THE IMPACT OF THE LAW OF THE SEA CONVENTION
ON VESSEL-SOURCE POLLUTION ENFORCEMENT IN THE
EXCLUSIVE ECONOMIC ZONE

By

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ABSTRACT

The enforcement of vessel-source pollution, a problem of significant global dimensions, had been left entirely to flag-state competence outside the territorial seas. This was an unsatisfactory arrangement, since coastal states who were often most affected by such pollution had no means of enforcement, but had to resort to flag states who were often unwilling or even unable to do so.

The Convention on the Law of the Sea provides, in addition, coastal and port-state enforcement and prescribes the use of the IMO standards as the basis of enforcement. Since the main burden of enforcement action should occur before the vessel commits a violation of pollution standards, much emphasis is still placed on flag-state enforcement under the Convention. It is this idea, and in particular, the right of pre-emption accorded flag-states that has raised doubts about the efficacy of the enforcement regime under the Convention. It has been said that the UNCLOS III scheme of enforcement is unlikely to be effective given the poor record of flag state enforcement in the past.

A contrary view is presented in this study in relation to enforcement in the Exclusive Economic Zone. It is argued that the tripartite scheme of flag, port, and coastal-state enforcement contains sufficient checks and balances to ensure a viable and
effective system of enforcement. Furthermore, states that ratify the Convention would have to ensure conformity of their legislation with the Convention's texts. This would lead to uniformity and consistency in national legislation, thus enhancing states' cooperation in the war against vessel-source pollution. To illustrate this point, the study examines Canadian vessel-source legislation in the light of the Convention on the Law of the Sea.
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### ABBREVIATIONS

<table>
<thead>
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<th>Abbreviation</th>
<th>Description</th>
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<tbody>
<tr>
<td>A.W.P.P.A</td>
<td>The Arctic Waters Pollution Prevention Act</td>
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<td>A.W.P.P.C.</td>
<td>Arctic Waters Pollution Prevention Certificate</td>
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<tr>
<td>CDEM Standards</td>
<td>Construction, Design, Equipment, and Manning Standards</td>
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<td>COLOREG 72</td>
<td>Convention on the International Regulations for Preventing Collisions at Sea, 1972</td>
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<td>C.S.A.</td>
<td>Canada Shipping Act</td>
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<td>E E Z.</td>
<td>Exclusive Economic Zone</td>
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<td>E F Z.</td>
<td>Exclusive Fisheries Zone</td>
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<tr>
<td>I.C.J.</td>
<td>International Court of Justice</td>
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<tr>
<td>I C N T.</td>
<td>Informal Composite Negotiating Text</td>
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<td>I L C.</td>
<td>International Law Commission</td>
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<td>I L O.</td>
<td>International Labour Organisation</td>
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<td>I.O.P.P.C.</td>
<td>International Oil Pollution Prevention Certificate</td>
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<td>I M O</td>
<td>International Maritime Organisation</td>
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<td>Intervention 69</td>
<td>International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, 1969</td>
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O A U Organization of African Unity

O.D.I.L. Ocean Development and International Law Journal

OILPOL 54 International Convention for the Prevention of Pollution of the Sea by Oil, 1954

R.S.C. Revised Statutes of Canada

R S N T Revised Single Negotiating Text

S.C. Statutes of Canada

S N T. Informal Single Negotiating Text

SOLAS 74 International Convention for the Safety of Life at Sea, 1974

S T C W 78 International Convention on Standards of Training, Certification, and Watchkeeping for Seafarers, 1978

UNCLOS I The First United Nations Conference on the Law of the Sea

UNCLOS II The Second United Nations Conference on the Law of the Sea

UNCLOS III The Third United Nations Conference on the Law of the Sea
UNCTAD
United Nations Conference on Trade and Development
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CHAPTER I
INTRODUCTION

Background to the Study

The enforcement of vessel-source pollution regulations outside the territorial seas has been largely one of flag-state competence. In the past, however, many states have been unable or even unwilling to enforce these regulations; a particular problem has been enforcement by flag of convenience states. The matter has been one of intense discussion and controversy, both within the International Maritime Organisation (IMO) and at the Third United Nations Conference on the Law of the Sea (UNCLOS III). At the latter, a tripartite approach involving flag, coastal and port-state enforcement together with safeguard and enforcement provisions in the Arctic and other special areas, was adopted. The object of this study is to assess the impact of this UNCLOS III scheme of enforcement in the Exclusive Economic Zone (EEZ), which formerly formed part of the high seas.

This chapter considers the nature, sources, and effects of marine pollution, an international problem of several dimensions; it will focus on marine pollution by oil, as well as the nature of the EEZ and jurisdiction therein, with a view to providing a clear setting for the study. The second chapter will be devoted to an examination of the pre-UNCLOS III regime of enforcement and the related problem of flags of convenience. This will provide a
background for a fuller understanding of the UNCLOS III scheme of enforcement. An analysis of the scheme is further preceded by an examination of the proceedings at UNCLOS, mainly in the Third Committee, where these rules were discussed and agreed upon as part of a "package deal" on the basis mainly of consensus. This will throw further light on the rationale behind the present tripartite scheme of enforcement. The Convention's provisions will then be analyzed.

It has been said that in view of the right of pre-emption accorded flag-states under the scheme, the system is unlikely to be effective given the poor record of flag-state enforcement in the past. A contrary view will be expressed in this study with regard to enforcement in the EEZ: the flag-state regime has been considerably strengthened under the Convention. Further the scheme must be viewed not merely in terms of flag-state competence, but as a whole. Moreover, the prescriptive as well as the enforcement provisions of the Convention constitute a norm or benchmark against which national legislation must be judged. Hence, state parties to the Convention would have either to change or modify existing legislation, or even adopt new legislation in conformity with the Convention's texts. To illustrate this point, a chapter will be devoted to an examination of the existing Canadian legislation in the light of UNCLOS III. The overall effect of these is to provide a much easier, consistent, uniform and hence effective regime of enforcement based on international standards.
Marine Pollution - An International Problem.

Marine Pollution has been defined as:

"the introduction by man, directly or indirectly of substances or energy into the marine environment (including estuaries) resulting in such deleterious effects as harm to living resources, hazard to health, hindrance to marine activities including fishing, impairment of quality for use of sea water and reduction of amenities."  

This definition, emphasizing activities of "man," is said to ignore the general problem of other changes that might impede beneficial uses of the water, irrespective of perpetrators. Further, the notion of "deleterious effects" is also said to be imprecise: "it is unclear whether pollution may be deemed to occur when the substances or energy have been introduced, but before harm to living resources of the sea or hindrance to marine activities can be demonstrated ... [T]he environment may already be biologically irreversibly deteriorated before the detrimental or deleterious change can be demonstrated."  

Okidi defines pollution as the:

Introduction in any manner whatsoever, of any substances or energy, into the marine environment, including estuaries, which may result in deleterious effects as harm to living resources, hazards to human health, hindrance to activities including fishing, impairment of quality for use of sea water, and reduction of amenities (emphasis added).  

This definition has the merit of emphasizing not only human conduct, but all undesirable changes that may occur in the marine environment. However, in a study such as this dealing with enforcement, it is unhelpful since activities embraced in the
phrase "in any manner whatsoever" such as 'acts of God' cannot be prevented by man.

For our purposes, pollution of the marine environment means:

"the introduction by man, directly, or indirectly, of substances or energy into the marine environment including estuaries, which result or is likely to result in such deleterious effects as harm to living resources and marine life hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for use of sea water and reduction of amenities (emphasis mine)." 10

This definition emphasizing activities of man excludes occurrences such as natural seepage of oil and other minerals from land into the oceans as well as foreign chemicals like sulphur introduced into the seas by phenomena such as volcanoes and earthquakes. These are matters currently beyond human control.11 Further, the phrase "which results or is likely to result" in deleterious effects is an improvement on the earlier definition and provides a solution to the second criticism levelled against the definition.12 In addition, it serves to emphasize that the marine environment could legitimately be used for the disposal of non-deleterious waste. Enforcement measures must, therefore, be limited only to disposal actions that are likely to have consequential damage to the marine environment; and in this, doubts must be resolved in favour of enforcement measures. Also reference to "deleterious effects as harm to living resources and marine life", also emphasizes that other aspects of marine life such as the ecosystem are equally important for purposes of pollution prevention.
Marine pollution is a problem of several dimensions: it affects the quality of the oceans in all parts of the world, it affects all states and all states contribute to some aspects of the problem. In particular, if one considers the effects of marine pollution on the living resources of the sea, very few marine pollution problems can be considered matters exclusively of local interest.\textsuperscript{13} Pollutants know of no national frontiers so that even when pollution is localized, the effects of winds, currents and waves almost invariably results in a spread of these pollutants to other areas. Traces of DDT have been located in remote corners of Antarctica, illustrating the global nature of oceanic pollution.\textsuperscript{14} Pollution from oil is, however, probably the most widespread. Indeed, oil slicks and tarry residues have been encountered in the ocean even in areas remote from shipping routes.\textsuperscript{15}

In recognition of the global nature of marine pollution, the Convention requires states to "co-operate on a global basis (directly or through competent international organisations) in formulating and elaborating international rules, standards, and recommended practices and procedures ... for the protection and preservation of the marine environment, taking into account characteristic regional features."\textsuperscript{16} The enforcement regime provided under the Convention for vessel source pollution is a step in this direction.

Pollution control measures could be most effectively applied at the sources where pollutants originate, and five sources based on man's activities may be discerned: disposal of domestic sewage;
argicultural and industrial waste; deliberate and operational discharge of ship borne pollutants; pollution from the exploration and exploitation of mineral resources; and disposal of radioactive waste resulting from the peaceful uses of the oceans. These correspond broadly to the Convention's classification of pollution from land-based sources; by dumping; from vessels; from activities in the area; and from or through the atmosphere. These, however, are by no means mutually exclusive.

The present study, based on vessel-source pollution, mainly by oil, then, is an aspect of the overall global pollution problem, albeit a minor one. It has been estimated for example that vessel-source oil pollution accounted for only about 27.9 percent of the estimated 2.95 million tonnes of oil that entered the oceans in 1978. The remainder was from land-based and other sources.

The Convention on the Law of the Sea, however, deals with land-based and other sources of pollution in general terms, but rather provides a comprehensive enforcement mechanism for vessel-source pollution.

Land-based pollution, originating as it does from land, is an area where the notion of national sovereignty is particularly strong. States are not willing to accept international limitations on issues of vital interest that might result in a slowing down of their development. This is particularly the case with the developing states bent on rapid industrialization with its concomitant environmental hazards and hence need for preventive measures against, for example, industrial fumes. Pollution control
from land-based sources has thus largely been a subject of national competence. There is, however, a trend towards regionalisation on the matter. Different considerations apply to vessels. Being movables, the harm from them may affect third states more directly. Further, although subject to flag-state competence, vessels may be often found in other coastal areas subject to other states' jurisdiction. Vessel-source pollution thus raises peculiar jurisdictional problems. Besides, vessel accidents in particular those from tankers resulting in large spills, often have dramatic and devastating consequences, and they are certainly spectacular media events. The sight of a Torrey Canyon disaster involving some 120,000 tons of crude oil or an Amoco Cadiz grounding, involving a spillage of over 200,000 tons of oil, has provided impetus to act against this type of pollution by the international community. Pollution is one of the first environmental problems to have been tackled internationally and the IMO, a specialized agency of the United Nations, has over 20 years history in this field of regulation.

Vessel-source pollution may be divided into two broad groups: accidental and operational discharges from vessels. Accidental discharges occur in the form of terminal spills during loading and unloading of tankers; there is, in addition, vessel accidents. These result from factors such as structural failures, groundings, collisions (in turn the result of navigational errors), breakdowns, fires, and rammings. Even though these contribute less than 10 percent to the oil pollution problem, their impact has been most
spectacular. By far, the worst accident record comes from old vessels registered in flag of convenience states. Measures for the control of this type of pollution involves the provision of adequate structural and equipment standards, the proper management of vessel traffic, the technical competence of crews and the control of flag of convenience vessels.

Operational discharges result from ballasting of vessels, dry docking, the discharge of oil from bilges, as well as the intentional discharges of oil from vessels. Operational discharges account for the greatest percentage of vessel-source pollution. Control measures have thus largely focused on this problem whose elimination depends on the provision of adequate construction, design, equipment, and manning standards in combination with reception facilities.

The immediate effects of oil pollution on marine life has been most graphic: wild birds, fisheries and marine flora all suffer in varying degrees. Tens of thousands of birds, their feathers clogged with oil, have died after each of the larger accidents such as the Torrey Canyon and Amoco Cadiz disasters. Studies carried out some six months after the latter disaster, revealed that some 30 percent of the local fauna and 5 percent of the flora had been destroyed. The long term effects of spills depend on such factors as temperature, currents, winds, the volume, type and concentration of oil discharged and the location of the spill.
Oil pollution, in particular large spills, have very harmful effects on fisheries; they provide an environment suitable for disease-producing bacteria or viruses; cause failure of individuals to survive and maintain the population species; lower the nutrition of organisms by affecting their ability to find prey; interfere with digestion or assimilation of food by contamination; and cause mutations that are detrimental to the survival of the young. Further, pollution, in conjunction with climatic variables and over exploitation, affects marine stock; in particular, it imposes new stresses that could hamper the recovery of depleted stock, make organisms more sensitive to climatic extremes, and have unpredictable long-term ecological impacts. Soviet scientists have argued that prolonged oil contamination causes a decline in primary productivity and a shift in the composition of the phytoplankton and ultimately a reduction in fisheries potential. This could be very harmful, especially in the frigid northern regions where the natural decompositon of spilled oil, so essential to holding down its damage to living things, proceeds far slower than in warm zones. In addition, pollution concentrations tend to be highest in coastal and landlocked seas, areas where migratory fish such as salmonids must pass through in order to reach their fresh water spawning sites.

There could also be other kinds of physical and aesthetic damage consequent upon oil pollution. These include the tainting of nets and fishing gear, the contamination of pleasure yachts, lights, buoys, harbour works, and beaches and coastline, generally,
with consequent losses to the tourist industry. The Mediterranean, a premier tourist region with over 100 million tourists each year, is now threatened by offshore pollution. Dozens of beaches in Italy and Israel have had to be closed down for health reasons. Fishermen may be unable to fish in polluted waters or their catches may be tainted, with consequent losses. For example, certain Nigerian fishermen lost their livelihood for months in 1980 following an explosion at a Texaco rig which spread oil slicks over 60 miles of shore line and up into the Niger delta for 20 miles. Oil pollution could also affect human health. The carcinogens ingested by fisheries in polluted waters could get concentrated in the food chain. These agents become a hazard to man through the consumption of fish. There is also the immense cost of taking measures, both preventive and curative such as the spraying of detergents and the laying of booms. Equally significant is the value of the lost cargo. And yet, the picture has not changed despite various attempts to control the problem. As the UNEP report for the period 1972-82 concludes on the matter, "world wide oil pollution continued to be a potential threat to marine life and habitats in the 70s both as a result of major accidents and through persistent chronic pollution at specific localities."

Conventions have been concluded under IMO auspices to combat both operational and accidental discharges. The problem, however, has been their enforcement. Based on flag-state competence, their enforcement have been largely ineffective. Besides, the International Convention for the Prevention of Pollution from ships
as amended by its protocol of 1978 (MARPOL 73/78), the latest and most comprehensive Convention on vessel-source pollution, leaves the jurisdictional aspect, including enforcement measures, of the Convention to UNCLOS III to resolve. The effectiveness or otherwise, of the UNCLOS texts on the matter, will thus determine the overall efficiency of MARPOL 73/78 in pollution prevention.

The Exclusive Economic Zone (EEZ)

This study is devoted to the enforcement of pollution regulations in the EEZ for a number of reasons. The EEZ formerly formed part of the high seas. A study of enforcement by coastal states of vessel source pollution measures in the zone thus gives an idea of the nature and extent of the expansion of states jurisdiction beyond the territorial seas. With the advent of the EEZ, it is estimated that as much as 40 percent of ocean space is placed under some form of national jurisdiction. Further, much of the world's shipping as well as resources are located in the zone. The EEZ is the locus of virtually all exploitable offshore hydrocarbons, minerals such as sand, gravel, tin, polymetallic sulphide and cobalt crusts and manganese nodules; over 90 percent of commercially exploited living resources of the sea, nearly all marine plants and all known sites suitable for the production of energy from the sea.26 Hence, the effectiveness or otherwise of pollution enforcement measures in the zone would reflect on resource management and conservation which is of prime importance to states and the international community as a whole.
Also, the EEZ is neither the high seas, nor territorial seas, but a zone sui generis (discussed below). A study of pollution enforcement in the zone in the light of UNCLOS III, thus provides an idea as to the nature of jurisdiction in this novel regime under international law. The sui generis nature of the EEZ, in particular, has been a controversial issue. We thus devote some time to its examination and clarification.

The EEZ, under the Convention, is an area starting at the outer edge of the territorial sea and extending up to a limit of 200 miles from the baseline from which the territorial sea is measured. There, coastal states enjoy sovereign rights to the resources of the seabed, of the subsoil and of the superjacent waters as well as jurisdiction with regard to marine scientific research, environmental preservation, and the establishment of artificial islands, installations and structures. Interwoven with these rights are the rights of all other states to the enjoyment of the traditional high sea freedoms of navigation, overflight, and the laying of submarine cables, and pipelines. The 200 mile right enures to states without the requirement of any proof of any special situation or circumstances. There is, however, a requirement for a formal declaration of such a zone, unlike, for example, the continental shelf whose existence needs not be declared.

The EEZ regime allows a two-fold utilization of the seas. It ensures coastal states' sovereignty over the resources adjacent to its coast, whilst guaranteeing other states the necessary
facilities of communication and transit. It is a compromise between those who would deny the coastal state rights over the resources beyond the territorial sea limits and those who advocate full or limited jurisdiction over the resources of those areas. The concept is economic and not political. Its roots lie in the Truman proclamation of 1945 in which the United States asserted jurisdiction over the resources of its continental shelf. This proclamation, however, made it clear that the United States did not intend to affect the character, as high seas, of the waters above the continental shelf, and their right to free and unimpeded navigation. It was this proclamation, then, that initiated the functional approach to jurisdiction over the seas; as Polard observes, "it would be difficult to deny that the claim advanced by President Truman on behalf of ... the United States in respect of the non-living resources of the continental shelf ... was a claim to an economic zone of exclusive coastal state jurisdiction" (emphasis added).

The Truman proclamation was an attractive precedent, especially for the Latin American states who followed suit with sometimes contradictory and even fantastic claims. In this movement, two groups were discernible: the moderates and the extremists, one advocating a territorial sea of 12 miles, the other 200 miles. Amongst the extremist states that declared a 200 mile territorial sea were Ecuador, Peru, and Uruguay. However, an accord was arrived at between the two groups in the Santo Domingo
Declaration of 1972 on the "Patrimonial Sea," which was adopted by an affirmative vote of 10 of the 15 states present.32

The Declaration involved an assertion of jurisdiction up to 200 miles from the baseline; 12 miles of territorial seas and the remainder, an external patrimonial sea zone. There, the states asserted their sovereign rights over the renewable and non-renewable resources found in the water, on the sea-bed, and in the subsoil of the patrimonial sea subject to high sea freedoms such as navigation and overflight. The considerations were thus economic and not political. Furthermore, a closer look at even the extremists view revealed that, although they insisted on a territorial sea of 200 miles, "it was not a territorial sea conceptualized in the traditional sense. It was, in fact, a territorial sea with a differential juridical content, the first twelve miles of which were assimilated to the territorial sea in the traditional sense, and the remaining one hundred and eighty-eight, virtually indistinguishable in juridical configuration from the corresponding area in the patrimonial sea."33 Indeed, it has been said that the term "patrimonial sea" was adopted to afford the extremists of Latin America "a plausible opportunity to abandon their verbal extremism and to embrace the language of moderation without significantly compromising positions of principle or policy."34 In any case, the effect of the negotiations at UNCLOS III and developing states alliance under the banner of "The Group of 77" was a shift in position in support of the EEZ concept which
was in fact not radically different from the concept of the patrimonial seas.35

The EEZ originated in Africa.36 It was first advocated by Kenya at the 1971 Colombo session of the Afro-Asian Consultative Committee. The concept was endorsed by the Organization of African Unity (OAU) Council of Ministers in their May 1973 Declaration on the issues of the Law of the Sea. Subsequently, Kenya, together with 13 other African states submitted draft articles on the EEZ to the U.N. Sea Bed Committee. These articles form the basis of the EEZ as enunciated under the Convention.37

In these articles, the emphasis was on the establishment of an EEZ "for the benefit of their peoples and their respective economies in which they shall have sovereignty over the renewable and non-renewable natural resources for the purpose of exploration and exploitation."38 The draft emphasized that "ships and aircraft of all states, whether coastal or not, shall enjoy the right of freedom of navigation and overflight and to lay submarine cables and pipelines ..."39

Again, like the patrimonial sea concept, the emphasis was economic and not political. Admittedly, the draft, and the Convention's provisions for that matter, referred to jurisdiction for the control, prevention, and elimination of pollution, as well as marine scientific research (article VII). These are, however, matters related to resource exploration, exploitation, and conservation. Indeed, to most of the delegates who supported the EEZ regime at UNCLOS, environmental preservation was as important
as resource allocation. As emphasized by a Canadian delegate, the concept of the 200 miles EEZ "did not relate simply to control of resources: the support of her delegation and of many others for the economic zone was based on recognition of the fact that environmental management was inseparable from resource management. Accordingly, there could be no question of a trade-off of environmental objectives against resource objectives, [or vice-versa]".

The EEZ, then, is a product of states seaward expansion that arose out of factors like the growing demand for food (fisheries) and industrial raw materials and environmental protection and control. This movement was accentuated by post World War II emergence of states. Virtually all these had been colonies of the Western powers. Independence meant their ability to do away with the conservative territorial sea breadths of their colonial masters in order to increase their wealth from the sea. The pre-UNCLOS III regime of territorial-high seas dichotomy was not a suitable medium for the attainment of these objectives. The notion of high seas meant that all states had rights to the resources of the area, whilst an expansion of the territorial seas out to 200 miles meant an infringement of navigational rights, something the maritime states were not willing to accept. The resultant compromise was the EEZ; "an accommodation that guarantees not only coastal, but international rights."

It is mainly the resources of the zone valued at many trillions of dollars, that have led states, particularly the
developing ones for whom they are so crucial for socio-economic development, to clamour for the zone. However, this means a sellout of the interests of the landlocked and geographically disadvantaged developing states (LLGDS). Furthermore, with the exception of a few South American states, the developing coastal states would receive narrow slices of 200 miles that were relatively resource poor and prospectively difficult to manage. In the circumstances the actual beneficiaries were developed states like Canada, the United States, the United Kingdom, Australia, and Norway.42

The EEZ as a Customary Institution

By late 1982, 56 states had established a 200 mile EEZ, and 36 had declared a related 200 mile Exclusive Fisheries Zone (EFZ). The division of states into those claiming only EFZ and those claiming EEZ, is a reflection of developments in customary international law.43

With regards to the 200 miles fisheries zones, such states generally do recognize navigational rights by other states in the zone, with sovereignty limited to living resources. A feature of the EFZ is the conclusion of bilateral and other agreements by coastal states with other states. These arrangements, however, do not detract from these states sovereignty over the resources; rather they represent "practical instruments in the exercise of sovereign rights: in particular insofar as [such] coastal state by its own will chooses to allocate fishing rights to other states."44

In the Fisheries Jurisdiction case45 however, the
International Court of Justice (ICJ) accorded recognition only to 12 mile EFZs. It may be recalled that in that case, Iceland had proclaimed a 50 mile EFZ, the effect of which was to exclude British fishermen who had traditionally fished in the waters of the zone. The United Kingdom (U.K.) naturally challenged this. The ICJ had to decide, inter alia, whether Iceland's claim to a 50 mile EFZ was contrary to international law, and whether it was opposable to the U.K.

The Court did not state expressly whether Iceland's action was contrary to International Law, although it held that the 50 mile EFZ was not opposable to the U.K. On the permissible extent of the EFZ, it said:

Two concepts have crystallized as customary law in recent years arising out of the general consensus revealed at that conference. The first is the concept of the fishery zone, the area in which a state may claim exclusive fishery jurisdiction independently of its territorial sea; the extension of that fishery zone up to a 12 mile limit from the baseline appears now to be generally accepted (emphasis added)⁴⁶

The Court conceded the fact that several states had asserted jurisdiction beyond this limit and the matter was under discussion at UNCLOS III. Its view, however, was that these assertions of jurisdiction beyond 12 miles and various proposals and preparatory documents presented to UNCLOS III by states on the matter must be regarded as "manifestations of the views and opinions of individual states and as vehicles of their aspirations, rather than as expressing principles of existing law".⁴⁷ Consequently, the Court
said it could not "render judgment sub specie legis ferendae, or anticipate the law before the legislator had laid it down."\(^{48}\)

The Court's judgment has been criticized as, among other things, implying that EFZ claims in excess of 12 miles were contrary to international law, a conclusion it arrived at without proper regard to the prevalent state practice and the on-going negotiations at UNCLOS III which all pointed to a progressive development of the emerging EEZ/EFZ concept.\(^{49}\) In any case, as Fleischer points out: "Since 1974...state practice then existing which in itself represented strong arguments in favour of rights (to 200 mile limits) has been supplemented by a vast amount of practice concerning 200 mile zones in the wake of UNCLOS III negotiations. These zones are either 200 mile fishery zones or economic zones...There can be no doubt that...possibly the most important role of the Convention as its predecessors in the form of negotiating texts have...been instrumental in bringing about the larger amount of the new existing practice on coastal limit of 200 miles."\(^{50}\)

Essentially then, the EEZ is a well established institution of customary international law. This view was affirmed by the ICJ in the recent Tunisia-Libya continental shelf case,\(^{51}\) albeit in an obiter dictum: "the concept of the Exclusive Economic Zone...may be regarded as part of modern international law."\(^{52}\)

However, in terms of specific authority permitted to be exercised within the zone, there appears to be no agreement amongst coastal states. This is the view of Professor Burke\(^{53}\) who, after a study of state legislation on the subject, has stated that "some of
these states appear to regard the zone as simply another parcel of national territory...Although other claimants fall short of this level of acquisitiveness, they demand potentially harmful and certainly unjustified exclusive authority over navigation. Still other zone claimants refrain from direct assertion of authority over navigation but nonetheless pose a threat because they claim exclusive authority for protection of the marine environment."54
A lack of uniformity and consistency in a practice, elements which together with opinio juris are very vital to the establishment of a customary rule on a matter, casts doubts on the status of the EEZ as a customary norm of international law. As emphasized in the Asylum case55

"the party which relies on a custom...must prove that this custom is established in such a manner that it has become binding on the other party. [The Party] must prove that the rule invoked by it is in accordance with a constant and uniform usage..."56(emphasis added)

However, with regard to these legislative acts on territorial sea claims, many are without pretence to sovereignty in the traditional sense. Furthermore, some of the developing coastal states proclaimed 200 mile territorial seas in the wake of UNCLOS III as a basis for negotiations and have shown readiness to settle to a 12 mile territorial sea, if a comprehensive 200 mile exclusive economic zone is adopted.57 Yet still, for others, the assumed rights to pollution control with its potential for infringement on navigational rights are nugatory; lacking as they do, the necessary resources and appropriate technology to police these vast 200 miles. In any case, since virtually all these states may become
parties to the Convention, they would have to modify or even change their legislation to conform with the Convention's provisions. Indeed, the Convention's provisions are the norm or benchmark against which state legislation may be evaluated. Even the United States, a non-party to the Convention, has proclaimed an EEZ. Under the Convention, the EEZ is neither the high seas, nor territorial seas, but a zone "sui generis." This view of the matter is, however, not accepted by certain states. Some maritime states, like the U.K., argue that the EEZ is high seas, whilst certain coastal states would want to subsume it under the territorial seas regime. The issue was one on which delegates were most divided at UNCLOS III.

The EEZ as High Seas

A classic formulation of the nature of the high seas, with its corollary, the freedom of the seas, is that of Professor Schwarzenberger in his Hague lectures of 1955.

"Under international customary law, the right of use of the high seas, the air space above them and the sea bed may be exercised for any purposes not expressly prohibited by international law as for instance for sea and air navigation, fishing, laying of submarine cables and pipelines, naval exercises and wartime operations." Implicit in this definition is a common use right of all states, of the high seas. Certain states, both in and outside UNCLOS III, because of fear of creeping jurisdiction, argue that the EEZ has a high seas character. The Fiji, Indonesia, Mauritius, and Philippines draft articles on the high seas submitted to the UNCLOS III Second Committee, for example, simply stated that the high seas
meant "all parts of the sea that are not included in the territorial seas or in the internal waters of a state..." 61

Admittedly, the EEZ is an area that formerly formed part of the high seas, but it is not now the high seas. For, in terms of Schwarzenberger's common use understanding of the high seas, the resources of the EEZ, both living and non-living, belong to the coastal state. Further, unlike the high seas whose non-living resources are to be exploited under international arrangements, these resources in the EEZ are exclusive to the coastal state in the sense that if it does not choose to explore or exploit it, that is its own affair, but no one else may do so without its consent. 62

The view that the EEZ is not the high seas is also supported by certain provisions of the Convention: the exclusion of the high seas freedom of fisheries from the EEZ; the definition of the high seas, *inter alia*, as all parts of the sea not included in the exclusive economic zone... of a state (emphasis added); and the requirement that states in the EEZ shall have due regard for the rights and duties of the coastal state and shall comply with the laws and regulations adopted by the coastal state; 63 the attribution of rights by article 59 does not resolve doubts in favour of the high seas. Such doubts are to be resolved on the basis of "equity". In addition to fisheries, the more novel rights of scientific research and environmental preservation (although circumscribed) are also subject to the jurisdiction of coastal states. Perhaps the only important high seas freedom left
in the EEZ is freedom of navigation; but even here, as will be seen later, coastal state enforcement of vessel-source pollution in the name of living resource conservation is a potential source of threat to freedom of navigation in the zone.

The EEZ, then, is not the same as the high seas, for the denudation of other states' high seas freedom in the zone as evidenced by the Convention's provisions on the matter, refute any notion of its being the high seas.

The EEZ as a Territorial Sea

As observed above, the EEZ in its origin was dictated mainly by economic considerations devoid of any pretences to sovereignty. In this it differs from the territorial seas whose evolution was motivated especially by security considerations. Under the 1958 Convention on the Territorial Seas which was said to be declaratory of customary international law, state sovereignty over the air space, over the territorial sea as well as to its bed and subsoil was recognized albeit the Convention failed to establish the breadth of the zone. This was made subject to "innocent passage" couched in terms of its being non-pre-judicial to the peace, good order, or security of the coastal state.

The Convention on the Law of the Sea established a 12-mile territorial seas breadth as opposed to the EEZ's 200 mile limit. It elaborates in its article 19, a regime of innocent passage by itemizing activities that render passage non-innocent, as well as matters over which coastal states may legislate (article 21). With regard to navigation, a significant development is the trend
towards international standards of enforcement; international, not national construction design, equipment and manning (CDEM) standards only, are permitted. In this wise, there is a resemblance to pollution control in the EEZ where international standards are the rule.

However, other features of the territorial sea, such as rights to submarine cables and pipelines, sovereignty over the airspace, sea-bed and sub-soil, as opposed to functional rights in the EEZ, and control over military activities, distinguish the territorial sea from the EEZ. Further, the coastal state may suspend temporarily in specified areas of its territorial sea, the innocent passage of foreign ships if such suspension is essential for the protection of its security, including weapons exercise.65 What constitutes "temporary suspension" as well as the necessary security considerations are the discretionary competence of coastal states. This rule is inapplicable in the EEZ where the prompt release of vessels is required on the posting of a bond in the event of violations of international standards.

The EEZ as "Sui Generis"

The EEZ, then, cannot be assimilated to the territorial seas, neither can it be subsumed under the high seas: it is a zone sui generis; a multifunctional zone of jurisdictional competence that allows a two-fold utilization of the seas. It ensures coastal states sovereignty over the resources of the zone whilst guaranteeing, at the same time, other states the necessary facilities of communication and transit. As Mr. Aguilar, UNCLOS
III Second Committee's chairman put it: "It is a zone *sui generis*...the matter should be addressed in terms of residual rights. In simple terms, the rights to resources belong to the coastal state, and insofar as such rights are not infringed, all other states enjoy the freedoms of navigation and communication."66

The EEZ is thus a new entrant to the international scene. Consequently, the exercise of states' jurisdiction in the zone must not be viewed from the old territorial-high seas distinction. The present study based on enforcement of vessel-source pollution in the zone provides an insight into an aspect of the nature and scope of this novel regime under international law.

**Prescription and Enforcement in Marine Pollution Law**

As observed, the Convention grants coastal states jurisdiction with regard to the protection and preservation of the marine environment in the EEZ. Jurisdiction has been defined as the power of a sovereign state to affect the rights of persons whether by legislation, executive decree, or by the judgment of a court.67 An aspect of jurisdiction is thus prescription and enforcement.

Prescription of vessel-source pollution standards have, since 1959, been the responsibility of the IMO. It develops standards and gets them incorporated in Conventions. Flag-states are then responsible for ratifying these Conventions and applying them on their vessel, wherever they may be.68 Coastal state prescriptive competence in the pre-UNCLOS III era had been limited generally to the territorial sea. UNCLOS III endorses the use of these
international standards; and provides for in addition, coastal state prescriptive competence in Arctic and other special areas.

In the general context of marine pollution, enforcement means the process by which such legislative or other acts are made effective or the process designed to compel obedience to such rules. A distinction is, however, drawn between enforcement *lato sensu* and enforcement *stricto sensu* in the area of vessel-source pollution:

Enforcement *lato sensu* comprises all measures or methods for the effective application of principal rules concerning marine pollution and may include the adoption of secondary rules providing for penalties, the punishment of violations, intervention on the high seas in cases of accidents, cleaning-up operations and even the establishment of the material conditions for the effective application of principal rules (for example, residue reception facilities for the elimination of discharges into the sea). In contrast, enforcement *stricto sensu* refers to the punishment of violations of the principal rules which prohibit discharges or establish certain standards for design, construction, equipment, etc.

The Convention's provisions on vessel-source pollution are based on the assumption that it refers to punishment of violations (enforcement *stricto sensu*). There are, however, two exceptions namely, flag-state enforcement, which is wider in scope, and intervention on the high seas in case of emergency.

Enforcement *stricto sensu* is a continuous and inseparable process. In practice, it is divided into the following stages: the reporting or the discovery of the violation which involves measures such as inspection and surveillance; the investigation involving the collection of all evidence and material surrounding the
violation; the judgment which involves the evaluation of such evidence and the determination of sanction and finally, the process of giving effect to the sanction determined (enforcement of the judgment). A related process is the obtaining of security in advance for the purpose of facilitating the enforcement of the judgment. Security is usually obtained by the arrest of the ship or its subsequent release upon depositing adequate bond. Arrests or detentions in some cases also serve investigation purposes.72

The pre-UNCLOS III regime of enforcement was based largely on flag-state enforcement. UNCLOS III provides for, in addition, coastal and port-state enforcement.73 The present study focuses mainly on the efficacy or otherwise of the enforcement of these internationally prescribed standards; for it is the Convention's approach to the enforcement of these standards that has been the subject of criticism.
Chapter I

1. Vessel-source pollution in this study denotes pollution mainly by oil arising out of operational and accidental discharges from ships. For this purpose, a ship is any sea-going vessel of any type whatsoever and any floating craft, but does not include an installation or device engaged in the exploration and exploitation of the resources of the sea-bed and the ocean floor and the subsoil thereof. See art. 11(2), Int'l Convention relating to Intervention on the High Seas in Cases of Oil Pollution Casualties 1969 (Intervention 69), 9 Int'l Leg. Mat., 25 (1970); cf art. 2(4), Int'l Convention for the Prevention of Pollution from ships 1973 (MARPOL 73) as amended, 12 Int'l Leg. Mat., 1319 (1973).

2. See chap. 2, infra.

3. The decision by the United Nations to convene UNCLOS III to formulate a comprehensive convention on the International Law of the Sea was the result of widespread dissatisfaction with the pre-existing legal regime for the oceans or a lack of it. In particular, there was concern over the increased expansion of coastal states jurisdiction with its potential for conflicts and the infringement of navigational rights, the rational utilization of the living and non-living resources of the oceans for the benefit of mankind as a whole, the awareness of the endangered marine environment, and the sea-bed arms race among the big powers.
The initiative for convening UNCLOS III dates from the Maltese proposal before the United Nations General Assembly in 1967, urging the world community to regard the area beyond the limits of national jurisdiction as the "common heritage of mankind." This proposal was attractive, and received the active support, especially of the developing states who saw in it a means of sharing in the wealth of the oceans, lacking the technology to exploit the area by themselves. A number of resolutions on the question of the reservation of the sea-bed and ocean floor exclusively for peaceful purposes and the use of their resources in the interest of mankind as a whole were adopted. By Resolution 2340 (XXII), the General Assembly established an ad-hoc committee to study the peaceful uses of the sea-bed and the ocean floor beyond the limits of national jurisdiction. A sub-committee of this body dealt with marine pollution. Further, by Resolution 2749, the General Assembly adopted the "Declaration of Principles" governing the sea-bed and the ocean floor, and the subsoil thereof, and by Resolution 2750 on the same day, decided to convene in 1973, a conference on the Law of the Sea. Consequently, the sea-bed committee was enlarged and requested to prepare draft treaty articles and a comprehensive list of items, among others, on the preservation of the marine environment including, inter alia, the prevention of pollution, for UNCLOS III.

Subsequent to the report of the sea-bed committee, the
General Assembly by Resolution 3029 requested the Secretary General to convene the first and second sessions of UNCLOS III. Further, by Resolution 3067 (XXVIII) the General Assembly, in recognition of the fact that the problems of the seas were closely interrelated and thus needed to be considered as a whole, decided that the mandate of UNCLOS III was the adoption of a convention dealing with all matters relating to the Law of the Sea.

Participating in the conference were not only states (numbering 157 at the close of the conference), but some specialized agencies of the United Nations as well as liberation movements recognized by the OAU and the Arab League. Namibia was represented by the U.N. Council for Namibia. The work of the conference was conducted in committees, and all decisions in accordance with the "gentleman's agreement", were arrived at by consensus with no voting on such matters until all efforts at consensus had been exhausted. The final act of the adoption of the convention was, however, by voting. A record 119 states signed the Convention at Montego Bay, Jamaica. It enters into force 12 months after ratification by 60 states. The United States, Israel, Turkey, and Venezuela voted against the Convention. The Soviet Union as well as many EEC states abstained. The Soviet Union, however, signed the Convention at Montego Bay. The United States and some of the EEC states' stand is mainly

4. "Oil" in this study means petroleum in any form including crude oil, fuel oil, sludge, oil refuse and refined products. See Annex I MARPOL 73, 12 Int'l Leg. Mat., supra note 1, at 1335.


6. Ibid., 274.

7. See "The Sea: Prevention and Control of Marine Pollution," U.N. Doc E/5003, May 7, 1971, para 45 (hereinafter referred to as "The Sea"). The definition was originally prepared by a
special committee on Ocean Research/Advisory Committee on Marine Resources Research Working Group. It has been accepted (in this amended form) by the Joint Group of Experts on the Scientific Aspects of Marine Pollution (GESAMP) as authoritative. For a critique of this definition see C.O. Okidi, *Regional Control of Ocean Pollution*, chap I, (Sijthoff and Noordhoff, 1978).


15. The sea *supra* note 7, at 5. See also Annex II, (*ibid.*) for a graphic illustration of mid-Atlantic ocean pollution in Report Delivered to the Permanent Mission of Norway to the U.N. by Thor Heyerdahl.


23. When a tanker has discharged its cargo, it has to fill some of its cargo tanks with ballast water in order to provide the necessary stability. As a certain amount of cargo is left clinging to the tank walls and bottoms, the ballast water becomes contaminated with oil and the discharge of this dirty water causes pollution. The Load on Top (LOT) system was devised in the 60's to deal with the problem. The oily ballast water and tank cleaning residues are placed in a special slop tank where it is allowed to separate. When it is clean enough, the water at the bottom of the tank can be pumped overboard and fresh oil loaded on top of the oil which remains. See: IMO News, November, 1982, p. 10.

24. On the effects of oil pollution see M'Gonigle and Zacher, *op cit. supra* note 19; The Sea, *supra* note 7; Eckholm, *op cit.*

25. UNEP Report, ibid., at 92.


27. See Convention, supra note 10, arts. 55-75.


30. The Truman Proclamation on the continental shelf is reproduced in 4 Whiteman, Digest of International Law 756 (Washington, 1965). On the Proclamation on Fisheries, see ibid., at 945.


32. Ibid.: See also Castaneda, supra note 29, at 538.

33. Polard, ibid., 606.

34. Ibid.

35. There were some initial differences between the Latin and African approaches. The former were tolerant of claims to the margin beyond 200 miles. The Africans were not. The Africans also called for the right of the landlocked and geographically disadvantaged states to exploit the living resources of the zones of neighbouring states, possible regional or sub-regional arrangements for resource management, and resolution of boundary disputes on the basis of equity as well as equidistance. See Ann L. Hollick, op. cit supra note 29, at 253.
36. See for example Rembe Okidi, Nawaz supra note 29.
38. Ibid., art. 11.
39. Ibid., art. iv.
43. For a comprehensive analysis on this, see Fleischer, supra, note 28.
44. Ibid.; 28
46. Ibid., para. 52.
47. Ibid., para 53.
48. Ibid.
52. Ibid., para 100.


54. Ibid., 312.


56. Ibid., 276.

57. See Rembe, op cit. supra note 29, at 126.

58. See, supra note 6.

59. Although the U.S. Proclamation on the EEZ is based on the premise that the zone is recognized by "international law", at the same time the proclamation affirms that it does not change existing U.S. policies on fisheries. There are, however, significant differences between the Convention's texts and United States policy on fisheries. For example, there is no duty, as under the Convention, to give other states access to any surplus fish in the zone. Furthermore, U.S. legislation allows for imprisonment in fishery violations; this is not permitted under the Convention (art. 73). U.S. policy on migratory species is also inconsistent with UNCLOS III's texts. See Robert Hage, "Canada and the Law of the Sea," 8 Marine Policy 2 (1984) at 14; George A.B. Peirce, "Selective Adoption of the New Law of the Sea: The United States Proclaims its Exclusive Economic Zone," 23 Va. J. Int'l L. 581 (1983).


63. See arts. 55-75, and 8 of the Convention, supra, note 10.

64. See for example, Rembe, op. cit. supra note 29, at 86.

65. Art. 25(3).

66. Statement by Mr. Arguilar, chairman of the Second Committee whose responsibility was the EEZ, in his introductory note to Part 2 of the Revised Single Negotiating Text (RSNT), Doc. A/Conf. 62, WP. 8 Rev. 1.


68. There are in existence 28 IMO International Conventions and protocols incorporating standards in nearly every aspect of shipping. See 1 IMO News 9 (1983).
69. On Enforcement in Marine Pollution, see Gr. T. Timagenis, *International Control of Marine Pollution* 57 (Dobbs Ferry, N.Y., 1980).

70. Ibid., 58.

71. Ibid., 615.

72. Ibid., 58.

73. For purposes of enforcement, a "port-state" is a state in which a vessel which has violated a relevant rule in a sea area not under the jurisdiction of such state, enters port. The term "coastal-state" is used when the violation takes place in a sea area (for this purpose the EEZ) which falls under the jurisdiction of this state regardless of whether or not the vessel violating the rule enters port. "Flag-state" is the state of registry of the vessel. See W. Van Reenen, "Rules of Reference in the New Convention on the Law of the Sea, in particular in connection with the Pollution of the Sea by Oil from Tankers," 12 Neth. Yr. Bk. Int'l L. 3 (1981).
CHAPTER II
THE PRE-UNCLOS III REGIME ON ENFORCEMENT
Flag-state Competence: Origin and Nature of the Rule

One of the dominant principles of traditional international law is the "freedom of the seas": "In the era of small populations and limited technologies, problems of congestion or over exploitation rarely occurred. The principal ocean activities of fishing and navigation could be pursued with little concern for the impact on other interests. The legal regime that periodically prevailed under these conditions came to be known as freedom of the seas."\(^1\) One of the foremost exponents of the rule was Hugo Grotius, a Dutch lawyer of the seventeenth century. In his *Mare Liberum*,\(^2\) he wrote: "The sea is common to all because it is so limitless that it cannot become a possession of anyone, and because it is adapted for the use of all, whether we consider it from the point of view of navigation or fisheries...Therefore, the sea cannot in any way become the private property of anyone, because nature not only allows, but enjoins its common use."\(^3\)

The principle of the freedom of the seas was, however, not without an initial opposition. There were those who adhered to the doctrine of *mare clausum*\(^4\) or the closed seas which was the opposite of the Grotian view. Indeed, Anand\(^5\) describes the history of the Law of the Sea as the story of the vicissitudes through which the doctrine for and against the freedom of the seas has gone through the ages. It was freedom of the seas that eventually won the day. This was confirmed by the Geneva Convention on the High Seas:\(^6\) "The
high seas being open to all nations, no state may validly purport to subject any part of them to its sovereignty. Freedom of the high seas .. comprises *inter alia*, both for coastal and non-coastal states: 1) Freedom of navigation, 2) Freedom of fishing, (3) Freedom to lay submarine cables and pipelines, 4) Freedom to fly over the high seas...

The freedom of the high seas are, however, made subject to the consideration that they shall be exercised by all states with reasonable regard to the interests of other states. Freedom of the seas does not, therefore, mean the high seas are a lawless area of vacuum. The "reasonable regard" clause requires the maintenance of juridical order on the seas as states engage in various activities on the seas; and flag-state competence developed as a corollary of the freedom of the seas. This functional basis for flag-state competence is a more plausible view of the matter, and is preferable to the now discredited fiction of assimilating a ship on the high seas to the territory of the flag which she flies, underlying the decision in the *Lotus case*.

As Boczek has stated:

The high seas area subject to law, and this idea lies at the basis of regulations for their utilization. The subjection of the high seas to juridical order is organised and effected by means of a permanent legal relation between ships flying a particular flag and the state whose flag they fly...In the peaceful utilization of the oceans, the institution of the nationality of ships is of primary importance. Owing to it ships can be subject to the control and authority of the state which has ascribed its national character to them. This state takes responsibility for the lawful conduct of its ships and the use they make of maritime areas. This state is also their protector against any deprivations the ship may suffer on the part of other states.
Flag-state competence is, thus, the rule on the high seas, and the conclusive test of a ship's nationality is registration accompanied by the issue of appropriate documents by the competent organ of the state.

Flag-state Pollution Enforcement of International Conventions

Article 24 of the Geneva Convention on the High Seas required states to legislate, subject to existing treaty provisions, to prevent pollution of the seas. This is in reference to the 1954 Convention on the Prevention of Pollution of the Sea by Oil (OILPOL 54).10 Indeed, marine pollution is an issue that has been dealt with solely on treaty basis. OILPOL 54 which has now been superceded by the International Convention for the Prevention of Pollution from ships as amended by its Protocol of 1978 (MARPOL 73/78),11 was primarily aimed at pollution resulting from routine tanker operations which was, and still is, the greater cause of pollution from ships. It established prohibited zones extending at least 50 miles from the base lines in which the discharge of oil or of mixtures containing more than 100 parts of oil per million was forbidden. Further amendments were adopted in 1962 and 1969 extending the application to ships of a lower tonnage and further extended also the prohibited zones for oil tankers. The Convention put a complete ban on operational discharges of oil from ships except where the total discharge on a ballast voyage did not exceed 1/15,000 of the total cargo carrying capacity of the vessel and the rate of discharge did not exceed 60 litres per mile travelled by the ship. OILPOL 54 also prohibited discharge of oil from cargo...
spaces of tanks within 50 miles of the nearest land; and introduced a new form of oil record book designed to show the movement of cargo oil and its residue from loading to discharging, on a tank-to-tank basis. Finally, for other ships, OILPOL 54 placed a limit on rate of discharge at not more than 60 litres per mile being travelled by the ship. With regard to the oil content of any bilge water discharged from ships, it was not to be less than 100 parts per million.

The 1971 amendments to OILPOL 54 provided greater protection to the Great Barrier Reef of Australia and also limited the size of tanks on oil tankers, thereby, minimizing the amount of oil that could escape in the event of an accident.

In line with the prevailing doctrine of the freedom of the seas, OILPOL 54's enforcement - inspections, investigations, and prosecutions for violations on the high seas was left to the flag-state. Coastal-states enforcement (discussed below) was limited to violations occurring in the internal waters and territorial seas.

For its enforcement, OILPOL 54 had serious limitations. Detection of oil discharges was difficult and could be achieved only at the expense of visual surveillance which in itself was difficult in view of the vast amount of areas to be policed and the rapidity with which oil slicks break up into smaller particles. Furthermore, prosecution of offences beyond the territorial seas, as observed above, was in the exclusive competence of flag-states. Hence, if the state of the offending vessel's registry was
disinclined to prosecute, such vessels could effectively escape control. This was the case in many instances; for almost invariably, the pollution did not affect the flag-state's territory, but that of some other coastal-state. Besides, all states encountered difficulties in getting the necessary evidence to prosecute. OILPOL 54's enforcement record was thus very poor.

Many flag-states refused to prescribe penalties against their offending vessels as provided under the Convention. For example, in a 10 year period ending 1977, of the 80 violations that were recorded by Canadian authorities and reported to the offending vessel's flag-states, almost half of the violations received no comment at all, and in only slightly over 20 percent of the reported violations did convictions result.12 Similarly, of the seven reported violations referred to flag-states from 1969 to 1972 by the United States authorities, only two violators received penalties.13 A United Kingdom (U.K.) delegate at UNCLOS III also disclosed, in the Third Committee, that the U.K. authorities had found it difficult to obtain sufficient evidence for successful prosecutions. Over the previous five reporting years, it had been possible to link with particular vessels 203 of the 900 spillages occurring off U.K. coasts, but there had been only 18 successful prosecutions.14

Within the overall framework of flag-state competence, the enforcement record of 'flag of convenience states' in the pre-UNCLOS III era, in particular, was very dismal.15 The term refers to the registration and operation under flags of states like
Liberia, Panama, and Honduras, of vessels that are beneficially owned and controlled by nations of other states, are manned usually by foreign crews, and hardly ever put in at their ports of registry.\textsuperscript{16} The registration is done under conditions convenient and opportune to persons registering these vessels, in particular, lower operating costs; comparatively lower wages are paid to the seamen on these ships, and the laws regarding labour regulations, crew composition, and manning can be avoided. Registration in the convenience states also provides other advantages, such as low tax liability, secrecy, and greater mortgage security.

The growth in the number of flag of convenience vessels, in particular in the period after World War II, has thus been largely owing to the specific competitive advantage which these vessels possessed over others. The ship owners of certain European states, like Greece, also resorted to registration in convenience states for fear of nationalisation.\textsuperscript{17}

The features\textsuperscript{18} of the flags of convenience posed two problems: firstly, the danger of unfair competition resulting from their special economic advantages, and secondly, the threat to the maritime community as a whole in view of their inadequate standards and ineffective enforcement. In the present study, concern is focused on the latter with its associated dangers of maritime pollution. As Meese has stated:

\begin{quote}
Essentially the flag-of-convenience countries lack the desire, power and administrative machinery to impose regulations [including pollution enforcement] that temper the narrowest economic concerns with social objectives. If they did try to impose stricter regulations, they would cease to
\end{quote}
be "convenient". The revenues from registration would shift elsewhere. Because they are only tangentially affected by the actual operation of vessels registered under their flags, there is no interest in exercising responsible and effective control over vessel construction and operation or the certification of personnel qualification, training, and performance...

Consequently, most vessel accidents with resultant pollution of the seas have in the past involved flags-of-convenience. The Torrey Canyon in 1967, the Pacific Glory and Allegro in 1970, and the 1978 Amoco Cadiz disaster are good examples.

There were attempts at the 1958 United Nations Conference on the Law of the Sea (UNCLOS I) to deal with the problems posed by flags of convenience by the provision of a "genuine link" requirement between ships and states whose flags they fly.

The "genuine link" concept was an extrapolation from the Nottebohm case. In that case, the court emphasized that nationality is a legal bond having as its base a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties. It constitutes the jurisdictional expression of the fact that the individual upon whom it is conferred is in fact more closely connected with the population of the state conferring nationality than with that of any other state.

The "genuine link" provision found expression in article 5 of the Convention on the High Seas:

Each state shall fix the conditions for the grant of 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, in particular the state must effectively exercise its jurisdiction and control in
administrative, technical, and social matters over ships flying its flag (emphasis added)

A more potent clause of non-recognition of the nationality of ships lacking a genuine link with the state of registration was, however, not inserted. The pre-UNCLOS III attempts to control flags of convenience were not motivated by environmental protection considerations; they were meant to curtail the competitive advantage possessed by the flags of convenience. This, of course, would have led to a reduction of the marine pollution problem since most vessel accidents in the past have involved "convenience" vessels. The attempts, however, were not successful. As Boczek concludes from a study of the subject:

The genuine link concept in its application to ships has been devised by its framers as an international law medium to curb the practice of the flags-of-convenience which for those who stimulated this concept, are dangerous competition, or are inconvenient because of other economic reasons....No elements of the genuine link could be defined, but effective jurisdiction and control in administrative, technical and social matters by the flag-state over its ships could be the result of this genuine link.

The issue of flags-of-convenience are not solved by [UNCLOS II] and could not be solved because the root of the problem, lies not in the legal sphere, but in the complex economic structure of the shipping industry.21

During the last decade there was a resurgence of the flags of convenience controversy. The concerns, this time, have been both economic and environmental. UNCTAD, since its inception, has been concerned with the establishment and expansion of national and multinational merchant marines, especially those of developing states. It has advocated the existence of a genuine link between these merchant marines and their flags of registry, thus enabling
the developing states to derive the full economic and social benefits from the expansion of their merchant fleets. The ILO has also been concerned with the relatively lower social and working conditions on these flags of convenience vessels. The greatest concern with flags of convenience vessels have been from the pollution point of view.

As observed, most of the major tanker accidents have involved convenience vessels. The issue attracted the attention first of the IMO, and subsequently UNCLOS III, and has prompted the latter to devise regulatory measures governing not only convenience, but all vessels. The Convention retains the traditional rules governing nationality of ships as well as the "genuine link" requirement. With regard to the latter, it spells out the contents, and in addition, imposes elaborate obligations on states. By so doing, it strengthens flag-state enforcement over their vessels and, therefore, is a big improvement on the 1958 Geneva provisions (see Chapter III infra).

Coastal-state Enforcement

International law grants coastal-states sovereignty over their internal waters and, subject to innocent passage, over their territorial sea. Under the 1958 Convention on territorial sea, passage is defined as navigation through the territorial sea. As a rule, it does not include stopping or anchoring. These activities are only permitted if incidental to ordinary navigation or made necessary by force majeure. As observed, so long as such
passage was not prejudicial to the peace, good order or security of the coastal-state, it was to be considered "innocent".

In terms of pollution, it is acknowledged that a vessel's passage is not innocent if it does not conform to anti-pollution standards and poses a pollution threat to the coastal-state. As stated by the Institute of International Law:

States have the right to prohibit any ship that does not conform to the standards set up...for the design and equipment and for the qualifications of the officers and members of the crews, from crossing their territorial seas and contiguous zones and from reaching their ports. 23

Thus, a prejudice to the marine and territorial environment of the coastal-state is tantamount to a prejudice to the peace, good order or security of that state. In other words, a vessel that so menaces the coastal-state constitutes a threat to its living in peace and security. 24 A coastal-state could, however, be liable for tortious conduct for interference with passage considered innocent. 25

OILPOL 54 acknowledged the right of coastal-states pollution enforcement in the internal waters and territorial seas. This, however, was a limited right. Inspections and prosecutions were limited to violations in the territorial seas. States' parties were allowed only to inspect a vessel's oil record book and were not to delay such vessels in the process. The value of this right was negligible as a record book was easily falsified by a recalcitrant crew. Flag-states were also required to furnish the then IMCO with details of such discharges, a requirement that was
not complied with by states. In the case of violations outside the territorial seas, these had to be reported to-flag states who, as observed, seldom reacted to such reports.\textsuperscript{26}

The Convention on territorial sea and contiguous zone\textsuperscript{27} allowed for states' creation of contiguous zones for customs, fiscal, immigration, or sanitary purposes. One could read 'sanitary' to include pollution prevention.\textsuperscript{28} This, however, is disputed.\textsuperscript{29} In any case, the contiguous zone was not to extend beyond 12 miles from the base lines from which the territorial sea is measured.

From coastal states' enforcement point of view, therefore, OILPQ 54 was unsatisfactory. High seas pollution often affected coastal-states' territorial waters and other interests, and this was what OILPQ 54 was aimed at remedying, but in view of flag-state competence, the aim was not achieved. The Convention limited coastal-states to enforcement in the territorial seas. Coastal-states' powers of enforcement on the high seas was limited to intervention to prevent or eliminate grave and imminent danger to their territorial seas from pollution following upon a maritime casualty; as the United Kingdom's bombing of the Torrey Canyon in 1967.\textsuperscript{30} This customary rule is now codified under the International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties (Intervention 69).\textsuperscript{31}

Intervention 69 introduces certain improvements into the law; it requires the Secretary-General of the IMO to provide a list of experts who may be called upon to advise the threatened state on
the technical aspects of the remedy. Secondly, it provides procedures for conciliation and arbitration of disputes in the absence of which there must be resort to municipal courts with consequent delays and bias.

OILPOL 54 has now been superseded by MARPOL 73/78 designed to eliminate the weaknesses of the former. MARPOL 73/78 aims to achieve the elimination of international pollution of the marine environment by oil and other harmful substances and the minimization of accidental discharges of such substances. It entered into force in October 1983. So far, 25 states, the combined fleet of which constitutes approximately 67.5 percent of the gross registered tonnage of the world's merchant fleet, are parties to the Convention.

In terms of standards, operational and construction, design, equipment and manning (CDEM), MARPOL 73/78 is widely acknowledged to be a big improvement on OILPOL 54 and capable of dealing with marine pollution. The problem with the Convention, however, has been the question of its enforcement.

Flag-states are required to provide International Oil Pollution Prevention Certificates (IOPPCs) for their ships as evidence of conformity with the Convention's construction and equipment standards. Port-states have powers of inspection of these documents. But it is limited to ensuring that they are valid. Where there are valid grounds for believing that the condition of the ship or its equipment does not correspond substantially with the particulars of the certificate; or if the
vessel does not carry a valid certificate, the party inspecting shall take such steps as will ensure that the vessel does not sail until it can proceed to sea without presenting an unreasonable threat of harm to the marine environment.

Parties could also deny substandard vessels entry into their ports. These actions are subject to the requirement to notify the flag-state of the actions taken against such vessels. The requirements of the Convention are also to be enforced against vessels of non-parties to ensure that no more favourable treatment is given such vessels.

State parties, either on their own, or at the request of a party to the Convention, can also inspect vessels in its ports to ascertain any discharge violations irrespective of where it occurred. This, however, does not include powers of prosecution. It is simply one of inspection in order to provide evidence on which the coastal or flag-state may be able to institute proceedings.  

Even though MARPOL 73/78 strengthens the enforcement system compared to OILPOL 54, especially inspection rights, its contribution fell far short of the revolution some called for. Exclusive flag-state enforcement on the high seas remained unchallenged, and no shift in authority from the flag to the coastal state occurred. This view is confirmed by MARPOL 73/78's article 4 which provides for flag-state jurisdiction over violations wherever they occur; and coastal-state jurisdiction over violations within their "jurisdiction".
MARPOL 73/78 does not define "jurisdiction" but leaves the term to be construed "in the light of international law in force at the time of the application or interpretation of the Convention." Indeed, the whole question of jurisdiction, both extent and content, was not resolved by the Convention. Coastal-states, dissatisfied with flag-state enforcement, wanted stronger and more extensive powers of enforcement, whilst maritime states opposed these for fear that such powers would impede freedom of navigation. This was the "special measures controversy", since it was concerned with the extent to which a coastal state should be allowed to set special standards for its coastal zone, in terms of both the content and the proper geographical extent of this jurisdiction.

Several proposals, including a compromise port-state enforcement, put forward by Canada, Australia, and New Zealand allowing prosecutions, were not adopted. The feeling was that the IMO, in spite of its global nature, was not a suitable forum for the discussion of these matters. UNCLOS III was scheduled to commence proceedings that same year and it was felt that it was the appropriate forum to deal with this jurisdictional problem.

Consequently, article 9(2) of MARPOL 73/78 emphatically stated that nothing in it was to prejudice the codification and development of the Law of the Sea by UNCLOS III, "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. And "jurisdiction" was to be construed as noted. Further, in a resolution on the nature and extent of states' rights
over the sea, the IMO conference declared inter alia that the decision of the present conference reflects a clear intention to leave the question of the nature and extent of states' rights over the sea to UNCLOS III.³⁵

There are other IMO Conventions that were concluded in the pre-UNCLOS III era. These are worth considering in this study even though they do not deal directly with the problem of oil pollution, but as they are concerned with vessel safety at sea, they have pollution reduction potential. There is the Convention on Load Lines (LL 1966) as amended;³⁶ the International Convention for the Safety of Life at Sea (SOLAS 74) as amended and its Protocol of 1978;³⁷ the Convention on the International Regulations for Preventing Collisions (COLREG 1972)³⁸ as amended; and the Convention on Standards of Training, Certification, and Watch-Keeping for Sea Farers (STCW 1978).³⁹ There is also the Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter (LDC 72).⁴⁰ In a strict sense, dumping is a land-based source of pollution, but it is being mentioned here inasmuch as vessels may be used as tools for dumping.⁴¹

These conventions in line with traditional international law, are generally modelled on flag-state enforcement on the high seas.⁴²

Thus, even though vessel-source pollution had been dealt with under international conventions, these conventions following traditional international law, had left their jurisdictional question to flag-state enforcement outside the territorial seas.
This, as observed, had been ineffective since flag-states did not usually enforce reported violations of these rules. In this, flags of convenience states were the worst offenders as they even lacked the necessary administrative and other institutional structures to ensure compliance of these rules by their vessels. Besides, there were under OILPOL 54, technical problems such as detection of discharges. MARPOL 73/78 is a big improvement on OILPOL 54 as it does introduce the requirement for facilities like oil monitoring devices, segregated ballast tanks and crude oil washing; facilities that help monitor, and lessen the incidence of oil pollution from vessels. MARPOL 73/78's enforcement provisions, especially in the area of inspections, even though an improvement on OILPOL 54, did not go far enough. There was no power of prosecution, and that meant such inspection reports ultimately had to be reported to flag-states; and these could be ignored. Besides, the question of the geographical extent of coastal-states' jurisdiction could not be resolved. Indeed, the IMO was not the appropriate forum to deal with such issues.

Thus even though the pre-UNCLOS III era had developed, in its latter stages, a technically sound international convention to deal with oil pollution, it lacked an effective machinery of enforcement. What was required therefore was the necessary jurisdictional framework to make these technical rules work. This was what UNCLOS III was to provide.
FOOTNOTES

Chapter II


3. Ibid., 28-30.

4. See for example John Selden, Of the Dominion or Ownership of the Sea (Leonard Silk ed.) (New York, 1972). Selden's treatise, written at the request of the British Crown, was in opposition to the Grotian view above.


7. Ibid., art. 2.


10. New Directions, vol. ii, 557. OILPOL 54 was concluded under British government initiative and its Bureau powers were
assigned to the then IMCO (now IMO) when the latter's Convention entered into force in 1959. On the IMO, see M'Gonigle and Zacher, *Pollution, Politics, and International Law* 39 (Berkeley, 1979).

11. 12 Int'l Leg. Mat. 1319 (1973), 17 Int'l Leg. Mat. 579 (1978). Conventions dealing with vessel-source pollution have mainly been concluded under the auspices of the IMO, which also undertakes secretariat responsibilities in respect of some of these conventions. A comprehensive list of these conventions, including signatories as at Dec. 31, 1983 is published in "Status of Multilateral Conventions and Instruments in Respect of which the International Maritime Organisation or its Secretary-General Performs Depository or other Functions" IMO Doc. Misc. 84(2). On these conventions and their enforcement, see M'Gonigle and Zacher, *op cit. supra* note 10, esp. chap vii, viii, David W. Abecassis, *The Law and Practice Relating to Oil Pollution by Ships* 80 (London, 1978); E.D. Brown, "The Prevention of Marine Pollution by Oil from Ships: Competence to establish standards and competence to enforce standards," 28 *Current Legal Problems* 199 (1975); L.J.H. Legault, "Freedom of the Seas: A Licence to Pollute?", 21 *U. of T.L.J.* 211 (1971); Robin Churchill, "The Role of IMCO in Combating Marine Pollution," and Patricia Birnie, "Enforcement of the International Laws for Prevention of Oil Pollution from Vessels," in Douglas (et al. eds.), *The Impact of Marine Pollution* (London, 1980); A.V. Lowe, "The Enforcement of


15. On flags of convenience, see Boczek, op. cit. supra note 9.

16. Ibid., 287.

17. Ibid., 287-8.

18. These have been listed in "OECD study on flags of convenience," 4 J. Mar. L. & Comm. 231 (1973), at 232 as:

   1) The country of registry allows ownership and/or control of its merchant vessels by non-citizens;
   2) 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;
   3) 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 acceptable understanding regarding future freedom from taxation may also be given;
   4) The country of registry is a small power with no national requirement under any foreseeable circumstances for all 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);
5) Manning of ships by non-nationals is freely permitted; and
6) The country of registry has neither the power not the administrative machinery effectively to impose any government or international regulations; nor has the country the wish or the power to control the companies themselves."


20. **Ibid., 23.**

**Nottebohm**, it may be recalled, was a case in which Liechtenstein instituted proceedings on behalf of its national, Friedrich Nottebohm and his property. Guatemala had disputed this on grounds, *inter alia*, that the nationality acquired was not in accordance with Liechtenstein law and contrary to the generally recognised principles in regard to nationality. Besides, Nottebohm had lived and worked in Guatemala for over 30 years. It was thus a contested case of nationality between two states; it involved not a recognition of nationality for all purposes but merely for the purposes of the admissibility of the Application, and, secondly, not recognition by all states but only Guatemala. For, under
international law, it is the right of every state to settle by its own legislation, the rules relating to the acquisition of its nationality.

A decision like Nottebohm, then, is inapposite with regard to nationality of ships. Besides, it is also a disguised mode of stating that because certain limits have been imposed on states with respect to individuals for some problems, other limits ought to be imposed with respect to ships for other problems. See McDougal & Burke, Public Order of the Oceans 1026 (New Haven, 1962).


22. On this discussion, see Donat Pharand, The Law of the Sea of the Arctic with Special Reference to Canada 1 (Ottawa, 1973).


The Convention on the Law of the Sea, as observed, (see Chapter I), radically alters the meaning of innocent passage: pollution must be serious and wilful to render passage non-innocent. However, limiting innocent passage only to cases of wilful and serious pollution is unsatisfactory as this detracts from the pre-existing customary international rules on the matter. Besides, irrespective of the polluter's state of mind, pollution alone may constitute a sufficient threat to the coastal states' vital interests to demand the retention of
states unfettered legal authority to protect those interests. The "wilful and serious" provision, it has been said, may not endure time and practice and will only contribute to an eventual erosion of respect for the international law of the sea. See Brian Smith, "Innocent Passage as a Rule of Decision: Navigation v. Environmental Protection," 21 Col. J. Transnat'l L. 49 (1982).

24. Pharand, ibid.
26. Ibid., 219.
29. See E.D. Brown, "The Lessons of the Torrey Canyon," supra note II.
30. See E.D. Brown, ibid.
31. 9 Int'l Leg. Mat. 25 (1970). Its operative art 1 provides:

Parties to the present Convention may take such measures on the high seas as may be necessary to prevent, mitigate or eliminate grave and imminent danger to their coastline or related interests from pollution or threat of pollution of the sea by oil, following upon a maritime casualty which may reasonably be expected to result in major harmful consequences.
A power of intervention under the Convention would thus only arise when there is grave and imminent danger from a maritime casualty. The interest threatened is widely defined. These include fishing activities, tourism, and the well-being of living marine resources and of wildlife; although these must be affected directly or threatened by the maritime casualties.

The IMO in 1973 adopted the Intervention Protocol of 1973 which extended the Convention to include substances other than oil, 13 Int'l Leg. Mat. 605 (1974).

32. The technical measures designed to achieve the Convention's objectives are contained in five annexes dealing with oil, noxious substances carried in bulk, harmful substances carried in packages, sewage, and garbage. The annexes on oil and noxious liquid substances are compulsory, the rest optional.

The oil pollution regulations apply to all tanks and ships of 150 and 400 gross tons and above respectively. MARPOL 73/78 maintains the oil discharge criteria contained in OILPOL 54 but limits, to half, the total amount of permissible oil discharged at sea (1/30,000 of the cargo). Oil is defined broadly to include petroleum in any form including crude, fuel sludge, oil refuse, and refined products. MARPOL 73/78 imposes an absolute prohibition on oil discharge in special areas (see below). The Convention also requires state parties to provide adequate facilities for the reception of oily
mixtures in places like loading terminals and ports. In addition, it provides that oil tankers must be equipped with facilities like slop tanks, oily water separating equipment, or filtering systems for the discharge of machinery space bilges and oil monitoring devices. The latter help detect the amount of oil discharged by vessels upon inspection. MARPOL 73/78 also retains the limitations on tank size imposed by the 1971 amendment to OILPOL 54. Furthermore, it requires new oil tankers of 20,000 tons dead weight and above to be provided with segregated ballast tanks (SBTS) of sufficient capacity to enable them to operate on ballast voyages without using cargo tanks for ballast purposes; and since SBTS are not used for carrying oil, there are no oily mixtures and hence no pollution (see Chapter I). Provision is also made for crude oil washing (COW) as an alternative requirement in SBTS on existing tankers, and is an additional requirement for new tankers. Under COW, tanks are washed with crude oil and not with water. The crude oil's solvent action makes the cleaning process far more effective than when water is used. Besides, there is no mixture of the oil and water that caused so much operational pollution in the past. The system, however, poses operational dangers because of the attendant build-up of explosive gases in cargo tanks. It is for this reason that the SOLAS 74 protocol (see note 39 infra) prescribes the use of inert gas systems on such vessels. See IMO News, supra note II.
To ensure that tankers in the event of accidents survive bottom damage, MARPOL 73/78 has introduced new subdivision and stability requirements based on ship lengths. The Convention also contains stricter regulations for the inspection and certification of vessels: there is the requirement for an initial survey before a ship is put into service or before an international oil pollution prevention certificate (IOPPC) is issued, as well as periodical surveys of vessels at intervals not exceeding five years.

The application of MARPOL 73/78's technical requirements to "new tankers" has meant that most vessels ordered since December, 1975 have incorporated the requirements of MARPOL 73/78. See IMO News 7 (1983). "Special areas" under MARPOL 73/78 are those sea areas where the recognized technical reasons in relation to the oceanographical and ecological conditions and to the particular character of its traffic, the prevention of sea pollution is required. These are the Mediterranean, the Baltic, and the Gulf Seas areas. See Annex I reg. 1(10) MARPOL 73/78.

34. Art. 9(3).
35. Ibid.
36. Res. 23, IMCO Doc. MP/Conf. WP 46, 40 quoted from E.D. Brown, supra note 11, at 207.
37. 640 UNTS 133. LL 1966, together with its amendments, is designed to deal with the problem of overloading on vessels which could result in vessel accidents and consequent pollution of the sea. The enforcement of this Convention is generally the responsibility of flag states. LL 66 entered into force on July 21, 1968. As at December, 1983, it had 100 contracting state parties, the combined merchant fleet of which constitutes approximately 98 percent of the world's fleet. See IMO Doc. Misc. 84(2), 69, at 75.

38. 14Int'l Leg. Mat. 959 (1975). The Convention was amended in 1981 and again in 1983. These amendments enter into force on September 1, 1984 and July 1, 1986, respectively.

As at December 31, 1983, SOLAS 74 had 78 contracting state parties, the combined merchant fleet of which constitutes approximately 94 percent of the gross tonnage of the world's merchant fleet. See IMO Doc. MISC 84(2), 7 esp. 14. The 1978 SOLAS protocol is reproduced in 17 Int'l Leg. Mat. 579 (1978).


SOLAS 74 as amended and COLREG 72 deal with almost every
aspect of vessel safety such as lighting and behaviour in restricted and unrestricted visibility, subdivision and stability, machinery and electrical installations, fire safety, life saving requirements, and the carriage of dangerous goods. The SOLAS 78 protocol strengthens the requirements regarding the use of inert gas systems which is now mandatory on tankers of 20,000 dead weight and above. The measure is designed to prevent tanker explosions by eliminating dangerous gases from cargo areas. The most important of these regulations from the point of view of oil pollution is routeing. Rule 10 of COLREG 72 makes traffic separation schemes mandatory, but violations of these, as well as the navigational rules have to be reported to flag-states for action.

40. IMCO Doc. STW/Conf./13 July 5, 1978. STCW 78 deals with training and personnel standards. The Convention was actually developed by the ILO but was adopted in the IMO because of the greater acceptability of the latter institution. It was developed in recognition of the importance of vessel crew competence for navigational safety.

STCW 78 which came into force on 28 April, 1984 has 30 contracting states, the combined merchant fleets of which constitutes approximately 64 percent of the gross registered tonnage of the world's merchant fleet. STCW 78 stipulates the type of special training officers and crews of vessels must
have. The Convention is enforceable by contracting parties on their flag ships and in their ports. Seafarers certificates must be accepted unless there are clear ground for believing that they have been fraudulently obtained. An inspecting official coming across violations must inform either the master or the flag-state's consul for appropriate action. It is only when the violation is not remedied and is likely to result in a danger to persons, property, or the environment, that the ship can be detained until the situation can be remedied. Again flag-state competence is the rule.

41. 11 Int'l Leg. Mat. 1291 (1972).

42. Art. III, ibid. defines "dumping", inter alia, as:

1) any deliberate disposal at sea of wastes or other matter from vessels, aircraft, platforms or other man-made structures at sea,

2) any deliberate disposal at sea of vessels, aircraft, platforms or other man-made structures at sea.

The emphasis is on "deliberate". Consequently, the Convention does not regard as amounting to dumping, the disposal at sea of wastes or other matter incidental to, or derived from, the normal operations of vessels at sea and their equipment. These are matters governed by MARPOL 73/78.

Annex I of LDC 72 prohibits outright the dumping of such compounds as organohalogens, mercury, cadmium, plastics as well as crude fuel, heavy diesel, and lubricating oils. A
special permit is required for the dumping of other materials listed in Annex II.

The Convention requires state parties to issue permits in respect of matter intended to be dumped that is either loaded in its territory or loaded by a vessel flying its flag when the loading occurs in the territory of a state which is not a party to the Convention. The Convention expressly recognises the need by states to develop procedures for its effective application, particularly on the high seas, thereby acknowledging the shortcomings of flag-state jurisdiction as a basis of enforcement. Although adopted following the Stockholm Conference, the IMO Secretariat acts as a depository for the Convention.

43. Regulation 10 of Chapter I of SOLAS 74, however, empowers contracting states to verify whether the certificate of safety prescribed by the Convention is on board. If it is, it must be accepted unless there are clear grounds for believing that the condition of the ship or of its equipment does not correspond substantially with the particulars of the vessel. Should this be the case, the inspecting officer shall take such steps as will ensure that the ship shall not sail until it can proceed to sea without danger to the crew. However, like MARPOL 73/78, this does not include powers of prosecution.
CHAPTER III

THE UNCLOS III REGIME OF ENFORCEMENT

Background to the Convention's Texts

Even though the sea-bed committee was to prepare draft treaty articles, among other things, on the preservation of the marine environment for UNCLOS III deliberations, issues relating to marine pollution were largely ignored during the preparatory work of the committee. A working group on marine pollution was established late in the summer of the 1972 session. It discussed proposals, but did not reach any agreement on draft articles.

It may be recalled that the 1973 IMO conference could not resolve the issue as to whether or not coastal states could establish and enforce anti-pollution standards beyond the territorial seas. The maritime states stuck to the prevailing rule of flag-state competence outside the territorial seas, whilst coastal states, dissatisfied with this regime, wanted enforcement powers outside the territorial seas. The controversy was carried over from the IMO conference through the sea-bed committee right into the substantive sessions of the Third Committee of UNCLOS III. The proposals that were submitted to the sea-bed committee reflected the stand of states on the issue.

On enforcement, a proposal by the United States granted powers to flag-states over its vessels and port-state enforcement over vessels entering its ports regardless of where the violation occurred. In addition, it provided for enforcement powers in
emergency situations threatening major harmful damage to the coast. Port-state enforcement had been proposed at the 1973 IMO conference as a compromise between coastal and flag state enforcement but had been rejected. It was, however, to be adopted at UNCLOS III and the United States proposal was one of the early initiatives on the matter at UNCLOS III. The French and Japanese proposals allowed for coastal state enforcement beyond the territorial seas but in limited circumstances. The Japanese proposed investigative and prosecution rights for violations of international standards regarding dumping and discharges, and the French, a general investigation for violations of international conventions with prosecutions limited to violations of the London Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (LDC 72).

In its draft articles, Canada proposed coastal states enforcement "within the limits of their national jurisdiction, including environmental protection zones (maximum limits...to be determined) adjacent to their territorial sea." This was a reflection of Canada's dissatisfaction with the then existing flag state regime of enforcement beyond the territorial sea. The proposal, however, raised the question of the protection of navigation. It was argued in opposition that shipping to and from a majority of coastal states while en route, would have to pass within 200 miles of at least one other state. Accordingly such shipping would be subject to interference if coastal states were given jurisdiction to establish pollution standards for vessels transiting the area.
This conflicting interest between coastal and maritime states was not considered in any depth or detail by subcommittee III. It was during the initial substantive sessions of UNCLOS III that the controversy raged most. It was not easy to reach agreement on the contents, both prescriptive and enforcement, of these anti-pollution standards in relation to vessel source pollution. The maritime states were not willing to accord greater enforcement powers to coastal states for fear that these might impede navigational rights. This was emphasized by a Denmark delegate who said that:

his country as a sea faring nation highly dependent on foreign trade, was keenly interested in securing adequate international enforcement measures. It adhered primarily to the principle that the flag state alone should have authority to enforce jurisdiction over its vessels especially with regards to their design, construction, equipment and manning (emphasis added)7

On the other hand, coastal states, dissatisfied with the pre-existing flag state competence, wanted greater enforcement powers. Canada, for instance, had enacted the Arctic Waters Pollution Prevention Act (A.W.P.P.A.)8 to protect its fragile and sensitive Arctic environment and wanted international endorsement for this action. Incidentally, Canada's enactment of A.W.P.P.A. was also evidence of the correctness of the maritime states fears about the use of environmental legislation to extend sovereignty over the oceans to the detriment of freedom of navigation.

Together with nine other states, Canada introduced draft articles on the "zonal approach to the preservation of the marine environment."9 The proposal required states to take all measures, in a zone contiguous to the territorial seas, to prevent pollution of the marine environment from any source using for this purpose
the best practicable means, in accordance with their capabilities and their own environmental policies. With regard to vessel source pollution in the EEZ, the proposal would allow a coastal state to take measures "relating to the prevention of accidents, the safety of operations at sea, and intentional or other discharges, including measures relating to the design, equipment, operation and maintenance of vessels, especially of those vessels engaged in the carriage of hazardous substances whose release into the marine environment, either accidentally or through normal operation of the vessel, would cause pollution of the marine environment."\textsuperscript{10} Article VII 3(b)\textsuperscript{11} of the proposal was drafted with Canada's A.W.P.P.A. in mind. This was a resurgence of the special measure controversy carried over from the IMO 1973 MARPOL Conference (Chapter II). Under the zonal approach, the rights and duties of coastal states in the EEZ were to be performed without undue interference with other legitimate uses of the sea including the laying of submarine cables and pipelines. Furthermore, ships and aircraft of all states were to enjoy freedom of navigation and overflight, subject to the exercise by the coastal state of its right within the zone.\textsuperscript{12}

The 'zonal approach' proposal received the support of coastal states like Australia\textsuperscript{13} and Tanzania.\textsuperscript{14}.

The need for the preservation of fisheries in the EEZ was a prime factor for the assertion of environmental jurisdiction in the zone. As pointed out by the German Democratic Republic delegate:

It was natural that countries-especially those of Africa, Asia and Latin America-whose supply of animal proteins depended on fishing were concerned about preserving or re-establishing an ecological balance of the seas which would help them to solve their economic problems more rapidly.
Combating pollution of the high seas and conducting marine research for peaceful purposes required the effective cooperation of all States.15

The EEZ principle had been widely accepted in Committee II. Indeed over 100 states at Caracas spoke in support of an economic zone extending up to a limit of 200 nautical miles as part of an overall treaty settlement. With regard to its content, there was wide support for, among other things, coastal states rights and duties with respect to pollution, the details of which were left to be specified in committee III.16 The 'zonal approach' thus served to create a link between coastal state pollution prevention responsibilities and the concept of the EEZ.17

The proposal, however, was criticized by certain maritime states which argued that it gave coastal states too much power to the detriment of the convention as a whole, and by some environmentalists who criticized the double standard provision in favour of developing states.

On the whole, however, the reception among the maritime states was mixed; ranging from partial acceptance by states like Liberia,18 to total opposition by the Soviet Union19 and the United Kingdom.20

The Caracas session thus saw a wide gap between the maritime and coastal states on the question of enforcement of vessel-source pollution, the former desiring a shift from the pre-existing flag-state order, whilst the latter generally stuck to the idea.

To promote progress and consensus, inter-sessional consultations on marine pollution were conducted within the framework of the Informal Group of Juridical Experts on the Law of the Sea or the Evensen Group.21 Further, at the Third Session,
a compromise proposal on enforcement of vessel source pollution was introduced by a group of nine maritime states led by the United Kingdom.22

The nine-power draft involved a tripartite enforcement by flag, coastal, and port-states, under stated conditions, of regulations established through the competent international organization (the IMO). In line with previous conventions on the subject, the proposal exempted warships, naval, auxiliary, or other ships owned or operated by states and used only on governmental non-commercial service.23 Port-state enforcement, then, was the main basis of the compromise. Again the reaction to the proposal was mixed. The United States delegate, for instance, "welcomed the draft articles in which careful attention was paid to certain specific problems and which would be useful in the final phase of the committee's work."24 However, he felt the articles placed too many restrictions on the enforcement of international rules by port-states. To him, a "truly effective system of port state enforcement should be given an important place in the current negotiations."

The U.S.S.R. delegate also said the sponsors had adopted the right approach towards reconciling national and international rules and had correctly evaluated various sources of pollution from the international point of view. He, however, reiterated his country's preference for flag-state jurisdiction.25

Canada, the leader of the coastal states was also "in general agreement with some elements of the approach adopted by the sponsors."26 It was of the view, however, that coastal states should retain the right of environmental self-protection and to
ensure effective enforcement of agreed standards, with participation in such enforcement by coastal states, port states, and flag states. It did not believe that standard-setting powers in the coastal state would lead to a plethora of conflicting regulations, provided the relevant provisions contained appropriate safeguards. The coastal states should have certain rights and obligations in its EEZ, and special provision should be made for pollution control in critically vulnerable areas.27

Similarly, the Egyptian delegation pointed out that the draft articles were concerned entirely with maintaining the powers of the flag state vis-à-vis the powers of other states, even in the waters of the jurisdiction of the latter. That concept, he stressed, had prevailed in earlier international treaties because of the dominance of international affairs by certain states, but such inequities had become unacceptable, and world opinion had come to reject the hegemony of one group of states over another. The delegation could, therefore, not accept those provisions of the nine-power draft which gave eminent rights to the flag state.28

The compromise nine-power draft, therefore, initially could not bridge the gap between the coastal and maritime states, the former desiring an extension of jurisdiction outside the territorial sea whilst the latter opposed this. Further negotiations on the vessel source pollution problem was conducted by the Evensen group, but the matter was not fully resolved. A clear trend, however, emerged against coastal state standard setting in the EEZ.29 In the course of the session, the conference President proposed that the chairman of the three committees should each prepare a single negotiating text (SNT) covering the subjects entrusted to them. This was to
take into account all the formal and informal discussions held. The texts would not prejudice the position of any delegation, but would be a basis for further negotiation.30

The SNT draft31 on pollution incorporated all the texts the main lines of which had been agreed upon in committee, while for vessel-source pollution, the basic idea of the nine-power draft were more or less followed.31 The SNT, however, made provision on the lines of the zonal approach draft, for enforcement in special areas in the EEZ in articles 4, 5 and 6.33

By article 5 above, Canada obtained recognition of its right to adopt and enforce its own laws for the prevention, reduction, and control of vessels in ice-covered areas.34 Article 5, however, was felt to be so permissive and vague, that many maritime states expressed concern lest it be applied too freely. A specific Arctic exception as well as another more restrictive article for other areas of environmental vulnerability had, therefore, to be provided at the subsequent New York session.35

The ISNT were presented on the very last day of the session. Between the third and fourth sessions, the Evensen Group met on three occasions to consider these drafts. At the fourth session, informal meetings and small groups discussed the SNT under the chairmanship of J.L. Vallarta of Mexico. The negotiating and drafting group that was formed effected some basic structural alteration to the SNT.36 This was done upon the basis of an "outline of issues concerning vessel-source pollution" prepared by the Chairman of Committee III. The results of the negotiations, done in small groups, were subsequently approved by Committee III as a whole. This formed the basis of the Revised Single Negotiating
The new section on ice-covered areas, based on consultations among Canada, the United States, and the Soviet Union, the delegations directly concerned with the question, read:

Article 43: Coastal States have the right to establish and enforce non-discriminatory laws and regulations for the prevention, reduction, and control or marine pollution from vessels in ice-covered areas within the limits of the economic zone, where particularly severe climatic conditions and the presence of ice covering such areas for most of the year create obstructions or exceptional hazards to navigation, and pollution of the marine environment could cause major harm to or irreversible disturbance of the ecological balance. Such laws and regulations shall have due regard to navigation and the protection of the marine environment based on the best available scientific evidence.

In addition, the RSNT further elaborated on the previous SNT texts. Further negotiations were conducted at the New York session, where the President of UNCLOS III proposed the preparation of an Informal Composite Negotiating Text (ICNT). This was to be a revision of the RSNT, including in a co-ordinate manner, the provisions of all parts of the RSNT. The text, prepared by the President, assisted by a team composed of the chairmen of the three main committees, the chairman of the Drafting Committee and the Rapporteur General, was based on the experience, judgment, and assessment of the chairman in regard to the provisions that not only commanded the widest ascertainable support, but at the same time held out the prospect of consensus.

The ICNT was to serve purely as a procedural device and only provide a basis for negotiations without affecting the right of any delegation to suggest a revision in the search for a consensus.
In spite of its informal character, "because it was to be the third revision of the text in a conference working by consensus, no one could under-estimate the difficulty of amending its provisions and its influence on the development of the Law of the Sea, both in the conference and through State practice". In any case, the majority of delegations were in agreement on the provisions on vessel-source pollution.

The seventh session met (March 21 to May 19, 1978) to revise the ICNT and formulate a draft convention. The work of Committee III was influenced by the "Amoco Cadiz" disaster. This flag of convenience vessel had gone out of control, and with only one system each of propulsion and steering, had gone aground. The incident increased the awareness and the concern of the magnitude of possible hazards and the need to improve preventive measures by strengthening both standard setting procedure and the enforcement measures.

Among the ICNT articles governing the matter, was article 222, modelled on the lines of the International Convention Relating to Intervention on the High Seas in cases of Oil Pollution Casualties (Intervention 69). It read:

Nothing in this Chapter shall affect the right of States to take measures, in accordance with international law, beyond the limits of the territorial sea for the protection of coastalines or related interests, including fishing, from grave and imminent danger from pollution or threat of pollution following upon a maritime casualty or acts related to such a casualty. Measures taken in accordance with this article shall be proportionate to the actual threatened damage.

At the conference at which Intervention 69 was adopted, a number of coastal states such as Canada refused to sign the
convention because they felt the restrictions in it were even greater than those applicable under customary international law. A proposal was introduced by the French delegation to clarify and strengthen this article. As the delegate explained, the "obvious lesson of the Amoco Cadiz and other disasters was that remedies for pollution were not enough. What was important was the prevention of pollution. It must, therefore, be made clear that the measures referred to in Article 222 could be taken at an early stage before it was too late for them to be effective." This French proposal led to what eventually became article 221 of the convention. It provides that the right of intervention exercisable under the Convention are those applicable both under customary and conventional law.

During the eighth session, at its 30th meeting of May 12, 1978, the Third Committee considered the report on informal negotiations which took place during the 7th session and indeed completed its work. The protection and preservation of the marine environment was, in fact, the first concluded item on the agenda of the conference's negotiations. In these negotiations, an earnest effort was made "to keep a viable balance between the ecological considerations and the legitimate demands of expanding international navigation, between national legislation and enforcement measures on the one hand, and the international rules, standards and regulations on the other, between coastal State and flag State jurisdiction, between the interests of developed maritime powers and developing countries." That the marine environmental provisions were the first to be concluded is due partly to the fact that marine environmental issues had been the subject of discussion in previous international forums.
such as the IMO and Stockholm conferences. Thus compared to an issue like sea-bed mining, it was not new to delegates, many of whom had participated in these international conferences. With regard to vessel source pollution, there already existed technical rules on the matter. What was required was the necessary jurisdictional framework to allow the technical expertise of the IMO to be brought to bear on these measures. Even on the question of jurisdiction, issues such as port-state enforcement and enhanced coastal-state competence outside the territorial seas had been the subject of intense discussion in previous conferences. Besides, catastrophic vessel accidents such as the Torrey Canyon and the Amoco Cadiz (the latter occurring right in the middle of the conference) brought clearly home to delegates the need for effective preventive measures against vessel-source pollution. Much credit also goes to the Chairman of the Third Committee Mr. Yankow, and his deputy Mr. Vallarta, as well as the Evensen group for the able manner in which they conducted the business of the Third Committee. Above all, there was the realisation on the part of delegates of the need for compromise. Port-state enforcement emerged as the main basis of this compromise. The proposal, coming as it did from the maritime states, was evolved with the protection of navigational interests in mind. In-port inspections constitutes minimal interference with navigation. Besides, it obviates the practical dangers inherent in the stopping and boarding of vessels at sea. Port-state enforcement (discussed below), however, requires the co-operation of both coastal and flag-states. Once this is forthcoming, it is a good complement to coastal and flag-state enforcement, especially for states that lack the requisite technical and manpower requirements to police the vast expanse of the EEZ.
The result of this prolonged negotiation was that with regard to the EEZ coastal states agreed to forego the right to enact national laws to protect and preserve the marine environment, except in limited circumstances, in return for the right to enforce internationally agreed standards covering vessel source pollution.49 To an examination of this, we now turn.

The UNCLOS III Scheme of Enforcement

As observed in chapter I, the Convention on the Law of the Sea crystallizes the EEZ as an established institution of international law. The vessel-source pollution provisions of the Convention cover the EEZ.50 This allows for the enforcement of international rules and standards established through the competent international organisation or general diplomatic conference, for the prevention, reduction and control of pollution of the marine environment from vessels.51

The Convention does not supplant IMO standard setting competence as regards vessel-source pollution. Rather it supplements these by providing solutions to the jurisdictional questions necessary for the effective implementation and enforcement of the IMO standards, in particular MARPOL 73/78.52 For, even though the Convention does not expressly state what this "competent international organization" is, the IMO is acknowledged as the organisation concerned.53 Therefore, the IMO rules, especially the International Convention for the Prevention of Pollution from Ships, as amended by its 1978 protocol (MARPOL 73/78), are to be the basis of enforcement in the EEZ.
A problem that arises in connection with this is whether non-parties to these IMO conventions will be bound by such rules if they ratify UNCLOS; for *pacta tertiis nec nocent nec prosunt*.\(^{54}\) As emphasized by the International Court of Justice (ICJ) in the *North Sea Continental Shelf Cases*,\(^ {55}\) a "Convention is in force for any individual state only insofar as having signed it within the time limit provided for that purpose that state has also subsequently ratified it; or not having signed within that time limit, has subsequently acceded to the Convention."\(^ {56}\) With regard to these IMO conventions, however, it is arguable that they could be customary rules on the matter.\(^ {57}\) For, as observed, these rules are in force for a majority of ship owning states.\(^ {58}\) Further, if the Convention incorporates the IMO conventions, then signatories would be bound by them.\(^ {59}\) This, in fact, appears to be the case. It may be recalled that MARPOL 73/78 and the London Dumping Convention (LDC 72) left their jurisdictional question to be resolved by UNCLOS III. A reference to the enforcement of international rules and standards must necessarily refer to such rules. Moreover, the view prevailed at UNCLOS III that these international rules and standards were those established by the IMO. Indeed, "one delegation stated in an informal negotiating group of the Third Committee, that the applicable international rules and standards for the protection of pollution from vessels in the article on enforcement by port states, refer to the existing IMCO [now IMO] treaties of 1954 and 1973 .... and to future IMCO treaties; this was not contradicted."\(^ {60}\) This view also has the support of jurists. Churchill\(^ {61}\) for instance has stated that:

> Although [the Convention] nowhere define such "generally accepted international rules
and standards"; they are generally taken as referring to the rules and standards contained in the IMCO Conventions... Thus if the Convention were to enter into force and be widely ratified, the rules and standards of the IMCO Conventions would be applied more widely than at present, because they would also be applicable... to non parties of the Conventions and not just the parties as at present (emphasis added).62

Similarly, Van Reenen has stated that

becoming a Party to the new Convention on the Law of the Sea entails being bound by rules and standards which are already binding on other states, viz., the states addressed by them. By becoming a Party to the new Law of the Sea Convention, a state acquires a series of additional rights and more importantly - duties. Most of the rules of reference in the Draft Convention call for the adoption of municipal laws and regulations which "conform to" certain rules and standards, which "give effect" to them or which "implement" them, or "ensure compliance with" those rules and standards. This is tantamount to creating a formal obligation to adhere to the rules and standards concerned. It is submitted that the rules of reference may therefore be qualified as rules of incorporation. The phenomenon of incorporating legal rules with a different origin into a treaty is not new. The incorporation of rules and standards in the new Convention on the Law of the Sea will certainly apply in relations between Parties to this Convention.63

After an exhaustive enquiry into the matter, he concludes with "an affirmative answer... to the Question whether a reference in the new Convention on the Law of the Sea to international rules and standards or to generally accepted international rules and standards would entail these rules and standards being binding upon every State which becomes a party to the new Convention."64

Thus the IMO rules, especially MARPOL 73/78, become the norm or benchmark to which the validity of any national standard may be assessed. State parties to the Convention would thus have to...
change, modify, or even adopt, as the case may be, their legislation to be in conformity with UNCLOS III texts.65

The Convention marks a shift from the reliance on flag-state enforcement outside the territorial seas. In addition to flag-state jurisdiction, it provides for coastal and port-state enforcement, and hence, a three "pronged assault" on the vessel-source pollution problem. This, as observed, is the result of consensus and compromise at UNCLOS III.

Since the main burden of enforcement action should occur before a ship commits a violation of pollution laws,66 much emphasis is still placed on flag-state enforcement under the convention.67 It is this idea, and in particular, the right of pre-emption (discussed below) accorded flag-states, that has raised doubts about the efficacy of the enforcement regime under the convention. Professor Bernhardt, for example, has commented:

The practical effect of [flag state pre-emption] is to make flag State enforcement the lowest common denominator of mandatory enforcement under the vessel-source pollution chapter, notwithstanding the elaborate machinery which has been established for port State and coastal State enforcement. Given the poor record of flag State enforcement, this scheme is not likely to be effective (emphasis added).68

A contrary view, however, is presented in this study. Admittedly, the flag-state enforcement record in the past has been poor. However, flag-state jurisdiction under the Convention is radically different from the 1958 Geneva provisions.69

The Convention on the Law of the Sea follows the Geneva texts on nationality and the requirement for a "genuine link" between a vessel and the state of its registry. Mere requirement for
a "genuine link" is, however, not enough. "A detailed elaboration of this requirement... is necessary in order to ascertain whether the maritime nations and in particular the flag of convenience states satisfy the minimum standards of control and jurisdiction over their ships."70 To this end, the Convention goes beyond the mere requirement for a state to exercise its jurisdiction and control in administrative, technical, and social matters over ships flying its flag (as provided by the 1958 Geneva provisions),71 by detailing certain specific obligations in connection with these requirements. The Convention provides specifically that states maintain a register of ships containing the names and particulars of ships flying its flag and to assume jurisdiction under their internal laws in respect of masters, crew, and other administrative and social matters connected with these vessels. Article 94(3) further requires states to take appropriate measures to ensure safety at sea with regard to:

4. Such measures shall include those necessary to ensure:

a) the construction, equipment and seaworthiness of ships:
   b) the manning of ships, labour conditions and the training of crews, taking into account the applicable international instruments;
   c) the use of signals, the maintenance of communications and the prevention of collisions.

4. Such measures shall include those necessary to ensure:

a) that each ship, before registration and thereafter at appropriate intervals, is surveyed by a qualified surveyor of ships, and has on board such charts, nautical publications and navigational equipment and instruments as are appropriate for the safe navigation of the ship;
   b) that each ship is in the charge of a master and officers who possess appropriate qualifications, in particular in seamanship, navigation, communications and marine engineering, and that the crew is appropriate in qualification and numbers for the type, size, machinery and equipment of the ship;
   c) that the master, officers and, to the extent appropriate, the crew are fully conversant
and required to observe the applicable international regulations concerning the safety of life at sea, the prevention of collisions, the prevention, reduction and control of marine pollution, and the maintenance of communication by radio.

These measures are not exhaustive and must conform to generally accepted international regulations. These are the IMO Conventions already discussed. The effect of these provisions will be that as seen above, even where a state is not party to the relevant IMO conventions, it will be bound to exercise proper control over its vessels by virtue of overriding obligations imposed by the Convention.

Article 217 further imposes an obligation on flag-states to ensure compliance by their vessels, of international rules and standards established by the IMO for the prevention, reduction, and control of vessel-source pollution. In this connection, they are to adopt laws and regulations including measures for their implementation. The measures include ensuring that ships are prohibited from sailing until they can comply with these international standards, periodical inspections, the carrying aboard international certificates, and immediate investigation of, and where necessary, institution of proceedings in respect of violations irrespective of where they occurred. The outcome of these proceedings must be promptly communicated to either the coastal state or the IMO in cases where such proceedings are instituted at their request. Penalties in the event of convictions are to be "adequate in severity to discourage violations wherever they occur." The requirement by the flag-states to inform states and the IMO of the outcome of proceedings being now an overriding obligation imposed by the Convention, it is not likely to be
ignored. This is because governments do not want to have a reputation for illegal or irresponsible behaviour. The recording, publication and discussion of enforcement records could thus put a substantial pressure on them to act.  

The Convention does not provide for sanctions in the event of non-compliance by flag-states with these provisions as certain delegations at UNCLOS and some publicists would have wished. However, this is a feature of international law which, among other things, has no police force to ensure compliance with its rules but defer to states to ensure such compliance. In this regard, article 300 of the Convention requires states to fulfil in good faith the obligations under the Convention and to exercise the rights, jurisdiction, and freedoms recognized in it in a manner that would not constitute an abuse of rights. This is a codification of the pacta sunt servanda rule.

Provision of sanctions for non-compliance with conventional obligations is likely to be frowned upon by states as inconsistent with their sovereignty. This does not mean that without this states will not comply with the rules provided by the Convention. For, as Henkin has stated:

Violations of law attract attention and the occasional important violation is dramatic; the daily, sober loyalty of nations to the law and their obligations is hardly noted. It is probably the case that almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time.

In spite of the lack of sanctions, there are other equally compelling reasons for state observance of the rules of international law:

That international law will be generally observed is an assumption built into international relations. Nations have a common interest in keeping the society running and keeping
international relations orderly... Every nation's foreign policy depends substantially on its "credit" - on maintaining the expectation that it will live up to international mores and obligations. Governments do not like to be accused or criticized. They know that violation will bring protest, will require reply, explanation, and justification. In our time, at least certain kinds of violations are likely to be brought to the United Nations... and few governments would face that prospect with equanimity. Law is commonly observed because nations desire their relations with other countries to be friendly. Any violation between two countries will disturb relations... 

Besides, vessel-source pollution is a problem of global dimensions. It is thus in the interest of states to cooperate in combating it. This point has been brought fully home to states, during the last decade, following catastrophic vessel accidents like the Torrey Canyon, the Argo Merchant and the Amoco Cadiz; the activities of various environmental pressure groups and in international forums such as the Stockholm conference, the IMO and UNCLOS III; as well as unilateral action by states like Canada and Iran. States are thus more likely to obey such rules dealing with issues affecting their interests. Further, unlike the High Seas Convention that was not widely ratified, a majority of states was in total agreement with the Convention's texts on environmental preservation. It may be recalled that it was through the initiative of states such as the United States and the United Kingdom that the pollution enforcement regime was devised at UNCLOS III. The refusal of these states to sign the Convention is not because of the marine environment provisions which, in fact, were the first to be negotiated, but rather of the sea-bed provisions. Indeed Dr. Guruswamy, for instance, has suggested that the environmental provisions of the Convention, in view of the nearly complete
consensus by which they were arrived at, could be customary rules on the matter. He writes:

Notwithstanding any difficulties obstructing the formation of customary law created by the requirements of a "package deal" and the context of "consensus" negotiation, it would be erroneous to preclude the codification of customary law or its development... Indeed compromises and trade-offs are of the essence of negotiations at law making conferences. If the law codified at Geneva can be treated as customary law, it is difficult to see why the same results should not follow the law codified by UNCLOS.81

Such a reliance on custom would appear to enable non-parties to enjoy benefits from the Convention's marine environmental provisions without becoming parties to it. The United States for instance insists that most of the Convention's provisions including those parts dealing with navigation and overflight, reflect prevailing international practice and, therefore, can be invoked by non-parties as representing new customary international law. This view, however, was opposed by delegates, at the Convention's signing ceremony at Montego Bay, as inconsistent with the "package deal" nature of the Convention.82

Further, many of the maritime states that have not signed the Convention, have ratified MARPOL 73/78.83 The latter relies on the Convention to resolve its jurisdictional question including enforcement. These maritime states would thus have to rely on the Convention's provisions on the matter in implementing MARPOL 73/78.84 In addition, coastal and port-state enforcement (discussed below), in particular, the denial of entry into ports by states of vessels not conforming to international standards, is another potent means of ensuring that flag-states maintain standards on their vessels.
The problem, however, is with flag of convenience states. These as noted, lack effective administrative, technical, and other institutional structures to ensure compliance by their vessels of anti-pollution standards. But even with these vessels, as the Liberian example shows, there could be a way of enforcement.

Most of the vessels registered under the Liberian flag seldom call at its ports. Liberia has, therefore, instituted a system of vessel inspection abroad. It has set up a Marine Division made up of inspectors and qualified surveyors and required its vessels to undergo a periodic inspection once a year. For convenience, owners or masters may request their annual inspection at a port convenient for the ship's purpose. The inspector's report could result in an investigation and eventual prosecution for an offence or a revocation of licence. Liberia has also updated its procedures in respect of enquiries in connection with vessel accidents. These usually turn up navigational and other offences and thus help to ensure that standards are maintained in the future. Above all, the growth of iron ore exports from Liberia has contributed to a modification of Liberia's position as a "pure" flag of convenience, since many of these ore combined carriers employed in the trade are owned by Liberian companies. These developments in Liberia are quite significant since about 21.3 percent of the recorded 28.9 percent of the registered world shipping tonnage sailing under flags of convenience are registered in Liberia. With the coming into force of the Convention, the remaining flags of convenience states (about 7.6 percent) would have to follow Liberia's overseas inspection example or face the sanctions of coastal and port-state enforcement. For under these as we shall see, substandard
vessels could be denied entry into ports, detained or even prosecuted for non-compliance with prescribed international standards. Thus, the significance of flags of convenience vessels from the point of view of safety and protection of the marine environment is likely to decline.

Besides, the enforcement regime provided by the Convention must not be viewed solely in terms of flag-state enforcement. It is a tripartite scheme involving as well, coastal and port-states, together with adequate checks and balances to ensure an effective and viable system.

Port-state jurisdiction, in a strict sense, is not new. States in the past have had the right to set conditions for entry into and exit from their ports, although provision for access to ports have always been ensured by treaties and other means. This competence, however, has traditionally been limited to matters connected with, up to and including, the territorial seas. Also certain IMO Conventions, in particular, MARPOL 73/78, it may be recalled, incorporated the concept of port-state enforcement even to the extent of enforcing the discharge violation standards on the vessels of non-state parties. However, this jurisdictional question was not fully resolved. MARPOL 73/78 also does not allow prosecutions by port-states.

Under the Convention, in addition to powers of inspection and investigations, port-states have powers to prosecute vessels that violate the established international standards. The Convention recognizes the right of states to set conditions for the entry into their ports subject to the requirement of due publicity. Further it goes beyond this by providing for port-state enforcement (including prosecutions) of international discharge violations up to
and including the high seas, when a vessel is voluntarily within its ports (article 218). Those violations occurring outside a coastal state's own EEZ must, however, be enforced at the request of a state damaged or threatened by the discharge violation or by the flag-state.

The Convention limits states in-port inspections to an examination of certificates or documents issued under the IMO Conventions such as the International Oil Pollution Prevention Certificate (I.O.P.P.C.) under MARPOL 73/78; and the Cargo Ship Safety Construction Certificate (C.S.S.C.C.) and Cargo Ship Safety Equipment Certificate (C.S.S.E.C.) under SOLAS 74. These certificates are issued by Classification Societies. To ensure the bona fides of these, MARPOL 73/78 requires states parties to furnish the IMO with the details of Classification Societies which they authorize to issue I.O.P.P.C.s to their vessels.

Further in-port inspection may be carried out only after an inspection of these documents and when there are clear grounds for believing that the condition of the vessel does not correspond substantially with the particulars of those documents, the contents of such documents are not sufficient to confirm or verify a suspected violation, or the vessel is not carrying valid certificates and records. Where an investigation reveals a violation of international standards, the vessel pending proceedings, should be promptly released on the posting of a bond or other financial security. This provision is aimed at preserving a balance between environmental protection and rights to navigation. However, the release of such a vessel may be refused "whenever it would present an unreasonable threat of damage to the marine environment . . . or made conditional upon proceeding to the nearest
This provision should enable port-states to prevent substandard vessels from polluting the marine environment.

Article 218 refers to discharge violations but there is no reason why port-state enforcement should not include construction, equipment and manning (CEM) standards as well. Article 219 provides:

States which, upon request or on their own initiative, have ascertained that a vessel within one of their ports or at one of their off-shore terminals is in violation of applicable international rules and standards relating to seaworthiness of vessels and thereby threatens damage to the marine environment shall, as far as practicable, take administrative measures to prevent the vessel from sailing. Such States may permit the vessel to proceed only to the nearest appropriate repair yard and, upon removal of the cause of the violation, shall permit the vessel to continue immediately (emphasis added).

CEM standards, it is submitted, form part of "standards relating to seaworthiness of vessels." Article 218 is couched in permissive terms ("may" instead of "shall") and this has been criticized by Professor Bernhardt:

...Given that port-state enforcement initially was formulated as the viable compromise solution between the conflicting modes of coastal-State and flag-State enforcement, the failure to insist that it be mandatory seems an unnecessary sacrifice of environmental interests.96

The provision is designed so as not to place obligations on states; especially the developing ones that may lack the necessary technical and other institutional structures to carry out such obligations under MARPOL 73/78.97 There is however, every incentive for such states as well as the developed ones, to exercise this right of enforcement. This is more so in view of the harm that pollution does to marine life in the EEZ over whose resources these
states enjoy sovereign rights. Besides, a coastal state is under the general obligation to take the necessary measures to protect and preserve the marine environment,\textsuperscript{98} and this includes the requirement to legislate to give effect to international rules.\textsuperscript{99}

Port-state enforcement is quite significant in many respects. As Legatsi states:

Port state jurisdiction may reduce the incentive of coastal states to extend unilaterally their powers over broad areas of the sea. In the past few years, coastal states have sought to widen the geographic reach of their vessel-source pollution control powers in order to protect their coastlines from environmental damage due to vessel activity. Coastal states may be induced to relinquish some of their power by allowing port states to conduct their enforcement proceedings. This relinquishment of enforcement power is largely motivated by safety and economic considerations; coastal states would be able to reduce their policing of coastal waters and the boarding at sea of vessels suspected of violating pollution standards. The port state has an incentive to accept its enforcement role because it may later wish to request similar assistance from other states. Thus it is to the reciprocal advantage of both the coastal state and the port state to assign enforcement powers to the port state.\textsuperscript{100}

The issue is whether this reciprocal advantage is sufficient enough an inducement for states to spend time and scarce resources on the enforcement of violation of pollution regulations occurring in other states jurisdiction. Contrary to doubts expressed on the matter, it appears that states are prepared to do this (as shown by the discussion below). This stems from the awareness of the global nature of marine pollution and the consequent need for international cooperation to combat it.\textsuperscript{101}

MARPOL 73/78 which entered into force in October 1983 has 25 states parties, the combined fleet of which constitutes approximately 67.5 percent of the gross registered tonnage of the world's merchant fleet. These include leading maritime states such
as the United States, the United Kingdom and the Federal Republic of Germany. Even though MARPOL 73/78 does not allow for prosecutions by port-states, the evidence gathered by these states during in-port inspections are to be submitted to coastal or flag states for them to institute proceedings when violations are detected. Several regional agreements dealing with the protection of the marine environment were concluded during the last decade in Europe. Of these, the Helsinki Convention and Bonn Agreement dealing with marine pollution by oil have adopted port-state enforcement.

The Helsinki Convention is a formal and comprehensive intergovernmental arrangement on marine pollution, including both East and West European states. For vessel source pollution, the convention follows MARPOL 73/78 and the relevant IMO recommendations on the subject such as ship reporting system and port-state inspection rights. These have been adopted and largely implemented especially by the Scandinavian countries.

Under the Bonn Agreement, states bordering the North Sea are responsible for surveillance, reporting and combating of oil spills on the basis of geographical zones of responsibility, and for providing mutual assistance when required. To strengthen this Agreement, the parties decided "to turn it into an instrument for a regional 'port state' enforcement system for vessel-source pollution as envisaged in the MARPOL Convention of 1973/78 and the Law of the Sea Convention." The Paris Memorandum of Understanding on Port State Control was concluded in July 1982. During its first year of operation, a total of 8839 vessels from 108 different states were inspected by authorities in the 14 states which signed the
Memorandum. Of the 8839 vessels, 217 had "deficiencies serious enough to result in their being delayed or detained. ... 30 per cent of all deficiencies were found in the life-saving appliances with 17 per cent involving fire fighting equipment."107 Similarly, there are plans to strengthen Canadian-United States cooperation on the subject.108 Thus contrary to fears expressed by certain jurists,109 port-state enforcement is in fact a viable institutional mechanism for dealing with vessel-source pollution.

Port-state enforcement should provide an alternative means of enforcement, especially for developing states that lack the necessary technical and manpower requirements to police the vast expanse of water in the EEZ. This is because many of the vessels that navigate through the EEZ usually call at ports.110 The technical and manpower limitations are not with developing states alone. The cost of regular air and sea patrols is such that many developed states have had to rely almost completely on reports of aircraft and vessels engaged in other duties. Even the United States Coast Guard engages in little surveillance outside the harbours.111 Similarly, Canadian enforcement in the EEZ is limited to the Department of National Defence (DND) surveillance flights.112

Port-state enforcement underlies the global nature of pollution and the need for international means to combat it. For without it, even if a state could eliminate pollution within its EEZ by effective standards and enforcement measures, it could not protect itself from discharges occurring just beyond this zone that are carried landwards by winds and currents.113
Article 220 provides for coastal state enforcement:

When a vessel is voluntarily within a port or at an off-shore terminal of a State, that State may, subject to section 7, institute proceedings in respect of any violation of its laws and regulations adopted in accordance with this Convention or applicable international rules and standards for the prevention, reduction and control of pollution from vessels when the violation has occurred within the exclusive economic zone of that State . . .

This provision like that on port-state enforcement is couched in permissive and not mandatory language. The criticisms and comments on port-state enforcement regime apply mutatis mutandis to this enforcement regime. Coastal-state enforcement involves surveillance, inspections, investigations and prosecutions. Inspections and investigations are to be carried out as is provided for under port-state enforcement.114 Outside its ports and within the zone, the enforcement powers are circumscribed. This is owing to the sui-generis character of the zone which requires that a careful balance be maintained between the interests of coastal states and navigational rights as a whole.

Coastal-state enforcement power in the EEZ is limited to information gathering and inspections, the latter action under stated conditions.115 There must be "clear grounds" for believing that the vessel has violated international rules and standards governing vessel-source pollution. Further, the violation must have resulted in "substantial discharge causing or threatening significant pollution of the marine environment." In addition, inspection is justified only when the vessel has refused to give information or "if the information supplied is at variance with the evident factual situation and if the circumstances of the case justify such inspection."
After inspection, and where violations are established, the coastal state may either await the arrival of the vessel in its ports so as to commence proceedings, or transmit the necessary evidence to the next port of call for necessary action. In this connection, article 220(3) allows the coastal-state to require information regarding the identity and port of registry, the last and next port of call, and other relevant information required to establish whether a violation has occurred. As observed, the Convention requires port-states to act as far as practicable on this request. Flag-states are also to adopt laws and regulations and to take measures to ensure that vessels flying their flags comply with such requests (article 220(4)).

Admittedly, the success of the system depends on cooperation between states, but, as seen above, in view of the global nature of the pollution problem, there is every incentive for states to collectively act against it; and also in fulfilment of their Convention obligations. In addition, coastal states have other stronger powers of enforcement in the EEZ. Where there is "clear objective evidence" that a violation has resulted in "discharge causing a major damage or threat of major damage" to the EEZ or its resources, the coastal state may institute proceedings including detention of the vessel in accordance with its laws (article 220(6)). In this connection, it may exercise the right of hot pursuit. The Convention neither defines "clear grounds," "objective evidence," nor "substantial discharge." Presumably it leaves that for the determination of coastal states. In view of the rights that these states have over the resources of the zone, and in spite of the circumscribed nature of coastal state enforcement powers, there is immense potential for coastal states to determine
these standards in such a manner as to enable them to exercise greater enforcement powers than the Convention's stipulation in the name of resource conservation.117

The Convention also provides for enhanced coastal state enforcement with regard to dumping, rights of intervention, as well as enforcement in "special" and "Arctic areas." At the conference that adopted LDC 72, delegates were unable to agree on specific coastal state jurisdiction over dumping in off-shore areas other than territorial seas.118 Although article VII(1) of LDC 72 provided for enforcement by a state of vessels under its "jurisdiction" believed to be engaged in dumping, this was not viewed by many delegates as extending beyond the territorial seas. Consequently, like MARPOL 73/78, this jurisdictional question was left to be resolved by UNCLOS III. Article 216 of the Convention provides an answer to this jurisdictional problem by providing for coastal state enforcement of this anti-dumping law in the EEZ.119 Article 221, as seen above, also provides for a much broader and enhanced coastal state right of intervention in the event of maritime casualties.

Coastal states, it may be recalled, agreed to forego prescriptive rights in the EEZ in return for the right to enforce internationally agreed standards in the EEZ. However, there are two exceptions to this arrangement, namely enforcement in "special" and "Arctic areas". These as seen above, originated from the "special measure controversy" at the 1973 conference and the "zonal approach" proposal of enforcement presented by a group of coastal states led by Canada at UNCLOS.

Article 211(6)120 on special areas enables coastal states to adopt "special mandatory measures" of enforcement in areas of its
EEZ where international standards are inadequate for "recognized technical reasons in relation to its oceanographical and ecological conditions, as well as its utilization or the protection of its resources and the particular character of its traffic." These measures are subject to prior notification to, and approval by the IMO; and must be duly publicized. Such additional laws may relate to discharges as well as international CEM standards. The provision is an improvement on MARPOL 73/78 which is limited to discharge violations mainly in the Baltic, Gulf and Mediterranean Seas areas.

The requirement to consult with the IMO should not detract from the effectiveness of the provision since the latter is unlikely to disagree with the establishment of such an area when the stated conditions exist. Rather, they must be viewed as a check on coastal states that might act arbitrarily or even capriciously in the name of environmental protection and preservation in the EEZ to the detriment of the freedom of navigation. Provision is also made for enforcement in Arctic areas under article 234 of the Convention. This provision was at the instance of Canada to justify its A.W.P.P.A. (See Chapter IV). Outside these areas, coastal states are limited to the enforcement of IMO standards, which as seen above, thus become the norm or benchmark to which the validity of any national standard may be assessed. As observed, state parties to the Convention would thus have to change, modify or even adopt, as the case may be, their legislation in conformity with these prescribed UNCLOS standards. Consequently, there would be uniformity and consistency in national legislation. This in turn would engender a much more efficient and effective regime of enforcement since, as in the European example, it would be easier
for states to cooperate on the matter. Indeed, reliance on international standards is a highly desirable thing especially in a sui-generis zone such as the EEZ. Abecassis sums up the matter as follows:

First, it is clear that marine-based oil pollution is an international problem, and so should be solved by international agreement. Secondly, unilateral measures can affect fair competition in an open market. For instance, if State A alone enacts that all ships flying her flag shall be fitted with segregated ballast tanks, or oily water separators, or shall comply with other such regulations, such ships will bear economic and operational burdens unknown to ships registered elsewhere. Thirdly, it is most important to shipowners and to personnel aboard that a different set of regulations do not have to be complied with at each different port visited on a voyage. It makes for simpler and more efficient ship management to know exactly where the ship stands legally at any one moment and in any given situation, and uncertainty or confusion over local law can have serious effects.121

Both coastal and port-state enforcement are subject to the "Safeguard" provisions in section 7122 of the Convention. These provide guidelines on enforcement. They are also aimed at protecting international navigation from abuse and thus help ensure that careful balance required between coastal states' rights and navigational interests.

The Convention provides for the observance of the "due process" requirement in proceedings; that enforcement may only be exercised by states' officials, warships, military aircraft, or other ship or air craft marked and identifiable as being on government service; that enforcement should not cause hazard to vessels or their crew; and that a vessel should be promptly released on the posting of a bond. Section 7 also provides, in addition, that states shall not delay a foreign vessel longer than necessary. Inspections as seen
above, are limited generally to those documents required under theIMO Conventions. Furthermore, enforcement is to be exercised in a
non-discriminatory way, and only monetary penalties may be imposed
upon foreign vessels. A three-year period of limitation for
proceedings as well as a "double jeopardy" clause are also provided
for under the safeguard provisions.

The most important and also the most controversial of the
safeguard provisions is the flag-state pre-emption clause. This
provision enables flag-states to suspend proceedings instituted by
coastal or port-states, within six months of the institution of such
proceedings, and to undertake its own proceedings. This provision
must, however, not be viewed as detracting from the effectiveness of
the enforcement regime. The rationale behind the rule is that
before allowing coastal or port-states to take proceedings and
impose penalties on foreign vessels, the flag-state should be given
reasonable opportunity to exercise its enforcement rights and carry
out its obligations which are directly derived from the relation of
the ship to this state.123.

Article 228(1), the relevant provision reads:

Proceedings to impose penalties in respect of any
violation of applicable laws and regulations or
international rules and standards relating to the
prevention, reduction and control of pollution
from vessels committed by a foreign vessel beyond
the territorial sea of the State instituting
proceedings shall be suspended upon the taking of
proceedings to impose penalties in respect of
corresponding charges by the flag State within
six months of the date on which proceedings were
first instituted, unless those proceedings relate
to a case of major damage to the coastal State or
the flag State in question has repeatedly
disregarded its obligations to enforce
effectively the applicable international rules
and standards in respect of violations committed
by its vessels. The flag State shall in due
course make available to the State previously
instituting proceedings a full dossier of the
case and the records of the proceedings, whenever
the flag State has requested the suspension of
proceedings in accordance with this article.
When proceedings instituted by the flag State
have been brought to a conclusion, the suspended
proceedings shall be terminated. Upon payment of
costs incurred in respect of such proceedings, any
bond posted or other financial security provided
in connection with the suspended proceedings
shall be released by the coastal State.

As formulated, the provision is not an immutable precept that
allows flag-states to pre-empt proceedings anyhow. The right of
pre-emption does not apply in the case of "major damage." What
amounts to a major damage is not defined. Hence a coastal state
could deny a flag-state pre-emption rights on the ground that the
polluting vessel's damage amounts to "major damage." Secondly, it
does not apply where a flag-state has repeatedly disregarded its
enforcement obligations. A flag-state that "pre-empts" proceedings
without imposing any sanctions on its vessels could find itself
being denied this right in subsequent proceedings involving its
vessels. This is more so since flag-states are obliged to inform
coastal or port-states of the outcome of such proceedings. Above
all, states parties would have to ensure that their legislation
conform with the Convention's texts. So long as the rules,
especially penalties are uniform, flag-state pre-emption pales into
insignificance.124

The Convention's environmental protection and preservation
provisions are made subject to the "Sovereign immunity" provision
under article 236. The issue of immunity for warships and other
government vessels was not much discussed at UNCLOS III. The
Convention merely follows the example of other pre-existing
conventions125 by granting immunity to such vessels.
The doctrine of immunity of government ships is derived from the wider principle of jurisdictional immunity of sovereign states under traditional international law. It is the immunity of a foreign state from jurisdiction or execution in respect of its maritime property that entitles a state's vessel to immunities while outside its waters. The basis of the rule, it has been said, is the independence, equality, and dignity of states expressed in the maxim *par in parem non habet imperium*. As stated by Lord Atkin in the *Cristina*:

The courts of a country will not implead a . . . sovereign; that is they will not by their process make him, against his will, a party to legal proceedings . . . The second is that they will not by their process . . . seize property which is his or of which he is in possession or control.

For a long time, absolute immunity remained the rule. However, with states entry into commercial or other private law transactions, there developed a theory of restrictive immunity that distinguishes between acts *jure imperii* and acts *jure gestionis*, recognising immunity in the former and denying it in the latter.

The restrictive theory is thus the predominant rule in the contemporary international scene. The Convention follows this trend by providing immunity for warships and other government vessels. Article 236 reads:

The provisions of this Convention regarding the protection and preservation of the marine environment do not apply to any warship, naval auxiliary, other vessels or aircraft owned or operated by a State and used, for the time being, only on government non-commercial service. However, each State shall ensure, by the adoption of appropriate measures not impairing operations or operational capabilities of such vessels or aircraft owned or operated by it, that such vessels or aircraft act in a manner consistent so far as is reasonable and practicable, with this Convention (emphasis added).
Thus, these vessels navigating the zone are immune from the enforcement regime discussed above. A related problem is the identification of such vessels. With regard to warships, naval or auxiliary vessels, there is not likely to be a problem. For, usually such vessels have identification marks. In any case, once established that such vessels are naval vessels of a state, absolute immunity prevails. In the words of Delupis:

it is indeed a well established rule of international law that warships are immune from legal process, execution or other jurisdictional measures of foreign authorities. This immunity applies to the commander and the crew as well as to the ship itself. Thus as the Institute of International Law phrased in its "Stockholm Rules," "warships cannot form the subject of seizure, arrest or detention by any legal means whatsoever or by any jurisdictional process." These rules codify relevant norms with regard to the immunity of warships as accepted in State practice . . . 129

The problem is, however, determining vessels owned or operated by a state and used only on government non-commercial service within the meaning of article 236 above. Stated differently, the problem is how to draw a distinction between acts jure imperii and acts jure gestionis. For as Professor Lauterpacht concludes from a study of the subject, "in a real sense all acts jure gestionis are acts jure imperii . . . in modern conditions, the distinction between acts jure gestionis and acts jure imperii cannot be placed on a sound logical basis."130

The problem is further compounded by state legislation on the matter that fails to provide satisfactory definitions as to what constitutes commercial activity. This is, however, important, for if the plea of immunity is accepted anytime it is raised, the restrictive theory would cease to have any content and trading
relations as to state owned ships would become impossible. Legislatures have thus shifted the determination of the issue to the courts.

An attempt has been made by the House of Lords to provide guidelines on the matter. In the Congreso case, the court said (per Lord Wilberforce) that faced with such a situation:

Under the restrictive theory the court has first to characterise the activity into which the defendant state has entered. Having done this, and (assumedly) found it to be of a commercial, private law, character, it may take the view that contractual breaches or torts, prima facie fall within the same sphere of activity. It should then be for the defendant state to make a case that the act complained of is outside that sphere, and within that of sovereign action.131

In so doing, the existence of a governmental purpose or motive will not convert what would otherwise be an act jure gestionis or an act of private law into one done jure imperii.132 The court then stressed:

Whether State immunity should be granted or not, the court must consider the whole context in which the claim against the State is made, with a view to deciding whether the relevant act(s) on which the claim is based should, in that context, be considered as fairly within an area of activity, trading or commercial or otherwise of a private law character, in which the State has chosen to engage or whether the relevant act(s) should be considered as having been done outside that area and within the sphere of governmental or sovereign activity.133

Thus, a polluting vessel confronted in the EEZ of a coastal state cannot just raise a claim of sovereign immunity on the ground of being on government non-commercial service. The matter would initially have to be determined by the municipal courts of the coastal state with consequent loss of time and expense.134 That in itself is enough to ensure compliance by vessels with the vessel source pollution regulations. Above all, the immunity is from arrest and prosecution and not immunity from liability.135
Consequently, such vessels, be they warships, naval auxiliary or other vessels, or those used on government non-commercial service, are legally bound to observe the vessel-source pollution regulations. Indeed, article 236 provides that states should ensure that such vessels act in a manner consistent with the Convention. The Convention also provides that states shall be liable in the event of default of compliance with obligations concerning the protection and preservation of the marine environment. Provision of immunity under article 236 is no licence to pollute. A coastal state could, through diplomatic or other peaceful means, seek reparation for damage done to its resources or other interests in the EEZ by pollution caused by such vessels. This should lead flag-states to ensure that standards are maintained on their vessels.

Altogether then, the UNCLOS III regime of enforcement is a big improvement on the pre-existing order of flag-state enforcement. For, apart from the merits in the use of international standards, the tripartite scheme of flag, port, and coastal-state enforcement contains sufficient checks and balances to ensure a viable and efficient system of enforcement. The strengthened flag-state enforcement regime together with possible sanctions by port-states should ensure that flag-states maintain standards on their vessels. Further, as the Liberian example shows, the flag of convenience problem in the matter of vessel-source pollution is capable of being surmounted. In any case, the flag of convenience vessels constitute only a small percentage of the existing world fleet.

Coastal state enforcement is admittedly circumscribed, limited largely to information gathering and inspections. However, given the goodwill and cooperation of port and flag-states, the evidence
gathered could form the basis for further enforcement action by these states. The Convention also provides for enhanced intervention rights in the event of maritime casualties in or threatening the zone, as well as the application of LDC 72 throughout the 200 mile zone.

The universal nature of port-state enforcement is a welcome inroad into the enforcement system. For, apart from acting as a check on flag-state enforcement, it should provide a viable alternative basis of enforcement, especially for states that lack the required technical and manpower requirements to police the vast waters of the EEZ. In addition, inspections in port, unlike inspection on the seas, constitutes minimal interference with vessel navigation.

Above all, flag-state pre-emption is not an immutable precept that allows flag-states to act arbitrarily or even capriciously. As formulated, the conditions for its invocation are such as to prevent their abusing it. Similarly, the sovereign immunity provision is no licence for state owned vessels to pollute the zone; it entails liability in the event of pollution damage. The Convention, it is submitted, provides an effective means of fighting vessel-source pollution.
FOOTNOTES - CHAPTER III

1. For background information on the decision to convene UNCLOS III and other related matters, see chapter 1 note 3. The proceedings of the sessions are recorded in "The Third United Nations Conference on the Law of the Sea, Official Records (vols. 1-xiv), (hereinafter referred to as "Off. Recs."]. However, much of the informal proceedings are not recorded. In this section, the works of authors referred to were either participants in or had insight into the proceedings; in particular the following: Gr.T. Timagenis, "International Control of Marine Pollution 577 (Dobbs Ferry, N.Y., 1980); Robert Hage, "Canada and the Law of the Sea", 8 Marine Policy 2 (1984); Stevenson and Oxman's accounts on UNCLOS III in 68 A.J.I.L. 1 (1974).


6. Ibid., art. X.

7. See statement by Mr. Buhl (Denmark), Off. Recs. vol. II, 312.

8. Discussed in Chap. IV, infra.


10. Ibid., art. 3(b).

11. Art. VII 3(b) provided:

   In respect of ship-generated pollution, the laws and regulations of the coastal State shall conform to internationally agreed rules and standards. Where internationally agreed rules and standards are not in existence or are inadequate to meet special circumstances, coastal states may adopt reasonable and non-discriminatory laws and regulations additional to or more stringent than the relevant internationally agreed rules and standards. However, coastal states may apply stricter design and construction standards to vessels navigating in their zones only in respect of waters where such stricter standards are rendered essential by exceptional hazards to navigation or the special vulnerability of the marine environment, in accordance with accepted scientific criteria. States which adopt measures in accordance this sub-paragraph shall notify the competent international organization without delay, which shall notify all interested states about these measures.

12. See art. VIII, Ibid.

13. In the words of the Australian delegate:

   "Australia favoured a zonal approach under which a coastal state would have the right, under
international law, to exercise effective anti-pollution control in a broad zone contiguous to its territorial sea."

Specifically on vessel source pollution, his delegation was of the belief that the matter required the fullest co-operation of both the shipping and coastal interests. Further he stressed:

The total environment would be best protected if shipping was subject to internationally agreed regulations between all interested parties which flag states were obliged to enforce on their own vessels. But, in addition, coastal states must remain able to protect their own environment, including that of the economic zone for which they were responsible, and must therefore be able to enforce the internationally agreed regulations. Considerations of time, evidence and distance made local enforcement essential.

Existing regulations, however, might not always be adequate: the 1973 London Conference on Marine Pollution had itself recommended that intentional pollution be completely eliminated by the end of the decade, thus recognizing the need for stricter international regulations. Since, however, amendment procedures could be slow, the convention currently being drafted must provide for the right of a coastal State, where necessary, to act on its own. ...

For both normal and exceptional cases, a balance must be struck between on the one hand, a coastal state's ability to protect its environment, including that of its economic zone and, on the other, safeguards against unreasonable interference with shipping. Those who gave so much emphasis to the problem of preventing unreasonable interference with shipping and international trade must be prepared to discuss seriously the interest of coastal states in a pollution zone. (Emphasis Added)

See statement by Mr. Petherbridge (Australia), Off. Rec II, 314.
14. See statement by Mr. Warioba (United Republic of Tanzania, Off. Recs. ibid., 320-1. See also statements by New Zealand, ibid., 326; Ecuador 329; Chile 330.

15. Statement by Mr. Braune (German Democratic Republic), Off. Recs. ibid., 311.


17. Hage, supra note 1, at 7.

18. The Liberian delegate said that:

as a developing coastal state his country was fully aware of the problems of marine pollution, while appreciating the tremendous relative cost of anti-pollution measures. As a maritime state Liberia recognized the special responsibility of flag states to support and enforce the highest attainable standards for inclusion in multinational agreements to combat marine pollution.

Such pollution was no longer a local problem: it was a global threat, requiring truly international solutions. In dealing with it, unilaterality would be destructive. Nevertheless, Liberia did not exclude the concept of specially sensitive ecological areas of the oceans requiring special anti-pollution measures, such areas and the special measures to be taken must, however, be determined internationally...

Liberia was not opposed to the concept of a coastal or port state enforcing jurisdiction over marine pollution offences committed outside its territorial waters; but it did believe that the primary responsibility for enforcement lay with the flag state, and that coastal or port state jurisdiction should come into play only in cases when the flag state failed to take action within a reasonable time. If the flag state had in fact initiated action, no other action should be permitted unless and until it had been determined, according to the agreed mechanism for international dispute settlement, that the flag state action was inadequate.

See statement by Mr. Collins (Liberia), Off. Recs. ibid., 314.
19. The Soviet delegation denied the coastal states any enforcement measures beyond the territorial seas. It took the view that:

the 1973 Convention contained adequate provisions for the prevention of pollution from ships. If they were strictly observed, there would be no need for additional measures to be adopted on a national basis; moreover, they should be incorporated in a future convention in such a way as to form the basis for future work by IMCO and by specialized conferences for the formulation of specific technical rules and recommendations for the prevention of pollution from ships. In case of infringement of those rules by foreign vessels, the coastal state should have the right to inform the flag state, or to take appropriate legal or administrative action in accordance with its own legislation. The captain or other officers of the ship should be liable to fines on a non-discriminatory basis. Punishment in the form of deprivation of liberty should be imposed only by the flag State, which would be responsible for informing the coastal state of the measures taken.

A future convention should, of course, also lay down more general obligations for all States to ensure the cleanliness of the seas and oceans of the world. In particular, states should have the obligation to ensure that ships flying their flags refrained from causing marine pollution, and to co-operate with other states and competent international organizations in elaborating and applying more progressive standards.


20. The United Kingdom delegation also expressed fears about possible infringement of navigational rights entailed in increased coastal state jurisdiction. It said:

The United Kingdom had a very extensive coastline and was much exposed to pollution from what was probably the world's busiest shipping lane, the English Channel and the Dover Straits. It therefore needed to be able to protect its shores and waters against marine pollution, like any other coastal State. Indeed, it had been one of the
victims of the largest ship-pollution incident ever known. However, preservation of the right of innocent passage was vital to the United Kingdom, with its dependence on long-distance trade. It was essential and quite possible for the new convention to balance the need to prevent and control pollution with the need to preserve freedom of navigation. The Committee must ensure that the steps it took or the measures it invited states to take should be clearly designed to that effect.

On the specific question of vessel source pollution enforcement the delegation emphasized that:

the interests of all nations were involved and an international approach was best because consistency was needed. As the potential danger of vessel-source pollution had been recognized, the willingness of the flag states to make stricter regulations to control such pollution had increased, culminating in the 1973 International Convention, which went a long way towards eliminating deliberate vessel-source pollution. The combination of firm flag state obligation allied with the arrangements in the 1973 Convention, for inspection in port should enable violations to be discovered and punished without creating additional hazards by interventions outside the territorial sea that could not be justified under the International Convention or an extension of it....

The United Kingdom was pleased that the 1973 Convention embodied the idea of especially vulnerable areas and measures, to be decided internationally. National discharge regulations more stringent than those currently required under the 1973 Convention would in practice have much the same effect as special construction requirements, since a ship had to be built and equipped to meet such requirements.

See statement by Mr. Simms (United Kingdom) Off. Recs., ibid., 322.

21. The group was formed between the first and second sessions of UNCLOS III on the initiative of Jens Evenson, head of the
Norwegian Delegation. See Timagenis, *op. cit supra* note 1, at 585.


23. Introducing the draft on behalf of the sponsors, the United Kingdom delegate said among other things that:

With regard to the effective enforcement of international regulations, his delegation had submitted at the second session proposals which had stressed the primary responsibility of the flag state for ensuring the safety of its ships. It had, however, recognized that in the matter of vessel-source pollution many countries wished to introduce greater enforcement powers for states other than the flag state. In the light of those views and of the fact that many ships passing the coast of the United Kingdom did not call at its ports, his delegation had reached the conclusion that additional enforcement powers would be useful, provided there were sufficient safeguards against abuse.

In practice, enforcement took the form of surveying the ship and issuing it with an international certificate which was normally accepted in ports of countries parties to the relevant convention. The convention, however, also provided for inspection in ports of call in cases where there were grounds for suspecting that a ship or its equipment did not correspond with its certificate. ... United Kingdom authorities had found it difficult to obtain sufficient evidence for successful prosecutions, either at home or abroad. Over the previous five years, it had been possible to link with particular vessels 203 of the 900 spillages occurring off United Kingdom coasts, but there had been only 18 successful prosecutions.

It was therefore clear that the main burden of enforcement action should occur before a ship
committed a violation of pollution provisions, and for that reason his delegation had started from the premise that the flag state was initially responsible for its own ships.

That position was made clear in article 3 of the draft articles. In his country's experience, there was a good deal of cooperation from flag states in the case of ships which had violated regulations inside or outside territorial waters. Vessels did, however, escape prosecution because they passed the coast of the United Kingdom without calling at its ports. In such instances, there would obviously be an advantage in establishing a system of obligations on other states at whose ports such vessels subsequently called. Paragraphs 9-19 of draft article 3 therefore proposed a system of port state inspection and enforcement, and the right of a coastal state to require information from a passing vessel. The coastal state would then have the option of asking, at its choice, either the flag state or the port state to take action. Draft article 3 imposed an obligation on both to comply with the request from the coastal state.

Although such changes in jurisdiction would not be a panacea, he was confident that the system of port state jurisdiction would be of value in the war against pollution by complementing better control by the flag state - provided for in draft article 3, paragraphs 6-8. ... Draft article 3, paragraph 12 proposed that such evidence should be collected at the next port of call, either at the initiative of the port state itself or at the request of a coastal state. Furthermore, in order to assist a coastal state in obtaining the relevant information on which to base such requests, draft article 3, paragraphs 20-22 established its right to require information from any vessel; paragraph 21 imposed an obligation on the flag state to ensure that its ships supplied such information. Some countries were attracted by the idea of empowering coastal states to inspect arrest ships at sea. However, there were practical difficulties in stopping and boarding large ships in a busy sea lane, and any evidence so obtained would be equally available at the next port of call.

Draft article 3 built up a system of enforcement from the initial obligation of the flag state, through port state inspection and enforcement, to the right of the coastal state to require
information from passing ships. Throughout, obligations and rights had been matched by suitable safeguards. It would be noted that the article showed a distinct shift in the United Kingdom position, partly as a result of reassessment of its requirements as coastal state and partly in order to meet the position of many other countries.


24. See statement by Mr. Moore (United States) Off. Recs., ibid., 86.

25. The U.S.S.R. delegate however added that:

in order to reach agreement, it was prepared to accept the proposal in the draft articles for an amplification of that principle by a limited grant of competence to the coastal state over any foreign ship coming into its ports. An essential condition should be the establishment of safeguards against the abuse of power by the port state and the avoidance of unnecessary international complications. In particular the articles should include the flag state's primary right to take proceedings within a fixed period against any persons in breach of the rules; the imposition of only monetary fines for such breaches; the immediate release of the ship on paying a deposit or giving some other guarantee for payment of the fine and full compensation for any damage caused by unjustified measures taken against the ship. ... In that connexion, his delegation had some doubts about article 3, paragraphs 11 and 12 of which enabled the port state to take proceedings against a foreign ship even when it had committed a breach of international rules many hundreds of miles from the coast of any state. ...


26. See statement by Mr. Legault (Canada) Off. Recs., ibid., 86.

27. Ibid.
28. See statement by Mr. Abd Rabon (Egypt) Off. Recs., ibid., 91.
    See also statements by Indonesia, New Zealand and Iran, ibid., 90.
32. See Timagenis, op. cit supra note 1, at 589.
33. Arts 4, 5 and 6 provide:

4. Where internationally agreed rules and standards are not in existence or are inadequate to meet special circumstances and where the coastal state has reasonable grounds for believing that a particular area of the economic zone is an area where, for recognized technical reasons in relation to its oceanographical and ecological conditions its utilization, and the particular character of its traffic, the adoption of special mandatory measures for the prevention of pollution from vessels is required, the coastal state may apply to the competent international organization for the area to be recognized as a "special area". Any such application shall be supported by scientific and technical evidence and shall, where appropriate, include plans for establishing sufficient and suitable land-based reception facilities.

5. Nothing in this Article shall be deemed to affect the establishment by the coastal state of appropriate non-discriminatory laws and regulations for the protection of the marine environment in areas within the economic zone, where particularly severe climatic conditions create obstructions or exceptional hazards to navigation, and where pollution of the marine environment, according to accepted scientific criteria, could cause major harm to or irreversible disturbance of the ecological balance.

6. Laws and regulations established pursuant to the internationally agreed rules and standards referred to in paragraph 4 of this Article, shall
not become applicable in relation to foreign vessels until six months after they have been notified to the competent international organization.

34. Hage, supra note 1, at 8.
35. See M'Gonigle and Zacher, Pollution Politics and International Law 246 (Berkeley, 1979).
36. See Timagenis, op. cit supra note 1, at 589.
38. 16 Int'l Leg. Mat. 1108 (1977).
40. Timagenis, op. cit. supra, note 1. at 593.
42. See statement by Mr. De Iacharriere (France). Off. Recs., Vol. IX, p. 144.
44. Statement by Mr. De Iacharriere supra note 42.
45. Article 221 provides:

   Nothing in this Part shall prejudice the right of states, pursuant to international law, both customary and conventional, to take and enforce measures beyond the territorial sea proportionate to the actual or threatened damage to protect their coastline or related interests, including fishing, from pollution or threat of pollution following upon a maritime casualty or acts relating to such a casualty, which may reasonably
be expected to result in major harmful consequences.
For the purpose of this article, "maritime casualty" means a collision of vessels, stranding or other incident of navigation, or other occurrence on board a vessel or external to it resulting in material damage or imminent threat of material damage to a vessel or cargo.

46. Statement by Committee III Chairman; Off. Recs. VOL. X, p. 97.
47. Timagenis, op. cit. supra note 1, at 596.
49. See Hage, supra note 1, at 7.

51. See Convention, arts. 211, 217, 218, 220.

52. See Meese, supra note 50, at 89.

53. See for example, J.D. Kingham and D.M. McRae, "Competent International Organisations and the Law of the Sea," 3 Marine Policy 106 (1979); Booth, Van Reenen, supra note 50; Timagenis, op.cit. supra note 1 at 610.


56. Ibid., 25.


58. See Chapter II.
59. Under article 35 of the Vienna Convention:

An obligation arises for a third state from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third state expressly accepts that obligation in writing.

Thus a state party that ratifies the Convention, by the very act of ratification, would be "expressly" accepting the vessel source pollution obligations under the IMO rules. See R.R. Churchill, "The role of IMCO in Combating Marine Pollution," in Douglas J. (et al. eds.), The Impact of Marine Pollution 73 (London, 1980).

60. Quoted from W. Van Reneen, supra note 50, at 21.


62. Ibid., 84. The statement is in relation to the ICNT's texts on the subject. These, as seen above, are virtually the same as the Convention's texts.

63. W. Van Reneen, supra note 50, at 15.

64. Ibid., 38-9.

65. To illustrate this point, the next chapter is devoted to an examination of existing Canadian vessel source legislation in the light of UNCLOS III.

66. See supra note 23.

67. See Convention, arts. 217, 228.

68. Bernhardt, supra note 50, at 298.

69. See on this Osieke; Herman; Popp; supra note 50.


72. Chap. II ante.

73. See also Popp, supra note 50, at 9.

74. Art. 217 (8).

75. See M'Gonigle and Zacher, op. cit. supra note 35, at 336.

76. See for example M'Gonigle and Zacher, ibid 244; Osieke supra note 50 at 609; UNCLOS III proceedings.


78. Ibid., 42.

79. Ibid., 48.

80. The Convention on the High Seas entered into force on Sep. 30, 1962. As of January 1963, there were only 25 signatories. Flags of Convenience states like Liberia and Panama did not sign. As of Jan. 1, 1983 there were only 57 signatories (see "Treaties in Force" (1983), compiled by the Office of the Legal Advisor, U.S. Dept. of State. The Convention, as observed, was signed by a record 119 states. So far 10 states including Namibia have ratified it.

Guruswamy, supra note 57, at 716.

83. For example the United States, the United Kingdom, The Federal Republic of Germany, Netherlands and Italy. See IMO Doc. Misc. (84)2.

84. If the "package deal" view of the convention prevails, then non parties may not be able to rely on these provisions. MARPOL 73/78's technical standards would then have to be implemented by these states under the old flag-state regime, which as observed, is ineffective. MARPOL 73/78 provides for inspections in port, however, unlike the Convention, it does not provide for powers of prosecution (see discussion on this below).


88. Although the Convention grants powers of prosecution to both coastal and port states, these are made subject to the "Safeguard" provisions of the Convention. This is discussed below.

89. Art. 25.

90. Art. 218 provides, inter alia, that:

1. When a vessel is voluntarily within a port or at an off-shore terminal of a State, that State may undertake investigations and, where the evidence so warrants, institute proceedings in respect of any discharge from that vessel outside
the internal waters, territorial sea or exclusive economic zone of that State in violation of applicable international rules and standards established through the competent international organization or general diplomatic conference.

2. No proceedings pursuant to paragraph 1 shall be instituted in respect of a discharge violation in the internal waters, territorial sea or exclusive economic zone of another State unless requested by that State, the flag state, or a state damaged or threatened by the discharge violation, or unless the violation has caused or is likely to cause pollution in the internal waters, territorial sea or exclusive economic zone of the state instituting the proceedings.


91. Art. 226.

92. On this, see M'Gonigle and Zacher, op. cit. supra note 35, at 336.

93. Art. 226.

94. Ibid.

95. Ibid.

96. Bernhardt, supra note 50, at 286.

97. See Chapter II, ante.

98. Under article 192, states have the obligation to protect and preserve the marine environment. Art. 194 also provides that:

1. States shall take, individually or jointly as appropriate, all measures consistent with this Convention that are necessary to prevent, reduce and control pollution of the marine environment from any source, using for this purpose the best practicable means at their disposal and in accordance with their capabilities, and they shall
endeavour to harmonize their policies in this connection.

2. States shall take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment, and that pollution arising from incidents or activities under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights in accordance with this Convention.

3. The measures taken pursuant to this Part shall deal with all sources of pollution of the marine environment. These measures shall include, inter alia, those designed to minimize to the fullest possible extent:

(b) Pollution from Vessels, in particular measures for preventing accidents and dealing with emergencies, ensuring the safety of operations at sea, preventing intentional and unintentional discharges, and regulating the design, construction, equipment, operation and manning of vessels;

(c) pollution from installations and devices used in exploration or exploitation of the natural resources of the sea-bed and subsoil, in particular measures for preventing accidents and dealing with emergencies, ensuring the safety of operations at sea, and regulating the design, construction, equipment, operation and manning of such installations or devices;

(d) pollution from other installations and devices operating in the marine environment, in particular measures for preventing accidents and dealing with emergencies, ensuring the safety of operations at sea, and regulating the design, construction, equipment, operation and manning of such installations or devices.

(4) In taking measures to prevent, reduce or control pollution of the marine environment, States shall refrain from unjustifiable interference with activities carried out by other states in the exercise of their rights and in pursuance of their duties in conformity with this Convention.

(5) The measures taken in accordance with this Part shall include those necessary to protect and preserve rare or fragile ecosystems as well as the
habitat of depleted, threatened or endangered species and other forms of marine life.


100. Legatski, supra note 90, at 467.

101. Chap. 1, ante.

102. Chap II, ante.

103. Ibid.

104. These arrangements are as a result of the Stockholm Conference on the Environment and the deliberations at UNCLOS III. The Agreements include the Bonn Agreement for Cooperation in Dealing with the Pollution of the North Sea by Oil (Bonn Agreement), the Oslo Convention for the Prevention of Pollution by Dumping from Ship and Aircraft (Oslo Convention), the Paris Convention for the Prevention of Marine Pollution from Land-based Sources (Paris Convention) and the Helsinki Convention on the Protection of the Marine Environment of the Baltic Sea Area (Helsinki Convention). On these, see Sonia Boehmer-Christiansen, "Marine Pollution control in Europe: regional approaches, 1972-80," 8 Marine Policy 44 (1984). The discussion on the Helsinki Convention and the Bonn Agreement dealing with marine pollution by oil is based on this article.

105. Ibid. 45.

106. The 14 signatories are Belgium, Denmark, Finland, France, the Federal Republic of Germany, Greece, Ireland, Italy, the
Netherlands, Norway, Portugal, Spain, Sweden and the United Kingdom. These states have committed themselves to inspect by July 1, 1985, 25 per cent of the estimated number of foreign flag merchant vessels that enter their respective ports each year. Inspections are carried out on the basis of six IMO Conventions and protocols, and one convention (No. 147) adopted by the International Labour Organization (see Chap. 2). On this, see 4 IMO News 16 (1983).

107. Ibid.

108. See Chap. IV, infra.

109. McDorman, for example, has stated: "Port state enforcement has emerged at UNCLOS III as a compromise between flag state and coastal state enforcement. Although promising much, it adds little to ensure enforcement of international vessel-source pollution regulations." See Ted L. McDorman, "National legislation and Convention obligations: Canadian vessel-source pollution law," 7 Marine Policy 302 (1983), at 308. This certainly is an understatement in view of the European experience above.

110. It is estimated that 96 per cent of vessel traffic in the United States waters call at U.S. ports. See Meese, supra note 50, at 292. Similarly, majority of the vessels navigating through Canadian waters end up in Canadian ports. See M'Gonigle and Zacher, op. cit supra note 35, at 234.

111. Ibid., 332.
112. See Chap. IV, infra.

113. Meese, supra note 50, at 92.

114. Art. 226.

115. Art. 220 (5).

116. Under art. 111(2), the right of hot pursuit shall apply mutatis mutandis to violations in the EEZ.

117. This view might sound revolutionary, but it stems from the rights which coastal states have over living resources in the EEZ. Even though these states are to allow other states to fish in the zone under stated conditions, this discretionary power is not subject to review. Besides, fisheries disputes are not covered by the compulsory dispute settlement procedure (under Part XV of the Convention). A coastal state could couch its anti-pollution actions in the form of resource conservation, thereby excluding the applicability of the compulsory dispute settlement procedure. See Shigeru Oda, "Fisheries under the United Nations Convention on the Law of the Sea", 77 A. J.I.L. 739 (1983), for a discussion of the Convention in relation to Fisheries.

118. See on this Booth, supra note 1, at 225.

119. Art. 216 provides, inter alia that

1. Laws and regulations adopted in accordance with this Convention and applicable international rules and standards established through competent international organizations or diplomatic conference for the prevention, reduction and
control of pollution of the marine environment by dumping shall be enforced:
   (a) by the coastal state with regard to dumping within its territorial sea or its exclusive economic zone or onto its continental shelf;

120. Art. 211(6) and (7) provide that:

6. (a) Where the international rules and standards are inadequate to meet special circumstances and coastal states have reasonable grounds for believing that a particular, clearly defined area of their respective exclusive economic zones is an area where the adoption of special mandatory measures for the prevention of pollution from vessels is required for recognized technical reasons in relation to its oceanographical and ecological conditions, as well as its utilization or the protection of its resources and the particular character of its traffic, the coastal states, after appropriate consultations through the competent international organization with any other states concerned, may, for that area, direct a communication to that organization, submitting scientific and technical evidence in support and information on necessary reception facilities. Within 12 months after receiving such a communication, the organization shall determine whether the conditions in that area correspond to the requirements set out above. If the organization so determines, the coastal states may, for that area, adopt laws and regulations for the prevention, reduction and control of pollution from vessels implementing such international rules and standards or navigational practices as are made applicable, through the organization, for special areas. These laws and regulations shall not become applicable to foreign vessels until 15 months after the submission of the communication to the organization.
   (b) The coastal States shall publish the limits of any such particular, clearly defined area.
   (c) If the coastal states intend to adopt additional laws and regulations for the same area for the prevention, reduction and control of pollution from vessels, they shall, when submitting the aforesaid communication, at the same time notify the organization thereof. Such additional laws and regulations may relate to discharges or
navigational practices but shall not require foreign vessels to observe design, construction, manning or equipment standards other than generally accepted international rules and standards; they shall become applicable to foreign vessels 15 months after the submission of the communication to the organization, provided that the organization agrees within 12 months after the submission of the communication

7. The international rules and standards referred to in this article should include inter alia those relating to prompt notification to coastal states, whose coastline or related interests may be affected by incidents, including maritime casualties, which involve discharges or probability of discharges.


122. Arts. 223-33. See on this, Timagenis, *op. cit.* supra note 1, at 622.


124. See Abecassis, *op. cit.* supra note 85, at 81.


126. Thommen, *ibid.*, 27.


129. Delupis, *supra* note 125, at 55.
130. Lauterpacht, supra note 125, at 224.
131. I Congreso, supra note 125, at 1072.
132. Ibid., 1074.
133. Ibid. The Congreso judgment is quite significant coming as it does, from the highest court of England, on an issue in which English law is said to be in accordance with International law (judgment, ibid., 1072). Besides, the judgment was delivered with due consideration "to foreign courts of authority and writings of reputed publicists." It is thus a source of International law within the meaning of article 38(1)(b) and (d) of the I.C.J. statute. See Brownlie, Basic Documents in International Law 276 (Oxford, 1972).
134. In the event of disagreement with the coastal state's action by the flag state, the matter would have to be resolved under the compulsory dispute settlement procedure (Part XV) of the Convention.
In the preceding chapter, the point was made that states that ratify the Convention would have to take steps to ensure that their enactments on vessel-source pollution conform to the Convention's prescribed standards. This point requires clarification. An enactment which is inconsistent with the Convention's texts may be perfectly valid under the municipal laws of the states concerned; it is at the international level that problems are encountered. States' attitudes towards international norms are determined largely by the standing of international law in the legal system concerned.\(^1\)

Under English law and for those states like Canada that adhere to a large extent to the English tradition on the subject, domestic statutes invariably prevail over international norms in accordance with the doctrine of parliamentary sovereignty. Thus in Mortensen v. Peters,\(^2\) a conviction of a Danish captain of a Norwegian ship for fishing in the Moray Firth was upheld, despite counsel's argument that the conviction was contrary to international law because it involved a claim to jurisdiction over a foreign ship on the high seas. Said the court:

It is a trite observation that there is no such thing as a standard international law extraneous to the domestic law of a Kingdom, to which appeal may be made. International Law, so far as this court is concerned, is the body of doctrine regarding the international rights and duties of States which has been adopted and made part of the law of Scotland...\(^3\)
In these states, customary rules would be considered as part of the law of the land and enforced as such where such rules are not inconsistent with Acts of Parliament. With regard to conventions, however, the courts of these states would enforce them only where these conventions have been implemented or sanctioned by legislation. There could be exceptions in respect of executed treaties or sovereign rights. In *Francis v. The Queen*, the Supreme Court of Canada (per Rand J.) said:

A treaty is primarily an executive act establishing relationships between what are recognized as two or more independent states acting in sovereign capacities; but as will be seen, its implementation may call for both legislative and judicial action. Speaking generally, provisions that give recognition to incidents of sovereignty or deal with matters in exclusively sovereign aspects, do not require legislative confirmation: for example, the recognition of independence, the establishments of boundaries and, in a treaty of peace, the transfer of sovereignty over property, are deemed executed and the treaty becomes the muniment or evidence of the political or proprietary title . . .

Except as to diplomatic status and certain immunities and to beligerent rights, treaty provisions affecting matters within the scope of municipal law, that is, which purport to change existing law or restrict the future action of the Legislature, including, under our Constitution, the participation of the Crown, and in the absence of a constitutional provision declaring the treaty itself to be law of the state, as in the United States, must be supplemented by statutory action.

Hence, since the Convention on the Law of the Sea does not fall within any of the above exceptions and would affect the scope of municipal law, there would be the requirement of domestic legislation in these states to make it binding.

On the other hand, in other jurisdictions with civil law systems, conventions are usually given precedence over domestic legislation; at least over prior, if not later legislation. Some of
these states, such as West Germany, also give customary law this status. In these states, therefore, assuming they have ratified the Convention and it is in force, it could be invoked so as to oust an inconsistent domestic law.

Between the 'nationalist' approach of the English courts and the 'internationalism' of the German courts, is the position of a third group of states; these adopt a position between those of the first two groups of states. In the United States for example, treaties, if they are self-executing, overrule inconsistent prior, but not later, statutes. For, under article 6 of the United States Constitution, "all treaties made or which shall be made, under the Authority of the United States, shall be the supreme law of the land, and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary not withstanding."  

It is, however, the usual practice of courts of all states to construe domestic statutes so as not to conflict with international law. Thus in Post Office v. Estuary Radio Ltd., the English Court of Appeal held that an ambiguity in the order defining British territorial waters should be resolved so as to accord with the provisions of the Territorial Sea Convention.

At the international level, however, international law, (both customary and conventional) prevail over domestic legislation. Pacta sunt servanda is the rule, and a state may not invoke domestic legislation as an excuse for non-fulfilment of its conventional obligations. This point was emphasized by the International Law Commission (ILC) in its article 13 of the Draft Declaration on Rights and Duties of States:

Every State has the duty to carry out in good faith its obligations arising from treaties and
other sources of international law, and it may not invoke provisions in its Constitution or its laws as an excuse for failure to perform its duty.9

The rule now is codified under articles 26 and 27 of the Vienna Convention on the Law of Treaties.10

Canada has signed, but not yet ratified the Law of the Sea Convention. As a signatory, Canada is obliged to refrain from acts which would defeat the object and purpose of the Convention.11 This requirement does not appear to impose an obligation on Canada to alter or review its legislation to ensure conformity with the Convention's texts.12 Assuming Canada were to ratify the Convention, however, it would have to ensure that its vessel-source pollution laws conform to the Convention's text. Canada has not yet claimed an EEZ, it has declared 200 mile Fishery Zones (EFZ).13 The evolution of the present Canadian fishery jurisdiction will now be examined.

Evolution of Canadian EFZ14

Canada has one of the longest coastlines in the world; it is bordered by three oceans and has a long history rooted in the maritime traditions of Western Europe; it therefore has an interest in the rules governing the oceans. Its concern with marine pollution flows naturally from the possession of extensive and actively used coastal areas and the need to protect fisheries and other vital resources and amenities. This concern is heightened by large areas in the Arctic, whose severe climate and fragile ecosystem raise the likelihood of severe pollution damage. Canadian concerns over fisheries, however, goes back much farther than its
marine environmental interests, although the two are directly related.

In spite of its large coastal fisheries, Canada did not join in the expansion of state fishery jurisdiction in the wake of the Truman Proclamation. Its first step in that direction was taken in 1956 when it proposed a retention of the three-mile territorial sea but the addition of nine mile fishing zone to the ILC which was then working on preparatory documents for the First United Nations Conference on the Law of the Sea (UNCLOS I). This position was reiterated at the Conference in 1958. It, however, switched its support to a 'six-plus-six formula' (six mile territorial sea and six mile fishery zone) as the one most likely to command a majority support. This position was maintained at UNCLOS II, where the formula failed to gain acceptance by a narrow margin. Subsequently, Canada mounted a private campaign in pursuit of a sub-global treaty based on the "six-plus-six" formula. Even though this gained the support of some forty states, it failed owing to the United States refusal to back it. Canada then turned to unilateral action in pursuit of its goal.

In 1964, Canada enacted the Territorial Seas and Fishing Zone Act which provided for a three-mile territorial sea plus a nine mile fishery zone; it also authorized the use of straight baselines. The introduction of baselines had the effect of greatly increasing the area of Canadian internal waters. The maritime states understandably opposed this legislation. In any event, the implementation of the legislation was so weak that it had very little impact on the level of foreign fishing off Canadian coasts.
In 1970, by amendment to the Territorial Seas and Fishing Zones Act, Canada extended its territorial sea to 12 miles. Although a unilateral act, more than 60 states had already done so; it was thus compatible with international standards. At the same time, Canada enacted the Arctic Waters Pollution Prevention Act (A.W.P.P.A.) which established a pollution control zone in areas north of the 60th parallel and extending from the coast 100 miles out to sea.

With the convening of UNCLOS III, Canada focused its attention on this international forum as a means of advancing its maritime interests. This began, it may be recalled, in the Sea-bed Committee where Canada championed a functional/custodian cause for coastal States with regard to issues governing living resources in return for their management and conservation. This approach was in tune with the then evolving EEZ which, as noted, had broad acceptance by 1974. Canada also conducted an energetic campaign on the salmon question and secured the inclusion of article 66 on salmon in the Convention. This article puts a virtual ban on high seas salmon fishing and gives recognition to the fact that the responsibility for the conservation and management of salmon stocks rests with the state where the salmon originate.

In the mid-70's, domestic pressure for the implementation of a 200 mile zone in relation to fisheries grew as foreign fleets continued to undermine the viability of coastal fishermen. Canada thus joined in the implementation of the 200 mile fishery zone along the lines more or less agreed on at UNCLOS III in early 1977. This action was accompanied by a series of bilateral negotiations with such states as Norway, Poland, the Soviet Union, Spain, Portugal and France. These states had traditionally fished in what
was to become the Canadian EFZ. Agreements were arrived at under which these states were granted access to the catch that Canadians did not take in the 200 mile-zone in return for those states' acceptance of Canadian extension of jurisdiction. These agreements were arrived at with little difficulty in view of the favourable international trend towards coastal states' rights to the living resources of the sea within 200 miles of their coasts.

The evolution of the Canadian EFZ may thus be seen as part of the general shift in favour of increased coastal state power and authority over the oceans, a process that was greatly accelerated by UNCLOS III. The improved Canadian access to fisheries consequent on the declaration of the EFZ has resulted in an industry whose product value is estimated at some two billion dollars. By 1981, Canada had become the world's largest exporter of fish.

Pollution of the oceans was important in the evolution of the Canadian 200 miles fisheries zone. The concern for fisheries brought with it a concomitant interest in preserving the quality of the marine environment and ensuring that Canada's coastline was not marred by oil pollution. In this, two main incidents were quite significant: the trial run through the Northwest passage of the American vessel, the S.S. Manhattan, to determine the prospect of the use of the passage as a commercial route; and the sinking of the tanker Arrow off the coast of Nova Scotia. These incidents prompted the passage of the two major Canadian pieces of legislation dealing with vessel-source pollution: the Arctic Waters Pollution Prevention Act (A.W.P.P.A.) and Part XX of the Canada Shipping Act (C.S.A.).
The Arctic Waters Pollution Prevention Act

The trial passage of the S.S. Manhattan aroused deep Canadian concern; in particular about its implications for Canadian sovereignty over the Arctic waters as well as about pollution damage to the fragile Arctic environment as a result of such vessel traffic. Rather than legislate a direct sovereignty claim over the zone, the Canadian government adopted the pollution control approach by unanimously enacting A.W.P.P.A. This Act and the regulations made thereunder, it may be recalled, established a 100 nautical mile pollution control zone in waters adjacent to the Canadian coast north of the 60th parallel. The Act put a complete ban on the discharge of wastes including oil in these waters subject to exceptions granted by an order-in-council; it makes violators strictly liable for illegal discharges and the cost of clean up; and it requires vessels in the area to provide satisfactorily evidence of financial ability to the extent of their potential liability. In addition, A.W.P.P.A. provides for the construction, design, and operation of vessels within a framework of sixteen shipping safety control zones (S.S.C.A.). In the absence of contrary evidence, Arctic Waters Pollution Prevention Certificates (A.W.P.P.C.) issued by the Department of Transport annually, constitutes proof of compliance with these regulatory requirements.

Enforcement of the Act is the responsibility of pollution prevention officers who possess extensive power under the Act. They can revoke an A.W.P.P.C. if an inspection of a vessel shows that A.W.P.P.A. requirements are not being met or there is a possible danger of an illegal discharge; prohibit sub-standard vessels from navigating in the Arctic waters; order any ship to participate in a
clean-up operation in the event of spills; board for inspection any vessel within the zone; order a vessel out of the zone, or even seize the vessel and its cargo, although the latter action is subject to confirmation by an order in council.

The Act was passed at a time when pollution control on the high seas was one of flag-state competence. It was thus viewed by many states as contrary to international law. The opposition to it came mainly from the United States which viewed the action, among other things, as an infringement of the freedom of the high seas and one capable of being a precedent in other parts of the world for other unilateral infringement of the freedom of the seas. It called for an international conference to agree on rules dealing with the subject, or failing that, a submission of the dispute for determination by the ICJ. Canada responded with arguments ranging from self-defence to its being the custodian of the seas off its coast on behalf of the international community. In its view, A.W.P.P.A. was a reflection of "the determination of the Canadian Government to fulfill its responsibilities to its own people and to the international community to preserve the ecological balance of Canada and to protect and conserve the living resources of its marine environment." It refused to submit the issue to the ICJ having modified its declaration under article 36 of the Court's statute to decline the latter's compulsory jurisdiction with regard to issues arising out of its anti-pollution measures.

Canada promised to seek internationally accepted rules for Arctic navigation within the framework of A.W.P.P.A. UNCLOS III was, thus, an appropriate forum for Canada to seek international
endorsement for its action. Indeed, the 1970 General Assembly resolution convening UNCLOS III was introduced by the Canadian head of delegation, Alan Beesley. Through intense and skilful diplomatic negotiations at UNCLOS III, Canada secured the inclusion of article 234 of the Convention which is widely acclaimed as legitimizing A.W.P.P.A.31 Section 8, article 234, of the Convention entitled "Ice-covered areas" provides:

Coastal States have the right to adopt and enforce non-discriminatory laws and regulations for the prevention, reduction and control of marine pollution from vessels in ice-covered areas within the limits of the exclusive economic zone, where particularly severe climatic conditions and the presence of ice covering such areas for most of the year create obstructions or exceptional hazards to navigation, and pollution of the marine environment could cause major harm to or irreversible disturbance of the ecological balance. Such laws and regulations shall have due regard to navigation and the protection and preservation of the marine environment based on the best available scientific evidence.

With the inclusion of this article, not only is A.W.P.P.A. legitimized under international law; the article permits, in addition, its extension throughout the entire 200 mile zone, as opposed to the original 100 miles. This is subject to the Convention's sovereign immunity provision.32

Other jurists, however, hold a different view. They concede the fact that since article 234 was drafted with the Canadian legislation in mind, it could be understood to support the Arctic waters legislation. At the same time, they point out that significant interpretative problems exist with article 234, and this might affect the applicable legislative regime in Arctic waters.33 Professor McRae and Mr. Goundrey34 are of the view that article 234 is susceptible to two interpretations: a broad interpretation under which it would be consistent with A.W.P.P.A. and a narrow
interpretation which limits the permissible scope of the article. After an examination of the issue, they conclude that even though article 234 has been hailed as legitimizing A.W.P.P.A., the matter is not free from doubt. Under the broad interpretation of the article, coastal states have the greatest amount of freedom; they can legislate and enforce anti-pollution measures without reference to the usual rules applicable to the jurisdiction of coastal states within the EEZ. Under this interpretation therefore, it would be irrelevant whether the waters concerned constituted an international strait. They argue, however, that under the narrow interpretation of article 234, the legislative and enforcement authority of the coastal state is confined to those matters that are rendered necessary by the conditions referred to in the article such as severe climatic conditions and the presence of ice creating obstructions or exceptional hazards to navigation. To the extent that the marine pollution sought to be prevented or controlled does not result from these conditions, so the argument goes, then the normal rules applicable to the EEZ would apply, including where appropriate, those applicable to international straits.

The view of these jurists is based largely on their analysis of the extent of permissible prescriptive and enforcement powers of the coastal states in the territorial seas, vis-a-vis the EEZ. As they point out, it is unlikely that it was ever intended that the coastal state would have greater power to regulate and control marine pollution within its EEZ than it would have within its territorial sea.

The validity of the above statement is unassailable. It is, however, submitted that it is inapplicable to article 234. This provision must be viewed as existing on its own. It is the end
product of Canadian negotiations of UNCLOS III to obtain international endorsement for A.W.P.P.A., a provision whose interpretation must, therefore, not be encumbered by considerations of the extent or prescriptive powers in the territorial seas vis-à-vis the EEZ. This stand is based on the history of article 234 as well as its location in the environmental provision sections of the Convention.

Article 234, it may be recalled, had its genesis in the "special measure" controversy at the 1973 IMCO conference, and the subsequent "zonal approach" provisions of UNCLOS III. The Informal Single Negotiating Text (SNT) gave recognition to this by simply providing (article 20(5)) for the right of coastal states to legislate special measures in "areas of the economic zone where particularly severe climatic conditions create obstructions or exceptional hazards to navigation." The provision was felt to be so permissive and its wording so vague that many maritime states expressed concern lest it be applied too freely. A specific Arctic exception was thus provided under article 43 of the RSNT under a special heading "ice-covered areas". This was distinct from, and in addition to, what eventually became article 211(6)(a) of the Convention where such special measures taken must be endorsed by the IMO.

The "ice-covered areas" provision of the Convention remained unchanged under the ICNT and appears in the present form as article 234. Thus, although article 234 began as part of the special measure prescriptive regime in the EEZ, the end result of UNCLOS III negotiations has been to place it in a class of its own. Consequently, its interpretation should not be fettered by a consideration of permissible standards in the territorial seas, the
EEZ or even in international straits. Article 234, in other words, may be termed a provision sui generis.

As Pharand points out:

Insofar as the Northwest Passage is concerned, it would seem that, even if it becomes an international strait, the special provision on ice-covered areas (Article 234) would continue to apply. Indeed, Article 234 constitutes a special section (Section 8 of Part XII) by itself. If it had been the intention to apply the legal regime of straits used for international navigations to those lying in ice-covered areas, Section 8 would have been added to the excluded sections specifically mentioned in Article 233. Article 234 stands in a completely independent position and is unaffected by the provisions of standards, enforcement, and safeguards. The article validates Canada's Arctic Waters Pollution Act, both as to standard-setting powers and as to their enforcement.

Needed changes in international law have often been effected through the initiative of interested states. The Truman Proclamation on the Continental Shelf initiated the present regime of the Continental Shelf; Norway introduced the straight baseline concept which was sanctioned in the Anglo-Norwegian Fisheries case; the United States and Canadian Air Defence Zones are also cases in point. Likewise, A.W.P.P.A. may be regarded as giving birth to article 234 of the Convention. Inasmuch as article 234 legitimizes Canada's A.W.P.P.A., there would be no need, upon Canadian ratification of the Convention, to amend it.

The Canada Shipping Act. (C.S.A.)

The other major Canadian vessel-source legislation is part XX of C.S.A. This was enacted in the early 1970's partly as a result of the Manhattan incident but more directly in response to the Arrow oil tanker disaster off the coast of Nova Scotia. Canadian
vessel-source legislation, however, dates as far back as 1956 when section 459A of the C.S.A. was enacted to provide statutory authority for the introduction of the International Convention for the Prevention of Pollution of the Sea by Oil (1954) (OIL PCL 54). Part XX of C.S.A. was thus a further development on the old rules.

Initially, C.S.A. was applicable only in the territorial sea where it placed an absolute ban on vessel discharges. Regulations have also been passed regarding vessel equipment, manning, operation, and construction. Similar enforcement powers along the lines of A.W.P.P.A. have been granted to pollution prevention officers for their enforcement. With the extension of Canadian fisheries jurisdiction to 200 miles, the C.S.A. automatically applied to these waters. Consequently C.S.A. now applies to all Canadian waters south of the 60th parallel, as well as 100 miles from the limits of A.W.P.P.A. north of the 60th parallel.

The zero discharge standard set by C.S.A. was inconsistent with (OIL PCL 54), to which Convention Canada was bound as a party. In view of the possible international opposition from the enforcement of the zero discharge standards outside the territorial seas, Canadian pollution prevention officers were instructed in January 1977 to refrain from exercising the full extent of their powers under the C.S.A. in the Canadian EFZ.

Enforcement of the C.S.A. involves surveillance, inspections, and prosecution of offenders. The Department of National Defence (DND), as part of its fisheries and aerial surveillance program, report polluting incidents to the Coast Guard for necessary action. On the whole, some 5000 hours of aerial surveillance is carried out
annually by the DND over waters frequented by shipping. This is supplemented by some 2000 hours of annual surface surveillance involving patrol craft of the Department of Fisheries and Oceans. These activities have important deterrent effects. In addition, violations are followed up by appropriate investigative and enforcement action (discussed below). Vessel Traffic Management (VTM) systems also monitor vessel compliance with national anti-pollution standards and thereby facilitate enforcement.

On the first arrival of a foreign vessel in a Canadian port, it is inspected for compliance with Canadian standards by steamship inspectors who are also pollution prevention officers, and thereafter, at least once annually. Other foreign vessels are spot checked whenever practicable. Canadian flag vessels are also required to undergo annual and periodic inspection by steamship inspectors to ensure compliance with all applicable anti-pollution standards.

Enforcement action against violators of Canadian anti-pollution standards is carried out in two ways. In the first place, where investigations of a pollution incident reveals an infraction of Canadian laws, the government may choose to prosecute such offenders in Canadian courts. Fines imposed for pollution related offences amounted to about 121,000 dollars in 1978. Secondly, in the case of contravention of OILPOL 54 by a foreign flag vessel, where enforcement of a violation is beyond the jurisdiction of a Canadian court, evidence gathered by Canadian authorities is provided to the flag-state for appropriate enforcement. These violations, as observed, have not been usually enforced by these states. Under the Convention on the Law of the Sea, Canada can, in the exercise of
port-state jurisdiction, punish such violators in its own courts. Alternatively, it could pass on such evidence to the vessel's next port of call for the necessary enforcement action. There is also the Eastern Canada Traffic System (ECAREG), a mandatory ship-movement reporting system. This further enhances in-port enforcement by identifying substandard vessels before they enter Canadian waters.45

The above relates to violations that mainly occur in the territorial seas and for those violations in the EFZ where such ships voluntarily enter Canadian ports. In the EFZ, enforcement of anti-pollution standards based on a permissible discharge rate of 60 litres per mile is carried out mainly by DND surveillance flights. Pictures of polluting vessels encountered during such flights are taken with the high speed cameras mounted on these aircraft. Such evidence is eventually reported through the Department of External Affairs to the flag-state of the ship for necessary action. A limitation of DND surveillance is that it is not operational during dark hours or bad weather when cloud or fog cover makes detection of ship source pollution impossible. There is also the problem of adequate manpower for the policing of the vast expanse of waters. The Canadian pollution prevention officers (Coast Guard) on the West Coast work in close cooperation with their United State's counterparts, especially in the Juan de Fuca Straits.

_C.S.A. and International Standards_

As observed, the total ban on discharges under Part XX of the C.S.A. is inconsistent with OIL POL 54's permissible standards. The latter Convention has been superseded by MAR POL 73/78, which is the norm or benchmark endorsed by UNCLOS III against which national
vessel-source pollution standards may be judged. Compared to MAR POL 73/78, C.S.A. standards are still stringent in many respects. Firstly, C.S.A.'s total prohibition against the discharge of oil conflicts with those permitted by MARPOL 73/78, both as to amount and kinds of oil. Secondly, even though Canada applies international standards with respect to design and construction of foreign ships, it applies more stringent Manning and equipment standards under Part XX of C.S.A. to all vessels navigating the EFZ contrary to the applicable international rules in MAR POL 73/78. Also the powers of pollution prevention officers, particularly those relating to the seizure of ships if exercised in the EFZ would be inconsistent with UNCLOS III's safeguard provisions.

In the light of the above, Canada on ratifying the Convention would have to take measures to ensure C.S.A.'s conformity with MAR POL 73/78. Canada's failure to so act would amount to a breach of international law. Besides, such inaction would be incompatible with the Canadian environmental posture on the international scene.

As McDorman points out, "Canada has expended much diplomatic capital on the environmental regime and such an approach would indicate a lack of good faith in adopting the LOS Convention. Canada's prominent environmentalist profile means that other States will be scrutinizing Canada's response to the obligations and expectations created by the LOS Convention . . . Canada could not argue that its legislation was the "generally accepted" international norm, since the most advanced international vessel-source pollution regulations are in MARPOL, and the Canadian legislation is more stringent than that permitted by MARPOL or
its 1978 protocol . . . (U)nder International law, a State is required to alter its legislation to conform with an accepted international treaty, thus Canada might be in breach of international law in this regard. 47

Canadian Response to the Challenge

The Canadian government is alive to its responsibility on the matter. In order to ensure compatibility of Canada's marine pollution regime with international standards and to formulate appropriate policy and programme options, the government set up an interdepartmental working group in 1978. 48

The working group reviewed all aspects of Canada's current marine pollution control programmes, and the advantages and disadvantages of Canadian participation in international pollution control measures in the light of developments, among other things, at UNCLOS III.

The working group recommended that Canada should ratify MARPOL 73/78 and the 1978 protocol to SOLAS 74. The report in part states:

There are considerable benefits to be derived from accessions to MARPOL '73. A comprehensive international approach offers the most effective long-term methods for dealing with ship-source pollution and with the substandard ships that constitute the major environmental threat. Flag and port state protection to coastal states against convention violators is considerably improved over the previous international regime, and provides additional protection as opposed to a unilateral regime outside the convention framework. It is expected that the great majority of maritime states will accept these Conventions and implement their provisions. Canadian refusal to participate would reduce multilateral flag and port-state enforcement protection. The commonality of standards of a global regime provides for easier and more cost-effective administration and enforcement, particularly with respect to the certification and inspection of shipboard equipment. Finally, participation of contracting states is important
not only with respect to improving the pollution control framework, but also with respect to other maritime interests, such as safety.49 (emphasis added).

This is an affirmation of the impact of IMO rules on pollution prevention on the global scene, rules whose jurisdictional basis are provided for under the Convention.

The Working Group also recommended50 that Canadian ratification of MARPOL be subject to a reservation that would protect Canada's application of higher standards to Arctic waters. This reservation would seem unnecessary in view of article 234 of the Convention.

Another recommendation of the Working Group was that bilateral cooperative arrangements be pursued with the United States in areas of mutual concern dealing with marine pollution. Canadian ratification of MARPOL 73/78 will add a new dimension to Canadian-United States cooperation. The United States is already a party to MARPOL 73/78. Canada's ratification of this Convention will thus provide a common basis of enforcement; this in spite of the United States' refusal to sign the Convention.51

The Working Group also recommended that changes be made to C.S.A. to ensure its conformity with MARPOL 73/78. It observed that any attempt by Canada to apply and exercise enforcement powers authorized under Part XX of C.S.A. in a manner inconsistent with MARPOL 73/78 and UNCLOS III jurisdictional framework would meet with strong international opposition and severe enforcement difficulties. In its view the coastal and port-state enforcement provisions of the Convention together with the discharge limits in MARPOL 73/78 should constitute a satisfactory overall regime against operational ship pollution. Pending the entry into force of the Maritime Code Act,52 and in line with the Working Group's recommendations, a draft
Bill 153 that seeks to make changes of an urgent nature to the C.S.A. that cannot await the adoption and entry into force of the Code has been prepared. These proposed amendments to the C.S.A. would be incorporated into the Maritime Code Act when the latter enters into force.

Proposals under the Draft Bill include: the implementation and adoption of the 1978 protocol to SOLAS 74, thus enabling Canada to become a party to it; updating Part II of C.S.A. to enable Canada to become a party to the 1978 Convention on Standards of Training, Certification and Watchkeeping for Seafarers, but with a reservation with respect to the compulsory knowledge of the English language (in conformity with the spirit of the Official Languages Act); amendment of Part XX of the C.S.A. on design, construction, equipment and operational standards to enable Canada to become a party to MARPOL 73/78 and to implement it). In addition, the Bill would make fully effective the Vessel Traffic Services agreement with the United States for the Juan de Fuca Strait concerning transit of ships to and from U.S. and Canadian ports. 54

The Bill would also extend the powers of pollution prevention officers by permitting them to board vessels in Canadian ports to ensure compliance with MARPOL 73/78; to detain a ship on reasonable and probable grounds for believing an offence has been committed under Part XX by such vessels. This replaces the existing provision for seizure. Admittedly, detention of a vessel with its attendant inconvenience and costs could be an effective means of ensuring compliance with standards; it must, however, be effected with the Convention's safeguard provisions in mind. Under this, a vessel should be released on the posting of a bond.
On the whole, the effect of the Bill, when passed, would be to ensure Canada's compliance with SOLAS 74 and its 1978 protocol, MARPOL 73/78, and STCW 78. These are the most important IMO Conventions dealing with marine pollution.

Article 210 of the Convention on the Law of the Sea requires states to adopt laws and regulations to prevent, reduce and control pollution of the environment by dumping. This is in reference to LDC 72 which Canada signed and ratified in 1975. Canada has implemented LDC 72 through the Ocean Dumping Act, and is thus in compliance with the Convention. With these measures, Canadian compliance with the vessel-source pollution requirements under the Convention would be assured. Canadian ratification of the Convention would thus ensure, especially by way of port-state enforcement, an enhanced enforcement of pollution control measures in the EFZ.

In conclusion, a study of the evolution of the Canadian EFZ and the applicable vessel-source pollution legislation is instructive in several respects. It shows the extent to which a state could go in enacting and enforcing unilateral measures for a global problem such as marine pollution. Even though A.W.P.P.A. was a unilateral action, Canadian efforts to obtain international endorsement for the Act shows that unilateral measures without the acceptance or acquiescence of the international community could be ineffective. Canada succeeded in this at UNCLOS III largely because of its diplomatic skill at the conference and the fact that the Arctic is an area not of much importance navigationally for many states. The successful implementation of the Canadian EFZ in the 70's is also testimony of international acceptability of the idea at the time.
Secondly, unilateral measures are likely to be opposed where they conflict with international standards, especially treaties on the matter. The Canadian unwillingness or inability to enforce the zero discharge standards under the C.S.A. in its EFZ, attests to this. Also, much concession had to be granted to insurers of vessels plying the Arctic waters before A.W.P.P.A. could be implemented.

This shows that in a world of interdependence, states actions are limited by the bonds of permissible tolerance on an issue. Finally, a state that ratifies a Convention such as UNCLOS, cannot use its domestic laws as an excuse for non-compliance of its vessel-source legislation with international standards. Canada has taken steps to ensure compliance of its vessel-source pollution legislation with international standards. Being a state with a strong environmental stature on the international scene, its action would be watched by other states; indeed, it could even be a basis for emulation by these states. Given similar action by other states, which they should take by virtue of a binding obligation under the Law of the Sea Convention (assuming it is in force), there would be consistency and uniformity in national legislations. This would enhance states' cooperation in the war against vessel-source pollution with consequent effectiveness and savings in cost.
FOOTNOTES

Chapter IV


3. I.T.C., ibid, 421.


6. Ibid., 647.


10. Art. 26: Every treaty in force is binding upon the Parties to it and must be performed by them in good faith.  

     Art. 27: A party may not invoke the provisions of its internal law for its failure to perform a treaty. This rule is without prejudice to article 46. Art. 46 makes exceptions "where the violation is manifest and concerned a rule of its internal law of fundamental importance."

11. Art. 18 of the Vienna Convention provides inter alia, that:

A state is obliged to refrain from acts which would defeat the object and purpose of a treaty when:
(a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; . .


13. See Fishing Zones of Canada (Zones 4 and 5) Order, Canada Gazette Part II, Jan 1, 1977. Although Canada has not claimed a full EEZ within the meaning of the Convention, the effect of the Fishery zone and rights to the non-living resources in the shelf enable Canada to obtain substantial EEZ rights under the terms of the Convention. This, however, does not cover other rights such as scientific research and environmental protection and preservation. Even with these, it is arguable that Canada can claim these by virtue of customary international law. See chap. 1, ante.


17. Both pieces of legislation, especially A.W.P.P.A. were, however, opposed by the United States. On A.W.P.P.A., see below .
18. See chap. III ante.


20. Barbara Johnson, supra note note 14, at 87. The practical result of these Agreements, however, was that many of these states were "phased out" of the zone. On the Pacific Coast for example, the Agreements resulted in the phasing out of the Japanese, Koreans and the Soviets. The only state allowed to fish in the zone is Poland, which is limited to Pacific Hake fishing. (Interviews, Fisheries and Oceans, Vancouver).


McDorman, "National legislation and Convention Obligations," supra note 12. This discussion on Canadian vessel source legislation is based on these texts as well as clarifications sought from Canada Coast Guard (Vancouver).


25. See supra note 23.

26. The Act originally imposed absolute liability on shippers. (ss. 6(1) and (1)). Insurers were not willing to insure vessels under those terms. Following consultations with marine underwriters and the international shipping community, the section was modified by a number of sections in the regulations so as to bring the provisions in line with strict liability principles. This was the cause of the delay of the implementation of the Act. See Pharand, The Law of the Sea of the Arctic op. cit supra note 23, at 227.


29. Ibid., 615.

30. The controversy was a field day for legal scholars and commentators. A comprehensive list of the literature on the subject is reproduced in Timagenis, Marine Pollution 50 (Dobbs Ferry, N.Y., 1980).

31. This is the view of such jurists as Pharand, M'Gonigle and Zacher, Robert Hage and Barry Buzan, as well as the Canadian Government.

32. See chap. III, ante.
33. See Ted Mcdorman, National Legislation, supra note 12, at 308.

34. D.M. McRae and D.J. Goundrey, supra note 23.

35. Ibid., 227.

36. Ibid., 221.

37. Chapter III ante; M'Gonigle and Zacher, "Control of Marine Pollution," supra note 23 at 123.


39. But see Henkin, "Arctic Anti-pollution: Does Canada Make - or Break-International Law," 65 A.J.I.L. 131 (1971), esp. 133 where he argues that unlike A.W.P.P.A., such earlier legislation as the Truman Proclamation did not infringe deeply on bona fide interests, "they slowly added up to custom, modifying previous fluid custom."


41. The C.S.A. applies to all Canadian waters and the Fishing Zones, except those areas under the jurisdiction of A.W.P.P.A., and all vessels therein. See Part XX, C.S.A., s. 727 (2).

42. See Doc TP 2937 E, supra note 23 at 3.

43. Ibid., 2-3; interview with Coast Guard (Vancouver)

44. See Chapter II.

45. For details, see: Doc. TP 2937 E, 186.

46. Ibid., 102; See also Chap. III, ante.

47. McDorman, supra note 12, at 309.
48. The Working Group's Report is pub. in Doc. TP 2937 E together with a summary entitled, "Executive Summary of Publication TP2937 "Control of Pollution from Shipping in Waters under Canadian Jurisdiction."

49. Ibid., 10.

50. A set of recommendations based on the Working Group's Report is contained in the "Executive Summary."

51. The Convention prescribes the IMO rules, especially MARPOL 73/78 as the basis of vessel-source pollution enforcement (Chap. III, ante). Consequently, assuming Canada were to ratify the Convention, it will be bound by MARPOL 73/78. The United States is a non-signatory to the Convention, but having ratified MARPOL 73/78 is also bound by it; hence this common basis of enforcement. 

52. The Maritime Code Act (S.C. 1977-78, c. 41) is intended to amend and/or replace the C.S.A. It has been passed by the House of Commons but has not yet been proclaimed in force (see Ted L. McDorman (et al.), op. cit. supra note 23, at 63). It is a comprehensive Act dealing with various aspects of shipping such as vessel registration, certification and flag requirements; mortgages and sale of ships; judicial proceedings; as well as the regulation of shipping for the protection of the environment. The most significant provisions from the enforcement point of view are those allowing for detention, forfeiture and sale of vessels (sections B1, 15-24) for violations under the Code. With regard to marine pollution offences, such powers are inconsistent with
UNCLOS III's safeguard provisions (Chap. III). The provisions are to be amended by the Draft Bill (Doc. TP 4888, Sep. 19, 1983). See below.


54. The agreement was signed in December, 1979. The agreement provides that where Canada enters into a VTS agreement with another state for a specific area, ships en route to ports in that state and transiting Canadian waters but not calling at Canadian ports would be exempted from compliance with Canadian requirements. Such exemptions would be granted on the basis of reciprocity. See Doc. TP 4888, 7.

55. S.C., 1975, c. 55.
CHAPTER V

CONCLUSIONS

The Convention on the Law of the Sea has crystallized the EEZ into an established institution of international law. The zone is neither the high seas nor the territorial seas. It is a zone *sui generis*; a multifunctional zone of jurisdictional competence that allows a two-fold utilization of the seas. It ensures coastal states' sovereignty over the resources in the zone whilst guaranteeing, at the same time, other states the necessary facilities of communication and transit.

In the evolution of the EEZ, concern for fisheries brought with it concomitant interest in preserving the quality of the marine environment. Consequently, the Convention provides for, among others, an enforcement regime against vessel-source pollution as part of the EEZ package. The Convention does not supplant the IMO rules on the matter. It endorses and indeed incorporates them in its provisions. In addition, it provides the much needed jurisdictional framework for the implementation of these rules.

The enforcement of vessel-source pollution, a problem of significant global dimensions, had been left entirely to flag-state competence outside the territorial seas. This was an unsatisfactory arrangement, since coastal-states, who were most often affected by such pollution had no means of enforcement, but had to resort to flag-states who were often unwilling or even unable to do so. Now under the Convention, there has been provided
for in addition, coastal and port-state enforcement in the EEZ. In so doing, the Convention has revolutionized vessel-source pollution enforcement, for the EEZ formerly formed part of the high seas where flag-state competence was the rule.

Contrary to other opinions, it is submitted that the tripartite scheme of flag, port, and coastal-state enforcement contains sufficient checks and balances to ensure a viable and effective system of enforcement. The regime also maintains that careful balance required between coastal states' interests and navigational rights. As the analysis has shown, flag-state pre-emption under the regime is not an immutable precept that allows these states to act arbitrarily or even capriciously to the detriment of the regime. Similarly, the sovereign immunity provision is no licence for state-owned vessels to pollute the zone; it entails liability in the event of pollution damage. Further, as the Canadian legislation shows, states that ratify the Convention would have to ensure conformity of their legislation with the Convention's texts; for *pacta sunt servanda*. This would lead to uniformity and consistency in national legislation, thus enhancing states' cooperation in the war against vessel-source pollution.

The future of the Convention is quite bright, despite United States' opposition. It was signed by some 119 States the very day it was opened for signature. The majority of these were developing states and the Soviet block. In addition, the Convention enjoys widespread Western support. Canada, Japan, and France have all
signed it, whilst the Federal Republic of Germany, the United Kingdom, and Italy are currently assessing their positions. Even if the Convention does not enter into force, it is arguable that its rules on environmental preservation have become customary rules of international law. These rules on vessel-source pollution have been incorporated into many national enactments. This appeal to custom coupled with ratification of MARPOL 73/78, as the United States has done, would appear to enable non-parties to enjoy benefits from the Convention's marine environmental provisions without becoming parties to it. This course of action is, however, inconsistent with the "package deal" nature of the Convention. Besides, as Hage points out, unlike the Convention, customary law offers few effective mechanisms for the resolution of disputes.

The Convention provides an effective and efficient jurisdictional basis for the enforcement of IMO rules. In the pre UNCLOS III era, there were rules without a strong jurisdictional basis for their enforcement. UNCLOS III has provided this much needed jurisdictional basis. What is required now is the political will of states to ratify the agreements and to implement these rules. With that, success in the war against vessel-source pollution in the EEZ is assured.
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