act contrary to its Treaty obligations ... and suffer the consequences." - Henkin (1989), 97.
278 Gold (1991), 443-444. In enacting the Oil Pollution Act, "Congress may have severely compromised America's position with respect to future international safety and environmental Conventions." - Wagner (1990), 586 - footnote omitted.
279 (1906) 14 S.L.T. 227. In that Case, the Danish captain of a Norwegian ship was convicted for fishing in the Moray Firth. It was argued that the conviction was contrary to international law since it involved a claim to jurisdiction over a foreign-flagged vessel which was more than three miles from shore.
280 "The Scottish Court of Justiciary held that even if the Statute under which Mortensen was convicted was contrary to international law, the Court was bound to give effect to the intention of Parliament and enforce it. The remedy for the consequent breach of international law is then diplomatic protection. In this case the British Government subsequently pardoned the fishermen and paid their fines." - Churchill and Lowe (1999), 447-448.
281 Churchill and Lowe (1999), 448.
282 Flag States do not seem to have taken any collaborative action against the United States for the imposition of vessel construction standards in excess of those prescribed by MARPOL. This is perhaps unfortunate from the perspective of promoting uniformity in the regulation of the standard of shipping. However, it is submitted that with respect to the adoption of Port State Control measures which exceed those contained in the Conventions being enforced pursuant to the various regional Memoranda of Understanding on Port State Control, flag States should become more proactive in protecting the legal rights of their flag vessels. If they do not take effective action to resist the enforcement of excessive measures and to seek redress where such occurs, they are likely to eventually lose a substantial measure of control over their flag vessels - see Chapter 12 below.
that their flag vessels be free to navigate without interference from coastal States.\footnote{283} For coastal States, national interest demanded that they have exclusive control over their marine resources and that they be permitted to exercise control over foreign shipping when necessary for the purpose of protecting those resources. In this, the coastal States' position has derived much force from the fact that sovereignty "privileges states' authority over their own resource management".\footnote{284}

By so privileging states' authority, sovereignty can be employed to legitimately justify a refusal to cooperate on development and environmental issues. That this is so is perhaps the most obvious reason why it has been described as "the most resistant barrier to international environmental cooperation".\footnote{285} Beyond that, its resistance as a barrier is reinforced by the status which sovereignty is accorded in international law. Sovereignty and equality of states "represent the basic constitutional doctrine of the law of nations",\footnote{286} a law which is constructed of obligations that generally cannot be enforced by legal process.\footnote{287} Thus, given that states in the pursuit of comparative advantage will generally assume little environmental responsibility in the absence of assurances that other states will assume similar responsibility\footnote{288} and given that the inter-state legal system, of which sovereignty is a basic constitutional doctrine, generally cannot provide that assurance, there would seem to be justification in describing sovereignty as "the most resistant barrier to international environmental cooperation".\footnote{289}

\footnote{283} Historically, the flag States' national interest in primacy of control prevailed. "[f]or many years it was the law of the flag which regulated the safety of ships registered by it ... and for many years the world community relied almost wholly on the flag State to maintain standards of safety and protection of life, property and the environment." - Clarke (1994), 203.

\footnote{284} Kamieniecki and Granzeier (1998), 260. Kamieniecki and Granzeier argue that "[t]he conventional doctrine of sovereignty privileges states' authority over their own resource management, thus allowing states to circumvent environmental regulations that do not coincide with the national interest or the objectives of economic development. Some scholars consider the state itself as the primary source of global environmental degradation and the main obstacle to effective environmental protection. From this state-centric environmental perspective, sovereignty is considered an impediment to concerted international ecological protection, or an underlying cause of the world's environmental woes. Other scholars point to the structure of the international system, and the inequitable distribution of wealth and power between and within industrialised and developing countries, as a source of the international environmental crisis. Some investigators regard the lack of an overarching sovereign authority to inform, create, and enforce effective environmental regulations as ultimately responsible for hindering ecological protection." - 260 - end notes omitted.

\footnote{285} Caldwell (1990), 311.

\footnote{286} Brownlie (1990), 287.

\footnote{287} South-west Africa Cases (1966), ICJ Reports, 9, 46.

\footnote{288} Wapner (1998), 282.

\footnote{289} Caldwell (1990), 311.
PART I

CONCLUSION TO PART I

The international maritime transport industry is essential to the international trading activities of states. In the competitive nature of that industry, the employment of cost minimisation is a rational strategy. To minimise costs in the pursuit of comparative advantage, ship-owners employ, *inter alia*, certain vessel operating procedures. These procedures discharge vessel wastes into the marine environment. When discharged directly into the sea, the removal of vessel wastes involves little or no cost to ship-owners and operators. However, these wastes pollute the marine environment. The methods by which such pollution can be prevented involve increased costs for ship-owners and operators. Accordingly, flag States competing for ship registrations in the conduct of their registry businesses, have no incentive to impose increased costs on ship-owners and operators by ensuring that their vessels do not pollute the marine environment.

Because of the international nature of the vessel source pollution problem, flag States and coastal States must cooperate in adopting, implementing and enforcing appropriate regulations if pollution from vessels is to be controlled. For the purpose of protecting their coastal environments against the effects of vessel source pollution, coastal States demand to exercise a measure of control over foreign-flagged vessels. However, flag States resist such demands. They seek to retain exclusive control over their flag vessels and deny to coastal States the right to interfere with that control and with the navigation of their flag vessels. Sovereignty issues intrude in these tensions between flag and coastal States respectively. Sovereignty in the inter-state system both justifies and assures the freedom of each state from any form of control by other similarly autonomous states. Thus, sovereignty is one of the defining characteristics of statehood. As such, it is a basic constitutional principle of the legal system which regulates relations between states. The international legal system is almost exclusively referable to the concept of sovereignty. This is a concept which is largely responsible for a legal system which arguably privileges independence and autonomy over cooperation. Within that system it is widely employed to justify the conflict which occurs between states in consequence of the diseconomies in their social relationships.

Recourse to sovereignty enables flag States to resist the adoption and implementation of controls on the discharge of pollutants from their flag vessels. Further, the lack of enforcement mechanisms in the international legal system accords flag States a certain freedom in deciding whether or not to compel their flag vessels to comply with vessel source pollution controls. The international legal environment is such that flag States are not faced with compelling reasons to ensure that their flag vessels comply with all applicable international safety and pollution rules and standards.
PART II

MARPOL

INTRODUCTION TO PART II

The purpose of this part is twofold. First it will demonstrate how the conflict over maritime sovereignty and coastal State issues at the 1973 MARPOL Conference influenced the creation of the jurisdictional regime upon which MARPOL depends for its enforcement. Through an examination of the Conference proceedings, the part will reveal how the sovereignty concerns articulated by the Conference delegates created a barrier to inter-state cooperation. That barrier ultimately precluded the Conference from resolving the issue of enforcement jurisdiction. By successfully arguing that the jurisdiction issue should be deferred to the then impending Law of the Sea Conference, the maritime States at the MARPOL Conference were able to ensure that there would be no significant derogation in the proposed Convention from the traditional primacy of flag State control over vessels. As a result, the Convention produced by the Conference preserves the primacy of flag State enforcement authority. It respects the principle that primary responsibility for implementing and enforcing its rules and standards should rest with its flag States Parties. Within its structure, however, the Convention does not provide any incentive for flag States to discharge that responsibility. This part will argue that although the Convention does confer upon its coastal States Parties an enforcement role, that role does not materially challenge the primacy of flag State control. Accordingly, the coastal State enforcement authority created by the Convention is neither a corrective to inadequate flag State enforcement nor an incentive for flag States to discharge their enforcement responsibilities. Flag States are given no reason in the Convention to enforce its rules and standards against their flag vessels.

Secondly, this part will argue that for flag States, as well as for many coastal States, there are other aspects relating to the implementation and enforcement of the Convention which do not make compliance a rational choice. These aspects largely concern the practical difficulties which States Parties encounter in implementing and enforcing the port waste reception facilities obligation, the Discharge Regulations and the Design Regulations. They also concern the economic, resource and competency difficulties which many States Parties experience. All of these difficulties combine to make the strict implementation and enforcement of the Conventions' rules and standards not necessarily a rational choice for many of its States Parties. The fact that this is so allows flag States further discretion in deciding whether or not to enforce MARPOL's rules and standards against their flag vessels.
The part will conclude, then, that MARPOL is not an entirely effective measure by which vessel source pollution might be controlled - this despite the fact that MARPOL is one Convention which clearly has its own structured community.¹

MARPOL's community is comprised of a significant majority of states for whom the Convention is particularly relevant – as at the 1st of February 2001 there were 114 States Parties representing 94% of the World's merchant shipping fleet tonnage.² The Convention contributes to the maintenance of its community by providing for a majoritarian amendment procedure,³ prescribing a compulsory dispute resolution mechanism,⁴ promoting technical cooperation between its States Parties,⁵ and creating a regulatory regime of highly detailed prescriptions designed to prevent the pollution of the marine environment from a comprehensive range of pollutants associated with ship operations.⁶ Beyond the Convention itself, the International Maritime Organisation (IMO) plays a key role in promoting and sustaining the Convention's community. It co-ordinates and facilitates a vast range of activities which not only give life to the Convention but guarantee its continuing relevance to the common goal of the community of States Parties, namely the elimination of ship-sourced pollution in the marine environment.⁷

Although the existence of this structured community is evident, there is reason to suspect that within the community the Convention does not engage the commitment of its members, particularly its flag State members, to achieving the goal of vessel source pollution control. The reason for this suspicion resides in certain features of the Convention which are largely referable to sovereignty and as such arguably prevent the Convention from engaging the necessary commitment of its flag States Parties for it to attain its stated goal. That goal was born of a recognition of the need to preserve the marine environment and of the fact that vessels which discharge oil and other harmful substances into that environment constitute a serious source of pollution. As expressly stated in the Preamble to

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¹ Here the term "Community" is intended to refer to a group formed by members who subscribe to common norms which are regarded as valid within and for the group – see Gehring (1994), 378.

² With respect to the optional Annexes of MARPOL the number of ratifications, acceptances, approvals or accessions as at the same date were as follows:
   - Annex VI – 80 representing 43% of the fleet tonnage – this Annex is not yet in force.
   - Annex VI – 3 representing 9% of the fleet tonnage – this Annex is not yet in force.
   - Annex I (in force 2nd October 1983) and Annex II (in force 6th April 1987) being the compulsory Annexes, each have the 114 ratifications, acceptances, approvals or accessions referred to in the text. Of these 114, 111 are from States Parties which are members of the International Maritime Organisation and 3 are from non-members. So far, 47 members of the IMO have not ratified, accepted, approved or acceded to MARPOL – IMO Doc. MEPC 46/18 15.2.2001, Annexes 1, 2 and 3.

³ MARPOL Article 16. It should be noted, however, that the amendment procedure is weighted in favour of flag State interests. An amendment to an Article of the Convention requires acceptance by two-thirds of the Parties, the combined merchant fleets of which constitute not less than fifty percent of the gross tonnage of the world's merchant fleet. An amendment to an Annex to the Convention, if the aforesaid voting procedure has not been specified, shall be deemed to have been accepted at the end of a period of not less than ten months, unless within that time an objection is communicated to the Organisation by not less than one-third of the Parties or by the Parties, the combined merchant fleets of which constitute not less than fifty percent of the gross tonnage of the world's merchant fleet, whichever condition is fulfilled - Article 16 (2) (f) (i), (ii) and (iii).

⁴ MARPOL Article 10
⁵ MARPOL Article 17
⁶ MARPOL Annexes I - VI
⁷ The role of the IMO will be considered in Part IV below.
the Convention, its goal is "the complete elimination of the intentional pollution of the marine environment by oil and other harmful substances...", which is "best achieved by [the establishment] of rules not limited to oil pollution having a universal purport". Disregarding all considerations other than the purely physical, there can be no real doubt as to the attainability of this stated objective. Equally, there can be no question but that so far in history, this objective has not been attained. The evidence that such is the case is unequivocal, as can be seen in the statistics recorded in Chapter 1 above. In addition to those statistics, there are others which confirm that vessel source marine pollution continues to be a problem, the MARPOL Convention notwithstanding. For example, in 1980 the National Academy of Sciences of the United States estimated that 1.5 million tons of oil were entering the sea annually as a result of routine tanker operations (700,000 tons), tanker accidents (400,000 tons), bilge and fuel oil dumping by tankers and dry cargo ships (300,000 tons), dry docking (30,000 tons), and non-tanker accidents and terminal operations (20,000 tons). This was a reduction from the 2,000,000 tons of oil previously said to be entering the sea annually as a result of accidents, tank cleaning and ballasting. Seventeen years after this estimate, the Secretary-General of the IMO announced that by 1999 the volume of vessel source oil pollution which had been recorded in 1980 had reduced by an estimated 1,000,000 tons annually. This reduction had been noted by GESAMP in 1993. In that year, GESAMP reported that for 1989 the annual discharge of oil into the sea from shipping activities was 0.54 million tonnes, a reduction from the 1.47 million tonnes which had been estimated for the 1982 year. Based on the statistics offered by Kiss and Shelton, it would seem that the reductions achieved during the nineteen eighties have since been reversed. Evidence of such a reversal is implicit in a submission made by Canada to the IMO in 1999. In that submission, Canada reported that "[a] re-examination of the historical data on the seriousness of chronic oil pollution of the oceans off eastern Canada has shown that the problem has been increasing over the last two decades, and that oiling rates of beach stranded birds in southern New Foundland is among the highest in the World... [The] oil coming ashore has been characterised as mainly heavy fuel oil (i.e. mixtures of bunker and marine diesel oils) and in many cases the heavy fuel oil is contaminated with lubricating and hydraulic oils." Given the nature of the oil identified by Canada, it is clear that continuing operational discharges in the north Atlantic Ocean account for its presence along the eastern Canadian sea-board.

8 Preamble to the MARPOL Convention.
9 See text accompanying footnotes 18, 19 and 20 in Chapter 1 above.
11 As reported by William A O'Neil, Secretary-General of the IMO, in the Wakeford Memorial Lecture, South Hampton, 24th March 1997.
12 GESAMP (1993).
13 See the text accompanying footnote 20 in Chapter 1 above.
This evidence can leave no room for doubt that MARPOL has not been successful in completely eliminating the intentional pollution of the marine environment by oil. Accordingly, if the effectiveness\textsuperscript{15} of MARPOL is to be measured by the degree to which its goals have been achieved, then there is sufficient evidence to warrant the conclusion that the Convention is not effective. Having said that however, it must be acknowledged that focusing upon goal achievement as a measure of effectiveness can be overly simplistic with the result that "basing an evaluation of the success of an international regime on its general preambular clauses may turn out to be seriously misleading".\textsuperscript{16} While it would be incorrect to suggest that such is necessarily the case with MARPOL, given the specificity of its stated goal, there is sufficient justification based on the evidence of continuing vessel source pollution to challenge its effectiveness and to question the claim that the MARPOL rules are "sufficient for dealing with vessel source pollution".\textsuperscript{17} Accordingly, this part will seek to identify the reasons why the rules are arguably not sufficient. However, there are certain features within the structure of the Convention's community which do facilitate implementation and enforcement. These features will be examined in Part IV below, since they are just as germane to the matter of effectiveness as the reasons why the rules are arguably insufficient.

\textsuperscript{15} "Effectiveness is the question whether the goals of the norm are achieved, and may be independent of compliance" - Shelton (2000), 5 - emphasis in original. See also Friedheim (2000), who writes that "[t]he test of effectiveness is in regime implementation. We need to know whether supposed actors' converged expectations led to coordinated action. More broadly, do the agreed principles, norms, rules solve the problem for which they were created?" - 298.

\textsuperscript{16} Gehring (1994), 59.

\textsuperscript{17} Brubaker (1993), 249 – Citing Birnie (1986), 234
CHAPTER 3

HISTORICAL BACKGROUND
AND THE 1973 CONFERENCE

3.1 HISTORICAL BACKGROUND

It is commonly stated that MARPOL had its origins in a Resolution of the Inter-Governmental Maritime Consultative Organisation (IMCO) (the former name by which the IMO was known) Assembly held on 21st October 1969\(^1\) to convene an international conference in 1973. This Conference was to address the problem of marine pollution through the preparation of an international agreement which would restrain the contamination of the sea, land and air by ships, vessels and other equipment operating in the marine environment. The Resolution was a response to, inter alia, the United Nations Resolution 2414 (XXIII) which invited the promotion and adoption of effective international agreements to prevent and control marine pollution.\(^2\) To describe MARPOL’s origins as such is somewhat misleading, for when viewed from a broader historical perspective, it is clear that the Convention was but one stage in an evolutionary process which identifiably began in 1922.

In that year, the United States Congress\(^3\) requested President Harding to convene a conference of maritime powers for the purpose of producing effective measures to prevent the pollution of navigable waters by oil. Four years later the conference, attended by representatives of thirteen maritime states,\(^4\) opened in Washington D.C. It produced a Draft Convention which, rather than completely prohibiting the discharge of oil from seagoing vessels, conceived the zone system. By its terms, the Draft Convention created prohibition zones, varying from 50 to 150 nautical miles from the coast, in which the deliberate discharge of oil or oily mixtures was proscribed if the oil content exceeded .05 of one percent, sufficient to create a surface film visible to the naked eye in daylight.\(^5\) Although the Draft did not require the installation of oil/water separators on vessels, it did contract the States Parties to enact legislative incentives to encourage such installation.\(^6\) The Draft Convention standards were to be enforced only by flag States which were obligated to use all reasonable means to secure compliance.

Limited to controlling vessel source oil pollution by discharge standards in a zone system, the Draft Convention did not require any changes to be made to those operational procedures and associated design of vessels to which international oil discharges were immediately referable. It is probable that the failure to direct the regulations towards those procedures and features was

\(^1\) Resolution A.176 (VI).
\(^2\) Singh (1983), 2272.
\(^3\) 42 Stat. 821-22 (Pub. Res. No. 65) 1.7.22.
\(^4\) US, UK, Canada, Belgium, the Netherlands, Denmark, Norway, Sweden, France, Germany, Italy, Spain and Japan.
\(^5\) Preliminary Conference on Oil Pollution of Navigable Waters (1926), T.S. No. 736-A.
\(^6\) Ibid 438-40.
due in part to the economic climate in the shipping industry during the mid-nineteen-twenties. At that time, world shipping was in such a state of economic depression that the costs of design modifications which would have rendered all discharges no longer a matter of routine vessel operation, could not have been absorbed by the shipping industry. Accordingly, the states attending the Conference "were not receptive to proposed regulations that would add substantial costs to the industry". Although the economic constraints of the time may have justified exempting the existing fleet from design and equipment modifications, the Draft Convention could have required new vessels to make such modifications. It would not have been unreasonable to expect that in the case of new vessels the additional construction costs would be recovered during in-service life.

Following the 1926 Conference, marine pollution continued, unregulated and unabated. According to the "Financial Times" of London, by 1928 waste oil was being discharged into the sea at the rate of 500,000 barrels a year. It was against this background, then, that the British Government at the League of Nations in 1934 initiated a further attempt to construct an international agreement by referring the problem of oil pollution to the League's Communications and Transit Organisation. This Organisation prepared a Draft Convention but no conference was convened, as European countries (especially Germany and Italy) became focused on the more pressing political issues of the latter half of the nineteen-thirties.

After the Second World War, vessel source oil pollution as a matter of governmental concern again became submerged by the events of the time, in particular by the more immediate projects of post-war reconstruction and the establishment of the United Nations and its specialised agencies. However, in 1954 it was the British Government which once again called for another conference. On this occasion, it was motivated to do so by the continued fouling of British beaches by oil and the attendant decimation of shore birds. It was also influenced by the fact that "political disputes and economic differences concerning the status of flag of convenience shipping" were delaying the establishment of the Inter-Governmental Maritime Consultative Organisation, the specialised UN Agency within the authority of which the matter of oil pollution regulation then seemed to fall.

Thirty two states representing 75 percent of the world's shipping tonnage responded to the British initiative by attending a conference in London between 16th April and 12th May 1954.

From the outset, the actual seriousness of the oil pollution problem was in dispute, with maritime States such as France asserting that the environmental impact of oil pollution was minimal. The contrary was argued by coastal States. They produced scientific evidence demonstrating the

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7 Curtis (1985), 684.
10 Cycon (1980), 36.
11 Ibid, 37.
13 The Organisation was not established until its Multilateral Convention entered into force in 1958 - Convention on the Inter-Governmental Maritime Consultative Organisation, 6th March 1948. By Article 1 of the Convention, the purposes of the Organisation included: "4. To provide for the consideration by the Organisation of any matters concerning shipping ...".
14 Curtis (1985), 685.
adverse environmental effects of oil in seawater. Beyond the scientific debate, however, lay the all-pervasive sovereignty issue, with many states resisting the infringement on sovereignty inherent in any form of international regulation. On this premise, the continuation of the voluntary standards employed in the past was promoted. Likewise, resistance to bearing the additional costs involved in environmental protection surfaced as a major obstacle to the adoption of the measures proposed to address the problem.

In the events, the delegates opted for a cost/benefit analysis on which to found the agreement.\(^{15}\) The resultant Convention, the International Convention for the Prevention of Pollution of the Sea by Oil (OILPOL),\(^{16}\) therefore "reflected the unwillingness of many of those participating to shoulder the financial and political costs of control of vessel pollution"\(^{17}\) and thus OILPOL would not prove to be an effective pollution control regime.

In summary, the OILPOL Convention applies to non-naval vessels over 500 gross tons registered in any of the contracting states\(^{18}\) and prohibits the discharge of oil and oily mixtures which foul the surface of the sea within fifty miles of land within certain designated prohibition zones.\(^{19}\) Where the oil in mixture is less than 100 parts per million it is deemed not to foul the surface of the sea.\(^{20}\) Ships are required to carry an "oil record book"\(^{21}\) in the form prescribed by the Convention\(^{22}\) and subject that book to inspection by any of the contracting states.\(^{23}\) Contracting states are obliged to report any violations of the Convention standards to the government of the state in which the violator is registered.\(^{24}\) In turn, that government is required to punish the violator under its national laws, which must provide for penalties "adequate in severity to prevent any such unlawful discharge"\(^{25}\). Coordinating responsibilities under the Convention devolve on IMCO to which contracting states are required to submit the text of laws, decrees, regulations and orders giving effect to the Convention as well as reports indicating the results of application of the Convention.\(^{26}\) In the preventive area, the Convention requires contracting states to be proactive in the provision of port facilities for the reception of oil wastes.\(^{27}\)

In its confection, OILPOL drew heavily on the 1926 Draft Convention. Aside from one relatively minor prescription, namely the requirement that all ships be "... so fitted as to prevent the escape of fuel oil or heavy diesel oil into bilges the contents of which are discharged into the sea without being passed through an oily water separator"\(^{28}\) the main thrust of the Convention is directed to the prohibition through overly rigid standards\(^{29}\) of the polluting activity in circumstances where the detection of that activity would present significant practical difficulties. Many, if not most,
coastal States simply do not have sufficient resources to effectively police the prohibition zones. Further, the concept of self-incrimination inherent in the oil record book requirements is hardly a reliable medium through which non-compliance with the discharge prohibitions might be detected.

That aside, an analysis of the Convention’s features reveals the extent to which it is handicapped in achieving the objective of reducing vessel source oil pollution in the marine environment. These features include the following:

- There is no general prohibition on discharge by tankers heading to ports with waste reception facilities.

- Non-tankers are permitted to discharge operational pollutants within the fifty mile prohibition zone, provided that the ports to which such vessels are headed do not have waste reception facilities.\(^{30}\)

- Many refined oils are excluded from the scope of the Convention, which applies only to "crude oil, fuel oil, heavy diesel oil and lubricating oil".\(^{31}\)

- The Convention does not apply to all seagoing vessels – ships of less than 500 tons, whalers and naval auxiliary vessels are all excluded.\(^{32}\)

- Discharges fall outside the Convention where they are necessary to "[secure] the safety of the ship, [prevent] damage to the ship or cargo, or [to save] life at sea"; similarly excluded are discharges due to "damage or unavoidable leakage" provided that "all reasonable precautions have been taken after the occurrence of the damage or discovery of the leakage for the purpose of preventing or minimising the escape".\(^{33}\)

- Also permitted are "discharges of sediment which cannot be pumped from the cargo tanks of tankers by reasons of its solidity and residues left from the purification or clarification of oil or lubricating oil".\(^{34}\)

The discharge of oil outside the fifty mile zone and designated prohibition zones is unregulated by the Convention. Thus, the Convention has no application where oil drifts into the fifty mile zone or designated prohibition zones after legal discharges outside those areas – the Convention places reliance upon the zone concept to prevent pollution. This is a reliance which is not well taken, given the ease with which wind and sea currents disperse pollutants.

\(^{30}\) OILPOL Article II (2).
\(^{31}\) OILPOL Article I (1).
\(^{32}\) OILPOL Article II.
\(^{33}\) OILPOL Article IV (1).
\(^{34}\) OILPOL Article IV.
In the final analysis, the only burden placed upon the oil transportation industry by the 1954 Convention was "the extra time spent outside the prohibition zones discharging dirty ballast and tank cleaning residues".35

It is also relevant to record that the acceptance by the Convention of a fifty mile prohibition zone did not have the effect of conferring jurisdiction or enforcement authority upon coastal States outside traditional territorial waters beyond that already possessed; nor did it derogate from that authority.36 Equally undisturbed in any significant measure was the customary flag State enforcement regime. The inefficiency of this regime became readily apparent in a 1962 survey conducted by IMCO which "revealed a pattern of laxity and neglect among many signatories to the Conventions".37 England and Germany were responsible for citing the majority of territorial water offences, whereof approximately one half were successfully prosecuted. However, not one of the offences detected outside territorial waters resulted in a successful prosecution.38

In following the regulatory style of the 1926 Draft Convention, OILPOL predetermined the limited extent of its impact on the problem to which it was addressed. But it was not only the regulatory style which drew influence from the earlier Draft Convention. Within the Conference itself, similar dynamics to those which drove the 1926 Conference were active. For example, objection was made to the provision of port reception facilities—this on the argument that such facilities were "unacceptably inflationary when oil pollution through mid-oceanic discharges had a disputable fate and effect on the environment".39 The net result, then, was a Convention which did not contain effective regulations for preventing marine pollution.40 If anything, it did no more than move pollution from coastal waters without actually reducing the quantity of oil being discharged into the sea.41

Even before the OILPOL Convention came into effect, dissatisfaction with its regulatory aspects spread among the States Parties and demands were soon made for its amendment.42 In response to this situation, IMCO convened a conference in 1962 to review the Convention. Matters of jurisdiction and enforcement were considered by the delegates. These included a proposed extension of the fifty mile zone to one hundred miles upon request and some formal justification. However, with no accompanying extension of coastal State jurisdiction beyond the territorial sea, the 1954 Reporting and Enforcement Regime, which had proved demonstrably ineffective, remained.43 Also discussed was the obligation of contracting states to impose penalties which the Conference required to be "adequate in severity" to deter violations. This obligation was preferred over the Yugoslavian proposal that "severe" penalties be imposed, and the imposition of penalties "according to an international standard" as suggested by Malagasy.44

In recognition of the near impossibility of proving discharge violations, the British delegation proposed that the burden of proof be shifted so as to require vessels, accused of violating the

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35 Curtis (1985), 687.
36 OILPOL Article XI.
37 Cycon (1980), 39, footnote 15.
38 Ibid.
40 Curtis (1985), 685.
41 Griffin (1994), 491.
42 Sweeney (1974), 289.
43 Cycon (1980), 39.
44 Ibid.
Convention standards, to establish their innocence. This proposal was soundly defeated – the concept of reversed burden of proof was contrary to the national legal systems of many of the attending states.\textsuperscript{45}

In the years following the 1954 Convention there was a substantial increase in oil transportation and in international recognition that oil pollution had become a more serious problem. Despite this, however, the 1962 Conference made no attempt to foster technological advances designed to eliminate or at least substantially reduce the polluting effects of those vessel operating procedures which discharged oil into the sea. Furthermore, states were largely relieved of their obligations under Article 8 to "ensure the provision" of waste reception facilities at ports by an amendment which required contracting Parties to take "all actions appropriate to promote" the installation of such facilities. This Amendment effectively ensured that adequate reception facilities would not be built. Non-tankers would thereby be permitted to continue their historical practice of discharging ballast close to shore.

One reason for the failure of the 1962 Conference to agree upon technology-forcing measures was a general disenchantment with certain alleged "advances", such as oily water separators, which had proved in practice to be of questionable viability.\textsuperscript{46}

The Conference did, however, achieve some improvements over the 1954 Convention. These included an enlargement of the prohibition zones, the delegation of technical responsibilities to IMCO, the removal of the sediment discharge exception, the reduction of tanker threshold size to 150 tons\textsuperscript{47} and positive discouragement of the practice of carrying water in fuel oil tanks.\textsuperscript{48} In addition, and perhaps more significantly, the 1962 Conference accepted a British proposal whereby a general prohibition (less than 100 parts per million) on operational discharges was to be applied to all new vessels (i.e. vessels for which building contracts were placed on or after the date on which the provision came into force) over 20,000 deadweight tons.\textsuperscript{49} The real significance in this proposal lay not so much in the prohibition itself, but in the means by which it was to be achieved. The oily waste residues produced by ballasting and tank cleaning operations would have to be retained on board in consequence of a ship construction control. Achieving the prohibition through such control represented a departure from the mainly "end of pipe" or effect proximate style of regulation which had thus far obtained. This attempt to regulate through construction standards rather than the effect producing activity itself was clearly a cause-oriented attempt. Unfortunately, however, this attempt was too tentative and basically ill conceived, with the result that the regulation was to prove largely ineffective in practice. First, there was a widespread lack of port reception facilities (which were not in any event mandatorily prescribed by the Convention) to receive the onboard retained residues. Secondly, given the lack of port reception facilities, the only way in which a ship could comply with the requirement was to have sufficient segregated ballast tankage which, as with reception facilities, was not prescribed.

\textsuperscript{45} Ibid.
\textsuperscript{46} Curtis (1985), 689.
\textsuperscript{47} For other vessels, the 500 gross ton weight was retained.
\textsuperscript{48} Ships would often fill oil fuel tanks with water as the fuel tanks were emptied during the voyage, thus maintaining proper ballast. However, most non-tankers constructed during the 1960s were designed to reduce the need for using this type of ballast – Cycon (1980), 40, footnote 20.
\textsuperscript{49} OILPOL Article III (C) – 1962 Amendment to the 1954 Convention, done 11th April 1962, 600 UNTS, 332.
Finally, an exception permitted discharge where the master of a ship not fitted with segregated ballast tanks was of the opinion that special circumstances rendered it neither reasonable nor practical to retain the oily wastes on board. "No doubt the master of such a ship would have had this opinion every time he was headed for a port with no reception facilities."  

Following the adoption of the 1962 Amendments, the oil transport industry formally introduced the Load on Top system for handling oily wastes. This system was promoted as a more economic alternative to the general prohibition and zonal schemes of OILPOL, which were perceived as involving significant compliance costs. On 17th June 1964, after three years of trial and research, Shell, Exxon and British Petroleum, between them owning or chartering sixty percent of the world tanker fleet, announced the introduction of the Load on Top system as a means whereby oil pollution from routine tanker operations would be abated. This economically mediated industry initiative, proclaimed by its proponents as "as major 'breakthrough' in environmental policy, a 'practical cure of operational pollution', one that 'balances the need to protect the environment with the everyday requirements of ships'" in fact violated both the 1954 Convention and the 1962 Amendments. Furthermore, behind the much lauded cost effective merits of the system lay some realities which cast doubts upon the claims of environmental effectiveness made by the shipping industry. Writing in 1977, Johnson identified some of these realities: Although an estimated 80-85 percent of the world’s tanker fleet is equipped to use the LOT system, sources have suggested that it is used by only 50 percent of ships so equipped; the system can be effectively employed only on long voyages where there is sufficient time for the oil and water mixtures to separate; separation is, however, inhibited by rough sea conditions; increased operating costs are caused by delays associated with the slop tank discharge into reception facilities at loading and unloading ports; there is a lack of port reception facilities; and finally, there are increased construction costs or decreased profits attributable to the use of a special slop tank or an existing cargo tank to hold oily water. Despite this, during the latter half of the nineteen-sixties, the LOT system, with its defining characteristics of the reduction of discharges overboard and the retention of waste oil on board, was actively promoted by an industry anxious to avoid the imposition of expensive regulations to control marine oil pollution. The development of this system and its concerted promotion by otherwise highly competitive industry organisations represented a level of environmental cooperation which is not often evident in inter-state relations. Driven by a common concern, those within the industry "closed ranks" to present a combined front to states responsive to divergent national interests and apparently unable to transcend their resultant differences to present a concerted front. The essential dynamics of this situation were to become reflected in the 1969 Amendments to OILPOL which one commentator proffered as an example of "the

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50 Abecassis (1985), 38.
51 A system whereby tankers were required to include oil/water separators in their machinery. After separation, the water, virtually oil free, could be discharged overboard. The resultant oil sludge was then kept on board in the bottom of the tanks. The new cargo would be loaded on top of the sludge – hence the expression "Load on Top".
52 Pritchard (1978), 185-186.
53 Ibid, 186 – footnote omitted.
54 Curtis (1985), 690 – the LOT system prevented compliance with the 100 ppm discharge limitation required by the 1954 Convention in coastal prohibition zones and also conflicted with the 1962 Amendments prohibiting any discharge by new tankers over 20,000 deadweight tons.
55 Johnson (1977), 63.
56 Ibid, 70.
57 Pritchard (1978), 199.
timidity of IMCO's efforts". Perhaps more significantly, the 1969 Amendments were also a reflection of the difficulties encountered in the enforcement of the 1954 and 1962 Discharge Standards.

The failings of OILPOL, as amended in 1962, were soon to be openly admitted by IMCO. Against this background, the United Kingdom in 1968 submitted amendments to IMCO. These amendments would legitimise the use of the LOT system which by then had become quite widespread. In sum, the 1969 Amendments:

- Replaced the 100 parts per million discharge system with an industry backed permissible discharge rate of not more than 60 litres of oil per nautical mile. This discharge arrangement was compatible with the use of the LOT system. "[A]lthough some quantities of effluent would unavoidably exceed the concentration standard, those more contaminated quantities could be discharged at a slower rate. While more oil could be introduced into the environment under this scheme, the proponents argued that the dispersal factor would prevent significant damage."

- Prohibited discharges other than clean ballast water (15 parts per million oil content) within a fifty mile coastal zone.

- Set the maximum quantity of oil which could be discharged at 1/15,000 of the cargo's capacity. This Regulation was initially resisted by the oil industry, as it would enable inspectors to detect violations at the loading port by checking the vessel following the return voyage. Ultimately, however, the industry accepted the quantity restriction to secure acceptance of the LOT system. In practical terms, this acceptance did not expose the industry to any greater risk of detection – the Amendments did not grant rights of inspection to non-flag states. Even if they were to have done so, the incidence of loading port inspections may not have increased "since the oil exporting states ... have always lacked interest in inspecting returning tankers."

- Made changes to the mandatory oil record book to improve enforcement capabilities.

At the IMCO Assembly in 1969, at which the above Amendments were adopted, "[a] Resolution was passed calling upon governments to promote the LOT system." However, three other proposals were rejected. The first was that the burden of proof of violation be reversed (this was a repeat by the United Kingdom of a proposal first put forward in 1962); the second was that a

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58 Greenberg (1976), 138 – the 1971 Amendments were similarly categorised by the same commentator.
59 Cycon (1980), 40.
60 Collins (1987), 278.
61 Ibid.
63 Collins (1987), 279.
65 Ibid.
67 McGonigle and Zacher (1979), 241.
68 Joda (1977), 568.
69 Cycon (1980), 40.
reporting State have the right to participate in a foreign State's prosecution (a French proposal); and the third was that the flag State be obligated to prosecute upon receipt of an accusation by a reporting state (another French proposal).70

Two years after these Amendments, the IMCO Assembly voted further changes to the OILPOL Convention. These changes addressed construction standards based upon the ship's dimensions, provided for compartmentalisation, limited tank sizes and specified acceptable tank configurations.71 The construction standards were aimed at limiting the maximum amount of oil flow at grounding or collision72. They would not affect operational discharges.

As an illustration of regulatory inadequacy, OILPOL is a fine example. Its inadequacy, largely attributable to prescriptions which were unenforceable in the absence of appropriate compliance mechanisms in the form of cargo monitors and non-flag State rights of inspection,73 ensured that vessel source oil pollution would continue unabated. Under the Convention, maritime sovereignty continued to prevail. Thus, with the 1969 Amendments years away from ratification and no prospect of change to the disastrous record of enforcement of the discharge standards,74 the United States lobbied for change. In 1970, under the influence of a strong domestic environmental movement, it expressed dissatisfaction with the ability of the LOT system and the Convention as amended to effectively control the oil discharge problem.75 This dissatisfaction, echoed by several other states, became the catalyst for an IMCO sponsored conference convened for 1973.76

The goal of the 1973 Conference

"was foreshadowed in 1971, when [IMO] adopted a US/NATO Resolution that the Conference should have as its main objective the achievement by 1975, if possible, but certainly by the end of the decade, of the complete elimination of the wilful and intentional pollution of the sea by oil and noxious substances other than oil, and the minimisation of accidental spills.77"

Thus it was, that the United States became one of the principal promoters at the Conference for changes designed to create an enforceable pollution control regime. The position taken by the Americans included proposals for the mandatory installation of segregated ballast tanks, double bottom hull construction, reversal of the burden of proof (i.e. any visible sheen trailing a vessel would be prima facie proof of discharge violations - this proposal had its origin in regulations under the US Federal Water Pollution Control Act first passed in 1948) and port State jurisdiction (a proposal on which the United States joined forces with Canada, to empower coastal States to undertake proceedings against vessels in port for violations outside territorial waters).78

70 Ibid, 41.
71 IMCO Resolution A.246 (VII) (1971).
72 Juda (1977), 568.
73 Collins (1987), 279.
74 Cycon (1980), 41.
75 Curtis (1985), 693.
76 Seventy-one Nations attended, and although the majority of delegates came from developing States, their impact was not reflected in the final product of the Conference – Cycon (1980), 41, note 26.
77 Cycon (1980), 41.
78 Ibid, 42.
The final act of the London Conference was the adoption on 2 November 1973 of two instruments, the first entitled "International Convention for the Prevention of Pollution by Oil from Ships, 1973" and the second "Protocol Relating to Intervention on the High Seas in Cases of Marine Pollution by Substances other than Oil". The Convention, which has been described as "one of the most innovative and far-reaching marine pollution instruments conceived so far, a precedent for regulating other polluting industries", emerged out of long and difficult negotiations between coastal and shipping interests. These interests were in conflict over many issues. In the events, the negotiations resulted in a compromise in which neither side received all it wished. On the other hand, each major faction received something:

"Coastal States obtained a very effective new anti-pollution regime; maritime States found themselves with better, safer and modern operational requirements which must inevitably be cost-effective; the IMO was further strengthened as MARPOL became the very centerpiece of the Organisation's 'safe ships and clean seas' principle."

Such a glowing testimony to MARPOL would seem to suggest that despite the conflictual atmosphere of the 1973 Conference, sufficient cooperation to the end of a common purpose prevailed to produce an effective regulatory regime for controlling vessel source pollution within a structured community. On a more general level, it has also been observed that in relation to some of the less difficult issues, of which marine pollution is said to be one, states have managed to achieve the requisite degree of cooperation to produce satisfactory environmental outcomes. To what extent, then, does MARPOL deserve either the specific testimony given or alternatively warrant inclusion within the ambit of the general observation just recited? In answering these two questions, the ensuing examination will raise some doubts. Specifically, doubt will be expressed that the Conference delegates did achieve the necessary depth of cooperation to produce an effective Convention. Then, doubt will be cast upon the capacity of the Convention as enacted to maintain the commitment of its States Parties, particularly its flag States Parties, to its stated goal of the complete elimination of intentional pollution of the marine environment by oil and other harmful substances discharged from ships. By way of preliminary outline, the examination in this chapter will canvass some of the more indicative aspects of the Conference negotiations. Then, Chapter 4 will analyse one of the core Conference issues, namely, the Convention's jurisdictional regime. Chapter 5 will assess the effectiveness of the control regime constructed by the Convention.

### 3.2 THE 1973 CONFERENCE

Under the auspices of IMCO, the Conference was convened in London in November 1973 to consider a draft Convention which would regulate marine pollution caused by discharges of oil, other noxious liquid substances carried in bulk, packaged harmful substances, sewage and

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70 Gold (1973), 58.
81 Hurrell and Kingsbury (1992), 47.
82 An analysis of the intersection between MARPOL and UNCLOS on the issue of jurisdiction will be reserved for Part III below.
garbage. The basic documentation for the Conference had been prepared by technical experts. It included a draft of the proposed Convention which provided the focus for the negotiations. This Draft had the effect of confining substantive discussion only to those issues implicated in its language. From the records available, it does not appear that the delegates ventured much beyond the parameters set by the text of the Draft. To the extent to which alternative measures differing significantly from the Draft were not considered, the eventual outcome of the Conference was in large measure predetermined by the basic documentation prepared by the technical experts. This is not meant to suggest that the basic documentation was in any way inadequate. What it does signal, however, is the fact that constrained by the Draft Convention, there was little opportunity for "creative brain storming that might have yielded additional alternatives responsive to the benefit of all sides".

3.2.1 Cooperation at the Conference

Given that the Conference had been convened to address specific issues which were of an essentially technical character, the hope was expressed that cooperation, rather than conflict, would inform the negotiations. While recognising that the delegates represented the seventy-seven states participating in the Conference, the Canadian representative voiced optimism "that they would work together as a body rather than as defenders of particular national or commercial interests". Against the background of a growing international and national demand "for more effective legislation to deal with the problem of pollution ... he hoped that the Conference would succeed in meeting that demand by establishing global criteria and global solutions. IMCO, by developing appropriate rules and standards, could hasten the day when both flag States and coastal States could consider themselves as partners in bettering the lot of mankind.". These same sentiments were reiterated by Canada at the Eleventh Plenary Meeting: "... the very purpose of the Convention, which was to promote cooperation between nations". Unfortunately, however, the expectations of the Canadian representative were not completely met. Issues born of long standing political rivalries impacted on the process. With the majority of the delegates coming from developing states, it was inevitable that sovereignty, financial assistance (being an aspect of broader equity issues) and national interest would dictate positions and so produce conflict. Providing a good example of the politicisation of the process was the statement by one delegate who opined that "the argument that a conference on a technical subject should not concern itself with political questions seemed to ... be quite worthless, since considerations concerning the environment could not be dissociated from the ideological context in which they were situated; colonialism, fascism and apartheid were essential elements of the environment and forms of the worst possible pollution". The sentiments which motivated this opinion were also echoed in statements from other delegations representing developing states.

83 IMCO Doc. MP/Conf/SR.1 25.10.73 - Summary Record of the First Plenary Meeting - page 3.
84 IMCO Doc. MP/Conf/4 23.8.73.
85 Susskind and Ozawa (1992), 150.
87 Ibid.
88 IMCO Doc. MP/Conf/SR.11 4.3.74 - Summary Record of the Eleventh Plenary Meeting, page 8.
89 Mr Nhigula, IMCO Doc. MP/Conf/SR.5 2.11.73 - Summary Record of the Fifth Plenary Meeting, page 6.
The heavy financial costs involved in the implementation of the Convention prompted the Brazilian delegate to exhort the developing countries not to ratify it: "... although the Convention was of interest to developed as well as to developing countries, it would impose on the latter a considerable burden which was not consonant with their resources. It would therefore be unwise for them to ratify it."90 For the Nigerian delegation, the heavy financial burden which the Convention would impose on all participating states meant that it should contain provisions enabling those states without adequate financial means to request technical assistance at the very least.91 In similar vein, the Kenyan delegation argued the financial assistance issue: "The Convention was only justified if it effectively enabled pollution to be eliminated, and the cooperation of developing countries in that fight was essential. The support they should receive could not be limited to that which could be offered to them under bilateral agreements."92 Likewise, the Philippine delegation considered that the implementation of the Convention by developing countries should be contingent upon adequate support.93 Both the USSR and the United States were opposed to any notion of assistance, even technical assistance. They based that opposition on the considerable financial repercussions of (in the case of the USSR)94 and the political questions implicated in (in the case of the United States) the proposal to incorporate technical cooperation provisions within the Convention.95

Regarding the opposition voiced by the USSR, the United States and others, the representative of Tunisia conveyed his surprise at the "number of highly industrialised countries hesitating to vote on the proposed [technical cooperation] Article when a developing country like his own, aware of its responsibilities, had not hesitated to subscribe to the Stockholm decisions, to build an oil settling tank at La Skira, to set aside from its development plan considerable sums for the treatment of sewage, to carry out tests on destroying oil slicks that threatened its beaches, to fight desertification, and when its authorities had not waited for the outcome of the Conference, to give the Tunisian National Ports Department instructions that consideration should henceforth be given to the setting up of reception facilities for residues, refuse and sewage from ships.".

After acknowledging the financial implications of technical cooperation, he then questioned whether highly industrialised countries could "hesitate to give their mite to those who despite their lack of means, had already made every effort to improve the environment on what in Stockholm was called 'one world".96

The divergent positions taken at the Conference on the issue of technical cooperation illustrate very graphically just how problematic and fragile international environmental cooperation really is. When faced with the prospect of non-reciprocating arrangements, states which would bear the burden thereof will often oppose those arrangements, disengaging with references to sovereignty and national interest. A statement by the Mexican representative at the Conference

90 IMCO Doc. MP/Conf/SR.8 4.3.74 – Summary Record of the Eighth Plenary Meeting, page 10.
93 IMCO Doc. MP/Conf/SR/12 4.3.74 – Summary Record of the Twelfth Plenary Meeting, page 25.
95 Ibid, 8.
96 Ibid, 10-11.
provides no better evidence of the legitimacy accorded to national interest as justification for disengagement. After confirming that he understood the point of view of the other delegations, the representative of Mexico said that he "considered that [those other delegations] were justified in attempting to protect their own interests", concluding with the remark that "[t]he developing countries must look to theirs too". As to the sovereign right not to cooperate and participate, it is equally well recognised and resorted to, a fact which emerges from a statement made by the Norwegian representative. His statement typifies the equanimity with which states can refuse to cooperate. After asserting that Article 9 was central to the whole Convention, he then stated that "if it were deleted, Norway would have to give serious consideration to its attitude to the Convention before deciding upon signature and ratification". Such confrontational, positional bargaining, facilitated by the principle of the sovereign equality of states, can often predispose to compromise solutions which resonate more with the national interest underpinning the hard bargaining than with the specific environmental problem at issue. It can also lead to outcomes which, being the product of negotiations that are determined by the power and capabilities of the participating states, are ultimately rendered ineffective due to the continued resistance of those states whose positions did not prevail. The legacy is apt to be yet further conflict which compromises and confounds the outcome that was ostensibly achieved. In this context, it is of interest to note that although the developing states were in the majority at the Conference, "their impact was not reflected in the final product of the Conference". Their impact was largely restricted to the Article on Technical Cooperation which was adopted notwithstanding the opposition from the developed states.

3.2.2 The Jurisdiction Issues at the Conference

By far the most contentious issue at the Conference and the one which would sabotage the realisation of the cooperation envisaged by the Canadian delegation, was that of jurisdiction. Always a sensitive issue in inter-state relations, jurisdiction in the context of the marine environment is one sovereignty issue on which there is much actual and potential conflict. At the 1973 Conference, that conflict was a dominant feature, "arousing the most discordant debate at the month long gathering. The central issue was the concern over the content of the coastal jurisdiction which was compounded by another basic disagreement as to the proper extent of coastal jurisdiction.". The debate was fuelled in significant measure by the fact that many of the states represented "felt that the traditional division of legal authority between a narrow territorial sea and the high seas was dangerously anachronistic". As representatively expressed by the Indonesian delegate, "... an increasing number of countries were finding that the traditional concepts of international law were becoming more and more out of line with modern technological development". The scene was thus set for conflict on an issue upon which the eventual entry into force and effective application of the Convention would largely depend.

98 IMCO Doc.MP/Conf/SR/11 4.3.74 - Summary Record of the Eleventh Plenary Meeting, page 7.
101 Sweeney (1974), 301.
102 IMCO Doc. MP/Conf/SR/10 4.3.74 – Summary Record of the Tenth Plenary Meeting, page 11.
As noted above, the Draft Text of the Convention\textsuperscript{103} submitted for consideration, effectively directed and confined the scope of the conflict. Providing no better example of this demarcative role is the jurisdictional issue, which surfaced in two distinct respects. In the first respect, the issue was over physical area, while in the second it centred on functional competence.

Both Alternative I of Draft Article 4, which was headed "Penalties", and Alternative II, headed "Violation" employed the expression "territorial seas". By the first Alternative, for example, each contracting state was to prohibit under its laws any discharge of harmful substances occurring within its territorial seas.\textsuperscript{104}

In the second Alternative, the first use of the expression came in Paragraph (2) which would provide that "[a]ny violation of the requirements of the present Convention within the territorial seas of any contracting state shall be prohibited under the law of that state". The use of this expression, which was the preferred choice of the traditional maritime States in Committee I\textsuperscript{105} virtually guaranteed open conflict on a very contentious issue. While some delegations did express a preference for more neutral terms such as "waters under its jurisdiction", "areas under national jurisdiction" or "within the limits of national jurisdiction"\textsuperscript{106} the clash between opposing positions on the issue could not be avoided. Taking the most extreme position were countries such as Brazil, Chile, Ecuador, Peru and Uruguay. They promoted the extension of sovereignty and jurisdiction to a limit of up to 200 nautical miles from their coasts.\textsuperscript{107} Less extreme was the claim of Nigeria to a territorial sea extending 30 nautical miles from its coast\textsuperscript{108} while the USSR was one of the states favouring a more modest 12 nautical mile territorial sea.\textsuperscript{109} This latter proposal drew opposition from Argentina, Australia, Brazil, Chile, Ecuador, Peru, Uruguay, Canada, Japan, New Zealand, Nigeria and the Philippines.\textsuperscript{110} The most conservative position was that taken by states such as the United States of America which had historically subscribed to the 3 nautical mile territorial sea. For its part, the United States consistently maintained that the Conference should not encroach on issues, such as the extent of coastal State jurisdiction, which would be more properly left to the Law of the Sea Conference.\textsuperscript{111}

\textsuperscript{103} IMCO Doc. MP/Conf/4 23.8.73.
\textsuperscript{104} Draft Article 4
\textsuperscript{105} IMCO Doc. MP/Conf/SR/10 4.3.74 – Summary Record of the Tenth Plenary Meeting, page 12 – United Kingdom.
\textsuperscript{106} IMCO Doc. MP/Conf/4 23.8.73, page 4, footnote 10.
\textsuperscript{107} IMCO Doc. MP/Conf/WP.47 2.11.73.
\textsuperscript{108} IMCO Doc. MP/Conf/WP.45 2.11.73.
\textsuperscript{109} IMCO Doc. MP/Conf/WP.38 2.11.73.
\textsuperscript{110} IMCO Doc. MP/Conf/SR.13 4.3.74 – Summary Record of the Thirteenth Plenary Meeting, page 18.
\textsuperscript{111} IMCO Doc. MP/Conf/WP.42 2.11.73, page 8.
Given the impossibility of reaching agreement on the formula "territorial sea", it was decided to replace it with the term "jurisdiction".\textsuperscript{112} This replacement was regarded by the traditional maritime States as "a concession which was an essential part of the package deal."\textsuperscript{113} Such a strategy did not, of course, resolve the conflict. Instead, so far as the formula "territorial sea" was concerned, it did little more than submerge the conflict beneath the illusion of cooperation. Consequentially, however, it had the effect of creating further conflict. If the formula "territorial sea" were retained, the conflict would be limited to a question of measurement. But by substituting "jurisdiction" for "territorial sea", the conflict could become more qualitative in character.

In the second respect of the jurisdictional issue, the conflict was to be far more complex. Here it was engendered not only by the two Draft Text alternatives to Article 4 but also by Articles 8 and 9. In addition, it was fuelled by the concept of port State jurisdiction jointly proposed by the United States and Canada. As presented to the Conference, the problem of jurisdiction represented a challenge to the traditional legal order of the oceans. This is an order "based upon two well established, complementary principles of customary international law, freedom of the high seas and flag State sovereignty over ships flying that state's flag".\textsuperscript{114} Rising to that challenge were the maritime States, such as the Scandinavian States and Greece, which have always strongly endorsed the principle of the freedom of international shipping. On their philosophy, this freedom should be upheld by virtually unrestricted maritime shipping regulated only by free and fair competition.\textsuperscript{115} Having global interests, as opposed to purely coastal concerns, the maritime States had developed a system of law which sought to maintain its integrity by restricting the quantitative and qualitative assertions of coastal State authority.\textsuperscript{116} At the 1973 Conference, these assertions were prosecuted vigorously by coastal States, testing the resolve of the maritime States to defend their system. The result was that much conflict ensued, conflict which would ultimately remain unresolved by the Conference.

As presented to the Conference, the draft formulations for jurisdictional competence which had the potential to impact on the interests of maritime States were as follows:\textsuperscript{117}

(i) **Draft Article 4** entitled "Violations": By Paragraph (1) of this Article, the flag State would have jurisdiction to prohibit and punish violations wherever they might occur. The flag State would also be under an obligation to prosecute when informed of a violation, provided it was satisfied that sufficient evidence was available to enable a prosecution to be mounted. This draft paragraph produced no dissent insofar as it did no more than affirm the plenary powers of the flag State.

By Paragraph (2) of the Article, a coastal State would be empowered to prohibit violations occurring within its jurisdiction. When such a violation occurred, the coastal State would have

\textsuperscript{112} IMCO Doc. MP/Conf/SR.10 4.3.74 - Summary Record of the Tenth Plenary Meeting, page 15 - Mexico.
\textsuperscript{113} Ibid, page 12- United Kingdom.
\textsuperscript{114} Johnson (1977), 68.
\textsuperscript{115} Lampe (1983), 305.
\textsuperscript{116} Legault (1971), 211.
\textsuperscript{117} Refer IMCO Doc. MP/Conf/WP.17.
the option to either prosecute or refer the violation to the flag State.118 This draft paragraph did not pass without comment. The main point of contention was with the use therein of the term "its jurisdiction". Although by reference to Draft Article 10 (3) it was intended that the term be "construed in the light of international law in force at the time of application of the ... Convention", a number of delegations expressed concerns. For example, the Bulgarian delegation, having indicated a preference for a more precise formula in Paragraph (2) of Article 4, lent its support by way of a compromise to the use of the term "jurisdiction" "but opposed any manifest attempt to deprive that term of any legal value. It was absolutely essential to say in Article 10 (3) that the term should be construed 'in the light of international law' because the term 'jurisdiction' assumed some meaning in law. The formula was doubtless a very general one, but at least it produced a basis for negotiation." 119 In stating this position, the delegation clearly recognised that the use of the term "jurisdiction" would carry with it a measure of indeterminacy which the forthcoming Law of the Sea Conference could resolve. In the meantime, however, the application of Article 4 (2) would be problematic in the sense that the meaning of "jurisdiction" would be a variable within the Article. It would thereby admit the possibility of interpretive dissent. One delegation opposing Draft Article 10 (3) was Ecuador. It argued that it "constituted an infringement of the right of states to determine the extent of their jurisdiction themselves" then added, somewhat inexplicably, that the Draft Article would prejudice any solution which might be adopted at the 1974 Law of the Sea Conference.120

In an apparent attempt to reinforce the supremacy of flag State jurisdiction, particularly in relation to matters of design, construction and equipment, the Netherlands proposed that the following paragraph be added after Paragraph (4) of Draft Article 4:

"(5) The party to the Convention which in accordance with Para (2) intends to cause proceedings shall notify the Administration of the ship of its intentions. With regard to violations of the requirements of the regulations relating to design, construction and equipment, such proceedings shall not be initiated or continued upon notification by the Administration of the ship that the latter initiates proceedings of its own."121

A number of delegations opposed this Amendment on the grounds that it involved an unacceptable limitation on the jurisdiction of coastal States. The choice offered by Draft Article 4 (2) would be virtually eliminated by the proposed Amendment. It would effectively deprive the coastal State of the right to take legal action against a ship which had violated the Convention within territorial waters.122 The submission of the amendment to the Conference was a clear signal of the concern harboured by the maritime States at the prospect of more extensive coastal State jurisdiction to the prejudice of navigational freedom and the traditional primacy of flag State control over vessels. An even more explicit example of that concern appeared in Committee I where the Greek delegation had proposed replacing the words "any violation" in

118 Ibid, Article 4. This Article, subject to some changes, such as the substitution of "jurisdiction" for "territorial sea" was essentially the same as Alternative II of Article 4 in MP/Conf/4. Alternative I which provided for flag State jurisdiction and, within the territorial sea, coastal State jurisdiction was not submitted to the Conference.
119 MP.Conf/SR/10 4.3.74 - Summary Record of the Tenth Plenary Meeting, page 14.
120 Ibid page 19.
121 IMCO Doc. MP/Conf/WP.16 30.10.73.
Draft Article 4 (2) with the expression "any discharge in contradiction of the requirements ...". The stated purpose of the amendment was to clarify the application of Draft Article 4 (2), limiting it to discharge violations. The Greek delegate argued that Draft Article 4 (2) had been "inspired by the idea that the [flag State] could not always give effect to the Convention in matters of discharge; but that did not apply to violations of the requirements concerning the design of the ship because, if such a case occurred, the [flag State] could always invalidate or refuse to renew the ship's certification. Then again, the words 'within the jurisdiction of any party to the Convention ...' in Article 4 (2) clearly implied that the violations referred to in the Article would occur in some areas but not in others: That would not happen with violations of the regulations on ship construction and equipment. If Article 4 (2) were to cover violations concerning the design of the ship, it would amount to introducing an almost universal jurisdiction into the Convention, to which a large majority of the members of Committee I were opposed."

There can be little doubt that this was an argument driven by flag State concerns at the apparent inevitability of more extensive coastal State powers being created by the Conference.

Far more contentious in the context of Draft Article 4 were the proposals submitted by the United States and Canada. They proposed that it be expanded to include port State jurisdiction. Substantively, both proposals differed only in relatively minor detail. In essence, each would empower a contracting state to cause proceedings to be taken against any ship not entitled to fly its flag, when that ship entered its ports or offshore terminals, in respect of any violation of the requirements of the Convention by such ship, wherever that violation occurred, provided that the proceedings be commenced within three years of the occurrence of the violation. This concept of port State jurisdiction had support from within the shipping industry itself, provided that it was subject to the jurisdictional priority of the flag States. Such primacy would avoid any diminution in the responsibility and authority of the flag administration which would be important in the proper control of international shipping. However, this proposal was defeated. Traditional maritime States, including the United Kingdom, Norway and France, together with developing countries driven by concerns over the condition of their older fleets, combined to ensure that port State jurisdiction was excluded from the Convention.

(ii) Draft Article 9 entitled "Powers of Contracting States": Paragraph (1) of the Draft Article was to provide that "[n]othing in the present Convention shall be construed as derogating from the powers of any party to the Convention to take more stringent measures, where specific circumstances so warrant, within its jurisdiction, in respect of discharge standards". However, the power was to be qualified by a prohibition against the imposition of "additional requirements with regard to ship design and equipment in respect of pollution control" except where the particular characteristics of waters, as determined by accepted scientific criteria, rendered the

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122 See comments by Canada, Spain and the USA - IMCO Doc. MP/Conf/SR.10 4.3.74 – Summary Record of the Tenth Plenary Meeting, pages 10-16.
123 IMCO Doc. MP/Conf/SR.10 4.3.74 – Summary Record of the Tenth Plenary Meeting, page 20.
124 USA – MP/Conf/8/9 10.7.73; Canada – MP/Conf/8 25.6.73.
125 Oil Companies International Marine Forum, IMCO Doc. MP/Conf/8/2 AD.2 5.10.73, page 3.
126 This Draft Article was originally numbered 8 in the Draft Text of 23.8.73 – IMCO Doc. MP/Conf/4.
environment exceptionally vulnerable. Even more so than Draft Article 4 did this Article fire the sovereignty and jurisdictional conflict at the Conference. It tested the capacity of the delegates to cooperate on a issue which, in the words of one delegation, was central to the whole Convention.

Described as "a genuine accommodation between two extreme points of view - the first holding that coastal States Parties to the Convention shall be free to take any measures they choose within their jurisdiction in respect of matters to which the Convention related and the second holding that coastal States should have no right to take any such measures", Draft Article 9 was an attempt to define "the extent, if any, to which coastal States Parties could undertake to refrain within their jurisdiction from imposing their own national standards in respect of matters to which the Convention relates". As such, the Draft Article implicated a derogation from the sovereign rights of States Parties. This derogation was perceived as necessary to the objective of achieving uniform regulations. If States Parties were to insist upon respect for their supreme authority, then that would entail a risk of interference with international navigation. For those supporting Draft Article 9, which had been approved by a large majority in Committee I that included "many coastal States, shipping States and maritime powers" the issues were very clear and the arguments very compelling: As an international problem, marine pollution could only be controlled in accordance with international rules which in turn could only be respected if states agreed to a reduction of their sovereign rights. Restraining unilateral national action would pre-empt the imposition by coastal States of the type of divergent standards which would impede maritime transport, particularly were such standards to be applied along major international sea routes. In being asked, then, to agree to Draft Article 9, states were in effect being requested to "circumscribe, on a contractual basis, their exercise of sovereign powers with respect to other parties to the Convention". Thus, it would be argued that the core issue of Draft Article 9 was essentially contractual, "defining the obligation of the parties to the Convention to one another" in a workable compromise between conflicting interests which "would promote environmental interests without unduly impeding the efficiency of world sea borne trade". If that request were to be denied, then coastal States might consider that they had full authority to take whatever restrictive measures they thought appropriate. In arguing to the issues attendant upon Draft Article 9, those supporting its retention had no doubt that a curtailment of sovereign freedom would be necessary to ensure the effective application of the proposed Convention.

Opposition to Draft Article 9 was concerted and in one major respect quite contrived. Those opposing its adoption argued that "... the Conference should not prejudice the outcome of the Law of the Sea Conference and [that] the present formulation of Article 9 as a whole was indeed

127 Draft Article 9 (2).
129 IMCO Doc. MP/Conf/SR.11 4.3.74, page 8 - Canada.
130 IMCO Doc. MP/Conf/SR.12 4.3.74, page 14 - Canada.
131 Ibid, page 2 - France.
132 IMCO Doc. MP/Conf/SR.11 4.3.74, page 8.
133 IMCO Doc. MP/Conf/SR.12 4.3.74, page 5 - Trinidad and Tobago.
134 IMCO Doc. MP/Conf/SR.11 4.3.74, page 7 - Norway.
135 IMCO Doc. MP/Conf/SR.11 4.3.74, page 11 - Australia.
137 IMCO Doc. MP/Conf/SR.12 4.3.74, page 3 - Spain.
prejudicial in that it gave coastal States powers to take unilateral action which was a complete infringement of the competence of the Law of the Sea Conference".\textsuperscript{138} This theme of prejudice to the Law of the Sea Conference informed virtually all the arguments against Draft Article 9. For the United Kingdom, Draft Article 9 was the point at which conflict was created between the two aims which it had at the Conference - "first to produce a Convention which would effectively combat pollution, and secondly, to avoid prejudicing in any way the Conference on the Law of the Sea".\textsuperscript{139} As presented to the Conference, the Draft Article empowered states "in certain circumstances to introduce special construction standards applying to all ships within its jurisdiction", a power to which the United Kingdom was opposed. In its view, such a power represented a new development in the law of the sea.\textsuperscript{140} Also stressing the undesirability of encroaching on to the prerogatives of the Law of the Sea Conference was Tanzania, which argued that "the issue involved in Article 9 was the extent to which coastal States could take action under international law, and that very issue had been under discussion for three years at the UN Seabed Committee; it was therefore a matter for the Conference on the Law of the Sea".\textsuperscript{141} The United States couched its opposition to Draft Article 9 in similar terms - "Article 9 was an attempt to define states' own jurisdiction over their own waters. It therefore purported to decide issues which were not within the competence of the Conference but were to be dealt with by the forthcoming UN Conference on the Law of the Sea. The issue of jurisdiction was a very complex one to which the Conference had not given adequate consideration and could not do so ... The US had consistently opposed any prejudging of the issues to be decided at the Law of the Sea Conference, and which, moreover, needed further consideration by governments. Article 9 as drafted was too simplistic to be accommodated in the Convention and was not necessary to it."\textsuperscript{142}

The arguments ranged against Draft Article 9 clearly recognised, as did those in its support, that it would involve a limitation on sovereign powers. Was it the prospect of this limitation rather than prejudice to the Law of the Sea Conference which really inspired the opposition? Were the references to the Law of the Sea Conference in all the opposition arguments a mere contrivance to duck an issue which has traditionally been a very difficult one in inter-state relations? An affirmative answer to both these questions would certainly seem to be justified on the basis of the only logical interpretation which Draft Article 9 would seem to admit.

Despite the appearance of being either permissive or empowering in application, Paragraph (1) of the Draft Article was clearly intended to operate as a contractual restriction on the sovereign powers of the States Parties. By allowing to each party the power to take, within its jurisdiction, more stringent measures than those prescribed by the Convention in respect of discharge standards and by conditioning the exercise of that power on the existence of special circumstances, Paragraph (1) effectively created a restriction. Unless special circumstances so warranted, States Parties would not be permitted to take measures within their jurisdiction more stringent than those contained in the Convention. Of course, it is possible to construe Paragraph

\textsuperscript{138} IMCO Doc. MP/Conf/SR.11 4.3.74, page 11 – Japan.
\textsuperscript{139} IMCO Doc. MP/Conf/SR.11 4.3.74, page 9 – UK.
\textsuperscript{140} Ibid.
\textsuperscript{141} Ibid, page 11
\textsuperscript{142} Ibid, pages 12-13.
(1) as empowering. It intended to confer an authority which would not otherwise have been available to States Parties to the Convention – this on the basis that by becoming a party to the Convention a state would only be competent to apply within its jurisdiction the discharge standards set forth in the Convention; Paragraph (1) would enlarge that competence where special circumstances so warranted. Whichever of these two approaches to Paragraph (1) is taken, however, it is simply not possible to read into the Paragraph an intent to define jurisdiction in the sense of the term as employed in the statements made in opposition to the Draft Article. Quite the contrary, in employing the unqualified formula "within its jurisdiction" the Paragraph clearly intended that the question of jurisdiction, that is, jurisdiction in the sense of the area within which authority might be exercised, would be exogenously determined.

In the case of Paragraph (2) of the Draft Article, the intent to create a contractual restriction on sovereign power is even more overt. This Paragraph clearly precludes each party to the Convention from imposing within its jurisdiction additional design and equipment requirements relating to pollution control to vessels other than those flying its flag. As with Paragraph (1), it is not possible to interpret this Paragraph as defining the nature and scope of the jurisdiction of parties to the Convention. Again, any suggestion that it does do so can be refuted by referring to its use of the expression "within its jurisdiction" which, as with Paragraph (1), clearly involves an exogenous determination of what will suffice for "jurisdiction" for the purposes of the Paragraph.

On this analysis, then, it seems reasonable to conclude that the Conference delegates who opposed the Draft Article were either confused as to its true import or were not prepared to countenance any restrictions on state sovereign powers. Whatever may have been the case, the objections succeeded, with the result that Draft Article 9 was not adopted and the conflict between the two extreme points of view was to remain unresolved. That this was so was made expressly clear by the Australian representative at the Twelfth Plenary Meeting:

"In light of the failure of Article 9 to secure the necessary two-thirds majority, Australia reserves its position entirely to impose whatever conditions it may lawfully impose within its jurisdiction to protect from pollution the marine environment adjacent to Australia. Australia cannot accept the contrary view that the failure of the text to secure the necessary two-thirds majority carries the implication that Australia may not within its jurisdiction impose more stringent standards than those embodied in the Articles and Regulations."143

At the same Plenary Meeting, the Canadian delegation expressed similar views:

"In the absence of any provision restricting the powers of contracting states to take measures within their jurisdiction in respect of matters to which the Convention relates, the Canadian delegation formally declares its view that nothing in the Convention can be construed as derogating from such powers. The Canadian delegation reserves all rights of the Government of Canada to take any and all measures within its jurisdiction for the protection of its coasts and the adjacent marine environment from pollution from ships."144

143 IMCO Doc. MP/Conf/SR.12 4.3.74, page 13; see also IMCO Doc. MP/Conf/WP.31 1.11.73, pages 1-2.
The failure of Draft Article 9 to win acceptance at the Conference provides a clear illustration not only of the reluctance of states to accept limitations on their sovereign powers but of the type of conflict which such reluctance can create. Emerging from that conflict, the enforcement jurisdiction provisions in the Convention produced by the Conference do not guarantee that the goal of the Convention can be attained. As will be argued in the next chapter, a significant deficiency lies in their failure to provide flag States with reasons to ensure that their flag vessels comply with the adopted rules and standards.
CHAPTER 4

THE JURISDICTION REGIMES
IN THE CONVENTION

MARPOL’s prescriptive and enforcement provisions are primarily located in Articles 4 and 9, but also associated therewith are Articles 3, 5 and 6. When taken together, all these Articles seek to establish the parameters of each State Party’s competences with respect to the application and enforcement of the Convention’s prescriptions.

4.1 ARTICLE 3

By Article 3 (1), the Convention is stated to apply to ships entitled to fly the flag of a party, and to ships not entitled to fly the flag of a party but which operate under the authority of a party. Into this latter category fall fixed or floating platforms which, by Article 2 (4) are included within the definition of "ship". Then, reflecting the sovereignty concerns harboured by the Conference delegates, Paragraph (1) is followed disjunctively by Paragraph (2) which provides that "[n]othing in the present Article shall be construed as derogating from or extending the sovereign rights of parties under international law over the seabed and subsoil thereof adjacent to their coasts for the purposes of exploration and exploitation of their natural resources". One possible explanation for the inclusion of this paragraph is that it may have been thought that in rendering the Convention applicable to platforms operating on the continental shelf the sovereign rights of the adjacent coastal State to the sea-bed and subsoil thereof may have been affected. The justification for this explanation can be found in the provisions of Article 2 (2) as it appeared in the draft text circulated for consideration prior to the Conference. In that Draft, "administration" was said to mean "the government of the state whose flag the ship is entitled to fly or under whose authority the ship is operating in accordance with Article 3 (1) (b)". For some delegations, the use of the expression "authority" in Draft Article 2 (2) would lead to confusion. This would occur in circumstances where a fixed or floating platform owned or operated by the nationals of one State Party, and therefore under the authority of that state, was being operated in an area within the jurisdiction of another state. The situation envisaged obviously implicated issues of sovereignty and jurisdiction and admitted the possibility of conflict. Thus, to counter that potential conflict, Draft Article 2 (2) was replaced by Article 2 (5) which reads:

"(5) 'Administration' means the government of the State under whose authority the ship is operating. With respect to a ship entitled to fly a flag of any State, the Administration is the government of that State. With respect to fixed or floating platforms engaged in exploration and exploitation of the seabed and subsoil thereof adjacent to the coast over which the

1 IMCO Doc. MP/Conf/4 23.8.73.
coastal State exercises sovereign rights for the purposes of exploration and exploitation of the natural resources, the Administration is the government of the coastal state concerned."

By the last sentence of this Paragraph (5) any potential for conflict has been removed. That sentence makes it clear that with respect to fixed or floating platforms engaged in the exploration and exploitation of the sea bed and subsoil thereof over which a coastal State has sovereign rights to explore and exploit, the Administration is the Government of that coastal State. Thus, it is that coastal State which is required under Article 4 to establish sanctions for violations of the Convention committed by platform operators. In this context, the state of which the owner of the platform is a national, does not have authority. With that clarification, the retention of Article 3(2) would seem to have been rendered unnecessary.

4.2 ARTICLE 4

By Article 4, violations of the Convention’s requirements must be prohibited, wherever they may occur, and sanctions established therefor by the law of the flag State. Also, the article requires that a flag State Party prosecute violations in accordance with its law whenever informed of a violation committed by one of its ships, provided it is satisfied that sufficient evidence is available to warrant such prosecution. The terms of Paragraph (1) of Article 4 make it clear that the question of the sufficiency of the available evidence is left to the sole and unfettered discretion of the flag State. It alone decides whether that evidence is sufficient to enable proceedings to be brought against its flag vessel. In practice, that decision is not readily contestable by any other State Party to the Convention. Accordingly, Article 4 (1) provides a solid anchorage to secure the primacy of flag State control over vessels.

Under Paragraph (2) of Article 4, coastal States Parties are required to prohibit violations of the Convention within their jurisdiction and to establish sanctions therefor. However, "jurisdiction" is, by Article 9, left to be construed in light of international law in force at the time of application or interpretation of the Convention. When a violation does occur within the jurisdiction of a party to the Convention, that party must either cause proceedings to be taken in accordance with its law, or furnish to the flag State of the ship concerned such evidence and information as may be in its possession that a violation has occurred. Whenever informed of a violation by one of its ships, a State Party must report both to the informant party and to the IMO as to the action which it has taken in respect thereto. Finally, Article 4 requires States Parties to prescribe penalties for violations which are adequate in severity to discourage violations and which apply with equal severity no matter where the violations occur.

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2 Article 4 (1).
3 A flag State decision that the evidence is not sufficient to enable proceedings to be taken could be contested under Article 10. This Article provides for the compulsory arbitration of disputes concerning the interpretation or application of the Convention. However, as will be argued in Part III, the existence of this compulsory dispute settlement mechanism does not in practice provide a reason for flag States to enforce the Convention against their flag vessels.
4 Article 4 (2).
5 Article 4 (3).
Thus it is through Article 4 that MARPOL maintains the traditional primacy of flag State prescriptive and enforcement jurisdiction. It respects and gives effect to the principle that the primary responsibility for the application of vessel standards laid down in international instruments rests upon the state whose flag a ship is entitled to fly. In addition, Article 4 complements that flag State jurisdiction with a coastal State competence to prescribe and enforce. However, that competence has limitations. Such are its limitations that the competence conferred upon coastal States is neither a corrective to inadequate flag State enforcement nor an incentive for flag States to discharge their enforcement responsibilities. That this is so can be demonstrated from two perspectives: First, the practical and systemic reasons for the inadequacy of flag State enforcement, and secondly, the indeterminancy created by the use of the formula "within the jurisdiction" with respect to coastal State competence.

4.2.1 Flag State Implementation

The problem of flag State implementation is one which continues to exist, despite the best endeavours of the IMO to the contrary.6 As publicly lamented in 1996 by Lord Goschen, the then Minister for Aviation and Shipping in the United Kingdom, "experience has shown that [reporting pollution incidents to the ship's flag State] is rarely effective in bringing sanctions against polluters".7 This lament was made following an alleged pollution incident on 13th May 1996 when the Panamanian registered M/V Vacy Ash was observed illegally discharging palm oil some fifty miles from the entrance to the River Tyne.

There are, it is suggested, two categories of reasons for the poor record of flag States in the implementation and enforcement of pollution controls. The first category comprises factors which are of an essentially practical nature, while the second is sovereignty-based.

From a practical perspective, there are some obvious difficulties in the way of flag State implementation:

- The infrequency with which many vessels call at the ports of their flag States.8

- The fact that vessels are often constructed in countries other than their flag States – the flag State cannot readily ensure compliance with construction standards.9

- The difficulties encountered by flag States in collecting evidence to support proceedings where a flag vessel has committed a violation in far away waters. Geographical inaccessibility coupled with the limited availability of inspecting officers can inhibit the institution of proceedings.10

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7 UK Department of Transport, Press Notice 261, 13.8.96.
8 Lowe (1975), 634.
9 Anderson (1976), 1005-1006.
10 IMCO Doc. MP/Conf/8/2/AD.2 S.10.73 - Oil Companies International Marine Forum.
The lack of appropriate resources available to flag States.\(^11\)

From a sovereignty perspective, problems with flag State implementation can be traced to "states with 'open' registries which place minimal or no restrictions on what ship may fly their flag".\(^12\) According to a 1970 enquiry,\(^13\) there are some features which are common to those States that offer flags of convenience, namely:

"(i) The country of registry allows ownership and/or control of its merchant vessels by non-citizens;

(ii) Access to the registry is easy. A ship may usually be registered at a Consul's Office abroad. Equally important, transfer from the registry at the owner's option is not restricted;

(iii) Taxes on the income from the ships are not levied locally or are low. A registry fee and an annual fee, based on tonnage, are normally the only charges made. A guarantee or an acceptable understanding regarding future freedom from taxation may also be given;

(iv) The country of registry is a small power with no national requirement under any foreseeable circumstances for all the shipping registered (but receipts from very small charges on a large tonnage may produce a substantial effect on its national income and balance of payments);

(v) Manning of ships by non-nationals is freely permitted; and

(vi) The country of registry has neither the power nor the administrative machinery effectively to impose any governmental or international regulations; nor has the country the wish or the power to control the companies themselves.\(^14\)

The states which currently offer or which have in the past offered flags of convenience are Liberia, Panama, Honduras, Costa Rica, Lebanon, Cyprus, Somalia, Morocco, Singapore, San Marino, Haiti, Malta, Sierra Leone and Vanuatu.\(^15\) Although this list omits the Bahamas and Bermuda, which provide tax haven facilities, both of these states were identified, along with Liberia, Panama and Cyprus, as the five major open registries in the 1989 UNCTAD Review of Maritime Transport. As at the end of December 1999, the four largest flag States were, in

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\(^{12}\) Matlin (1991), 1019. The problem with flag States which offer open registers is recorded in the ICONS Report in the following terms:

"Data from the International Underwriting Association of London show that some registers have tonnage-loss ratios up to four times the world average. Several of the same registers have port State control detention records up to 50 per cent in excess of the average for all flags. The same registers with consistently unsatisfactory records appear in databases on sub-standard shipping from all regions. These registers include several of the world's largest open registers and account for a substantial portion of the world's fleet. However, this can be said not only of open registries, but also for many traditional national registries. Conversely, many substantial open registers have never featured on port State control target lists." - ICONS Report (2001), 88-89.


\(^{14}\) Ibid, 51.

\(^{15}\) Matlin (1991), 1020. It is said that the traditional open registries are now being augmented by a new generation of open registries, thereby complicating the open registry problem - Oxman and Bantz (2000), 149.
descending order, Panama, Liberia, the Bahamas and Malta. Between them, these four flag States had on their registries a gross merchant fleet tonnage of 28,205,481.\textsuperscript{16}

As a practice, flagging out to open registries was pioneered by American and Norwegian ship owners\textsuperscript{17} and by English merchants.\textsuperscript{18} After the end of World War II the growth of this practice accelerated, largely due to the then highly competitive nature of the World shipping industry. With this growth came international controversy. This was driven initially by maritime States which regarded their merchant fleets as valuable assets. These states saw an imminent economic threat to their fleets in the open registry practice which offered to ship owners lower operating costs and hence a comparative advantage.\textsuperscript{19} By the late nineteen seventies however, this opposition had also become driven by environmental concerns. During that decade there were a significant number of maritime casualties which involved oil tankers registered in Liberia.\textsuperscript{20} One generalised conclusion drawn from these casualties was that large oil tankers registered under flags of convenience posed a serious threat to the marine environment. In this way, the open registry system became the focus of environmentally mediated opposition.\textsuperscript{21}

The open registry system is an incident of the fundamental premise in international customary law that a ship must have a nationality and that while on the high seas it is subject to the exclusive jurisdiction of the state whose nationality it holds.\textsuperscript{22} In addition, customary international law and many explicit agreements impose upon a state which has ascribed its nationality to ships a responsibility for the lawful conduct of those ships while on the high seas.\textsuperscript{23} These principles demand that there be both certainty and ease of identification of the nationality of vessels. Traditionally, such has "been achieved by according states a virtually conclusive unilateral competence to confer their nationality upon vessels".\textsuperscript{24} This competence is limited only by the traditional doctrine of international law which precludes a ship from having a dual or multiple nationality.\textsuperscript{25} Not only has each state the sovereign right to determine which vessels might fly its flag, but each state has the sovereign right to set the standards under which such

\textsuperscript{17} Ibid, 348 – footnote omitted.
\textsuperscript{18} "As early as the sixteenth and seventeenth centuries English merchants resorted to it in their attempts to circumvent Spanish trading monopolies in the West Indies and South America" – Goldie (1963), 224 – footnote omitted.
\textsuperscript{19} Ibid, 220-221. Maritime unions also oppose flagging out on the grounds that it enables ship owners to circumvent minimum wage, social benefit and competency standards imposed by developed maritime states. Lost employment opportunities are also a factor in union opposition – see Matlin (1991), 1050-1051.
\textsuperscript{20} Of particular note were the breaking up of the Argo Merchant south west of Nantucket Island on the 20\textsuperscript{th} December 1976 with the loss of approximately 7.5 million gallons of oil and the grounding of the Amoco-Cadiz off north western France with the loss of 58 million gallons of oil. During 1976, 19 oil tankers were lost in accidents, of which 11 were vessels registered in Liberia – Herman (1978), 2.
\textsuperscript{21} Matlin (1991), 1051-1052.
\textsuperscript{22} Ibid, 1021-1022. Boisson writes that "... it is logical to attach a ship to a given State, which thereby becomes responsible for its safety. The needs of international navigation mean that the ship sails through zones subject to different sets of conditions. For it to operate safely, the requirements it has to comply with must remain the same, wherever it is. It therefore has to be attached to a single legal system. Those managing a ship must be able to conduct business without being harassed by every State. The simplest means of avoiding the confusion that would result from a complex overlapping of successive national powers consist of attaching each ship to a State, its nationality being given material expression by the flag it flies." - Boisson (1999), 157 - footnote omitted.
\textsuperscript{23} McDougal, Burke and Vlasic (1960), 26.
\textsuperscript{24} Ibid, 27.
\textsuperscript{25} Goldie (1963), 254 – citing McDougal, Burke and Vlasic (1960) - "The one necessary limit upon the discretion of states, and a limit which appears universally accepted, is that, once a state has conferred
vessels will be granted its nationality. These sovereign rights derive from the "well established principle of customary international law that one state cannot infringe upon the sovereign rights of another state". It was on the basis of these principles that the open registry system was able to develop and it was with the same principles that the opponents of the open registry system had to contend.

The view that an unrestricted freedom to register vessels would ultimately lead to international conflict was one of the influences which motivated opposition to the open registry system. Inspired by the idea that a grant of nationality by one state would be meaningless unless that grant were generally recognised by other states, those opposing the system sought to secure general acceptance of an objective test by which recognition might be accorded. That test inhere the notion that there must be a "genuine link" between the ship and its flag state. It was "conceived shortly after the appearance of the Nottebohm decision by the International Court of Justice, which found a necessity for a 'genuine connection' between an individual and a state as a condition precedent to conferring nationality". Those advocating the test argued that it would bring a measure of order and protection to interactions on the high seas and in so doing protect broader community interests.

In its preparatory work for the 1958 Geneva Conference on the Law of the Sea, the International Law Commission produced a formulation of the test in the following terms:

"1. Each 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. Ships have the nationality of the State whose flag they are entitled to fly. Nevertheless, for purposes of recognition of the national character of the ship by other States, there must exist a genuine link between the State and the ship.

"2. A merchant ship's right to fly the flag of a State is evidenced by documents issued by the authorities of the State of the flag."

That formulation drew vehement opposition from flag of convenience states at the Conference, provoked particularly by the non-recognition provision in Paragraph 1 of the Draft Article. In the events, that provision was deleted and as adopted by the Conference the genuine link concept appears in Article 5 of the High Seas Convention in the following terms:

its national character upon a vessel, other states may not confer their national character as long as the original national character remains unchanged" - 57.

26 Matlin (1991), 1029. In 1905 the right that each state has to unilaterally determine when and the conditions under which it confers its nationality upon vessels was judicially recognized in the Muscat Dhow (France v. Great Britain), Hague Court Reports (Scott), 93 (Permanent Court of Arbitration, 1916.) - "Generally speaking it belongs to any sovereign to decide to whom he will accord the right to fly his flag and to prescribe the rules governing such grants." - 96.

27 Ibid.

28 "A major reason for proposing the requirement of a genuine link was dissatisfaction by many maritime states with the increasing and illegitimate employment of flags of convenience. It was contended that flag of convenience ships had essentially no meaningful link with their states of registry, and that, therefore, other states should not be required to recognise their nationality".


29 Ibid, 59.

30 Herman (1978), 13.

"1. Each 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. Ships have the nationality of a State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship; in particular the State must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.

"2. Each State shall issue to ships to which it has granted the right to fly its flag documents to that effect."

The deletion of the non-recognition provision is said to constitute evidence that the majority of the Conference delegates agreed with the argument of El Salvador "that the non-recognition clause would 'offend against the principle of sovereignty', and would allow a state to interfere with matters coming within the scope of the domestic jurisdiction of another state."32

The inclusion of the genuine link provision in Article 5 of the High Seas Convention as the means by which to control flag of convenience vessels generated considerable legal debate, much of it critical. Among the criticisms which have been levelled are that it breaks with the long standing precedent established by the Muscat Dhow case, that it inheres an ambiguity which has not been resolved by an appropriate definition in the Convention and that neither the consequences for, nor the status of a vessel which fails the genuine link test are specified by the Convention.33 More cogent than these however, were the criticisms of McDougal, Burke and Vlasic34 who argued that "that the new-found contrivance of genuine link could do incalculable harm. ... It is yet to be demonstrated that any conceivable good could attend to the introduction of this new-found requirement of genuine link. It has not been established that it would be an economic technique for achieving the laudable aims of labour for more suitable working conditions and higher standards of living. It has not been established that it is an economic technique for remedying the ills that business interests find in competition, even if it be assumed that these ills are entirely real and not hypochondriacal. Finally, it has not been established that safety of navigation or any other shared interest in common use of the oceans would in any way be improved. It has not, in sum, been established that the proposed innovation would serve any common interest which might counter-balance the very grave risks and dangers which it would entail. On the contrary, it would seem reasonably clear that the only purposes it would serve are those of disruption, controversy and anarchy."35

Despite these criticisms, the genuine link test was restated in Articles 91 and 94 of UNCLOS36 in language virtually identical to that found in Article 5 of the High Seas Convention.

34 McDougal Burke and Vlasic (1960).
36 Article 91 –
UNCLOS did not, however, end the debate on the genuine link requirement. That debate continued in UNCTAD in the course of its efforts to eliminate flags of convenience. Those efforts culminated in the adoption of the United Nations Convention on Conditions for Registration of Ships in 1986. This Convention details the criteria which must be satisfied before a State Party accepts a vessel on its register. The principle aim of the Convention is "to strengthen the link between a ship and its flag State, and to ensure that States effectively exercise jurisdiction and control over their ships, not only in relation to administrative, technical, economic and social matters, but also with regard to the identification and accountability of ship owners and operators who, in the past, have sometimes hidden behind a complex and artificial veil of interconnecting companies."

To this end, the Convention requires each party to establish a competent and adequate national maritime administration which must ensure that its flag vessels comply with rules on registration, safety and the prevention of pollution, that they are periodically surveyed and that they carry on board all relevant documents (i.e. those which evidence its right to fly the flag of its state of registration and those which are required by international conventions). Ownership and

1. Every 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. Ships have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship.

2. Every State shall issue to ships to which it has granted the right to fly its flag documents to that effect."

Article 94 -

1. Every State shall effectively exercise its jurisdiction and control in administrative, technical, and social matters over ships flying its flag...

Articles 91 and 94 were subjected to analysis by the Law of the Sea Tribunal in its 1999 decision in The M/V "Saiga" (No. 2) (Saint Vincent and the Grenadines v. Guinea). In that case, Guinea argued that there was no "genuine link" between the Saiga and Saint Vincent. The Saiga was owned by a Cypriot company, managed by a Scottish company, and chartered to a Swiss company. The master and crew of the vessel were Ukrainian. Guinea also noted that Saint Vincent could not fulfill its obligations as a flag State as it lacked the necessary prescriptive and enforcement jurisdiction over the owner and operator. The Tribunal found on the facts that the genuine link test had been satisfied. After noting that UNCLOS does not stipulate the legal consequences of a failure to satisfy the genuine link requirement, the Tribunal made the following comments with reference to Article 94 (1):

"Paragraphs 2-5 of Article 94 ... outline the measures that a flag State is required to take to exercise effective jurisdiction as envisaged in Paragraph 1. Paragraph 6 sets out the procedure to be followed where another State has 'clear grounds to believe that proper jurisdiction and control with respect to a ship have not been exercised'. That State is entitled to report the facts to the flag State which is then obliged to 'investigate the matter and, if appropriate, take any action necessary to remedy the situation'. There is nothing in Article 94 to permit a State which discovers evidence indicating the absence of proper jurisdiction and control by a flag State over a ship to refuse to recognise the right of the ship to fly the flag of the flag State." (Judgment, Paragraph 82.)

The Tribunal then concluded that "the purpose of the provisions of the Convention on the need for a genuine link between a ship and its flag State is to secure more effective implementation of the duties of the flag State, and not to establish criteria by reference to which the validity of the registration of ships in a flag State may be challenged by other States." (Judgment, Paragraph 83.)

On this issue the following comment has been made: "Although the issue of genuine link is distinguishable from the question of flag state duties, the Tribunal referred to both in its analysis, implicitly recognising that the issue of supervision and control is in some measure common to both as a matter of logic and also of legislative history. In this regard, the judges presumably were aware that the International Maritime Organisation (IMO) is preoccupied by the vexing problem of ensuring adequate enforcement of international safety and pollution standards by flag states (complicated by a new generation of open registries), and that this problem also affects its conservation of living resources. Even if the Tribunal believed that withholding recognition of nationality in response to a lack of requisite supervision by the flag state would not be well founded in law, why take pains to clarify an issue with respect to which ambiguity may serve to encourage flag states to cooperate more effectively with multilateral efforts to promote compliance with safety and environmental duties under the Convention and related instruments?"

Oxman and Bantz (2000), 148-149.
Registration Convention Article 5. Ozcyayr criticises this Article in the following terms:
manning, being the economic aspects of the genuine link, are covered in Articles 7, 8 and 9 of the Convention. Article 7 empowers the flag State to choose between participation of its nationals in the ownership or in the manning of its flag vessels. By Article 8, the levels of participation of nationals in ownership must be set in the flag State's laws and regulations. The Convention requires that the level of participation should be sufficient to enable the flag State to exercise effective jurisdiction and control. By Article 9, a satisfactory number of officers and crew must be either nationals or persons domiciled or having a permanent residence in the flag State. This requirement, however, is subject to the availability of qualified seafarers, the existence of binding bilateral or multilateral agreements and the operational requirements of the flag State's vessels. The management of ship-owning companies and ships is regulated by Article 10. Pursuant to this Article, the location of management is optional. Article 6 requires that information about each ship and its owner be published in a register of ships, available for inspection by any person with a legitimate interest. Article 11 then stipulates the type of detailed information which must be contained in the register on each ship, its ownership and mortgages. The maintenance of this information is designed to ensure that for each ship the owner and operator, and a resident agent of the owner, can be readily identified.39

Although the Convention contains many compromises,40 it is not yet in force and it is unlikely that it will enter into force in the near future.41

Consequently, flag States still enjoy considerable sovereign latitude in the operation of open registries. They can make their own determination of what constitutes a genuine link having regard to their own particular economic needs and interests. "Flag of convenience States reveal in the ambiguity surrounding the genuine link requirement because it conveniently leads to economic benefits."42 The result then, is that far from being constrained either by the High Seas Convention or by UNCLOS the practice of open registries has expanded.43

"Under Art. 5, a mandatory Article, the flag State must have a competent and adequate national maritime administration. Although it is one of the strongest provisions of the Convention, the terms 'competent' and 'adequate' are not defined. There is no requirement that the maritime administration be located within the flag State. This was proposed but rejected. The terms, 'competent' and 'adequate', used in Art. 5 are not very clear. Who would judge the adequacy and competency of the administration? Or who would determine what is adequate or competent? Even if 'competent and adequate administration' was defined under Art 5, how would an administration enforce the rules of this convention? If Art. 5 is examined with Art. 2, it is possible to reach the conclusion that the ownership, manning and management provisions cannot be effectively enforced if the maritime administration is incompetent and inadequate." - Ozcayir (2001), 19.

39 "The aim of transparency is to find out the owner of the ship. Obviously, even with developed legal and administrative systems it is difficult to establish ownership. Ship owners prefer to guard their privacy because of beneficial interests." - Ozcayir (2001), 20.
40 Boisson (1999), 387.
41 Ozcayir (2001), 19.
42 "It is to take effect twelve months after the date on which at least forty states with a combined tonnage representing at least 25% of world tonnage have become parties to it. The Convention was rather badly received by the maritime industry, while ship owners (Intertanko) and seamen's unions (ITF) strongly criticised its imprecision, resulting in an unacceptable compromise." - Boisson (1999), 387 - footnotes omitted.
43 The problem of ships reflagging to open registries for the purposes of avoiding compliance with international rules and standards had been on the IMO agenda for some time prior to the Seventh Session of the Commission on Sustainable Development held in 1998 and 1999. The lack of progress being made on the problem motivated certain IMO members to raise the "genuine link" issue at CSD 7. In response, the Commission invited
In fact, during the twenty years between 1970 and 1990, open registry fleets expanded at a rate which surpassed that of all other flags of the world's merchant fleet - from 21.6 percent of the world total in 1970 to 34.1 percent in 1990. By the year 2000 "[m]ore than an absolute majority of tonnage in the World [had become] registered with open registries with traditional owners from Greece, UK, Norway, Japan and the US using open registries as a matter of course in their business." This expansion can be explained in terms of the competition in the World shipping industry and of the comparative advantages offered to owners by flag of convenience registration, namely:

- Reduced operating costs, particularly in respect of labour.
- Freedom either in whole or in part from taxation on revenues.
- Cheaper maintenance costs.
- Avoidance of various governmental regulations.
- Freedom from restrictions on the use of cash flows.
- Concealed identity and the ability to escape responsibilities and law enforcement procedures that apply under normal flag State registers.

"IMO as a matter of urgency to develop measures, in binding form where IMO members consider it appropriate, to ensure that ships of all flag States meet international rules and standards so as to give full and complete effect to UNCLLOS, especially article 91 (Nationality of Ships), as well as provisions of other relevant conventions. In this context, the Commission emphasises the importance of further development of effective port State control ...


44 UNCTAD and LMIS, London. It should be noted that 
"[d]uring the early sixties, flag of convenience registrations actually declined, reaching a low point in 1962. ... It appears that ship owners in the traditional maritime countries, during a period of relative stability of shipping cost elements and enjoying in many countries considerable fiscal benefits or direct financial aid, were little inclined to register under flags of convenience"
- OECD Study (1973), 231.

45 Frendo (2000), 384. Open registries have expanded their business opportunities by offering bareboat charter registration.

"A vessel registered in one State is permitted to fly the flag of another State for a specific period of time during which the operator of that vessel might take advantage of benefits which may be beneficial in line with the vessel's trading patterns for that time. During this period of charter, while the vessel's operation is regulated by the laws of the bareboat charter registry, matters of title, ownership and encumbrances remain regulated by the underlying registry."
- Frendo (2000), 384-385. Article 12 of the United Nations Convention on Conditions for Registration of Ships (1986) authorises the registration of ships bare boat chartered-in for the duration of the charter contract, subject to the ships remaining fully subject to the jurisdiction and control of the States Parties. The technique of bareboat chartering-in "consists of allowing a ship bareboat chartered-in provisionally to fly the flag of the charterer's State. This allows ship owners in countries where operating costs are high to operate their ships under an economic flag, without removing them from their original register. This temporary exemption from flag state rule is meeting with some success. It is authorised by most open registry countries, and certain traditional maritime States." - Boisson (1999), 386 - footnotes omitted.

According to the International Transport Workers' Federation, the number of states with open registries increased from 11 in 1980 to 27 in 1999 - see "Flags of Convenience Campaign Report 1999" International Transport Workers' Federation.

46 "In several cases, 'traditional' flag States have created second registers as a means of retaining national shipping that can compete with ships under the newer open registers. Examples are the Norwegian International Ship Register, Isle of Man, Danish International Register, the Kerguelen Islands (France) and the Netherlands Antilles. These registers are designed to be available only to ships engaged in international trade. They are intended to relieve shipowners of some financial requirements associated with full national shipping registers, but seek to maintain effective oversight of safety standards. They also seek to retain shore-based infrastructure."

47 Johnson (1977), 80; Vogel (1991), 416.
Open registries also offer advantages to the lenders who finance new vessel acquisitions. Such acquisitions often involve intricate financial arrangements. Accordingly, "lenders seek out countries that provide relatively easy procedures for foreclosure and title acquisition ... such as ... Liberia, which provides maximum security for the lender".48

For present purposes, however, the most significant advantage offered by open registries is the potential extended to owners and operators to avoid international pollution standards. "As flag of convenience nations typically are most interested in maximising the benefits to foreign ship owners registered under their flags, thus maximising their own economic return, strict enforcement of pollution regulations against ships flying their flags is not in their interest".49 Thus, given that strict enforcement of such regulations by less than all of the flag of convenience states would inevitably drive some ship owners to a state which either was not a party to MARPOL or was known not to enforce that Convention's rules and standards, the flag State implementation problem is in considerable degree a natural incident of the sovereignty-based open registry system. To the extent to which the system provides tangible benefits both to ship owners and open registry states alike, it is highly unlikely that the system will be abandoned in the foreseeable future. For ship owners, the avoidance of international rules and standards governing pollution prevention in the shipping industry translates into a significant competitive advantage50 in an industry beset by "deteriorating freight rates, financial pressures and increased competition."51 For the open registry states, the income from operating such registries generally provides much needed foreign exchange.

There is, however, a view which has it that MARPOL, in imposing obligations upon flag States to effect or supervise inspections and surveys, represents "an important change in the legal framework governing the exercise of flag State jurisdiction and control".52 This change, attributable to the comprehensive nature of the regulations in the Convention, involves flag States in obligations "so complex that the choice of a system of an open ship's registry no longer relies on purely financial reasons. To adopt an open registry system is no more 'good business' from a purely financial point of view, because the administration of the flag State, far from restricting itself to enable the use of its flag against payment of the corresponding fee, must invest considerable resources to fulfil the technical obligations imposed by the Convention." 53 This is a view which seems to inhere an assumption that States Parties will exercise due diligence in ensuring compliance with MARPOL by flag ships. The tenability of this assumption is open to doubt, given that in 1996 it was reported to the Fifth Session of the Sub-Committee on Flag State Implementation of the IMO that "there are some flag States which, while ratifying IMO's various safety and pollution prevention conventions, are consistently failing to ensure that vessels flying

49 Johnson (1977), 81.
52 Blanco-Bazan (1991), 458. (Mr Blanco-Bazan is the Legal Officer of the IMO.)
53 Ibid.
their flags fully comply with the requirements of such conventions". One of the reasons for such failure as identified in the Report was that while some flag States were in fact willing to fulfil their responsibilities, they could not do so because of the costs involved. In fact, the high costs and the complications attendant upon implementing compliance with the MARPOL requirements have been identified as one of the reasons for the reduced effectiveness of the Convention. For example, it was said in 1991 that without taking into account infrastructure establishment costs, an expenditure of about US $330,000 annually was required by each of the fourteen coastal States in Europe to conduct on board port State inspections under the Memorandum of Understanding on Port State Control. The need to invest considerable resources to fulfil the technical obligations imposed by the Convention may even operate as a disincentive for states, not yet parties, to become parties.

Thus, the inadequacy of flag State enforcement is referable to a combination of the sovereignty-based system of vessel registration and the cost minimisation strategies which ship-owners, pursuing comparative advantage, must employ in the operation of their merchant fleets. In such a commercial environment, the rational choice for flag States competitively pursuing ship registrations and the income generated therefrom is to offer their flag vessels the opportunity of avoiding the costs of complying with the relevant vessel source pollution controls. By allowing their flag vessels to violate MARPOL's rules and standards without the threat of sanction, flag States can make a material contribution to the minimisation of vessel operating costs. Accordingly, it is not in the interests of flag States to enforce vessel source pollution controls, since the enforcement of such controls increases the operating costs to ship-owners and in doing so renders their own registry businesses less competitive.

4.2.2 "Within the Jurisdiction"

The second perspective on the inability of MARPOL to engender the commitment of its flag States Parties, centres on the coastal State competence prescribed in the Convention. As will be argued in the following sections in this chapter, this competence is largely indeterminate. Thus, it is not a viable corrective to inadequate flag State implementation, nor does it provide a reason for flag States to discharge their obligations under Article 4 (1) of the Convention. Why this should be so relates to the use in the Convention of the expression "within the jurisdiction" when referring to coastal State enforcement authority in article 4 (2).

The use of that expression was necessitated by the refusal of many of the delegates at the 1973 Conference to entertain changes to established customary principles. They managed to stall the

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54 IMO Doc. FSI 5/3/2 18.10.1996, page 1. The problem of flag State implementation is still being given attention at the IMO. At the Ninth Session of the Sub-Committee on Flag State Implementation, the performance of flag States was the subject of Agenda Item 3 "Responsibilities of Governments and Measures to Encourage Flag State Compliance" and Agenda Item 4 "Self-assessment of Flag State Performance" - IMO Doc. FSI 9/19 26.3.2001, Report to the Maritime Safety Committee and the Maritime Environment Protection Committee from the Sub-Committee on Flag State Implementation.
56 Maingi (1991), 482. See also Chapter 5 below.
57 Quansah (1991), 478.
issue by arguing that any jurisdictional regime change should be entrusted to the then impending Third United Nations Conference on the Law of the Sea. The net effect of that refusal is reflected in Article 4 (2), Article 9 (2) and Article 9 (3). 58 By leaving the measure of jurisdiction conferred upon coastal States to a source other than the Convention itself, the Conference courted the risk of confusion and conflict. This is a risk which, as will be argued in Part III below, was to be partly realised through the application of the jurisdictional provisions in UNCLOS to the MARPOL Convention. In the meantime, however, it is appropriate to analyse Article 4 (2) solely within the context of the customary law applicable at the time of the Conference in order to understand the full extent of its indeterminacy.

Under international law, the marine environment is divided on the horizontal plane into three principal areas: Internal waters, territorial seas and high seas. In addition to these areas there are the following further legally constituted areas, namely: Contiguous zone, continental shelf, archipelagic waters, exclusive economic zone, straits used for international navigation and the deep sea-bed. For present purposes, however, it is to the three principal areas that close attention must be given.

Over the high seas, ships of all nations are accorded freedom of navigation, and as a general rule, each ship while on the high seas falls within the exclusive authority of the state whose flag it flies. 59 In contrast, while in internal waters or territorial seas, ships are not only subject to flag State authority but also come within the jurisdiction of the particular coastal State which has sovereignty over those internal waters or territorial sea. The extent of that jurisdiction, however, differs as between internal waters and territorial sea.

With respect to pollution control in its internal waters, a state is competent to regulate navigation, pollution discharges, manning, design and construction criteria and any other matters relevant to such control. This competence is limited only by the following:

"(i) Constraints imposed by international law generally upon states’ treatment of aliens within its territory;

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58 Article 4 (2):
"Any violation of the requirements of the present Convention within the jurisdiction of any party to the Convention shall be prohibited and sanctions shall be established therefor under the law of that party. Whenever such a violation occurs, that party shall either:
(a) Cause proceedings to be taken in accordance with its law; or
(b) Furnish to the Administration of the ship such information and evidence as may be in its possession that a violation has occurred."

Article 9 (2):
"Nothing in the present Convention shall prejudice the codification and development of the law of the sea by the United Nations Conference on the Law of the Sea convened pursuant to Resolution 2750 C (XXIV) of the General Assembly of the United Nations nor the present or future claims and legal views of any State concerning the law of the sea and the nature and extent of coastal and flag State jurisdiction."

Article 9 (3):
"The term 'jurisdiction' in the present Convention shall be construed in the light of international law in force at the time of application or interpretation of the present Convention."

Article 6 (1) "Convention on the High Seas - Geneva" 29th April 1958 - "Ships shall sail under the flag of one State only and, save in exceptional circumstances provided for in international treaties or these Articles, shall be subject to its exclusive jurisdiction on the high seas ...".

59 Article 6 (1) "Convention on the High Seas - Geneva" 29th April 1958 - "Ships shall sail under the flag of one State only and, save in exceptional circumstances provided for in international treaties or these Articles, shall be subject to its exclusive jurisdiction on the high seas ...".
(ii) Certain rights of innocent passage through waters which, before the application of the straight base line in accordance with Article 4 of the Territorial Sea Convention, had been considered as part of the territorial sea or high sea;

(iii) Certain possible constraints upon the coastal or port States' jurisdiction over criminal offences committed on board the ship which do not affect the interests of the State;

(iv) Constraints agreed to by the State in a treaty. 60

Within its territorial sea, a coastal State's powers to control pollution from vessels are more constrained. In addition to the limitations applicable to internal waters, the coastal State must not hamper innocent passage. At the time of the MARPOL Conference, rights of innocent passage were codified in the 1958 Territorial Sea Convention. 61 A ship's right of innocent passage through the territorial sea 62 was not, however, an unconditioned right. Coastal States were permitted certain competences by the 1958 Convention. In summary, the competences relevant to pollution control were as follows:

- A right to prevent any breach in the territorial sea by foreign ships proceeding to its internal waters of the conditions of entry to those waters. 63 In exercising this right, a coastal State may prohibit the entry of any foreign ship to its internal waters where, for example, the coastal State considers that the ship constitutes a pollution threat. The coastal State may turn the ship away at the edge of its territorial sea if the ship is en route to that state's internal waters but it may not exclude a ship which is in passage to another destination.

- A right to require compliance by foreign ships with the laws and regulations enacted in conformity with the Articles of the Convention and other rules of international law, and, in particular, with such rules and regulations relating to transport and navigation. 64 This right would not extend, for example, to a power to require foreign ships en route through the territorial sea to the high seas to comply with manning or construction standards in excess of those prescribed by international law.

- A right to prescribe sanctions for unlawful oil discharges by foreign ships in innocent passage through the territorial sea. 65 This right does not permit the coastal State to take action against a foreign ship in respect of an unlawful discharge committed before that ship entered the territorial sea "if the ship, proceeding from a foreign port, is only passing through the territorial sea without entering internal waters". 66

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60 Abecassis (1985), 85.
63 Ibid, Article 16 (2).
64 Ibid, Article 17.
65 Ibid, Article 19 (1) (a) – The unlawful discharge of oil has consequences extending to the coastal State and accordingly is an offence which is within the jurisdictional competence of the coastal State under this Article.
In addition to these three principal divisions of ocean space, there was yet another zone recognised by international law at the time of the 1973 MARPOL Conference. This was the Contiguous Zone which had been created by Article 14 of the Territorial Sea Convention. By dimension, the Contiguous Zone at that time could extend for a distance of no more than 12 nautical miles beyond the base line from which the territorial sea is measured. Although having the juridical character of high seas, the Contiguous Zone is an area within which the coastal State can exercise such control as may be necessary to prevent the infringement of its customs, fiscal, immigration or sanitary regulations within its territory or territorial sea, and to punish infractions of such regulations committed therein. The competence of the coastal State to prescribe and enforce oil discharge standards within the Contiguous Zone by holding those standards to be within the category of sanitary regulations has been a matter of some doubt. The better view thereon is that such competence is not mandated by the Contiguous Zone provisions. There can be no doubt, however, that these provisions do not incorporate manning, design, construction and navigational standards.

Although described above in definitive terms, the competences of coastal States with respect to oil pollution control in the territorial sea as derived from the Territorial Sea Convention were not, in fact, without a measure of indeterminancy in 1973. For example, doubt had been expressed as to whether passage in violation of pollution regulations could still be regarded as innocent. The silence of the Convention on that issue led some commentators to argue that passage would not be innocent if a foreign ship within the territorial sea violated a discharge regulation or a reasonable equipment regulation. Then there was the argument that Article 17 created a coastal State jurisdiction of some ambiguity. Described as a "constructive ambiguity ... for a coastal State to use its customary power to implement regulations" since it was based on a theory which made innocent passage referable to "the degree of threat to the coastal State's peace, good order, and security", Article 17 was open to an interpretation which excluded environmental harm.

Thus, with divergent claims being made over the breadth of the territorial sea, with no clarity in respect of pollution control in the Contiguous Zone and with difficulties surrounding Articles 14 and 17 of the Territorial Sea Convention, the delegates at the 1973 Conference adopted the expression "within the jurisdiction" as the formula to circumscribe coastal State competence for

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67 Convention on the Territorial Sea and Contiguous Zone, Article 26 (1).
68 See, for example, Wulf (1971), 133-155 – from the deliberations of the International Law Commission the term "sanitary" was intended to cover only disease. That limited interpretation was not expanded by the Conference at which the 1958 Territorial Sea Convention was created. See also Wulf (1972), 537, where the author suggests that "within the 12 mile zone provided by the 1958 Convention, some pollution control over vessels may be authorised" 538-539. Then at page 543 he submits "that a coastal State could reasonably prescribe a standard prohibiting all visible discharges of oil within the Contiguous Zone" and further "that a coastal State within the Contiguous Zone not only can prescribe standards but also apply the sanction to vessels of signatories and non-signatories [to the OILPOLL Convention] alike to deter intentional discharges".
69 Abecassis (1985), 90; see also Blanco-Bazan (1991) 449 – "it is very doubtful whether a coastal State could have invoked [the right to intervene in order to prevent the infringement of sanitary regulations within its territory or territorial sea] in order to ensure compliance with OILPOLL. Sanitary measures were basically focused on human health but not on the health of the marine environment. The protection of the marine environment was still to be acknowledged as a distinctive notion deserving a special set of regulations."
70 Abecassis (1985), 90.
71 See, for example, Wulf (1971), 133-155 – from the deliberations of the International Law Commission the term "sanitary" was intended to cover only disease. That limited interpretation was not expanded by the Conference at which the 1958 Territorial Sea Convention was created. See also Wulf (1972), 537, where the author suggests that "within the 12 mile zone provided by the 1958 Convention, some pollution control over vessels may be authorised" 538-539. Then at page 543 he submits "that a coastal State could reasonably prescribe a standard prohibiting all visible discharges of oil within the Contiguous Zone" and further "that a coastal State within the Contiguous Zone not only can prescribe standards but also apply the sanction to vessels of signatories and non-signatories [to the OILPOLL Convention] alike to deter intentional discharges".
72 Abecassis (1985), 90; see also Blanco-Bazan (1991) 449 – "it is very doubtful whether a coastal State could have invoked [the right to intervene in order to prevent the infringement of sanitary regulations within its territory or territorial sea] in order to ensure compliance with OILPOLL. Sanitary measures were basically focused on human health but not on the health of the marine environment. The protection of the marine environment was still to be acknowledged as a distinctive notion deserving a special set of regulations."
the purposes of the MARPOL Convention. To be sure, many of the delegates did so in confidence
that any indeterminancy inherent in the formula would be eventually eliminated at the then
forthcoming Law of the Sea Conference. Also it has been recognised that providing for
"jurisdiction to be construed in the light of international law in force at the time of application"
would permit flexibility, allowing "the conventional regime to accommodate itself to the
development of concepts such as pollution zones and economic zones which may occur after the
Convention comes into force". But such flexibility comes with a cost, for the term "jurisdiction"
can be interpreted both quantitatively as well as qualitatively. Thus, any disjunctiveness between
the external source from which "jurisdiction" is intended to derive its meaning for the purposes of
the Convention and the contextual use of the term within the Convention has the potential to
perpetuate indeterminancy. It will be argued in Part III that when UNCLOS is taken as the
external source, as intended by the delegates at the 1973 MARPOL Conference, there is
disjunctiveness and hence indeterminancy. It is this interdeterminancy which prejudices
MARPOL's capacity to ensure that its flag States Parties effectively enforce its rules and standards
against their flag vessels. In the meantime, however, the next section will demonstrate how the
use of the expression "within the jurisdiction" in Article 4 (2) has created an element of
indeterminancy within the Convention, even without its meaning being imported from an external
source. That indeterminancy relates to coastal State competence. It will be shown how the use
of this expression has led to a mistaken belief over the competence of coastal States to institute
proceedings under that Article. This is the belief, held by the IMO and at least one author, that a
coastal State has the right to institute proceedings when it has obtained evidence through an
inspection carried out under either Article 5 or Article 6 that the vessel inspected has committed
a violation of MARPOL's rules and standards within its jurisdiction. It will be argued in the next
section that this belief, seemingly induced by the expression "within the jurisdiction", is incorrect.
Then, in Part IV, the full implications of this mistaken belief for the application of the Port State
Control concept under the various regional Memoranda of Understanding on Port State Control
will be fully argued.

4.3 THE INSPECTION REGIME

While there can be little doubt that the Conference ultimately sidestepped the jurisdiction issue,
the delegates did succeed in creating a limited inspection regime which has been described as
"one of the most outstanding features of MARPOL 73/78". The particulars of this regime are to
be found in Articles 5 and 6 of the Convention.

Article 5 provides for the acceptance of certificates issued by States Parties under the Regulations
and creates the special rules on inspection of ships. All ships must hold the prescribed certificate
which is subject to inspection while in the ports or offshore terminals under the jurisdiction of a
State Party. Inspections are limited to verifying that a valid certificate is held on board, unless
there are clear grounds for believing that the condition of the ship or its equipment does not

73 Lowe (1975), 632.
This Regulation, Article Convention applies is provides Parties 15) obligation the 75
"Although this paragraph "4, "3.
"2. In the circumstances given in paragraph (1) of this Regulation, the party shall take such steps as will ensure that the ship shall not sail until the situation has been brought to order in accordance with the requirements of this Annex.

"3. Procedures relating to Port State Control prescribed in Article 5 of the present Convention shall apply to this Regulation.

"4. Nothing in this Regulation shall be construed to limit the rights and obligations of a party carrying out control over operational requirements specifically provided for in the present Convention."

This Regulation, with appropriate contextual amendments, was added to Annex II (as Regulation 15) and Annexes III and V (in each case as Regulation 8).

Article 6 entitled "Detection of Violations and Enforcement of the Convention" requires States Parties to cooperate in the detection of violations and the enforcement of the Convention. It provides that, while in the ports or offshore terminals of a State Party, a ship to which the Convention applies is subject to inspection for the purpose of verifying whether it has discharged any harmful substances in violation of the Convention. Where a ship is found to have discharged

75 "The [no more favourable treatment clause in MARPOL] is placed in Article 5 (4), and reads: 'With respect to the ships of non-Parties to the Convention, Parties shall apply the requirements of the present Convention as may be necessary to ensure that no more favourable treatment is given to such ships.'

"Although this paragraph is placed in a provision which deals specifically with certificates and inspection regarding CDEM standards and not with discharges, the formulation 'the requirements of the present Convention' suggests a broader interpretation. Under this broader interpretation the [no more favourable treatment clause] would also apply to the enforcement powers with respect to discharges committed anywhere pursuant to Article 6 [MARPOL]." - Molenaar (1998), 121.

In the footnotes to this text, Molenaar cites M'Gonigle and Zacher (1979) who observe at p. 236 that the words "as may be necessary" indicate an unwillingness to impose on Contracting Parties the obligation to apply MARPOL in toto to non-parties. For the broader interpretation, Molenaar cites
a harmful substance, then a report must be submitted by the inspecting party to the flag State Party "for any appropriate action". Upon receipt of that report, and if satisfied that the evidence contained therein is sufficient to warrant prosecution, the flag State Party shall cause proceedings to be taken in accordance with its law as soon as possible.\textsuperscript{76} Article 6 also permits a State Party to inspect, upon the request of another party, any Convention ship which is in its ports, if the requesting party provides sufficient evidence of a violation of the Convention. The report of an inspection so instigated must be furnished to the requesting party and to the flag State "so that appropriate action may be taken under the present Convention".

The inspection powers thus created by Articles 5 and 6 cannot, of course, be construed as a port State jurisdictional regime. One commentator takes the view that they are merely an extension of the coastal State competence established in Article 4 (2).\textsuperscript{77} As will become apparent below, this view is incorrect - it misconstrues the relationship between Article 6 and Article 4. The correct interpretation is that the inspection powers are simply complementary to flag State jurisdiction.\textsuperscript{78} This is an interpretation which is warranted by Article 6 (2). Under that Article, ships to which the Convention applies when in ports or offshore terminals of States Parties are liable to inspection. Such inspections are for the purpose of verifying whether a ship has discharged any harmful substances in violation of the Convention regulations. However, no right has been conferred upon the inspecting state to prosecute such violations as may be detected on inspection. Instead, the inspecting state must report any violations so uncovered to the flag State for "any appropriate action". The same situation broadly obtains under Article 6 (5) which provides that a State Party may inspect a Convention ship when it enters its ports or offshore terminals if another party has requested an inspection and has furnished, with such request, sufficient evidence that the ship has discharged harmful substances in any place. The power of inspection so created is exercisable only whilst ships are in port or at offshore terminals - there is no right to inspect a ship which is en route or hove to in territorial waters.

Two authors, namely Cheng-Pang Wang\textsuperscript{79} and Brubaker\textsuperscript{80} hold that the rights of inspection cannot be exercised by the port authority on its own initiative. They argue that a State Party can only exercise the right of inspection after it has received a request, backed by sufficient evidence of a violation, from another party to the Convention. It is submitted that this is incorrect. Article 6 (2), without qualification, provides that Convention ships when in the ports or offshore terminals of States Parties may be liable to inspection. The corollary to this is that States Parties

\textsuperscript{76} MARPOL Article 6 (4) and Article 4 (1).

\textsuperscript{77} "... the port enforcement regime in MARPOL was only a branch of the competence of the coastal state." - Cheng-Pang Wang (1986), 316.

\textsuperscript{78} Blanco-Bazan (1991), 460-461.

\textsuperscript{79}Cheng-Pang Wang (1986), 316. Cheng-Pang Wang writes that "[p]ort-state authority has been limited by the MARPOL which does not give the port authority jurisdiction to inspect the Oil Record Book of a foreign ship on the ports' own initiative. The inspection of the Oil Record Book can be allowed only after the port authority has received a request concerning an alleged violation that could be backed up by 'sufficient evidence' that the ship has discharged harmful substances or effluents containing such substances in any place". As authority for this he cites Article 6(5).

\textsuperscript{80} Brubaker (1993), 124. Brubaker writes with respect to Article 6 that "[a] port State is allowed upon request to inspect a ship within its jurisdiction and if sufficient evidence exists regarding a violation which has occurred anywhere, issue a report to the flag State and the State Party requesting it. However, a port State may not bring legal action for violations outside its jurisdiction". - Emphasis in original.
shall have a right to inspect such ships. The power of inspection conferred by Article 6 (5) is in fact additional to that created by Article 6 (2). That this is so is clearly evident from the use of the words "a party may also inspect a ship ... if a request for an investigation is received from any party ..." (emphasis added). Thus, it is clear that the port State has a right to inspect under Article 6 (2) irrespective of whether or not it has received a request from another State Party to the Convention.

The limitations of this inspection regime are clearly evident. If a flag State elects to take no action, despite having been furnished with clear evidence of the commission of a violation of the Convention, the inspecting port State cannot instigate action against the offending vessel. There is a view, however, which has it that if the violation had been committed within the jurisdiction of the inspecting port State, then that State is entitled to commence proceedings by virtue of Article 4 (2).

Subscribing to the view that the inspecting port State does have the right to commence proceedings in respect of intra-jurisdictional violations uncovered on an inspection under Article 6 are Brubaker,\(^{81}\) Molenaar\(^{82}\), Durigbo\(^{83}\) and the IMO. In July 2000 the Secretariat of the IMO expressed its views on this issue as follows:

\[4.4.2.2 \text{ Inspection to detect violations of the discharge standards}\]

Pursuant to MARPOL 73/78 Article 6, a ship in any port may be subject to inspection for the purpose of verifying whether the ship has discharged any harmful substances in violation of the MARPOL regulations. A report must be made to the flag States when a discharge violation is indicated, and flag States must then bring proceedings if satisfied that the evidence is sufficient. The requirement for flag States to bring proceedings, however, does not pre-empt the right of port States to bring their own proceedings for violations which occur in the territorial sea or internal waters of the port State, or which cause major damage to the port State. MARPOL 73/78 Article 4(2).\(^{84}\)

\(^{81}\) Ibid, 253.

\(^{82}\) "[Article 6] allows for an investigation, but not the institution of proceedings unless the violation took place 'within the jurisdiction' of the coastal State pursuant to Article 4 (2)." - Molenaar (1998), 121.

"With respect to discharge standards it is noted that although essentially paragraphs (2) and (5) of Article 6 allow inspection irrespective of the locus of the violation, [MARPOL] gives the port State, in contrast with [UNCLOS] no competence to take further enforcement action beyond inspection if the violations have not taken place within its jurisdiction. The results of the inspection are to be forwarded to the requesting state and the flag State." - Molenaar (1998), 191-192.

\(^{83}\) "A port State may inspect a ship which enters a port or offshore terminal under its jurisdiction if there is enough evidence to establish a violation. It does not permit the port State, however, to take any action in cases in which the violation occurs outside its territorial waters, other than to forward a report of such inspection to the party requesting it, or to the flag State, which in turn is expected to take appropriate action." - Durigbo (2000), 72. It is implicit in the text quoted that if the inspection uncovered evidence of an intra-jurisdictional violation, then the inspecting port State would have the right to take action.

\(^{84}\) IMO Doc. MEPC 45/11/2 28.7.2000, Annex page 3 - Emphasis added. See also on this issue paragraph 3.4.1 of IMO Resolution A.787(19) 23.11.1995 which reads as follows:

"3.4.1 If the investigations provide evidence that a violation of the discharge requirements took place within the jurisdiction of the port State, that port State shall either cause proceedings to be taken in accordance with its law, or furnish to the flag State all information and evidence in its possession about the alleged violation. When the port State causes proceedings to be taken, it shall inform the flag State."
However, it is submitted that this is not correct. Although Article 4 (2) clearly establishes coastal State enforcement jurisdiction, a strict interpretation of Article 6 precludes the inspecting port State from exercising that jurisdiction. The mandatory language employed in Article 6 (2) (3) (4) and (5) does not allow any course of action by the inspecting port State other than to report to the flag State for appropriate action. In other words, taken in its totality and construed literally, Article 6 contemplates that where evidence of a violation has been secured as a result of a port inspection, the only party competent to take appropriate action in respect of such violation is the flag State. That such is the case derives from the clarity of expression of Article 6 and its relationship to Article 4 (1) within the scheme of the Convention.

Article 6 (2) and Article 6 (5) each explicitly requires the inspecting port State to forward a report to the flag State if an inspection indicates a violation of the Convention. Paragraph (2) states that if the inspection indicates a violation, then "a report shall be forwarded to the Administration [i.e. the flag State] for any appropriate action". Paragraph (5) similarly requires that the report be sent to the flag State so that the appropriate action may be taken. The appropriate action referred to in each of these Paragraphs is prescribed by Article 6 (4) which restates Article 4 (1) by providing that upon receipt of evidence that a ship has discharged harmful substances in violation of the regulations, the flag State shall investigate the matter and if it is satisfied that sufficient evidence is available to enable proceedings to be brought in respect of the alleged violation, it shall cause proceedings to be taken in accordance with its law as soon as possible. Once the criteria are met, namely receipt of a report indicating a violation and the sufficiency of evidence for a prosecution, then the flag State is required to bring proceedings. Article 6 (4) does not allow any other course of action.

If, as asserted by the IMO, the inspecting port State is entitled to cause proceedings to be taken, then the vessel in violation of the Convention is potentially exposed to two prosecutions, one by the inspecting port State and the other by the flag State. That situation would be at odds with the scheme of the Convention which is designed to preserve the primacy of flag State jurisdiction. Article 4 makes it clear that the flag State must cause proceedings to be taken "wherever the violation occurs". This supports the interpretation that the flag State alone has the prerogative to institute proceedings on receipt of evidence of a violation obtained through an inspection under Article 6.

As indicated, that the inspecting port State has no right to prosecute under the Convention is consistent with its scheme. That scheme is to preserve the primacy of flag State jurisdiction and to provide for cooperation to that end by permitting port States to inspect and to supply evidence of violations detected through such inspections to the flag State for appropriate action. Although

The issue is also addressed in IMO Doc. MEPC 43/12 31.3.1999, Annex 2 - "Pursuant to MARPOL 73/78 Article 6, a ship in any port may be subject to inspection for the purpose of verifying whether the ship has discharged any harmful substances in violation of the MARPOL Regulations. A report must be made to the flag States when a discharge violation is indicated, and flag States must then bring proceedings if satisfied that the evidence is sufficient. The requirement for flag States to bring proceedings, however, does not pre-empt the right of port States to bring their own proceedings for violations which occur in the territorial sea or internal waters of the port State, or which cause major damage to the port State. MARPOL 73/78 Article 4 (2) (also see UNCLOS Article 228 (1))." - page 7.
the grammatical clarity of Articles 6 and 4 render it unnecessary to resort to the Conference proceedings to determine the scheme of the Convention, those proceedings do disclose that the inspection regime was intended to be complementary to flag State enforcement jurisdiction. The intention was to engage, through Article 6, the cooperation of port States in the detection of violations of the Convention, recognising that such states are better placed than flag States to inspect and obtain the relevant evidence.

Within the scheme of the Convention, it can be said that the cooperation prescribed by Article 6 is conditioned – this in the sense that it is specifically targeted towards a given end, namely the maintenance of flag State primacy with respect to enforcement action under the Convention. In so conditioning cooperation, the Article does not structure into the inspection regime an assurance that the flag State will cooperate by causing proceedings to be taken. It does not confer upon the inspecting port State an authority which can be exercised as a corrective to inadequate flag State performance. Thus, flag States have no reason to cooperate by instituting proceedings against their flag vessels where such is warranted. In the cooperative relationship constructed, MARPOL defers to maritime sovereignty. Such deference is reinforced by Article 4 (1). As indicated above, that Article conditions the taking of proceedings by the flag State on its sole and unfettered judgment as to the sufficiency of the evidence available. With no realistic procedural accountability for its judgment in this regard, flag States have a significant measure of discretion as to whether or not they cooperate by bringing proceedings against their flag vessels.

In contrast to Article 6, Article 5 of the Convention does empower a State Party to take direct enforcement action against a ship while it is in port. By the latter Article, a party to the Convention is empowered to inspect a ship while the same is in port or at an offshore terminal but only for the purpose of verifying that there is held on board a valid certificate which has been issued in accordance with the Regulations. The power of inspection is not so limited once there have been established clear grounds for believing that the condition of the ship does not correspond substantially with the particulars of that certificate. Where a certificate is not held or if it is found that the condition of the vessel does not correspond with the certificate that is held, then the inspecting party may take such steps as will ensure that the ship does not sail until it can proceed to sea without presenting an unreasonable threat of harm to the marine environment. Although this right to inspect and detain has the appearance of a limited port State enforcement jurisdiction, it is suggested that to view it as such would be misconceived. The rights of inspection and action created by Article 5 are rights which are exercisable by States Parties as coastal States, not as port States. That such is the case can be explained by the fact that the attempts made to establish a port State regime at the MARPOL Conference were specifically rejected by the delegates. That rejection is evident in the substance of Article 6. If rights of prosecution had been given to inspecting port States Parties by that Article, then it could have been said that a type of port State enforcement jurisdiction had been created. However, Article 6 does not grant prosecution rights to inspecting port States. Equally, the same can be said of Article 5, where the only action which is open to States Parties is to prevent the departure from ports of ships on the conditions stipulated in Paragraph (2) of the Article.85

85 It should be noted here that the Article recognises the right of a State Party to deny a foreign ship entry to its ports or offshore terminals under its jurisdiction if that ship does not comply with the provisions of the Convention - Article 5 (3).
However, it is acknowledged that the IMO does consider that the inspecting port State has the right, pursuant to Article 4(2), either to report the ship to the flag State for appropriate action, or to "initiate proceedings under its own law for any violation which arises from non-compliance with the Convention." For the reasons already advanced above in relation to Article 6, it is submitted that MARPOL does not confer that right upon the inspecting port State. The only actions open to a port State in the circumstances contemplated by Article 5 are those contained in Paragraph (2) as indicated above. If this interpretation is correct, then the words "any action" which appear in Paragraph (3) of Article 5 must be intended to refer to those actions prescribed in Paragraph (2) of the Article. This would seem logical given that the expression "action" can be distinguished from the term "proceedings" as employed in Article 4(2) and that the steps which the inspecting port State is empowered to take by Article 5(2) are unquestionably "actions".

In theory, MARPOL's capacity to assure flag State cooperation is enhanced by the inspection rules contained in Article 5. The empowerment of port States to inspect and to take the actions which that Article prescribes, provides an incentive for flag States to ensure that their vessels do carry valid certificates and that they do comply with the particulars of those certificates. However, the same cannot be said of Article 6. Conferring upon port States the right to inspect for the purpose of determining the commission of discharge violations without at the same time according those same States rights of prosecution does not engender flag State cooperation. Port States would have no incentive to inspect vessels where the taking of appropriate action by the flag State is but a remote prospect. In turn, flag States would have no incentive to take such action where port States have no rights of prosecution, whether default or otherwise. The Convention does not create a self-correcting balance which would have the effect of assuring cooperation between the States Parties.

The rights of inspection and the obligation to report to the flag State prescribed in Article 6 have been contrasted with earlier OILPOL provisions. Under those provisions a coastal State could elect whether or not to inform the flag State of a violation. In drawing attention to this contrast, it has been suggested that the MARPOL regime "has contributed to protect vessels from wanton port apprehension". If this is the case, then there is yet more evidence within the Convention of the flag State orientation of MARPOL.

The various rights accorded to the parties to the Convention were made subject to a condition of exercise designed to appease maritime State concerns in the context of freedom of navigation. That condition, set forth in Article 7, obliges States Parties to avoid unduly detaining or delaying a ship when exercising the rights conferred by Articles 4, 5 and 6. Article 7 also provides that where such obligation has not been discharged, the ship so detained or delayed is entitled to compensation for any loss or damage suffered.

When viewed against the prescriptive and enforcement competences allowed to states by customary international law, it could be argued that Articles 5 and 6 represent limitations upon those competences. With respect to customary prescriptive jurisdiction, internal waters are

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87 Whether Article 10 has the potential to alleviate this situation will be considered in Part III below.
subject to the maximum authority which international law accords to states. Each state is entitled to permit or proscribe conduct in its sole discretion within these waters. So empowered, a state may enact legislation which makes it an offence for a vessel to discharge pollutants within internal waters or which requires vessels within those waters to comply with any construction, design, equipment or Manning standards that the state deems appropriate to its interests. As an incident of such expansive competence, states have the right to deny foreign vessels entry to internal waters, a right which is subject to one qualification only, namely the general obligation to allow entry to vessels in distress. Premised upon this right is the authority to condition the entry of foreign vessels upon their compliance with such standards as the state deems necessary to ensure the protection of its environment.

Of similar expanse to this prescriptive jurisdiction is enforcement jurisdiction. Within its internal waters a state has the authority to enforce its laws in such manner as it deems fit, an authority which extends to all laws whether they be of territorial or extra-territorial effect. Upon entry into the internal waters of a state, a vessel in violation of the laws of that state becomes susceptible to the authority of that state to enforce its laws, whether by way of "inspection, arrest, judicial proceedings, seizure, fines and imprisonment". There are, of course, limitations on this competence. One such limitation, imposed by Article 11 of the 1958 High Seas Convention, precludes a state from taking enforcement proceedings against a foreign vessel and its personnel for a violation of law committed in the context of a collision on the high seas. Another limitation is the customary law immunity accorded to foreign warships and similar state owned non-commercial vessels. These limitations aside, it is clear that the enforcement jurisdiction allowed to states over vessels in their internal waters when coupled to an expansive prescriptive jurisdiction is a potentially valuable weapon which could be deployed in combating the problem of marine pollution. While it must be conceded that a coastal State's prescriptive jurisdiction is not permitted under customary law to reach out "to all matters affecting the marine environment regardless of the allegiance of the actor or the location of the conduct or its impact" limited as it is to the customary bases of extra-territorial prescription and by the restriction upon enforcing law where there is no authority to prescribe, the expansive competences with respect to internal waters do admit of a certain creativity in application without derogating from the accepted principles of jurisdiction. For example, it has been suggested that a state could make it an offence for a vessel to be within its ports (i.e. internal waters) if that vessel had discharged pollutants in an area and in circumstances which were not within any of the accepted bases of extra-territorial prescription, or if it had documents evidencing such a discharge, and take appropriate enforcement action against such a vessel accordingly. By its very definition, the offence could only be committed within the internal waters of the prescribing and enforcing

89 Fitzmaurice (1959), 105.
90 Lowe (1975), 619. See also de La Fayette (1996), 1 et seq.
91 Although the right is recognised by most authorities, there is one decision of an Arbitral Tribunal which referred to a principle of international law that requires the ports of every State to be open to foreign vessels except when the vital interests of the State demand that they be closed - Saudi Arabia v. Arabian American Oil Co (Award of 23.8.58) (1963), 27 International Law Review, 117-212.
92 Smith (1988), 172.
93 Ibid, 175.
94 For example nationality, the subjective territorial principle, the objective territorial principle, the nationality principle and the protective or security principle.
coastal State. Another example, said to find support in state practice relative to civil jurisdiction, is the imposition of a condition that foreign vessels may only enter internal waters if such vessels submit to "the authority of prescriptions concerning remote conduct that would otherwise be ultra vires".

Against this background, it can be readily appreciated that MARPOL does fetter the otherwise expansive jurisdiction which a state may exercise with respect to its internal waters. The qualification of the inspection rights contained in Article 5, the limitations on enforcement jurisdiction in Article 6, and the undue detention and delay provisions in Article 7, all represent constraints upon the operational dimension of coastal State sovereignty with respect to internal waters. By imposing these constraints, MARPOL upholds maritime sovereignty, ensuring the primacy of flag State jurisdiction over vessels.

Of course it could be argued that despite this primacy, MARPOL does assure flag State commitment by providing for the coastal State enforcement jurisdiction in Article 4 (2). In theory, this coastal State authority to prosecute intra-jurisdictional violations, other than those detected on inspections under Articles 5 and 6, should provide flag States with an incentive to maintain control over their flag vessels by overseeing the compliant operation of those vessels. Practice, however, diverges from theory in a number of respects. First, as noted above, many flag States do not have the infrastructure necessary to ensure that vessels on their registries comply with MARPOL's standards. Secondly, coastal State jurisdiction under MARPOL is problematic. As will be argued in Part III, the jurisdictional regime in UNCLOS intersects with MARPOL in such a way as to make the nature and extent of enforcement jurisdiction under the latter Convention uncertain. Finally, there are a number of practical matters which further challenge the capacity of MARPOL to engender the commitment of its State Parties to achieving its stated goal. These matters, to which attention will now be turned, relate to the implementation and enforcement of MARPOL.

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98 It should be noted that the powers accorded to coastal States by Article 5 represent a constraint on the operational dimension of flag State sovereignty to the extent to which the freedom of navigation may be suspended.
99 Some flag States, however, have instituted Flag State Inspectorates to ensure that their vessels comply with the internationally imposed standards prior to port State inspections. They have perceived a need
"to keep up to date in their operation, continuously improve on the quality of shipping on their registers and on the safety standards and quality of operation and management of the ships which carry their flag. It is a responsibility with which the international community has burdened them and which follows the success of their flag as a maritime flag attractive to international ship owners."
- Frendo (2000), 386. For a more detailed examination of this trend, see Part IV below.
For the majority of States Parties the following actions must be taken to implement and enforce MARPOL, namely:\(^1\)

1. Accede to MARPOL.

2. Through the enactment of enabling regulations, give effect to the compulsory Annexes I and II, the optional Annexes which they intend to accept, prohibit violations and provide sanctions for violations.


4. Ensure the provision of adequate reception facilities.

5. Monitor compliance with the Discharge Regulations and the Design Regulations.

6. In appropriate cases, take proceedings, informing the involved parties and the IMO of such action.


8. Investigate casualties involving pollution and report the findings of such investigations.

Generally, states which have an approximately equal capacity to implement and enforce marine pollution controls and share a commitment to the objectives of those controls will have little difficulty in cooperating to the extent necessary to establish and maintain an effective control regime. However, where there are different levels of economic development, different administrative capacities and different levels of commitment to the protection and preservation of the marine environment, then cooperation in the required measure is unlikely. With respect to MARPOL, the nature and extent of such differences in the East-Asian Seas region and the significance thereof for the implementation and enforcement of the Convention by coastal States in that region, were identified in the proceedings of seven workshops which were conducted

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\(^1\) It should be noted that some States Parties may consider it unnecessary to undertake all of the actions listed. For example, there may be states which consider it unnecessary to enact enabling regulations given the specificity of the Regulations in the Annexes. Then there may be some which already have a framework of sanctions against violations in their domestic law.
between 1996 and 1998. These workshops found that a range of constraints variably affected the willingness and capacity of coastal States to accede to, implement and enforce MARPOL. It should be noted that although the constraints were identified in the context of the East Asian Seas region, they are not unique to that region - they are faced by many states, particularly developing states, in other parts of the world.

The constraints relevant to accession were found to be as follows:

- The lack of financial capacity and the prioritisation of economic development over environmental protection.
- Insufficient financial commitment from government and the private sector (i.e. ship owners, ship yards, terminal operators, petroleum and petrochemical companies).
- The inability of domestic shipping operators to generate sufficient profit margins to enable them to meet MARPOL standards.
- The disinclination of some foreign investors to invest in shipping and port development if MARPOL standards were to be strictly enforced.
- The state allocation of pollution control resources to land-based pollution problems in preference to vessel source pollution.
- Insufficient financial resources to acquire the capacity to collect the information necessary for policy formulation, to translate formulated policy into implementing measures and to effectively apply and enforce measures.
- The lack of technical capacity with respect to marine pollution issues.
- The spread of responsibility for marine related activities over many governmental agencies due to the low priority given to the problem of marine pollution.
- The differences in priorities between autonomous local governments and central governments and the turf conflicts between them.
- The absence of river pollution controls. With no controls on pollution entering the sea via rivers, it is difficult to justify the control of vessel source pollution.
- The commonplace discharge in the region of raw municipal sewage into domestic waters, and the consequent difficulty of justifying the control of vessel source sewage.

2 The Workshops were as follows:
IMO/APCET/MPA Workshop
Workshop on the Ratification and Implementation of MARPOL 73/78 in the East Asian Seas, Singapore, 30th October to the 1st November 1996;
Brainstorming Workshop for Top Scientists and Policy Makers from the East Asian Seas Region, Subic Bay 3rd-6th July 1997;
Legal Training Programme on Strategies, Tools and Techniques for Implementing International Conventions on Marine Pollution in the EAS Region, Bangkok, 21st-24th September 1998;
and APEC/ANZEC Regional Workshop "Working together on Preventing Ship-Based Pollution in the Asia-Pacific Region", Townsville, 20th-23rd April 1998
- as reported in Alam (2000), 47, footnotes 1-7.

3 In the present context, implementation is intended to mean the incorporation of MARPOL into domestic law through legislation. Enforcement is intended to mean the actions taken by States Parties to ensure that those within the scope of MARPOL comply with its rules and standards. For ease of understanding the constraints will be presented as being relevant to respectively accession, implementation and enforcement,
The constraints identified with implementation were as follows:

- The difficulty involved in translating the highly complex technical arrangements in the MARPOL regulations into the local language where English is not an official language.
- The absence of laws or the inadequacy of laws enacted to implement the Convention.
- The inability of laws to meet their objectives.
- The existence of penalties inadequate in severity to deter violation.
- The lack of capacity to enforce laws.
- The lack of uniformity and consistency in the laws enacted and in their application.
- The lack of a coherent overall policy informing those dealing with the marine pollution problem.
- The inappropriate delegation of the coordination of legislation to implementing agencies after enactment. (Coordination should be addressed in the drafting process.)
- The prevalence of large bureaucracies with no coordination between a multiplicity of implementing agencies.
- The lack of funding to construct reception facilities.
- The under-utilisation of reception facilities caused by vessel operators selling oily wastes to illegal disposal contractors.
- The widespread operation of vessels in domestic or coastal waters which are not fitted with approved oily water filtering equipment, slop tanks, oil discharge monitors etc.

In the context of enforcement, the following constraints were found to be of influence:

- The shortage of technical experts to monitor compliance due to inadequacy of funding.
- Bureaucratic conflicts caused by inadequately defined functional differentiation, overlapping jurisdictions and the absence of accountability.
- The inadequacy of enforcement authority and of strategies delegated to implementing agencies.
- The lack of confidence in the integrity of law enforcement agencies.
- The lack of consistency in the enforcement of laws and the general perception that enforcement of pollution controls hinders development.
- The weakness of the judicial system and the failure to appreciate that the predictable application of laws and regulations is important for effective pollution control.
- The limitations throughout the enforcement system (i.e. administration, policing, prosecution and judicial determination) of the technical skills necessary for effective law enforcement.

although it will be appreciated that a constraint presented as relevant, for example, to accession, also may be relevant to implementation or enforcement. The constraints are summarised from Alam (2000), 43-45.
• The lack of enforcement measures such as documentation, reporting and monitoring, and the failure to employ market-based instruments in legislation.
• The high costs (in terms of time, effort and money) of enforcement procedures, whether criminal or civil.

The detail of the constraints identified suggests that for many states, political will or capacity (or both) determines the strategic choice of whether or not to implement and enforce MARPOL. For such states, expectations of implementation and enforcement by other states would not necessarily feature in the decision-making processes by which their strategic choices are made. This is not to suggest, however, that expectations play no part where there is no political will or capacity. On the contrary, expectations that other similarly placed states would not implement and enforce MARPOL would serve to justify a state's decision not to implement or enforce the Convention. Then on the other hand, a reasonably held expectation that other states will implement and enforce the Convention, particularly where that expectation is based upon the perception of the greater capacity of those other states to do so, would not necessarily motivate a state to decide to do the same where capacity deficits rationally dictate that it not implement and enforce the Convention.

It could be reasonable to assume, however, that expectations of implementation and enforcement would be likely to play a more influential role where the circumstances of the various states concerned admit both a political willingness and a capacity to implement and enforce MARPOL. In such circumstances, it is probable that expectations of implementation and enforcement will be largely referable to the issues and practicalities of enforcement. If that be so, then it is suggested that the civil law/common law dichotomy, the issue of port waste reception facilities, and the practical implications involved in attempting to enforce the Design Regulations and the Discharge Regulations would each play a role in the formation of expectations of the commitment of other states to the implementation and enforcement of MARPOL. The ensuing analysis will attempt to identify the role which each of these factors is likely to play in this regard.

5.1 CIVIL LAW/COMMON LAW DICHOTOMY

There is no international consensus as to the characterisation of MARPOL offences. In civil law jurisdictions such offences are usually regarded as either "minor", "serious" or "aggravated". This is a classification which is referable to the severity of the damage caused by the violation. On the other hand, some common law jurisdictions classify such violations as either "strict" or "absolute" liability offences. Then there are other jurisdictions which adopt a so-called "half way house" approach to the characterisation of MARPOL violations. In this characterisation, the

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* In some situations a lack of political will to implement and enforce MARPOL may be explained by a lack of capacity and in others by a belief that vessel source pollution is not a problem which warrants regulatory intervention.
violation will be treated as one of "strict liability", subject to the defence of due diligence being allowed. Such a defence would cast upon the violator the onus of showing that all reasonable precautions were taken and that all due diligence was exercised in an effort to avoid the commission of the offence. These differences of approach in civil law and common law jurisdictions respectively are apt to create differences in outcomes.\(^5\)

From the perspective of engaging the commitment of flag States to ensure that their flag vessels comply with MARPOL's rules and standards, such differences in outcomes have the potential to impede rather than facilitate.\(^6\) If the characterisation of MARPOL offences were the same in all jurisdictions, then outcomes from prosecutions would be both uniform and largely predictable. Accordingly, no opportunity would be admitted for differences in approach to create the potential for comparative advantage. As it is, the differences do enable states to offer competing prosecution conditions. Such competing prosecution conditions can be openly justified by reference to the nature of the legal system in which they are intended to operate. Thus, the competitive element manifests not as a result of any given state deliberately characterising MARPOL offences to the end of comparative advantage, but as a natural incident of the legal system concerned. This competitive element, increasingly important both for flag States\(^7\) and for port States\(^8\) inhibits the uniform implementation and enforcement of MARPOL. It gives shipowners the ability to choose between flag registries based on the severity of penalties imposed for violations of MARPOL's rules and standards. Also, it enables ship operators to choose where to commit violations of those rules and standards, having regard both to the risk and to the consequences of detection by coastal States.

### 5.2 PORT WASTE RECEPTION FACILITIES

The provision of port waste reception facilities has "always been recognised in principle as the most effective solution to shipping pollution".\(^9\) In practice, there can be no doubt that the global provision of adequate port waste reception facilities will help pave the way for the total elimination of intentional pollution of the marine environment as envisaged by the Preamble to

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\(^6\) This phenomenon has been recognised in the context of maritime safety regulations.

"Voluntary observance of regulations by the shipping industry is the ideal way of preventing accidents. In reality, this is not what happens, and some deterrence is needed, by state control of these activities, and penalties for violation. The moral effect and exemplary value of such deterrence can prove extremely effective, given that human factors play such an important part in the occurrence of accidents at sea.

"While it is true that fear of punishment alone cannot prevent disasters, criminal legislation and its enforcement by the flag State remain an important element of the maritime safety system. Its deterrent purpose cannot be achieved properly except by strict penalties, and the promptness and certainty of punishment. Unfortunately, the diversity of national criminal laws against breaches of maritime safety regulations and of case law in their application makes any global deterrent effect rather patchy." - Boisson (1999), 378.

\(^7\) Competition in the international shipping industry, driven more recently by over-capacity, pressures ship owners into minimising operating costs. To this end, flag States can assist by offering competitive registration conditions.

\(^8\) The nature and intensity of increasing competition between ports is described by Seet-Cheng (2000), 5-6.

\(^9\) Pritchard (1978), 198.
MARPOL. If this objective is to be attained, vessel operators must be provided with the means to dispose of ships' waste ashore.

The history of port waste reception facilities began with the OILPOL Convention. Under the 1954 Convention, States Parties were called upon to "ensure the provision" in each "main port of facilities adequate for the reception ... of such residues from oily ballast water and tank washings as would remain for disposal by ships ...". This, however, was an obligation from which the States Parties were largely relieved by the 1962 Amendment. That Amendment simply required States Parties to take "all actions appropriate to promote" the installation of such facilities.

In 1973, MARPOL reintroduced a mandatory obligation for all States Parties to provide reception facilities at ports and terminals with its use of the expression "the government of each party to the Convention undertakes to ensure the provision of reception facilities ...". The reintroduction of this mandatory obligation was not without contest, as the records of the debate over Annex II, Regulation 7, disclose. The original Draft Regulation 7 provided that governments "should take appropriate steps to ensure the provision of reception facilities". In the events, however, that version was replaced by the formula "... undertake to ensure the provision of reception facilities". Although this formula was said to have been better than the first draft, it prompted the German delegation to query "whether governments would be able to respect the provision in all cases". Justifying the unequivocal obligatory nature of the undertaking, the French delegation recalled that despite governments having been urged since 1954 to provide port waste reception facilities, such facilities were still lacking in a large number of cases. In support of the original version, the Indian delegation argued that because ports were under the control of autonomous bodies in India, its government would have difficulty in ensuring the installation of the required facilities by direct means, as contemplated by the second version. More cogent, however, was the opposition to the second version voiced by the delegation of the United Kingdom. It feared that the new text might prove an obstacle to adhesion or rapid ratification on the part of governments. Although not without foundation at the time, this fear, while it may not have been realised in the manner contemplated, has over the years proved quite prophetic in the context of the failure of States Parties to comply with the obligations. There has been a marked reluctance by States Parties to build facilities due to the magnitude of construction costs and the lack of an adequate return on the investment. That reluctance is best evidenced in the Mediterranean where it was reported in 1992 that half of the coastal States did not have port waste reception facilities. Aside from the direct costs involved in the establishment and operation of facilities, there are also downstream costs. For example, in the case of solid waste

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10 OILPOL Article VIII.
11 Annex I, Regulation 12; Annex II, Regulation 7; Annex IV, Regulation 10; Annex V, Regulation 7. The expression "undertakes to ensure the provision of reception facilities" has been interpreted by many governments as not legally mandatory - Molenaar (1998), 65 - footnote omitted.
12 IMCO Doc. MP/Conf/SR.7 4.3.74 – Summary Record of the Seventh Plenary Meeting, pages 6-8.
13 Ibid.
14 Ibid.
15 Ibid.
16 Marine Environment and Development: The IMO Role (1992), 3 IMO News, 8; "... it has been estimated that it would have cost [US] $560 million to install oily waste reception facilities in developing countries for the period 1993-2000." - Duruigbo (2000), 82 - footnote omitted.
reception, there are the escalating costs of disposal on land.\textsuperscript{18} The fact that economic considerations continue to deter compliance with the obligation is confirmed by the efforts being made at the IMO to address the issue.\textsuperscript{19} In addition to economic disincentives, however, there is, in the context of Annex V and the disposal of garbage, one further consideration which militates against the provision of reception facilities. This is the matter of health risk, in particular the risk of the introduction of diseases foreign to the port State.\textsuperscript{20} This risk has prompted the United States to require that vessels arriving from foreign shores sanitise their waste before entering port. However, the high costs involved in sanitisation have encouraged ship operators to discharge wastes at sea.\textsuperscript{21}

From a logical perspective, the provision of port waste reception facilities is a natural corollary to the right of coastal States to prohibit polluting discharges from foreign ships in their coastal zones. Coastal States which exercise that right have a duty to ensure that vessel operators are able to discharge their wastes into adequate port waste reception facilities. This duty is explicit in MARPOL. Although its execution has been delegated in most cases to ports industries which operate either as public or private bodies, States Parties do remain ultimately responsible for ensuring that the duty is discharged.\textsuperscript{22}

Thus, coastal States must take ultimate responsibility for ensuring that adequate port waste reception facilities are provided and that ships are not presented with an incentive to discharge waste at sea. They must establish an appropriate infrastructure for the proper disposal of waste arising from shipping. If they do not, the commitment of flag States in ensuring that their vessels do not illegally discharge at sea cannot reasonably be expected.\textsuperscript{23}

One strategy to engage coastal States Parties to comply with their obligation to provide port waste reception facilities, is for flag States to report reception facility inadequacies. They should also report instances where their vessels have been subjected to treatment which would not have otherwise occurred had it not been for the fact that they had previously reported reception facility inadequacies. It has been found that masters and ship owners are on occasions reluctant to register formal complaints over inadequate port waste reception facilities due to the fear of commercial repercussions being meted out against them by the ports concerned. The type of inadequacies which typically deter the proper use of facilities and in respect of which reports should be made include the lack of a clearly defined point of contact, inadequate information on the facilities and the arrangements for their use as well as communication and linguistic

\textsuperscript{18} Hagen (1990), 480.
\textsuperscript{19} For example IMO Doc. MEPC 42/6/1 3.8.1998 - Inadequacy of Reception Facilities, submitted by the Netherlands. In November 1999 the Twenty-first Assembly of the IMO adopted Resolution A.896 (21) which requested the MEPC to develop guidelines on the provision and use of port waste reception facilities. The Draft Guidelines were reviewed and revised by the Working Group at MEPC 44. By Resolution MEPC.83 (44), MEPC adopted the Guidelines entitled "Guidelines for Ensuring the Adequacy of Port Waste Reception Facilities". These Guidelines provide practical advice which states can apply in the establishment and the management of port waste reception facilities. By way of further assistance to States Parties, the IMO has conducted a number of national and regional workshops under the auspices of its Technical Assistance Programme.
\textsuperscript{21} Joyner and Frew (1991), 44 - footnote omitted.
\textsuperscript{22} IMO Doc. MEPC 43/7 31.3.1999, Annex 3, page 2.
\textsuperscript{23} Ibid.
difficulties. The extent of the reporting problem is perhaps best evidenced by the fact that despite many coastal States Parties not having fulfilled their obligation to provide adequate port waste reception facilities since MARPOL's entry into force on 2nd October 1983 only one flag State furnished a report on inadequate reception facilities to the IMO in 1999.

The provision of adequate port waste reception facilities is a matter of extreme complexity. It involves the shipping industry, port operators, oil and chemical companies and governments. Because of the complexity of the issue, no satisfactory solution to the shortage of reception facilities in many parts of the world has been found. This has implications for compliance. In deciding whether or not to construct reception facilities, coastal States will be influenced by the lack of reception facilities established by other coastal States Parties. The strategic choice then will be to defer incurring the economic burden of constructing a facility. In order for this problem to be resolved, it will be necessary to address the economic and technical aspects of the issue of port waste reception facilities on regional bases worldwide and in so doing, attempt to create incentives for regional inter-state cooperation on this issue.

For the meantime, however, the general lack of port waste reception facilities provides flag States with a reason not to ensure that their flag vessels comply with MARPOL's rules and standards. With some justification, flag States can assert that they should not be required to enforce MARPOL's rules and standards against their flag vessels if coastal States are not providing the facilities which would remove the need to violate those rules and standards.

5.3 THE DISCHARGE REGULATIONS

The Discharge Regulations were framed against the background of a recognised need to preserve the marine environment, an end to which the elimination of the deliberate, negligent or accidental release of oil and other harmful substances from ships as a serious source of pollution would be directed. This need to preserve the environment represented one side of a conflict. On the other side of this conflict was the shipping industry with its vested interest, mediated by economic and practical considerations, in maintaining the practice of discharging wastes into the sea. To control the practice, as with other maritime operations, compulsory regulations were perceived to be necessary since then, as now, "the shipping industry could not be relied upon to regulate itself, even at a national level ... ".

Directed to stabilising a conflict in which powerful economic forces were, and continue to be at work, the Discharge Regulations have not proved very effective. Ongoing incentives to violate, such as the need to keep vessel operating costs at a minimum in a highly competitive market,

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28 MARPOL Preamble.
have severely tested the Regulations. In the events the Regulations have failed to eliminate intentional discharges. The reasons why non-adherence by the shipping industry continues to be an option are fairly obvious: First, the detection of discharges is very difficult. The area within which illegal discharges might occur is too vast and the number of ships involved is too great for surveillance to be an effective policing strategy. Then there are the illegal discharges committed during severe weather events, in fog or at night which are virtually undetectable - when and if discharges are detected, "the offending ships typically are no longer to be found within the coastal State's jurisdiction or even within the wider prohibited zone".31 Thus, the risk of being caught in the act is minimal. Secondly, evidential considerations also tend to favour non-adherence. Frequently, the available evidence of an illegal discharge is limited to photographs, the presence of an oil slick or the vessel's record books, all of which most states would regard as insufficient in the absence of other corroborative evidence.32 Even evidence derived from the remote sensing devices which now exist to identify discharges is not generally accepted as definitive without the support of other evidence that corroborates the commission of the violation.33 Finally, when the Discharge Regulations were drawn, reliance upon the human element was unavoidably integral to the regulatory scheme. Because of the then lack of commercially viable monitoring systems34 vessels had to maintain an Oil Record Book in which all movements and discharge of water or oil effluents had to be recorded.35 Similarly, chemical tankers regulated under Annex II had to complete a Cargo Record Book.36 To the extent to which these records would be self-incriminatory, there was little incentive for vessel operators to record data which would confirm the commission of illegal discharges. With the advent of more reliable monitoring systems, however, reliance upon manual record keeping by vessels has diminished. But this reduced reliance has not discouraged violations of the Discharge Regulations. The costs of advanced monitoring systems and the costs and logistics of obtaining the requisite evidence for successful prosecutions ensure that detection and conviction remain exceptional events.

For example, in response to increased levels of oil pollution along its Atlantic seaboard, Canada reported in 1999 that it had enhanced the monitoring of its exclusive economic zone by using radar satellite imagery to improve the efficiency of its aerial surveillance of shipping.37 Substantial costs are involved in such an exercise, costs which are beyond the budget of all but the most highly developed of developed States.38

Then, with respect to the prosecution of discharge offences, success depends upon the quality of evidence obtained. In most cases the collation of that evidence will prove costly and difficult.

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31 Johnson (1977), 77.  
33 Ibid, 8-9. As at the date of publication in 1994, a remote sensing device was being developed that not only would identify the fact of a discharge but also would provide data about the substances discharged - page 9. In the case of discharges in contravention of Annex V, proof of breach is even more problematic since garbage generally does not, unlike oil or other substances, leave a trail of evidence which can be traced to the offender - Molenaar (1998), 26, footnote 46.  
35 Annex I, Regulation 20.  
37 IMO Doc. MEPC 43/INF.18, 28.4.1999.  
38 The detection of discharge violations requires that coastal zones be monitored with ships, planes and/or advanced technology. Only a limited number of states possess such technology. Generally, developing states do not have the financial resources to fund the required technology - Molenaar (1998), 26.
Although evidentiary requirements differ in individual states and under different legal systems, there are some categories of evidence which are almost universally accepted. For example, photographs are generally regarded as an excellent way of recording evidence because they document what was actually observed. Pollution discharge sampling also provides cogent evidence. To be useful for prosecution purposes, a comparison of the physical and chemical attributes of a sample taken from a discharge with samples taken from the fuel and cargo tanks of the suspect vessel is required. Such a comparison will most likely involve a chemical analysis of the samples, typically by gas chromatography and mass spectroscopy techniques.

Another sophisticated means by which pollution discharges may be detected and investigated involves remote sensing technologies. Such sensors can be used to detect floating oil or noxious liquid substance slicks in cases where such slicks are not observable by the human eye due to darkness, cloudy weather, fog or other visibility restrictions. The devices used are based either on radar or infrared sensor technologies and can be integrated with aircraft navigation systems. Airborne sensor systems are invaluable for displaying and mapping the position of potential oil or noxious liquid substance slicks and suspect sources. Although these techniques may be used to detect floating substances, they are not capable of identifying the type or the quantity of the substances comprising the slick. Accordingly, evidence produced by remote sensing needs to be supported by other material evidence, including witness reports, photographs and samples from the discharge and suspect sources. In most jurisdictions such other material evidence is also required to support evidence produced by chemical analyses.

Where a pollution discharge occurs or where there is the threat of a discharge, MARPOL requires the Master or other person in charge of the vessel concerned to report such discharge or threat. For the purposes of receiving and processing such reports, the Convention requires States Parties to make appropriate arrangements and to notify the flag State of the involved or suspect vessel in addition to any other State which may be affected by the pollution incident.

All information collected during the investigation of a pollution incident, including the evidence obtained by remote sensing devices, witnesses' statements, sample analyses and any other additional information, is to be combined into an official statement. By Article 8 of MARPOL this statement must be relayed to the flag State. To facilitate cooperation, the IMO encourages States Parties to create and maintain accurate and current database records of all violations. It is considered useful to categorise violations based on the identity of the violator, the type of violation and the geographic location of the violation. A database containing such information facilitates resource allocation decisions by identifying repeat offenders, frequent discharge locations and the most common types of violation. The database can also be used to identify vessel operators for whom administrative sanctions, such as civil penalties, are not an effective deterrent. The sharing of the database information by the compiling state with neighbouring states is encouraged to the end of facilitating and enhancing regional enforcement efforts.

39 The following review of the type of evidence required for the prosecution of discharge offences is taken from IMO Doc. MEPC 43/12 Annex 2, pages 17-22.
40 MARPOL Article 8 and Protocol I.
Despite the enforcement possibilities created by the collection and cooperative sharing of information, the low risk of detection and the ever present imperative to minimise operating costs provide compelling reasons for vessel operators to disregard the Discharge Regulations. These reasons also explain the lack of flag State commitment to the enforcement of the regulations against flag vessels. Equally of influence is the general unenforceability\(^{41}\) of the regime. Not only for flag States but also for coastal States the costs of and the practical difficulties involved in detecting and prosecuting breaches are considerable. It is in the fact of these costs and practical difficulties that there is a strong incentive for many States Parties not to attempt to monitor and enforce compliance with the Regulations. Given that, it is clear that the Discharge Regulations cannot create expectations of enforcement and accordingly the strategic choice for most States Parties, whether flag or coastal, would be to not commit resources to the policing of compliance with the Regulations. Thus, in this respect, MARPOL fails to engage the commitment of its States Parties to achieving its stated goal.

### 5.4 THE DESIGN REGULATIONS

In MARPOL, however, the Discharge Regulations are not the only means by which the elimination of vessel source oil pollution is intended to be achieved. Annex I also contains detailed regulations prescribing design features which, if implemented, would obviate the need for vessels to routinely discharge oil wastes overboard. These Design Regulations, insofar as they do not hold the same opportunity as the Discharge Regulations for undetected violation, seem to offer greater potential for effective enforcement.

The routine shipboard operations which historically have accounted for the largest proportion of oil intentionally discharged into the sea are, as described in Chapter 1 above, ballasting, tank cleaning, the disposal of oily bilges and the removal of sludge produced in purifying fuel oil for use in diesel engines.

**Ballasting:** To maintain trim and seaworthiness, vessels running light take on seawater as ballast. For oil tankers, the ballast taken on may be a quarter to one-third of total cargo capacity in normal sea conditions and up to one-half of capacity in heavy conditions. Where the tanker is not fitted with permanently segregated ballast tanks, the seawater is pumped into some of the empty cargo tanks. There it mixes with those oil residues which remain in the tanks after unloading. To avoid the costs attendant upon the discharge of dirty ballast into port waste reception facilities and the tonnage and custom dues payable on anything other than clean ballast, ship operators have continued the practice of discharging dirty ballast at sea, taking on clean replacement ballast which can then be discharged without economic imposition in port.

**Tank washing:** After a cargo of oil has been discharged, the empty tanks must be cleaned of the clingage which remains on tank walls and horizontal surfaces. The removal of this clingage is necessary for a number of reasons: To maintain the tank drainage systems; to facilitate

\(^{41}\) The discharge regulations have been so described by Juda (1977), 580.
inspections; to ensure optimum cargo capacity; and to prevent the contamination of the next cargo to be loaded. Traditionally, cargo tanks have been cleaned with seawater. This process produces a mixture of oil and seawater which is then discharged overboard, leaving the cleaned tanks ready to receive the next cargo.

**Bilge cleaning:** In the normal course of ship operations a certain amount of oil leaks from pumps, tanks and machinery. This oil is usually drained into bilges for eventual disposal, often by discharge into the sea.

**Fuel oil purification:** To burn Bunker C or other heavy fuel oil in diesel engines, the oil must be purified in a process which produces sludge. Initially retained in sludge tanks, the accumulated sludge must ultimately be discharged from the vessel, either into the sea or into a port waste reception facility.

It is to these operations that the Design Regulations in Annex I are specifically directed.

Described as "*the most celebrated and problematic Regulation*"\(^{42}\) of the Convention, Regulation 13 as adopted in 1973 prescribes segregated ballast tanks (SBTs) for all new tankers over 70,000 deadweight tons and proscribes the carrying of ballast water in cargo tanks unless necessitated by severe weather conditions.

The initiative for segregated ballast tanks which would carry only ballast water, never oil, was first promoted by the United States of America in 1970. Although this initiative met considerable opposition from the oil and shipping industries, the position advocated by the United States ultimately came to prevail in the adoption of Regulation 13 at the 1973 Conference. That this was so was due in part to the fact that the Regulation would apply only to new oil tankers and that "*most states would not experience direct costs due to SBTs and saw SBTs as a means of preventing costly development of reception facilities to handle Lot residues.*"\(^{43}\)

Also of significance was the ability which the United States had under the Ports and Waterways Safety Act 1972\(^ {44}\) to require SBTs in US waters even though they were not mandated internationally.\(^{45}\) At the 1978 Conference the United States again took a strong line on the SBT issue, advocating their use both on new and existing tankers of 20,000 deadweight tons and above in an attempt to eliminate human involvement, allegedly the main difficulty with the LOT system.\(^ {46}\) Although the US proposal was opposed for much the same reasons as were advanced at the earlier Conference, the opposition in 1978 was slightly more muted. This was not, however, because of an increased concern for the marine environment. On the contrary, it was because ship owners were then losing income due to the fact that a high percentage of the world's tanker fleet had been laid up. The mandatory use of SBTs would result in reduced cargo capacity for those tankers actually in service which in turn would necessitate the use of more

\(^{42}\) Curtis (1985), 696.
\(^{43}\) Ibid, 696.
\(^{45}\) Curtis (1985), 693.
\(^{46}\) Ibid, 699-700.
tankers to carry the available cargo. In the events, a compromise was reached which produced a far more detailed regulation to replace Regulation 13 of the 1973 Convention. The new Regulation dealt not only with the SBTs as did its precursor, but also with dedicated clean ballast tanks (CBTs) and crude oil washing (COW). The main features of the then new Regulation 13 are:

All new tankers of 20,000 tons deadweight and above and all new product carriers of 30,000 tons deadweight and above must be fitted with SBTs and cargo tank cleaning systems using crude oil washing;

All existing oil tankers of 40,000 tons deadweight and above must retro-fit with SBTs or COW or CBTs.

One of the requirements for crude oil washing systems is the provision of an inert gas system in every cargo tank and slop tank to reduce the risk of explosion.

Existing oil tankers solely engaged in specific trades between ports belonging to States Parties to the Protocol where those ports have reception facilities adequate for the reception and treatment of all the ballast and tank washing water are exempted from SBTs, CBTs and COW requirements.

To provide a measure of protection against oil outflow in the event of grounding or collision SBTs on new tankers must be constructed in accordance with the specifications prescribed in the Regulation.

In 1992, further major amendments were made to Regulation 13 of Annex I. These amendments, which came into force on 6th July 1993, prescribe design standards which apply to both new and existing vessels. The history of these amendments can be traced to the 1973 Conference at which the United States unsuccessfully argued for a double hull requirement to be incorporated into the Design Regulations. Then, with a similar lack of success, the United States again lobbied for the inclusion of a double hull prescription at the 1978 Conference.

Finally, however, those earlier efforts paid off with the adoption in 1992 of the double hull specifications in the form of two additional Regulations, namely 13F and 13G.

Regulation 13F applies to new oil tankers of 600 deadweight tons and above, for which the building contract is placed on or after 6th July 1993, the keels of which are laid on or after 6th January 1994 or which are delivered on or after 6th July 1996. For all tankers of 5,000 deadweight tons and above, the Regulation specifies the fitting of double bottoms and wing tanks extending the full length of the ship's side. As an alternative to double hull construction, the

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47 McGonigle and Zacher (1979), 232.
48 Regulation 13 (1).
49 Regulation 13 (7).
50 Regulation 13B.
51 Regulation 13C.
52 Regulation 13E.
53 Alcock (1992), 128-129.
Regulation permits mid-height deck tankers with double-sided hulls as well as other methods of design and construction provided that they ensure the same level of protection against pollution in the event of collision or stranding as the double hull standard and are approved by the IMO's Marine Environment Protection Committee. Oil tankers of 600 deadweight tons and above but less than 5,000 deadweight tons must be fitted with double bottom tanks and the capacity of each cargo tank is limited to 700 cubic metres, unless they are fitted with double hulls.

Regulation 13G covers existing crude oil tankers of 20,000 deadweight tons and above and existing product carriers of 30,000 deadweight tons and above. It provides for the implementation of an enhanced programme of inspection, particularly for oil tankers older than five years, and sets time limits within which existing tankers must comply with the design criteria in Regulation 13F. With the exception of ships built with double hulls, ships built to MARPOL standards must comply with the requirements of Regulation 13F no later than thirty years after the date of delivery. For those tankers built to pre-MARPOL standards, at least thirty percent of the cargo area must be covered by side or bottom protection no later than twenty-five years after the date of delivery.54

While the necessity for these amendments may well be debatable55 their impact on the world tanker fleet will involve the expenditure of billions of dollars by the shipping and oil industries in compliance costs.56 However, the spread of that expenditure will be uneven, given the age range of the fleet. To those ships of 160,000 deadweight tons and above, most of which are now at least twenty-five years old and do not comply with MARPOL, the impact will be more immediate and more severe. On the other hand, more than half the fleet consists of ships constructed during the 1980s to MARPOL standards, and for them, the 1992 amendments will, in the short term, have only a minor impact with most being able to operate unmodified for many years to come.57

Despite these Design Regulations having imposed upon ship owners economic burdens greater than those which would be incurred in complying with the Discharge Regulations, adherence to the design standards is said to be more prevalent than compliance with the Discharge Regulations.58

"By 1981, one shipping research firm already had evidence that new tankers were being built with SBTs and existing tankers were being retro fitted SBTs and/or COW. Recent national and international studies as well as industry experts reveal a common assumption that oil tankers comply with equipment standards, although none provides empirical support for this assumption.

54 It should be noted here that a proposal to accelerate the phase-out times as originally enacted in Regulation 13G was developed by the Working Group convened in 2000 by MECP 45. This proposal to amend 13G and the circumstances in which it arose will be discussed more fully below.
56 White (1994), 146.
57 Griffin (1994), page 9 of the Lexis download.
58 Mitchell (1994).
Then, assefting the company, there can be Although these claimed compliance levels are open to some doubt (as will be explained below) there can be little argument that in theory at least, the Design Regulations are a potentially more effective method of intervention than the Discharge Regulations.

Unlike the Discharge Regulations, the Design Regulations intrude on the various relationships which form around a tanker. Thus, in the negotiations and arrangements between the tanker buyer and the tanker builder, considerations of compliance with MARPOL feature just as they do in the relationships between the tanker owner, financier, classification society and insurance company. One obvious reason why compliance considerations so feature is that to engage in international trade, a tanker requires classification, insurance and international oil pollution certificates, all of which can be withheld if the vessel does not comply with MARPOL standards. Then, asserting pressure on the various relationships are the inspection powers vested in port States which are exercisable for the purposes of verifying compliance with the Regulations and the sanctions for non-compliance. In theory, then, the design regime is positioned to have an aggregate impact in a manner conducing to compliance across a range of relationships to which the discharge problem is in part ultimately traceable.

While these comments are relevant to the design regime as a whole, the COW and SBT standards indirectly inhere more immediate implications with respect to compliance. In the case of the COW standards, the implications favour compliance. Under the COW system, the cargo tanks are washed with crude oil instead of water. The system is more efficient than washing with seawater in that crude oil acts as a solvent and so removes greater quantities of oil sediment and sludge than is possible with seawater. The end result is greater cargo capacity, cleaner tanks and reduced maintenance costs. Furthermore, the residue from COW is a useable product. Thus, in 1994 the net savings per voyage achieved through the use of the COW system were claimed to be US $9,000. Also favouring compliance is the fact that the COW system must be used at the unloading port, "the governing body of which is likely to be more inclined to conduct an adequate inspection than an oil exporting nation".

With the SBT standards, different considerations apply. Instead of the economic incentives which underpinned installation of the COW system, SBTs involved increased construction costs for new vessels and substantial retro-fitting costs for existing vessels. In the case of existing vessels, costs are not limited simply to those associated with the fitting of the required piping and pumps.

60 Ibid, page 9 of the Lexis download.
61 Collins (1987), 282.
There are also one-off costs in the time lost during the retro-fitting and permanent costs associated with the loss of deadweight, the increase in bunkers and other transport costs needed to ship a given quantity of oil.\textsuperscript{63} Notwithstanding the obvious economic disincentives to compliance, it has been claimed that as at 1994, more than ninety-eight percent of the tankers in the fleet required to install SBTs have in fact done so.\textsuperscript{64} This level of compliance has been attributed to the special characteristics of the design regime in MARPOL. In particular, the greater transparency of violations of the Design Regulations not only makes for ease of detection and enforcement but also serves "perhaps most importantly to reassure other tanker owners that their own compliance would not place them at a competitive disadvantage in the marketplace".\textsuperscript{65}

Then there are the sanctions, and in particular the ability of a port State to detain non-compliant vessels. In imposing opportunity costs on a tanker operator of several thousand dollars per day, detention is said to have the positive quality of being not so costly as to be considered a disproportionate response to the crime but costly enough to deter other violations.\textsuperscript{66} Finally, the high compliance levels claimed are also related to the fact that regime implementation is enhanced by virtue of it having imposed few direct costs on governments. The inspection and monitoring process not only builds upon existing institutions, but governments are permitted under MARPOL to fulfil their obligations by delegating responsibility for surveys and inspections to classification societies, thereby pushing implementation costs on to non-state actors. Hence, unburdened by direct costs, governments are said to be more inclined to "implement their international commitments as their interests in enforcement increase".\textsuperscript{67}

While there can be little doubt that on a theoretical level the design regime does have the ability to achieve the success claimed,\textsuperscript{68} the reality is that in practice its success is actually not as complete as has been suggested.

\textsuperscript{62} Cummins, Logue, Tollison and Willett (1975), 181-192.

\textsuperscript{63} Abecassis (1985), 35.

\textsuperscript{64} Mitchell (1994), page 10 of the Lexis download.

\textsuperscript{65} Ibid, page 13 of the Lexis download.

\textsuperscript{66} Ibid, page 15 of the Lexis download.

\textsuperscript{67} Ibid, page 17 of the Lexis download.

\textsuperscript{68} A recent theoretical analysis summarised the potential of the regime as follows:

"In its early history, the Intentional Oil Pollution Regime employed a series of control measures focused on regulating the act of discharging oil from tankers. These included limits on the size and location of discharges and rules mandating the recording of each discharge. Discharges were largely unobservable on the high seas, and hence the regulatory rules were an ineffective deterrent. These rules were replaced in 1978 by equipment standards: [They] mandated use, for new tankers, of segregated ballast tanks (SBT), and the option of SBT or a new washing technique for older tankers. Despite the fact that equipment standards such as SBT were significantly more expensive than the previous discharge controls, compliance with the SBT requirement was much higher.

"One reason for the higher levels of compliance was that the introduction of SBT included a grant of legal authority to port States to detain non-compliant ships. In practice, however, this sanction, because extreme, was rarely used. A much more powerful and theoretically-interesting cause of higher compliance levels is related to the structure of the tanker industry, the role of private actors within that structure, and the nature of an equipment standard. Though they were not legally obligated to do so, ship builders and ship-classification societies, who are private actors with pre-existing roles in the industry, ensured that SBT was integrated when a new ship was commissioned and built. Lack of proper classification from a society withheld necessary insurance and made the operation of the tanker prohibitively costly. These private actors were not compelled to enforce the international standards but rather chose to use it as an authoritative benchmark. This decision, in conjunction with the pre-existing role these actors played in the industry, helped ensure compliance by ship-owners with the international rule. Thus, one lesson of the oil pollution case is that the production of compliance with an international standard may largely result from private actors and market forces, and may not require an exclusive focus on government actions, though here the prospect of the sanction of ship detainment reinforced the pressures and incentives that stemmed from non-governmental sources."
Admittedly, in some areas such as the United States and Western Europe, where port inspection services are active and where enforcement procedures are taken for non-compliance, the success of the regime is virtually as claimed. However, in other areas, such as the Persian Gulf, the Caribbean and Nigeria, sub-standard shipping continues to be a problem. For example, although some fifty-four percent of all exported oil is shipped from the Persian Gulf, no oil exporting state in that area had ratified MARPOL as at December 1998. In consequence, there are no inspection services in the area and as a rule, tankers plying the Gulf are not equipped with SBTs. Coupled to this are the factors which subvert the impact of the Design Regulations on the relationships noted above, particularly that between owner, classification society and insurer. Self-regulation within these relationships can be defeated by an owner “shopping around” for a classification society prepared to issue a certificate on a sub-standard vessel and an insurer willing to accept that certificate without further inquiry. This strategy is made possible by the London insurance market, which tends to be more risk-taking than the European market and by the different standards that can be found among the classification societies. Then there are the

“A second lesson of the oil pollution case is the critical importance of ‘architecture’ as a regulatory strategy. It is important to underscore that the role that the industry actors played in the production of compliance with SBT was contingent upon the particular quality of the SBT rule itself. Because SBT was integral to the ship itself, the decision to build with SBT involved a one-time, irreversible decision to comply with international standards, in contrast to the continuous series of essentially unverifiable decisions associated with the discharge standard. Once installed, SBT could not be de-installed. Compliance was quite literally built into the vessels. By creating a structure of rules that made a non-compliance decision very costly and capitalised on the structure of the solution itself - the irreversible decision to build with new equipment - the revised oil pollution regime prevented non-compliance rather than deterred it. This form of prevention resonates with recent research in domestic law on architecture as a regulatory strategy.”

- Raustiala (2000), 413-415. As will be seen in the ensuing text, this analysis, as with the previous analysis by Mitchell, does not take into account some practical realities which cast doubt on the conclusions reached.

70 Ibid.

"[t]he system of using classification societies worked well, as long as the few ones existing operated under high standards. As the number increased to presently more than fifty registers, the level of quality and technical competence dropped. The competition from the laxer registers undermined the work of the classification societies. In order not to lose ships in their class, they have to become lenient with respect to the ships they classified or were supposed to control on behalf of the flag states. This resulted in further decline of safety at sea." - Salvarani (1996), 226.

Others have also drawn attention to the problems with classification societies. For example, in 2001, Moritake Hayashi, one of the four Commissioners appointed to the International Commission on Shipping which was established in 1999, wrote that

"[c]lassification societies have often been criticised, particularly in the aftermath of incidents which occurred shortly after having been surveyed. Of major concern are the commercial relationships and pressures between classification societies, ship-owners and flag states. It was pointed out that classification societies face a conflict of interest in acting for both ship-owners and regulatory authorities, and that they succumb to commercial pressures to compromise safety standards."- Hayashi (2001), 508.

In 1994, Sir Anthony Clarke summarised the situation with classification societies in the following words:

"Some of the complaints about the effectiveness of flag states have recently focused on the role of classification societies. Most flag states rely upon classification societies to ensure that their vessels comply with standards laid down by IMO. The problem is that not all societies apply the rules with the same strictness - no names, no pack drill. That leads some ship-owners leaving the tougher ones for the more liberal ones with a resulting lowering of standards. Although Hobhouse, J. (as he then was) said as long ago as 1983 in The Torenia that it is naïve for ship-owners to rely solely upon class, it remains the fact that some do and indeed that some find the slackest classification society upon which to rely. In any event, whatever the true reason or combination of reasons, for some years port states have begun to take active steps to help themselves." - Clarke (1994), 204.
factors of a more general nature which contribute in practice to the design regime’s failure to fulfill its theoretical potential. Each of these factors represents a systemic weakness in the self-policing mechanism upon which the design regime depends for its enforcement. First, those charged with the primary responsibility for ensuring and/or monitoring compliance with the regime, namely flag States and port States, those which have delegated authority in that regard, as is the case with classification societies, and those which have a concern for compliance through vested interests, as do chartering and marine insurance organisations and the maritime labour unions, bring different standards of diligence to their respective roles. The result, then, is an unevenness in implementation with consequent disparities in enforcement. Secondly, economic factors play a significant part in undermining the design regime. Port inspections impose a considerable financial burden on the port States – in 1992, members of the Paris Memorandum of Understanding on Port State Control estimated that the average cost of each visit to a vessel amounted to 240 ECUs. On the basis of that cost, inspections in 1993 burdened the Members of the Memorandum with an expenditure of at least 4 million ECUs, “although it has to be noted that the overall cost of the inspections accrued to the port State are significantly higher.” Contrary to the claim made above, these costs do not devolve upon non-state actors. It is only in exceptional circumstances that the costs are passed on by the inspecting port State. Aside from the actual cost of inspections, a port State which rigorously inspects vessels courts the risk of losing port revenue to the ports of other states which do not rigorously inspect – a situation which can, of course, only occur where vessel operators are able to choose between ports. Further, the suggestion that port States simply refuse entry to “fleets known to be in current violation of environmental laws and/or known to be repeat offenders,” whilst being an effective means of reducing the financial commitment to inspections, similarly founders on lost revenue and other obvious practical considerations. Then, on the other side of the coin, are the

It is interesting to note that the classification society which had inspected the Erika (see below) was the same society responsible for the Ievoli Sun, the Italian-flagged tanker which sank in October 2000 off Normandy with 6000 tons of toxic chemicals. As recorded in the ICONS Report, in the submissions to the Commission “[c]lassification societies were variously described as inflexible, unresponsive, incompetent, inept and, in some cases, corrupt” - ICONS Report (2001), 32. An example of the problems of classification societies is provided by the Cypriot panamax bulk carrier San Marco (35,538 GRT, built in 1968). This vessel: “was detained by Vancouver port authorities in 1993 after which BV [Bureau Veritas] withdrew her class. She was allowed to proceed under tow, unmanned, for repairs in Mexico. But no repairs were undertaken. The vessel slipped her tow, took her crew back on board, and proceeded to load a full cargo of fertiliser. During this voyage, she hit heavy weather off Cape Town and lost shell plating 14 x 7 metres in the way of No. 1 cargo hold. That the vessel reached the safety of Cape Town and did not sink with all hands was nothing short of a miracle. The San Marco was as sub-standard a ship as one could find, yet the Hellenic register issued a full suite of classification certificates after BV had withdrawn theirs.”

- Hare (1997), 580, footnote 27.
75 Reprinted in (1992), 21 International Legal Materials, 134 – this Memorandum, adopted in 1982, is an international agreement aimed at the establishment of a harmonised system of port State control. The parties which adopted the Memorandum were Belgium, Denmark, Finland, France, the Federal Republic of Germany, Greece, Ireland, Italy, Netherlands, Norway, Portugal, Spain, Sweden, the United Kingdom of Great Britain and Northern Ireland. The role of port State control will be more fully discussed in Part IV below.
77 Ibid. In the case of Germany, for example, standard control inspections are free of charge for the ship. However, reinspection is warranted in cases of serious deficiencies do incur fees. The fees charged amount only to compensation for the actual costs incurred - see Kiehne (1996), 221. The Flag State Implementation Sub-Committee of the IMO has noted that there is a well established practice that the first and single visit to a vessel for Port State Control is not charged. The IMO encourages its members to maintain that practice - see IMO Doc. FSI 5/16, Paragraph 11.30 - quoted in IMO Doc. FSI 9/6/2 17.10.2000 Annex page 2.
economics of penalties. Generally, penalties have been found to be insufficient to deter violations. Again, contrary to the claim made above, detention of vessels "is not a strong deterrent" - the financial gains to the ship owner operating a non-complying vessel invariably exceed the costs of detention. Aside from detention, actual financial penalties when imposed upon ship owners violating the Convention, have generally been "very low and definitely not adequate in severity to discourage MARPOL violations." 

Problems associated with vessel inspections and surveys, both of which are relevant to the enforcement of the design regulations, became the focus of attention at the IMO after the Maltese-registered Erika broke in two in moderate, but not extreme, sea conditions off the coast of France on 12th December 1999, spilling half of her heavy fuel oil cargo into the sea. This was a vessel which had been inspected eighteen times by Flag State and Port State Control Inspectors between 1991 and its loss in 1999.

The circumstances of this casualty prompted the Secretary-General to suggest that "that it ought to be recognised that, as a result of what happened, the credibility of the safety system had been damaged." Although he acknowledged that the Erika could be considered an exception, given the recent decline in the statistics relating to maritime casualties involving oil tankers, he did stress that "the facts should be faced that the safety net which had been developed over the years had failed in that particular case. It ought to be addressed head-on, otherwise it would not be possible to restore credibility to the whole system."

Such was the nature of the casualty that it drew regulators' attention to all of the elements which are involved in the 'chain of responsibility' for keeping shipping operators up to standard. The following post-Erika remarks made by the Head of Marine Safety Unit in the European Commission is illustrative of this: "Our prime concern was how on earth a tanker that had recently been surveyed by a classification society, inspected under Port State Control and vetted by charterers, with all its papers apparently in order, could suddenly break in two in moderate, but not extreme, sea conditions. This still is to us a great mystery."

The most immediate response to the incident within the IMO, galvanised by public opinion and the threat of unilateral regional action by the European Union, was a proposal submitted by

80 Peet (1992), 293.
81 "This figure does not include the vetting inspections undertaken by the oil majors, nor the surveys carried out by the classification society. According to the report prepared by Malta Maritime Authority, none of the flag or port State control inspection reports made mention of any inspectors having actually entered the ballast tanks. During [the period between 1991 and 1999] the ship was detained five times as a result of port State control inspections and the last detention was precisely two years before her sinking, at Rotterdam. The deficiencies noted at that time were not related to structural faults and were rectified immediately." - Ozcan (2001), 243.
82 IMO Doc. MEPC 45/7/2 8.6.2000, page 2.
Belgium, France, Germany and Spain to amend Regulation 13G to accelerate the phasing out of single-hulled oil tankers more rapidly than prescribed in Regulation 13G as originally enacted. The proposal was that the phasing out of single-hulled ships transporting dangerous goods and oil be completed by 2008 at the latest.

In the events, at MEPC 45 the Working Group convened to examine the various proposals developed a Draft Revision of Regulation 13G which establishes a timetable for the phasing out of all tankers that fail to comply with the double-hull requirement or equivalent protective measures prescribed in Regulation 13F.85

In addition to the phase-out proposals, many States Parties expressed concerns over other aspects to which the casualty drew attention. For example, serious questions were raised as to the integrity of the inspections and service procedures for oil tankers, particularly hull and structure inspections. Brazil86 proposed that the system should be improved by requiring better qualifications for surveyors and the provision of better conditions to carry out inspections. It was submitted that measures such as these would increase the reliability and credibility of inspections and the inspecting institutions.

Norway87 considered that various types of supplementary requirements would be even more important in relation to the prevention of future oil pollution than an accelerated phasing out of single hull oil tankers. Such requirements should be aimed at preventing the condition of oil tankers from slipping gradually into a state of substandardness without any authority noting and taking appropriate action. This was clearly the case with the Erika, the condition of which had deteriorated over a period of time without having been noticed during periodic inspections. The recommendations suggested by Norway would involve:

- Various types of operational limitations/restrictions for oil tankers above certain age limits;
- Stricter survey procedures;
- Stricter requirements on planning and execution of structural repairs;
- Better supervision of the work of classifications societies;

85 For the purposes of timetabling the phase-out of non-complying oil tankers, three categories were devised, each with its own phase-out schedule. In Category 1, which is intended to apply to crude oil tankers over 20,000 tons and product carriers over 30,000 tons without segregated ballast tanks, the phase-out period will commence on 1st January 2003 and expire on 1st January 2007. For Category 2 vessels, being crude oil tankers over 20,000 tons and product carriers over 30,000 tons which have segregated ballast tanks, it is intended that the last date for phasing out those constructed in or before 1986 be 2011. No agreement was reached on the phase-out date for those vessels constructed after 1986. There were, however, two alternatives suggested, namely 2015 (that being the phase-out date in the US Oil Pollution Act 1990) and 2017. In the third category were vessels not previously covered by Regulation 13G. These are smaller oil tankers of 5000 tons deadweight and above but below the limits intended for Categories 1 and 2. Although it was agreed that the amended Regulation should cover these tankers, the Working Group could not reach agreement on the phase-out date. Accordingly, two alternatives were presented. Under each alternative, all ships delivered in or before 1986 would be phased out between 1st January 2003 and 1st January 2012. For ships constructed thereafter, the same two alternative dates suggested for Category 2 were proposed, namely end dates of 2015 and 2017 respectively. The reluctance of some States Parties to allow any Category 2 single-hulled tankers to continue operating after 2010 produced a compromise whereby it was agreed that such tankers could remain in service if they met certain criteria to be adopted for a "condition assessment scheme" in addition to the enhanced survey provided for in Resolution A.744 (18).
86 IMO Doc. MEPC 45/7/19 1.9.2000, page 2.
• Stricter provisions on transfer of class;
• New provisions on change of flag;
• Renewed consideration of the ESP (enhanced survey programme - hull and structure inspections) requirements for oil tankers.

The International Chamber of Shipping\textsuperscript{88} expressed the view that the catastrophic structural failure which occurred to the Erika should be a matter of serious concern. The enhanced survey programme should have detected the deteriorating condition of the vessel. The Chamber was of the view that a review of survey requirements should be undertaken which might reveal the need to introduce certain improvements. That need was clearly suggested in the available evidence which indicated that the quality and conduct of some surveys appeared to be below acceptable standards. The Chamber considered that there may be too much flexibility in the way in which surveys are carried out and too little accountability by those having the responsibility to conduct the surveys.

Concern over the undetected progressive deterioration of the Erika also lay behind the submissions made by the Bahamas. In its opinion, a number of issues are particularly pertinent when ships present with hulls which are in poor condition. Those issues are the age of the ship, the integrity of the flag State, the integrity of the classification society, the integrity of the individual surveyor and the integrity of the ship owner. Having said that, however, the Bahamas then submitted that the traditional approach, which typically focuses on those issues, ignores a fundamental problem which would be within the power of the IMO to correct. That problem lies in the ease or otherwise of access for close-up surveys during the in-service phase of a ship's life. The Bahamas submitted that the vast majority of large bulk carriers and tankers are neither designed nor constructed to have the interior of their hulls conveniently surveyed, and many are almost impossible to survey in a satisfactory manner. That being so, the Bahamas submitted that the means to facilitate thorough and complete surveys should be considered in the design of the vessels and that international action be taken to ensure appropriate design. Given that the initial costs of building a "survey-friendly ship" are likely to be higher than at present, the Bahamas suggested that legislation would be necessary to create a level playing field for all builders, owners, classification societies and flag States. The end result of so doing would be considerable benefits in terms of safety. Further, the longer term costs of maintaining a survey-friendly ship would be less than for conventionally designed vessels, given the ease with which defects could be found at a much earlier stage.\textsuperscript{89}

It was the general recognition of failures within the survey and inspection system to which the Erika incident drew attention that also informed Greece's opposition to the accelerated phasing of single-hulled tankers. Greece submitted,\textit{ inter alia}, that improvements be made to the enhanced programme of surveys and that guidelines on the performance and control of classification societies should be reinforced. It was also submitted that shipyards should be made responsible for the construction of ships in accordance with class rules and specifications.\textsuperscript{90}

Those submissions aside, Greece concluded by stressing that such were the problems which had

\textsuperscript{88} IMO Doc. MEPC 45/7/12 22.8.2000, page 4.
\textsuperscript{89} IMO Doc. MEPC 45/7/11 7.8.2000, pages 1-2.
\textsuperscript{90} IMO Doc. MEPC 45/7/1 31.5.2000, page 3.
surfaced in the wake of the Erika incident that the Maritime Safety Committee should urgently turn its attention to the means by which the uniform and effective implementation of rules, regulations and guidelines for those with the responsibility for the safe transportation by sea of cargoes might be achieved.91

After the Erika incident initial assessments were made of the cost of the proposed accelerated single hull tanker phase-out. Those assessments suggested that without taking into account the time value of money, new buildings and scrappings would total some US $15,726.92 This cost estimate draws attention to an unavoidable reality of the MARPOL Convention, namely the expense to States Parties, whether flag or coastal, of cooperating in the implementation and enforcement of the Convention. Effective implementation requires resources which many flag States93 and coastal/port States94 simply do not have. Implementation and enforcement costs are without doubt quite substantial and inevitably for some States cost prohibitive,95 a reality which has promoted developing member States at the IMO to stress on many occasions "the importance of technical as well as financial support to assist [them] in ratifying and implementing the MARPOL Convention".96 Although MARPOL does provide for technical cooperation97 it does not provide for financial assistance to be made available to those States Parties which lack the resources necessary to implement and enforce the Convention. Article 17 was much opposed by developed states at the 1973 Conference. Its inclusion in the Convention was more a reflection of the persistence and voting strength of developing states than the equity inherent in their arguments in support of the Article. Thus, in the absence of a significant shift in the positions held by developed states on equity issues, it is unlikely that Article 17 will provide the impetus to satisfy the means deficit. In any event, that Article is directed only to technical cooperation – it does not obligate financial assistance, a matter which continues to be a primary need of developing states.98

Despite the obvious importance of economic capacity to the ability and willingness of States Parties to implement and enforce MARPOL, it would be incorrect to ascribe implementation and enforcement shortcomings exclusively to economic inadequacy. As the enquiries made consequent upon the Erika incident suggest, one factor which can account for system failure is the inability or unwillingness of those individuals and organisations whose responsibility it is to monitor compliance with MARPOL's rules and standards to competently and conscientiously discharge their responsibilities.99 Although MARPOL contains detailed prescriptions concerning surveys and inspections100 it does not contain any provisions which would assure to its States

91 Ibid.
95 Becker (1998), 634.
96 Peet (1992), 278-279.
97 MARPOL Article 17.
98 Peet (1992), 278-279.
99 "It is widely admitted that [the owners or operators of sub-standards shipping] can continue in business because a range of sub-standard players exists in this highly competitive industry to facilitate, willingly or unconsciously, their operation. They include, among others, charterers, cargo-owners, insurers, classification societies, bankers, manning agents, and above all, flag States or ship registers."
   - Hayashi (2001), 503.
100 Refer Annexes I, II and IV and see also Part IV below.
Parties that the responsibility for surveying and inspecting is entrusted to appropriately qualified and motivated individuals and organisations.\textsuperscript{101}

Then, of course, there is the fact that, as has been argued above, MARPOL respects and preserves traditional maritime sovereignty. Enacted under the same conditions which are said to have frustrated earlier efforts to control pollution from ships, namely "the existence of the sovereign nation states system ... traditional international legal concepts such as 'freedom of the seas' and exclusive flag State jurisdiction over ships on the high seas"\textsuperscript{102} the Convention makes no attempt to strengthen "the weakest link in the traditional law of the high seas - the coastal State or flag State which is either unable or unwilling to enforce its international obligations or even its domestic requirements".\textsuperscript{103} Certainly for flag States, MARPOL does not provide within its structure many reasons, if any, for them to enforce its rules and standards against their flag vessels. Even the theoretical potential of the Design Regulations for effective enforcement has not been realised. As the Erika incident demonstrated, there are failings within the inspection and survey system which admit non-compliance with the Design Regulations. The existence of these failings in practice allows flag States the option of choosing whether or not to enforce MARPOL's rules and standards against their flag vessels.

Against this, however, is could be said that the arbitration provisions in Article 10 and Protocol II are the means by which MARPOL can ensure that its States Parties comply with their obligations under the Convention. This dispute resolution mechanism, which is binding on States Parties, provides that disputes between two or more Parties concerning the interpretation or application of the Convention "shall, if settlement by negotiation between the Parties involved has not been possible, and if these Parties do not otherwise agree, be submitted upon request of any of them to arbitration ...". Underscoring the compulsory nature of this mechanism, Protocol II provides that "[a]n Arbitration Tribunal shall be established upon the request of one Party to the Convention addressed to another in application of Article 10 of the present Convention". The Protocol also provides that the absence from or default of a Party with respect to the arbitration proceedings "shall not constitute an impediment to the procedure"\textsuperscript{104} and that upon the Arbitration Tribunal rendering its award, which "shall be final and without appeal ... [t]he Parties shall immediately comply with the award".\textsuperscript{105} An examination of the question whether such a compulsory dispute resolution mechanism as that constituted by Article 10 can operate as an effective means of ensuring compliance will be deferred until Part XV of UNCLOS is discussed in Part III below. For the meantime, however, it suffices to reiterate that states rarely resort to adjudication as a means of compelling compliance with environmental treaty obligations.\textsuperscript{106} The fact that this is so thus casts some doubt on whether the presence of Article 10 in the Convention would have any influence on the strategic choices which States Parties make with respect to the monitoring and enforcement of MARPOL's rules and standards. If it has no such influence, as will be argued in Part III below, then to the extent to which MARPOL does not

\textsuperscript{101} Competence issues are currently being addressed by the IMO in the context of the ISM Code - see IMO Doc. FSI 9/19 26.3.2001 Annex 5, page 13 et seq.
\textsuperscript{102} Juda (1986), 579.
\textsuperscript{103} Sweeney (1974), 301.
\textsuperscript{104} Protocol II, Article IX (3).
\textsuperscript{105} Protocol II, Article X (1).
\textsuperscript{106} See Chapter 2, Section 2.3.2 above and the authorities there cited.
ensure that its States Parties, especially its flag States Parties, discharge their obligations under the Convention, it cannot be an effective means for controlling vessel source pollution.
CHAPTER 6

BACKGROUND TO THE CONVENTION

UNCLOS emerged from "widespread dissatisfaction with the existing legal regime or lack of it in the oceans" to target a complex range of conflictual issues which implicated interests as divergent as shipping, mining, fishing, the marine sciences, navigation and the military in one "comprehensive package deal". As such, it has been heralded as "no less than a comprehensive constitution for the oceans" which provides "the legal framework for the international cooperation necessary to save the oceans". However, it has also been described as "a political document ... [reflecting] ... both the predominant interests of politically ascendant states and the general aspirations of the world community".

To describe UNCLOS as a political document is not unwarranted. In attempting to construct a comprehensive legal code governing all aspects of maritime jurisdiction, including navigational rights and the delimitation of territorial waters, to formulate a regime for all aspects of the uses and resources of ocean space, particularly for deep sea mining, to settle the rights of land locked states, to regulate marine scientific research and to create controls for the protection and preservation of the oceans, the states participating at the Law of the Sea Conference were predominantly preoccupied with legitimising increased state sovereignty over ocean resources. Thus, one of the primary aims of the Conference was to redefine rights and reconfigure geographical ocean spaces in a manner designed to optimise freedom of movement and states' control and authority over valued marine resources. Against this background it is not surprising, then, that the Conference produced a Convention which has been described as a political document. It is equally unsurprising, given the

1 Stevenson and Oxman (1974), 2.
2 "Updating the law of the sea had become necessary for a variety of reasons of which two stand out. Firstly, the composition of the international community had changed dramatically due to the decolonisation process. The newly independent States demanded a role in the international law-making process and did not wish to be bound by a regime for the law of the sea which had been concluded without their express consent. Secondly, the traditional freedoms of the high seas and the primacy of flag State jurisdiction were under constant pressure from jurisdictional claims by coastal States, the phenomenon known as 'creeping jurisdiction'." - Molenaar (1998), 50 - footnote omitted.
3 Sebenius (1984), 81 - end note omitted.
5 Vallarta (1983), 147.
7 Curtis (1993), 189.
8 Ward (1998), 94.
9 "Essentially, the substantive provisions of the [LOSC], purport to balance three types of 'interests': The interest of a 'flag State' to use the seas as a hole for all sorts of purposes; the interest of a 'coastal State' in respect of the sea-areas 'adjacent' to its coastline; and the interest of the international community as a whole, which to a certain extent coincides with the interest of either a flag State or a coastal State and, in some respects, is opposed to both." - Molenaar (1998), 50 quoting Riphagen (1983), 287.
background, that the Conference should have produced a Convention which is said to favour "the litigation model of international law", for that model would seem to have an inclusive fit with those issues with which states participating at the Conference were so preoccupied.

Also indicative of a political dimension is the softness of some of the Convention Articles. In UNCLOS the rules are contained in Articles which range from the hard law provisions on state jurisdiction to the very soft law provisions on technology transfer. With respect to the rules contained in the Articles in Part XII, it is said that they are spread along the "softness continuum" with the majority being concentrated towards the soft end thereof. This concentration has prompted the view that "[t]he sections dealing with ... the Marine Environment seem to be the biggest losers due to the softness of law both in absolute and percentage terms."

The Convention Articles were the outcome of a long and arduous process. Described as "an exercise in multi-lateral treaty creation ... on an unprecedentedly ambitious level" the Third United Nations Law of the Sea Conference engaged some 150 nations in nine years of negotiations in search of a consensus on all issues implicated in the law of the sea. Given the obvious magnitude of the task, the Conference from the outset created three separate Committees, to each of which were assigned specific issues for negotiation. Committee I had the responsibility of designing a regime for the exploitation of the resources of the deep sea bed; Committee II was given the task of creating rules relating to the more traditional maritime law concerns, namely the high seas, territorial seas, exclusive economic zones, continental shelves, international straits, islands, archipelagoes and access to the sea, particularly by land-locked states; and finally Committee III was charged with formulating rules on pollution control, scientific research and the transfer of marine technology. In addition to these Committees, a separate group was established to negotiate a compulsory dispute settlement structure.

In the negotiating procedures adopted by the Conference, two aspects are of particular interest. The first was in the absence of a definite basic negotiating document prepared by a specialised group or agency similar to the technical experts who had drawn the Draft Convention presented to the MARPOL Conference delegates. Instead, the Conference began with alternative draft texts, the proposals of many states on various issues, a comprehensive list of subjects and issues as well as a number of studies prepared by the United Nations Secretariat at the request of the ninety-one member United Nations Seabed Committee. This was the Committee which had had responsibility

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9 Johnston (1996), 17.
10 Ibid, 14 - referring to Parts II, III, IV, V, VI and VII "which form the hard core of the Convention"; see also Gamble (1985), who categorises Parts II, IV, VI and XV as the hardest on various criteria - 43-46.
11 Johnson (1996), 14 - referring to Part XIV; see also Gamble (1985), who similarly classifies Part XIV - 44.
12 Gamble (1985), 42.
15 Gamble (1980), 528.
16 Stevenson and Oxman (1975), 3.
17 For the 1958-1960 Law of the Sea Conferences, texts had been prepared by the International Law Commission.
for the Conference preparations. Those materials provided the resources from which "single negotiating texts" were to be crafted by the delegates during the early sessions of the Conference. Forming the basis of Committee negotiations without binding delegates to their provisions, these texts evolved through revisions which the Committee Chairmen were empowered to make as outcomes of the continuing Conference discussions demanded from time to time. This power to revise was constrained at the 1978 session of the Conference by rules which were then introduced to ensure that textual modifications and revisions could be made only if they emerged from the negotiations, were supported widely and offered "a substantially improved prospect of consensus".

The second aspect of interest lay in the consensus decision making process adopted by the Conference. Loosely described, consensus is a process by which decisions are made through the consent of the participants rather than by the votes of pre-determined majorities. The rationale for this process lay in its potential to produce an outcome to which all delegates would subscribe and implement by reason of the inclusive participatory process engaged to achieve that outcome. In an inter-state system marked by the conflict of ideological and economic differences, the Conference attempted, in employing the consensus procedure, to promote cooperation by eliminating the opportunity for majority voting power to create and marginalise disaffected minorities.

"The consensus system assures that decision making at a multilateral negotiation of a Convention will not be dominated by the numerical superiority of any group of nations. Rather, procedural significance will be given to the variations in the power of nations. Since it is difficult to obtain acceptance of voting systems that overtly recognise the differences in nations' importance, the consensus approach permits the maintenance of an egalitarian procedure which in practice may assure that multilateral negotiations reflect the real geopolitical power of the participating nations."21

In terms of the Conference rules, all efforts at reaching a consensus had to be exhausted before a vote could be taken. Then, with respect to voting, the rules required that, on matters of substance, the majority would be two-thirds of those present and voting, provided that such two-thirds included at least a simple majority of the states which had participated in the session of the Conference at which the matter of substance had been addressed.22

Although the Conference did adopt this consensus decision-making process, "the conflicts of interest that dominate the law of the sea"23 ensured that the negotiating techniques brought to the Conference by the delegates were those of the more traditional approaches to negotiation.24 Thus it

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19 Oxman (1979), 4-5.
21 Charney (1978), 43 - footnote omitted.
22 Stevenson and Oxman (1975), 4.
23 Boyle (1985), 353.
24 The traditional approaches to negotiation are "competitive negotiation" and "cooperative negotiation". The ultimate goal of competitive negotiation, which is also descriptively labelled positional bargaining, adversarial negotiation or distributive bargaining (see Boulie, Jones and Goldblatt (1998), 48.) is winning. (See Menkel-Meadow (1984), 764.). Each party to the negotiation attempts to minimise loss and maximise
was that in the earlier sessions of the Conference, ideological debate and position driven "[t]actics, rather than negotiation, were the rule". Nowhere was this more evident than in the proceedings over the deep sea-bed provisions which were to prove to be the most contentious of all of the Conference negotiations. The intense legal and political character of the sea-bed issues with which the Conference delegates in Committee I were confronted predisposed, at least initially, to the adversarial position taking and incremental bargaining of competitive negotiation. That such style of negotiation did not in the events derail the proceedings of Committee I was due in no small measure to a range of factors which influenced the course of the negotiations. A brief analysis of some of those factors will serve to demonstrate how the Conference was able to achieve a negotiated outcome despite the "highly divided nature of alignments" and the temptation arising out of such division for delegates to adhere to the techniques of argumentation and adversarial negotiation.

From the perspective of the Conference as a whole two factors were of particular influence. The first was "the refusal of powerful minorities to negotiate under majority voting rules" and the second "a very widespread desire to have an internationally agreed regime for the oceans". In combination, these two factors not only provided a reason for the delegates' acceptance of the consensus procedure, but also assisted in creating, at least at a macro level, an atmosphere of cooperative endeavour appropriate to the levels of interdependence which existed between the issues under negotiation.

Then, on a more particular level, there were other factors which proved especially influential in steering the negotiations towards an agreed outcome. While not being necessarily representative of the entire range of negotiating strategies employed at the Conference, those relating to the complex financial arrangements which had to be established with respect to the mining of deep sea-bed minerals are very instructive. First, the financial arrangements were regarded as one of the "hard-core questions, upon whose resolution the fate of the Treaty was expected to turn"; and secondly, the negotiations over these arrangements provide a certain contrast with some of the more notable characteristics of the traditional approaches to negotiation.

gain in direct competition with the other party or parties. Hence, the strategies commonly employed in competitive negotiation are driven by self-interest to the end of undermining the confidence of the other parties in their respective positions and by so doing secure an agreement of greatest advantage. (See Hooper, Spiller and MacDuff (1999), 30-31.). Such strategies often include "dissembling, lying, exaggerating claims and making threats". (See Menkel-Meadow (1993), 367.). Cooperative negotiation "approaches negotiation through a distributive framework of fixed resources, and uses the same processes of compromise bargaining [as competitive negotiation]. However, cooperative negotiation is approached from the more accommodating viewpoint that it is in the best interests of the party ... to achieve a just settlement which does not endeavour to undermine the other negotiator's position. [It] begins, not with inordinately high initial demands, but with realistic and justifiable opening bids [that are] justified by reference to objective standards ... [It] relies heavily on the use of mutual concessions with a view to reaching a fair and just compromise ... [and] has the advantage over the competitive process of being directed towards collaboration."

(See Hooper, Spiller and MacDuff (1999), 32.)

26 Stevenson and Oxman (1975), 1.
29 Ibid, 329.
The delegates responsible for drafting the financial arrangements in Negotiating Group 2 of Committee I approached the negotiations representing widely divergent positions on the question. Even the delegates from the Group of 77 States\textsuperscript{31} did not enter the negotiations with a common position. This was a question, then, which held all the potential for adversarial confrontation and eventual non-agreement. That events proved otherwise has been attributable largely to the following:\textsuperscript{32}

- The initially divergent positions gave way to a set of negotiating dimensions within which incremental bargaining became possible.

- The Negotiating Group Chairman employed mediation techniques which "ranged from requesting 'positions' (a questionable tactic) to operating an intensive informal process in tandem with the larger group, to building momentum in a variety of ways."\textsuperscript{33}

- An intensive educative element was introduced into the negotiations. Assisted by the use of an outside model, the acceptance of which was facilitated by its perceived independence, credibility and accessibility, the delegates were mutually educated within the negotiating process. Thus it was that over time they became fully conversant with highly technical matters relevant to the question, matters such as "the time value of money, the risk analysis of investments, and the capital market access of international entities".\textsuperscript{34}

- The generous time period over which the negotiations were undertaken, namely two years, when combined with the educative element facilitated levels of understanding among the delegates without which agreement would not have been possible.

- The multilateral composition of the Negotiating Group permitted bargaining on issues which typically would have proved difficult even to discuss in bilateral mineral negotiations. This multilateral composition also allowed "provisions rejected by one party to reappear at the prompting of another"\textsuperscript{35} thereby reinvigorating the contribution of constructive ideas which had been previously dismissed.

- The manner in which differences among the delegates "in preferences, in forecasts and beliefs, in attitudes toward risk and toward time (discount rates)"\textsuperscript{36} were employed to engineer agreement.

\textsuperscript{31} "The countries that comprise this bloc are referred to variously as 'less developed countries'; 'third world countries', 'developing countries' or 'under developed countries' comprising the more than "110 'poor' countries of the world, located primarily in Africa, Asia and Latin America" - Friedman and Williams (1979), 555.

\textsuperscript{32} Summarised from Sebenius (1984), 49-70.

\textsuperscript{33} Ibid, 69.

\textsuperscript{34} Ibid, 50.

\textsuperscript{35} Ibid.

\textsuperscript{36} Ibid.
"The artful combination or disassociation of separate issues, along with the order of settlement of issues, proved critical to the negotiated outcome."37

Finally, the manner in which key textual provisions evolved from "small group invention, modification, testing, larger group familiarisation, passage into conventional wisdom, legitimation, and inclusion in the Draft"38 along with the use of a single negotiating text assisted the delegates in their efforts to reach agreement.

This use of a single negotiating text as a negotiating strategy by the Law of the Sea Conference39 is particularly interesting.

A single negotiating text is a draft text comprised of single articles on all issues for which legislation is intended. It does not contain alternative articles to represent the principal contending positions of the negotiating parties on the issues. Instead, it is a text which is compiled by the negotiating parties from their contending positions rather than of those positions, emerging to "serve as a coherent basis on which to [further] negotiate, and ... [to pull] ... states away from their varied starting positions towards a common position".40 In the compilation process, each negotiating party has the opportunity to advance its position, consider the positions advanced by other parties and, where appropriate, to signal any willingness to move towards a compromise without actually being committed to that compromise. From this process, a draft text is prepared to reflect the main trends of opinion coursing through the positions contended for by the parties.

The decision to produce a single negotiating text for the Law of the Sea Conference was taken in light of the reality that, because of the intensely political nature of the issues involved in creating a new law for the sea, the law would have to be created through political as opposed to legal mechanisms.41 Thus it was that the responsibility for producing the single negotiating text was given to the Seabed Committee of the United Nations. This responsibility was to have been discharged in preparation for the Conference. In the events, the Seabed Committee was unable to produce a text through the passive consensus procedure which it had adopted. The result was that it presented to the Conference "a massive jumble of alternative texts on almost every important item".42 Faced with that legacy, the Conference initially endeavoured to progress the negotiations on the basis of the same passive consensus procedures which had failed the Seabed Committee. By 1975, however, it had become apparent that such procedures provided neither "incentives to compromise, nor mechanisms for the discovery of non-obvious grounds for compromise".43

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37 Ibid, 70.
38 Ibid, 69.
39 The single negotiating text strategy was employed by the Conference as a whole as well as in all three main Committees and formally constituted Groups.
41 Ibid.
42 Ibid, 333.
43 Ibid, 334.