COMMENT*

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I
INTRODUCTION

A critical factor in the future legal regime for controlling pollution of the marine environment is the fate of the Law of the Sea (LOS) Treaty.[1] If one assumes that the Treaty will achieve widespread ratification and enter into force relatively soon, the Treaty could be dispositive in the area of marine pollution management. However, the marine pollution framework could differ substantially from that provided in the Treaty text if the Treaty never enters into force. Before addressing the nature of the future pollution regime, I will first examine the question of whether the LOS Treaty is likely to obtain the requisite number of ratifications to enter into force.

II
THE FATE OF THE LOS TREATY

I have deliberately chosen to be provocative on the issue of whether the Treaty will enter into force. The conventional wisdom is that the Treaty will receive sufficient ratification to enter into force quickly. I believe a reasonable case can be made for the proposition that the LOS Treaty will not receive the sixty ratifications required to bring it into force.[2]

Some may find this suggestion, particularly from one who has generally supported the Treaty, shocking, if not heretical. Obviously, to state this view is not necessarily to advocate it. However, the possibility of insufficient ratification is real

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* This paper is based on a speech delivered at Duke University School of Law on October 30, 1982. It has not been revised to reflect events occurring after its delivery but before its publication. The major event which has occurred is the concluding session of the Third UN Conference on the Law of the Sea at which the Convention on the Law of the Sea was opened for signature. One hundred and nineteen countries signed the Convention, while twenty-two countries, including the United States, declined. Washington Post, Dec. 11, 1982, at A23, col. 1.

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1. Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, U.N. Doc.A/CONF.62/122 (1982) [hereinafter cited as Convention], *reprinted in* 21 I.L.M. 1261 (1982).

2. *Id.* art. 308. The author notes that it may be some time before the proposition stated above can be proved or disproved. A far less contentious treaty was the Vienna Convention on the Law of Treaties which was opened for signature in 1969 but did not receive the 35 ratifications required to bring it into force until 1980. Multilateral Treaties Deposited with the Secretary-General as of December 31, 1981, U.N. Doc. ST/Leg/SER.E/1, at 619 (1982).

and must be considered. This proposition is based on my speculation—and I emphasize it is purely my own personal speculation, not based on any insider's information—about the attitudes of various governments towards ratification. Attitudes ascribed to countries or regions below could be markedly different should the Treaty obtain sufficient ratifications to enter into force. This analysis deals solely with likely attitudes of countries as they consider whether to ratify *before* the Treaty enters into force. It is assumed that most countries will find it more difficult to be among the initial sixty states ratifying to bring the Treaty into force than to ratify or accede to the Treaty once the initial sixty ratifications have been obtained.

A. United States

The U.S. position has been made clear by Assistant Secretary Malone[3] and the comments of other speakers—the United States is out. Were there to be a change of administrations in 1985, I do not believe this alone would result in the United States becoming a party to the existing LOS Treaty. The LOS Conference, for a variety of reasons not central to my thesis, cured not one of the six deficiencies identified by President Reagan.[4] If there is a new administration in 1985, it will be difficult for that administration to disregard the fact that those identified deficiencies were not cured. Moreover, I find it difficult to believe that the complexion of the U.S. Senate will be so altered by 1985 that opponents of the treaty will be unable to block ratification—a task requiring only thirty-four votes. Fred Tipson, who has far greater insight into the U.S. Senate than I, has stated a similar view.[5]

Obtaining ratification in 1985 will be rendered more difficult by the lack of a solid core of support. The domestic coalition of support is already beginning to erode—by 1985 it will be shaky at best. Key Congressional supporters will no longer be on the scene, enthusiasm among the public for the treaty will have waned, and support within the bureaucracy will have diminished. In short, a coalition for ratification may still exist, but it will be a far less focused and enthusiastic coalition.

Finally, the United States is likely to have already taken action which will make ratification by the United States even more difficult than it would be today. I will explore this latter point shortly,[6] but first I shall continue to explore the basis for the proposition that the LOS Treaty will not enter into force.

B. Western Europe

In addition to the likelihood that the United States is out and will remain so,[7]

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3. *See* Malone, *The United States and the Law of the Sea After UNCLOS III,* LAW & CONTEMP. PROBS., Spring 1983, at 29.

4. *See* Statement by the President, 18 WEEKLY COMP. PRES. DOC. 94 (Jan. 29, 1982). There was a subsequent statement following adoption of the Convention on the Law of the Sea on April 30, 1982. Statement by the President, 18 WEEKLY COMP. PRES. DOC. 887 (July 9, 1982).

5. *See* Tipson, *Comment,* LAW & CONTEMP. PROBS., Spring 1983, at 17, 18.

6. *See infra* note 18.

7. Of course, were the Convention to be substantially amended to cure the major deficiencies, my conclusion might well be different. Given the unwillingness of the Conference to modify the Treaty at the

it also appears to me that few western Europeans are likely to come in. Many, if not all, will sign the Treaty in Jamaica[8]—signature of the Treaty is a prerequisite to full participation in the Preparatory Commission (PrepCom).[9] The Western Europeans will wish to participate if for no other reason than to avoid criticism from other countries that have participated in the Conference. Participation in the PrepCom will allow them to hedge their position on the Treaty by seeking meaningful improvements in the seabed mining regime and only thereafter deciding whether to ratify.

Normally, a decision by these governments to sign a treaty is tantamount to a decision to ratify,[10] but not in this case. Satisfactory rules and regulations from the PrepCom are essential for determining the viability of mining under the Treaty, a proposition that all mining states have embraced. The Western European governments, therefore, will make clear when they sign that their signature is not to be construed as a decision to seek ratification (as would normally be the case) but rather as a decision to seek ratification only if the rules and regulations developed by the PrepCom are satisfactory.[11] This will allow the Western Europeans to retain all options, including the option of ultimately not ratifying the Treaty.

Their final choice will be only partially influenced by the outcome in the PrepCom—an outcome I would not choose to predict. Arguably, the PrepCom outcome will be better than the outcome of the treaty negotiation, but by no means will it be adequate to cure the six Reagan deficiencies.[12] A distinctly

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final negotiating session in the spring of 1982, it seems unlikely at best that any future efforts would cure the major deficiencies. Nonetheless, should all participants conclude that further efforts are desirable, the experience of the International Maritime Organization could provide a useful procedural precedent. It concluded the International Convention for the Prevention of Pollution from Ships in London on November 2, 1972. However, this Convention never attracted sufficient support to enter into force. In 1978, the Tanker Safety and Pollution Prevention Conference was convened, and the Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships was drafted in London on February 17, 1978. The Protocol superseded the 1973 Convention. The 1978 Protocol has now received sufficient ratification and will enter into force in October of this year. H.R. Rep. No. 1224, 94th Cong., 2d Sess. (1980), reviews the background for the 1978 Protocol and sets forward the legislation to implement the protocol. Pub. L. No. 96-478, 94 Stat. 2297 (1980).

Even the strongest proponents of the Treaty cannot draw great comfort from the possibility of amending the LOS Treaty. Many of the countries which *may* have ratified had consensus been maintained will have gone through the decisionmaking process and concluded that ratification of the LOS Treaty is not in their interest. It is hardly likely that they would subsequently ratify the Treaty that had been amended to satisfy U.S. interests. This likelihood, when coupled with the improbability of negotiating satisfactory amendments to the Treaty, makes the future prospects of the Treaty bleak indeed.

8. In fact, several major European countries did not sign the treaty at the December signing ceremony in Jamaica. Belgium, the Federal Republic of Germany, Italy, and the United Kingdom signed only the Final Act, as did the United States. Washington Post, Dec. 11, 1982, at A23, col. 1.

9. Signatories of the Final Act are allowed to attend meetings of the PrepCom as observers, but only signatories of the treaty can participate in PrepCom decisionmaking. Third United Nations Conference on the Law of the Sea, adopted April 30, 1982, resolution I, para. 2, U.N. Doc. A/CONF.62/121 (1982).

10. In a parliamentary system, failure to ratify following a decision of the government to support a treaty through signature is highly improbable since the requisite support would have been determined in the decisionmaking process.

11. See the statements of France at the Jamaica signing ceremony (on file at the Office of Ocean Law and Policy, Department of State).

12. The PrepCom will be unable to adopt rules and regulations that are inconsistent with the Treaty's terms, but it could adopt procedures to reduce the harmful impact of some provisions. Thus, the unacceptable provision in the Treaty regarding procedures for future amendments, CONVENTION, *supra* note 1, art.

adverse PrepCom outcome could insure that the Western Europeans stay out. But even an improved regime for seabed mining emanating from the PrepCom will not guarantee Western European ratification. My belief is that upon a satisfactory conclusion of the PrepCom *the* decisive factor in Western Europe's decision to ratify will be whether the Treaty has entered into force.

If a sufficient number of countries have ratified by the end of the PrepCom to bring the Treaty into force, it will be more difficult for the Europeans to reject ratification. If the Treaty is not in force, the Europeans are likely to conclude that there is inadequate support for the Treaty to justify their undertaking the burdens the Treaty entails since their ability to obtain the Treaty's benefits will be dependent upon widespread support. The issue, therefore, turns on whether there will be adequate support by the developing countries to bring the Treaty into force. I believe there is already ample evidence to justify speculation that support by developing countries will be inadequate.

C. Latin America

First, let us consider Latin America. Two key countries, Argentina and Venezuela, have made it clear they will not become parties for reasons which are largely unique to their own circumstances.[13] Ecuador has always been doubtful; it certainly is unlikely to ratify before the Treaty is in force.

Brazil and Peru have been among the most active in the LOS negotiation. Brazil, a developed country posturing as a developing country, seeks a leadership role among developing countries. As a leader, it could rush headlong into ratification, but it will not. It will wish to see where others are going before it decides which way to lead. Even if entry into force appears likely, Brazil will still have to confront its developed/developing state roles and it could well opt for a developed country nonratification posture.

Peru, on the other hand, while desiring a leadership role, a capacity in which it could be expected to seek ratification, will be caught by domestic pressures and will be forced to look inward. These pressures see a Treaty that protects some of Peru's domestic mining interests, but only if the seabed mining states ratify. Acceptance of the Treaty would also mean acceptance of a rollback of its 200-mile territorial sea. The decision by the seabed mining states to stay out, coupled with

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155(4), could not be cured by the PrepCom, but it could reduce many of the negative aspects of the technology transfer provision. Convention, *supra* note 1, annex III, art. 5.

The PrepCom had its first meeting in Jamaica from March 15 to April 18, 1983. It was an inauspicious beginning because the entire session was devoted to election of officers, principally the chairman. On the final day of the meeting Ambassador Joseph Warioba of Tanzania was elected Chairman.

13. Venezuela dislikes the formulation developed for boundary delimitation set forth in articles 74 and 83 of the LOS Treaty. (It is a tribute to the integrity of the Chairman of the Committee, Andreas Aguillar of Venezuela, that this formulation was inserted into the Treaty after the text emerged from an intense negotiating process.) Argentina found the transitional provision in the Conference Resolution prejudicial to its position on the Falklands/Malvinas controversy. *See* Third United Nations Conference on the Law of the Sea, adopted April 30, 1982, resolution III, U.N. Doc. A/CONF.62/121 (1982).

India will attempt to reconcile the leadership role it seeks among the developing countries with the domestic impact of ratification, particularly the financial implications. Revenue sharing from exploitation of resources on the Indian continental shelf beyond 200 miles will raise consternation. The effect of the Treaty on the possible exploitation of seabed deposits that India has been exploring jointly with the Federal Republic of Germany will cause further doubts. India's required contribution to financing the Seabed Authority, particularly when the Authority may be viewed as having no meaningful role, will raise even greater doubts. Finally, the Treaty will require India to surrender its claimed right to demand notification of warships entering its territorial seas.[17] As with most countries that seek to reconcile a proposed leadership role with conflicting domestic demands, India will ultimately give greater weight to its domestic concerns and will stay out of the Treaty, at least until it enters into force.

Some other Asian countries having minimal interests advanced by the Treaty are likely to be fence-sitters as well. Among these might be Burma, Thailand, Laos, Kampuchea, and some of the Oceana Group. In all, I would add twenty countries to the twelve Latin American countries.

F. Africa

Africa is my dilemma, my mystery. Africa has almost enough votes to single-handedly bring the Treaty into force. To the extent that ratification of the LOS Treaty is an issue for the Organization of African Unity (OAU), and to the extent that the OAU acts by consensus, obtaining approval for the Treaty could be difficult and time-consuming. Actions by the United States and others, however, could solidify the OAU in favor of ratification. For example, were the United States to enact legislation, make declarations, and announce policies that created the appearance that the United States was seeking to obtain all the Treaty's benefits (particularly those dealing with commercial and military navigation) while rejecting all the Treaty's obligations (particularly those likely to benefit African nations, such as seabed mining and revenue sharing from continental shelf activities beyond 200 miles), Africa could unite quickly in favor of ratification.[18] Prompt ratification by Africa and early entry into force of the Treaty could well create a snowball effect bringing most of the fence-sitters into the Treaty system.

Absent this sort of catalytic action, questions concerning the breadth of the territorial sea, the needs of land-based producers and the question of land-locked

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17. Maritime Zones Act, 1976, cited in *Limits in the Seas,* No. 36 National Claims to Maritime Jurisdiction 82 (Department of State 1981).

18. On Mar. 30, 1983, President Reagan issued a proclamation claiming a 200-mile exclusive economic zone for the United States. Accompanying the proclamation was a statement of United States Ocean Policy. 19 WEEKLY COMP. PRES. DOCS. 383-85 (Mar. 10, 1983). Except for the portion of the policy statement dealing with seabed mining, the proclamation and policy statement are generally consistent with the LOS Convention. To date, there has been little adverse reaction by other countries to the Reagan Proclamation and policy statement. Bills to implement an exclusive economic zone have been introduced in both the Senate and the House of Representatives. S. 750, 98th Cong., 1st Sess.; H.R. 2061, 98th Cong., 1st Sess. The Administration has not yet submitted its own legislation or commented upon the bills thus far introduced.

rights are among the issues likely to make the decision among the African states a lengthy process.

Africa presently has sixteen countries with territorial seas in excess of twelve miles.[19] The OAU, meeting in Mogadiscio in 1974, expressly left open the question of the breadth of the territorial sea in the absence of a treaty.[20] Africa could well decide that the Treaty provision of twelve miles for the breadth of the territorial sea is inadequate in the face of nonratification by developed countries.

The land-based producers in Africa face a dilemma. On the one hand, they believe the Treaty's protection for them is inadequate. On the other, if there is no Treaty, there is no protection whatsoever. But if there is a Treaty without the mining states, whatever protection the Treaty provides is purely symbolic.

The numerous land-locked states in Africa add to the complexity. On the one hand, the grant to them in the Treaty is pitifully meager, making their enthusiasm for the Treaty lukewarm. On the other hand, those meager benefits can only be obtained through the Treaty, and the land-locked states are likely to seek these benefits. Their support for the Treaty is likely to rekindle coastal state concerns and possible opposition because land-locked benefits come at their expense.

The conclusion, I believe, is that if ratification is a question within the competence of the OAU, an answer will be some time in coming—absent any catalytic actions by the United States and Western Europe. If the OAU does not take a position, or even if the OAU recommends ratification by consensus, the actual ratification by individual states will be time-consuming and uneven.

Several African countries, such as Mali, Niger, and Rwanda, will be unable to identify enough stakes in the Treaty to justify ratification. Others, such as Somalia, Liberia, Ghana, and Sierra Leone, will find the Treaty conflicting with existing domestic legislation. Countries like Nigeria and Kenya with leadership aspiration may choose to lead only after it is clear where the followers are going, and they will join the other fence-sitters until the trend is clear. Others will not wish to grant rights that they believe are either unavailable now or at least ambiguous, e.g., Morocco with respect to straits passage. The number of African countries willing to ratify before the Treaty is in force I believe will not exceed fifteen.[21] When added to the thirty-two from Latin America and Asia, thirteen ratifications will still be required to bring the Treaty into force.

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19. *Limits in the Seas, supra* note 17, at 10.

20. The Declaration of the Organization of African Unity on the issues of the law of sea states:

> Pending the successful negotiation *and general adoption* of a new regime to be established in these areas [territorial sea and straits] by the forthcoming United Nations Conference on the Law of the Sea, this position prejudices neither the present limits of the territorial sea of any State nor the existing rights of States.

III Official Records of the Third UN Conference on the Law of the Sea 63, U.N. Doc. A/CONF. 62/33 (1975) (emphasis added).

21. The election of Ambassador Warioba of Tanzania as chairman of the PrepCom, discussed *supra* at note 12, could impact favorably upon ratification prospects in Africa. Ambassador Warioba has been a forceful member of the African Group and could be very influential in collective and individual consideration of LOS ratification by the African states. Whether this talented diplomat will be able to forge consensus between developing and developed countries on the seabed issues that so polarized the LOS Conference remains to be seen.

G. Conclusion

This analysis leads me to conclude that entry into force cannot be assumed. Concluding that the Treaty is unlikely to enter into force does not mean it will be without influence. It already has guided and molded state action, and it will continue to do so for a period of time.[22] All coastal states will seek to take advantage of those provisions which confer benefits upon them. What will erode over time will be the obligations that the Treaty imposes upon them.

III

MARINE POLLUTION

In the pollution area, as Ambassador Vallarta has outlined,[23] the Treaty text seeks to balance navigational rights against pollution concerns. Generally, the Treaty tilts toward navigation by placing principal reliance on port states and flag states; little competence is conferred on coastal states. Summarizing the Treaty regime for pollution, the Treaty would confer plenary power on the port state to set and enforce pollution standards for vessels voluntarily entering its ports. In the territorial sea, standard setting by the coastal state would be limited to discharge standards, while enforcement by the coastal state would generally be unlimited. In the economic zone, the coastal state would have no real role in setting standards, and its competence to enforce against foreign ships would be limited to discharges causing or threatening major damage. Using the Treaty regime as the basis for comparison, I will suggest the likely future regime for pollution—a regime that will see an increasingly larger role for the coastal state in the territorial sea and in the economic zone.

A. Territorial Sea

In the territorial sea, the Treaty provides that the coastal state can set standards for discharges but not for construction, design, equipment, and manning unless giving effect to generally accepted international rules and standards.[24] There is no such limitation on coastal state actions in existing international law,[25] except for the limits that the right of innocent passage places upon standards that practically preclude passage.[26] Absent a Treaty, coastal states will seek to set standards for construction, design, equipment, and manning.

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22. An analogy one can draw would be to the Hague Codification Conference of 1930. Following several years of preparatory work, 42 countries met to seek agreement on the regime for the territorial sea. It, like the Second UN Conference on the Law of the Sea, foundered on the question of the breadth of the territorial sea. Although unable to agree on a treaty, the Hague Conference's draft has been referred to as "an important document in the history of international law and a landmark in the long process of codification." Reeves, *The Codification of the Law of Territorial Waters,* 24 AM. J. INT'L L. 486, 496-97 (1930).

23. *See* Vallarta, *Protection and Preservation of the Marine Environment and Marine Scientific Research at the Third United Nations Conference of the Law of the Sea,* LAW & CONTEMP. PROBS., Spring 1983, at 147.

24. Convention, *supra* note 1, art. 21(2).

25. Article 17 of the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone states: "Foreign ships exercising the right of innocent passage shall comply with the laws and regulations enacted by the coastal State in conformity with these articles and other rules of international law and, in particular, with such laws and regulations relating to transport and navigation." 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205.

26. Paragraph 1 of article 15 of the 1958 Geneva Convention on the Territorial Sea and the Contig-

Articles 22 and 23 of the Treaty clearly state that oil tankers have the right of innocent passage in the territorial sea. However, passage of certain pollution-threatening vessels such as oil tankers will, in the absence of the Treaty, be constrained. "Passage by an oil tanker is inherently non-innocent," said the Government of Canada in 1970.[27] Other states are likely to follow this course and exclude certain classes of vessels or vessels carrying certain cargoes from innocent passage on pollution grounds.

France, for example, has sought notification prior to the passage of an oil tanker through its territorial sea, particularly in the Straits of Dover.[28] Major tanker traffic in the territorial sea, therefore, could face real constraints. Generally, this will not be a significant burden because tankers do not traditionally traverse the territorial sea, regardless of whether it is set at three or twelve miles. It could, however, create some real difficulty for tankers in straits overlapped by territorial seas. The regime for straits, however, has already been addressed[29] and I will not venture into this sensitive area.

Enforcement competence against foreign vessels for pollution offenses in the territorial sea is generally unlimited (again excepting straits) under the Treaty, but the Treaty does place limits on punishment. Imprisonment, under the text, may not be imposed except for pollution incidents that are willful and serious.[30] This generally comports with what one would expect to find in the absence of a treaty—nations have not imprisoned and will not likely imprison foreign sailors for minor, accidental pollution incidents. Under present U.S. law, the only marine pollution action which authorizes imprisonment is the failure to notify authorities of a pollution incident.[31]

B. Economic Zone

A great deal of navigation occurs in the 200-mile economic zone and it is in that zone that coastal state claims for pollution control can be expected to seriously conflict with the Treaty regime. One could readily speculate that the United

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uous Zone states: "The coastal State must not hamper innocent passage through the territorial sea." *Id.* The LOS Treaty, in an attempt to clarify the right of coastal states to enact laws with their duty not to hamper innocent passage, states in article 24(1)(a) that coastal states shall not impose requirements "which have the practical effect of denying or impairing the right of innocent passage." Convention, *supra* note 1, at 24(1)(a).

27. Ambassador Alan Beesley, then Head of the Legal Division, Department of External Affairs, in a statement before a committee of the Canadian Parliament in 1970, stated: "It is the Canadian position that any passage threatening the environment of a coastal state cannot be considered innocent since it represents a threat to the coastal state's security." Proceedings of the House of Commons Standing Committee on External Affairs and National Defence No. 25, at 11, 28th Parl., 2d Sess. (Apr. 29, 1970). For a thorough discussion of the Canadian actions establishing a 100-mile pollution zone in the Canadian Arctic and extending their territorial sea to twelve miles, see Wulf, *Contiguous Zones for Pollution Control: An Appraisal Under International Law,* University of Miami Sea Grant Technical Bulletin No. 13 (March 1971).

28. The French law is set forth in English in Intergovernmental Maritime Consultative Organization Document MSC XXXVIII/21 (Mar. 30, 1978).

29. *See* Harlow, *Freedom of Navigation in a Post UNCLOS III Environment,* LAW & CONTEMP. PROBS., Spring 1983, at 125, 128-35.

30. Convention, *supra* note 1, art. 230.

31. 33 U.S.C. § 1321(b)(5) (1976).

States will be leading the charge. It should be recalled that in 1977 Congress passed legislation which claimed general pollution competence over any vessel in our 200-mile fishing zone.[32] This provision was subsequently amended to exclude enforcement against foreign vessels,[33] but this amendment was obtained only after much hard work and some fortuitous circumstances. If the United States seeks by legislation to create a 200-mile economic zone that includes pollution competence,[34] the likely result will be a law which claims pollution competence in excess of that set forth in the Treaty. This likelihood is increased if Murphy's law applies and a major tanker accident occurs off the coast of the United States while the legislation is actively being considered by Congress.

Let us examine with more particularity first what standard setting competence would have been permissible under the Treaty in the 200-mile zone, and second what enforcement powers the Treaty would have authorized. The Treaty provides no real role for the coastal state in standard setting.[35] On standard setting, one fear traditionally advanced is that a patchwork quilt of regulations will result from the conflicting standards promulgated by individual coastal states. This fear, it seems to me, was perhaps justified and reasonable when there were modest or largely ineffectual international standards. Given the steady increase in the quality of international standards from the 1973 Marine Pollution Convention[36] to the 1978 Marine Pollution Protocol,[37] one can wonder whether individual coastal states will feel compelled to promulgate their own separate standards. Of course, it is true with pollution incidents as with other accidents that regulations always overlook something, and the item that was overlooked inevitably seems to play a prominent role in the last accident. Coastal states may, therefore, seek to deal with the overlooked item by promulgating their own standards, particularly if the international response is slow in coming. With the new procedures that the International Maritime Organization (IMO) has put in place, it is able to respond, and has responded, to incidents identifying holes in the existing regulatory fabric in a responsible and timely fashion.[38] There are, therefore, reasons to be less concerned now than in the past about the patchwork quilt.

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32. Section 58 of Pub. L. No. 95-217, 91 Stat. 1593 (1977).

33. Sections 6 and 7 of Pub. L. No. 95-576, 92 Stat. 2467 (1978) (codified at 33 U.S.C. § 1321(b)(5)-(6) (Supp. II 1978)).

34. *See supra* note 18. Note that in the Reagan Proclamation cited therein the United States claims jurisdiction with regard to "the protection and preservation of the marine environment." In the accompanying policy statement it is stated:

> The Exclusive Economic Zone established today will also enable the United States to take limited additional steps to protect the marine environment. In this connection, the United States will continue to work through the International Maritime Organization and other appropriate international organizations to develop uniform international measures for the protection of the marine environment while imposing no unreasonable burdens on commercial shipping.

19 WEEKLY COMP. PRES. DOCS. 383-84. It is unclear, at present, what additional limited steps the United States will take. They may, as the Policy Statement suggests, be limited to multilateral steps through the IMO, but if that is to be the case, one wonders why the claim to pollution competence was included in the Reagan Proclamation.

35. *See* Convention, *supra* note 1, art. 211(5).

36. 26 U.S.T. 2403, T.I.A.S. No. 8165.

37. *See* Executive C, 96th Cong., 1st Sess., 121 JOURNAL OF EXECUTIVE PROCEEDINGS OF THE SENATE 111, 113 (1979) (transmitting the 1978 Marine Pollution Protocol).

38. The 1973 IMCO Conference on Marine Pollution created the Marine Environment Protection Committee (MEPC) as a standing body of the Organization. Amendments to the Convention on the

This does not mean, however, that I believe that all states will simply apply international rules and standards in this 200-mile economic zone. Some, I believe, will seek to place special restrictions or outright prohibitions on certain classes of vessels or vessels carrying certain types of cargoes, based not on a theory of protecting the coastline but rather on protecting fish in the 200-mile zone. If these claims remain limited in application and number, they are likely to be accommodated over time in the traditional claim/counterclaim process. In short, I do not believe the evidence at hand suggests that coastal states will exercise standard setting competence in the economic zone in a manner unduly burdensome to international trade and commerce. Some burdens will result, I submit, but they will not approach the level of a patchwork quilt.

I am not as optimistic about enforcement actions in the economic zone. States will not limit themselves to the very narrow circumstances set forth in the Treaty where they are authorized to take enforcement actions.[39] Rather, they will claim enforcement competence against any vessel that violates the international standards applicable in their economic zones.

Two factors significantly temper the burden such enforcement competence will create for international trade and commerce. First, few countries have the actual capability to enforce their laws effectively in their 200-mile zones. Second, those countries that have meaningful enforcement capabilities generally also have maritime fleets. The threat of reciprocal actions against their fleets will temper use of these capabilities. Problems, however, will exist. Countries' capabilities will increase and while they may not be able to enforce effectively in their entire zones, they will have sufficient capability to enforce against those offending vessels which they observe violating their pollution laws.

As in the territorial sea, specialized vessels or vessels carrying specific cargoes will be particularly at risk. Since few countries have an interest in such vessels or cargoes, the restraining influence of reciprocity will not operate. Resulting standard setting and enforcement actions will delay some commerce for periods of time and could result in the imposition of some burdensome penalties.

There will be a significant risk that pollution controls could be used as a method for applying politically inspired sanctions against a state that is internationally disfavored, such as Israel or South Africa. Finally, if there is a further deterioration in world public order, one could foresee the possible abuse of this power, particularly by one state against its neighbor. The maritime commerce of many countries is dependent upon crossing the economic zone of their neighbor.

Intergovernmental Maritime Consultative Organization, Mar. 6, 1948, 9 U.S.T. 621, T.I.A.S. No. 4044, 289 U.N.T.S. 3, were submitted to the Senate for its advice and consent, giving the MEPC equal status with other standing bodies and establishing procedures for expediting their recommendations on needed regulations. Executive S, 96th Cong., 1st Sess., 121 JOURNAL OF EXECUTIVE PROCEEDINGS OF THE SENATE 383, 384 (1979).

39. Paragraph 6 of article 220 of the Convention, *supra* note 1, provides for coastal state enforcement action, including detention of the vessel, for a violation in the economic zone "resulting in a discharge causing major damage or threat of major damage" to the coastline or the resources of the territorial sea or economic zone.

For example, some Central American countries have access to the Atlantic only by transiting the 200-mile economic zone of their neighbor.[40] Pollution competence could provide the justification or leverage to impede maritime commerce to and from such zone-locked states. Pollution control and enforcement, therefore, could be used as a far less belligerent act than a blockade of maritime commerce, while achieving similar results.

C. Conclusion

It is clear that pollution controls present the greatest opportunity to interfere with navigation. Concerns about reciprocal actions by others and the identifiable need to protect their own seaborne commerce will temper use of pollution controls by many states. Standard setting competence claimed by coastal states will in virtually all cases exceed that specified in the Convention and could, if abusively applied, create a significant impediment to, and burden on, commercial navigation. Assuming relative constancy in the need for commercial navigation and in adherence to minimal world order standards, most states, however, will exercise their expansive claims to standard setting competence by simply incorporating as their national standard the international rules and standards established by the IMO. The threat created by the exercise of standard setting competence will be greatest for specialized ships and ships containing specific cargoes that are alleged to pose a significant pollution risk. For these vessels, reciprocity will not serve as a restraint because few states have similar ships or carry similar cargoes.

With respect to enforcement, states will claim more than the Treaty offers and will seek to exercise this broader enforcement competence. Any vessel caught committing a violation of coastal state standards (even if derived from international standards) will be subject to enforcement action by the coastal state both in the territorial sea and in the 200-mile economic zone. Some burdens will result and the risk of abusive and discriminatory use of this power will remain a major concern. The vast majority of international trade and commerce, however, will continue relatively unhampered. If the burden increases, actions will have to be taken to reduce them to acceptable levels. Lacking alternatives, these actions may have to be taken through the IMO.

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40. It is impossible for the continental countries of Central America, or the traffic through the Panama Canal, to reach the Atlantic without transiting the 200-mile zone of one or more countries. Other countries can be seriously disadvantaged if navigation in the economic zone is seriously impeded. For example, to sail north from Argentina vessels must either navigate in the Brazilian 200-mile zone or proceed far east in the South Atlantic.