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Presidential Proclamation 7219: Extending the United States' Contiguous Zone—Didn't Someone Say This Had Something to Do with Pollution?

I. INTRODUCTION

On September 2, 1999, President Clinton issued Proclamation No. 7219¹ (hereinafter "Proc. 7219"), which extended the United States' contiguous zone from twelve-miles to twenty-four miles.² In a coinciding White House policy statement on Proc. 7219, the move was touted as "strengthening [the United States'] ability to enforce environmental, customs, and immigration laws at sea by expanding a critical enforcement zone."³ In the statement, Vice President Gore is quoted as saying, "[w]ith this new enforcement tool, we can better protect America's working families against drug trafficking, illegal migration, and threats to our ocean environment. We are putting would-be smugglers and polluters on notice that we will do everything in our power to protect our waters and our shores."⁴

Proc. 7219 was the third presidential proclamation since 1983 to extend an aspect of the United States' control over its coastal waters.⁵ These proclamations illustrate the United States' practice regarding the international law of the sea (hereinafter "LOS"), and shed light on how the United States views the various LOS conventions, as well as existing customary international law on the LOS. This Article analyzes Proc. 7219's impact, if any, on the United States' criminal jurisdiction over

1. Proclamation No. 7219, 64 Fed. Reg. 48,701 (Sept. 28 1999), *reprinted as amended in* Proclamations, 43 U.S.C.A. § 1331 (West 1986 & Supp. 2000) [hereinafter Proc. 7219].

2. Various treaties and commentators define the term "contiguous zone." Note that any belt of ocean adjoining the territorial sea could be considered "contiguous." The pertinent treaty definitions will be discussed *infra*. At this stage, consider one scholarly definition of the term: "a zone of sea contiguous to and beyond the territorial sea in which States have limited powers for the enforcement of customs, fiscal, sanitary and immigration laws." R.R. CHURCHILL & A.V. LOWE, *THE LAW OF THE SEA* 103 (1983).

3. Press Release, Office of the Vice President, Vice President Al Gore Announces New Action to Help and Preserve U.S. Shores and Oceans (Sept. 2, 1999) (on file with author).

4. *Id.*

5. In 1983, President Reagan issued Proclamation No. 5030, declaring the existence of the U.S. exclusive economic zone (hereinafter "EEZ"). Proclamation No. 5030, 48 Fed. Reg. 10,601 (1983) [hereinafter Proc. 5030]. In 1988, he issued Proclamation No. 5928, extending the U.S. territorial sea from three to twelve miles. Proclamation No. 5928, 54 Fed. Reg. 777 (1988), *reprinted in* Proclamations, 43 U.S.C. § 1331 (West 1986 & Supp. 2000) [hereinafter Proc. 5928].

foreign vessel-source pollution⁶ under the Federal Water Pollution Control Act⁷ (hereinafter "FWPCA") seaward of the three-mile territorial sea.⁸ The Article analyzes the FWPCA through the lens of international law, which President Clinton cited as authority for extending the United States' contiguous zone.

Part II outlines the international law development of the contiguous zone and its relationship with state enforcement of pollution regulations and laws within the contiguous zone. Part III lays out the pertinent domestic legislation. Part IV applies the foundation set out in Parts II and III to provide an understanding of the current state of the international LOS from the United States' perspective. It then analyzes the impact of Proc. 7219 on the FWPCA, and concludes it has none. Part V outlines recommendations for amending the FWPCA to incorporate Proc. 7219 and to better reconcile it with international law.

II. INTERNATIONAL LAW DEVELOPMENT

A. *Pre-United Nations Conventions on Law of the Sea: The Contiguous Zone*

From the early seventeenth century until the end of the nineteenth century, the seas "were largely subject to a *"laissez-faire"* regime: beyond the narrow belt of coastal seas [subjected to control by the littoral state⁹], the high seas were open to the free and unrestricted use by

6. The Law of the Sea Convention addresses three main categories of marine pollution: pollution from land-based (including air-borne), seabed, and vessel sources. 1 JOHN W. KINDT, MARINE POLLUTION AND THE LAW OF THE SEA 195-98 (1986).

7. The Federal Water Pollution Control Act Amendments (FWPCA) of 1972, Pub. L. No. 92-500, 86 Stat. 816 (1972).

8. Proc. 5928 extended the U.S. territorial sea from three to twelve miles seaward from the U.S. coast. Included in this proclamation was a disclaimer (a similar one is in Proc. 7219) stating that: "[n]othing in this Proclamation: (a) extends or otherwise alters existing Federal or State law or any jurisdiction, rights, legal interests, or obligations derived therefrom" 54 Fed. Reg. 77, Note 43 U.S.C. § 1331. The effect of Proc. 5928 was to extend the U.S. territorial sea for international law purposes only. Domestic laws referencing the territorial sea would continue to interpret the territorial sea as three miles seaward from the coast, until (or unless) Congress redefined the territorial sea as twelve miles seaward from the coast. This results in a patchwork application of the territorial sea, depending on the context. In some contexts, the territorial sea is defined as three miles. See, e.g., the Federal Water Pollution Control Act, 33 U.S.C. § 1362(8) (1994). In others, the territorial sea is defined as twelve miles. See, e.g., The Antiterrorism and Effective Death Penalty Act of 1996, P.L. No. 104-132, 110 Stat. 1214 (1996). In a third context, the territorial sea is referred to, yet not defined. For problems that may result due to the ill-defined territorial sea, see *United States v. One Big Six Wheel*, 166 F.3d 498 (2d Cir. 1999).

9. In this Article, the term "littoral state" is used to generically define a state bounding an ocean. Distinguish this term from "coastal state," which is a term used in various conventions to denote a state bounding an ocean or sea but with certain applicable rights derived from the respective convention. See, e.g. Convention on the Territorial Sea and Contiguous Zone, Apr. 29, 1958, art. 2, 15 U.S.T. 1606, 516 U.N.T.S. 205 [hereinafter TSC], and Convention on the Law of the Sea, Nov. 16, 1994, 1833 U.N.T.S. 397 [hereinafter LOSC].

all.”¹⁰ The origin of the contiguous zone as a zone of limited control or jurisdiction beyond a state’s sovereign territorial sea has its roots in the divergence from this laissez-faire regime by the United Kingdom’s hovering laws¹¹ and late eighteenth-century United States’ anti-smuggling laws.¹² In 1876, the United Kingdom returned to the laissez-faire regime by recognizing the establishment of the three-mile territorial sea under international law,¹³ and abolishing its anti-smuggling law to conform to this view.¹⁴ Then, until the 1950s, the United Kingdom consistently opposed any sort of extended littoral state control or jurisdiction beyond the three-mile territorial sea, arguing that any further state control into the high seas would be an unnecessary infringement on freedom of navigation.¹⁵

However, by the early 1900s, state practice¹⁶ and scholarly attention began moving forward the idea of a zone of limited jurisdiction or control seaward of the territorial sea, to be exercised by a coastal state.¹⁷ Most of the early attempts to codify the customary international law of the sea were taken by non-governmental learned societies.¹⁸ Masterson argued for the concept by examining the interests at stake in effectuating the contiguous zone concept:

[w]hat interest, if any, is there to be weighed against this tangible interest of the littoral state in protecting its revenue and in maintaining law and order near its coasts? There are no interests of the flag state¹⁹ or any interest of the community of states to be balanced against the interests of the littoral state, secured by the hovering laws.²⁰

10. CHURCHILL & LOWE, *supra* note 2, at 11. See also R.P. Anand, *Winds of Change in the Law of the Sea*, LAW OF THE SEA 37 (R.P. Anand, ed. 1978).

11. See W.E. MASTERSON, JURISDICTION IN MARGINAL SEA WITH SPECIAL REFERENCE TO SMUGGLING 3 (1929).

12. Act of Aug. 4, 1790, § 25, 1 Stat. 627.

13. J.L. BRIERLY, THE LAW OF NATIONS, AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE 205 (Sir Humphrey Waldcock, ed., 6th ed. 1963).

14. CHURCHILL & LOWE, *supra* note 2, at 112.

15. See PHILIP C. JESSUP, THE LAW OF TERRITORIAL WATERS AND MARITIME JURISDICTION 11, 17-18 (1927). In the 1950s the United Kingdom participated and espoused extending to a coastal state’s jurisdiction for limited purposes. See Shigeru Oda, *The Concept of the Contiguous Zone*, 11 AM. J. INT’L L. 135, 140 (1962).

16. Several Latin American states (Argentina, Chile, Ecuador, Honduras, Mexico) as well as Egypt, Latvia, and Norway, had laws enabling their right to police for customs and security purposes only. CHURCHILL & LOWE, *supra* note 2, at 113.

17. See Oda, *supra* note 15, at 148. For an example of learned society consideration and acceptance of the concept, see The Harvard Law School Research in International Law *Draft Convention on the Law of Territorial Waters*, 23 AM. J. INT’L L. 243 (Supp. 1929) [hereinafter *Draft Convention*].

18. CHURCHILL & LOWE, *supra* note 2, at 11.

19. A flag state is the state whose nationality the ship claims.

20. W.E. MASTERSON, JURISDICTION IN THE MARGINAL SEAS WITH SPECIAL REFERENCE TO

This balance concerning the contiguous zone, and other zones of jurisdiction and/or control with shipping interests, is a concept that international law, and this Comment, will return to.

It is necessary to understand what a state could do in this zone to effectuate its jurisdiction or control. Both the American Society of International Law, and the League of Nations, addressed the concept in roughly equal terms while attempting to articulate the international legal status of the high seas and territorial seas. Although neither came to an ultimate conclusion about the types of control or jurisdiction a littoral state could exercise, both addressed the same vessel infractions that could permit a state to take action, as well as the extent of that state action. It is worth examining their efforts to determine how the relationship, if any, between the contiguous zone and pollution, was viewed by those involved in the early efforts to codify the international law of the sea.

In 1929, in preparation for the League of Nations Conference on the Codification of International Law, the Research in International Law of the Harvard Law School²¹ drafted a Convention on The Law of Territorial Waters.²² The draft divided the ocean into two legal environments: territorial waters and high seas.²³ Under the draft, the coastal state was to have sovereignty over its territorial waters, subject to innocent passage by foreign vessels.²⁴ It also provided, in Article 20, for a zone of coastal state "control," analogous to the present-day concept of a contiguous zone.²⁵ Article 20 states that:

The navigation of the high sea is free to all states. On the high sea adjacent to the marginal sea, however, a state may take such measures as may be necessary for the enforcement within its territory or territorial waters of its customs, navigation, sanitary, or police laws or regulations, or for its immediate protection.²⁶

By plain reading, the terms of Article 20 are vague. No maximum permissible distance from the coast is given for littoral state action. Also, the phrase "such measures" would seem to allow intercept of

SMUGGLING (1929), *quoted in* Shigeru Oda, *The Concept of the Contiguous Zone*, 11 INT'L & COMP. L.Q. 131, 136 (1962).

21. *See Draft Convention*, *supra* note 17.

22. *Id.* at 241.

23. *See Draft Convention*, *supra* note 17, arts. 1, 4, at 243. The "territorial waters" were defined as a state's "marginal sea" and internal waters. *Id.* at 244.

24. *Id.*, art. 1 cmt., at 249; *id.* art. 14 cmt., at 244; *id.* at 295.

25. *Id.* art. 20 cmt., at 333-34.

26. *Id.* art. 20, at 245. The categories addressed in Article 20, customs, navigation, sanitation, and security (as noted by the phrase "for its immediate protection"), as well as immigration and fiscal laws, will be addressed repeatedly in international discussions on sources of action allowing states to exercise jurisdiction or control in their contiguous zone.

either an outbound offending vessel having just crossed a territorial sea, or an inbound vessel that would be committing an offense once it arrived in the littoral state's territorial seas. Thus, without delving into the intent of these early efforts, a plain reading interpretation suggests that states would be permitted to act in an indeterminate way for an indeterminate distance on the high seas to enforce certain defined categories of laws that would be offensive if committed within its territorial sea.

The 1930 League of Nations Conference on the Codification of International Law (hereinafter "Hague Conference"), meeting at The Hague, struggled with codification of the territorial sea and contiguous zone.²⁷ Discussions regarding the contiguous zone yielded diverse views over its existence and form, but it ultimately failed as a basis of compromise to bridge the gap between those states that wanted adherence to a three-mile maximum territorial sea and those who wanted a greater breadth. However, the Report of the Conference's Second Committee (Territorial Sea) provides insight into how this conference viewed the nature of the contiguous zone and whether pollution was considered as grounds for state action. The first issue considered by the committee regarding the contiguous zone was the rights of coastal states within the zone. Views diverged on whether a coastal state's enforcement of its customs laws was better served by a collective convention or regional/bilateral instruments, and whether enforcement of security and sanitation laws should be included in the convention.

Pollution is not one of the categories listed as debated in the 1930 Hague Convention²⁸ or the 1929 Harvard Research meeting.²⁹ It appears that the Research did not consider "sanitary" or "sanitation" to include pollution. Brief anecdotal evidence of this is found in the Report of the Second Committee (Territorial Sea) of the Hague Convention.³⁰ The report listed three territorial sea regimes that the Preparatory Committee used to query participating nations about their preference. The third regime provided:

Acceptance of the principle of a zone on the high sea contiguous to the territorial sea in which the Coastal State would be able to exercise the control necessary to prevent, within its territory or territorial sea, the infringement of its Customs or sanitary regulations or interference with its security by foreign vessels, such control not to be exercised

27. See Jesse S. Reeves, *The Codification of the Law of Territorial Waters*, 24 AM. J. INT'L L. 486, 491-94 (1930).

28. See generally Report of the Second Committee (Territorial Sea), Acts of the Conference for the Codification of International Law, League of Nations Doc. C 351(b) 1930V (1930), reprinted in 24 AM. J. INT'L L. 1, 234-58 (Supp. 1930) [hereinafter Second Committee Report].

29. See generally *Draft Convention*, *supra* note 17, at 249-364.

30. See generally Second Committee Report, *supra* note 28.

more than 12 miles from the coast.³¹

Yet only three paragraphs later, the report notes that under this scheme "[s]tates would still be free to make treaties with one another conferring special or general rights in a wider zone—for instance, to prevent pollution of the sea."³² If sanitation laws included pollution, the use of these different terms for pollution would be unnecessary.

Further evidence may be found in treaties in force at the time. One example is the 1925 Pan-American Sanitary Code,³³ which amended an earlier sanitation convention of the same name.³⁴ The subject matter of both these conventions was the prevention of the spread of communicable diseases. Nowhere in either convention is pollution prevention mentioned, either directly or indirectly. This obviously does not preclude the term later expanding to include pollution, as is discussed below. This point is merely offered as evidence that the common meaning of the term sanitary did not encompass pollution in the late 1920s and early 1930s.

The contiguous zone concept, as distinguished from a sovereign territorial sea, gained momentum in the 1920s as the United States began enforcing its prohibition laws and The Hague Conference focused greater attention on the issue.³⁵ After The Hague Conference, states began either claiming their own contiguous zones or dropping their opposition to the contiguous zone.³⁶ Development of the contiguous zone concept continued through the 1950s, and in 1956 the International Law Commission (hereinafter "ILC") codified the concept of "territorial waters."³⁷ The ILC discussions culminated in the First United Nations Convention on the Law of the Sea (hereinafter "UNCLOS I"), held for two months in 1958 in Geneva.³⁸

B. *First United Nations Conference on the Law of the Sea*

UNCLOS I was heavily influenced by the 1930 Hague Convention's articles and the ILC's work. The conference resulted in four conventions (hereinafter "Geneva Conventions") concerning the world's oceans, two of which are pertinent here: the Convention on the High

31. *Id.* at 235.

32. *Id.* at 235-36.

33. Pan-American Sanitary Convention, Nov. 14, 1924, 44 Stat. 2031, 14 U.N.T.S. 185.

34. Pan-American Sanitary Convention, Oct. 14, 1905, 35 Stat. 2094.

35. A.V. Lowe, *The Development of the Concept of the Contiguous Zone*, 52 BRIT. Y.B. INT'L L. 109, 110 (1982).

36. *Id.* at 110-11.

37. See 1949 Y.B. INT'L L. COMM. 43. The development of the contiguous zone is explored further in Section II.B.ii. *infra*.

38. CHURCHILL & LOWE, *supra* note 2, at 13.

Seas, and the Convention on the Territorial Sea and Contiguous Zone.³⁹ These two conventions will be examined to determine how they generally provided for coastal and flag state jurisdiction, specifically with regard to the contiguous zone and pollution.

The balance of jurisdiction generally set in the conventions is fairly straightforward: coastal states have sovereignty over their territorial seas subject to the right of innocent passage and flag states have almost unrestricted jurisdiction on the high seas.⁴⁰

1. CONVENTION ON THE HIGH SEAS

The Convention on the High Seas (hereinafter "HSC") was the first successful attempt to codify the rules of international law pertaining to the high seas.⁴¹ It defines "high seas" as "all parts of the sea that are not included in the territorial sea or in the internal waters of a state."⁴² The HSC reflects then-current international law by recognizing only two *sui generis* bodies of water: the high seas and states' territorial seas and internal waters.

The HSC recognizes a coastal state's right to commence hot pursuit from either its territorial sea or contiguous zone for infractions against the coastal state's laws.⁴³ Pursuit from the contiguous zone is allowed only if the infractions sought to be punished are in "violation of the rights for the protection of which the zone was established."⁴⁴ To give this phrase practical meaning, this provision would allow, for instance, pursuit from the contiguous zone to be executed by the coastal state if the pursuit was to punish an offending ship for violation of the state's fiscal, immigration, sanitary, or customs regulations while that ship was in the state's territorial sea.⁴⁵ This application demonstrates the nature

39. Convention on the High Seas, Apr. 29, 1958, 13 U.S.T. 2312, 450 U.N.T.S. 11 [hereinafter HSC]; Convention on the Territorial Sea and Contiguous Zone, *supra* note 9. The other two conventions were the Convention on the Continental Shelf, Apr. 29, 1958, 15 U.S.T. 471, 499 U.N.T.S. 312 and Convention on Fishing and Conservation of the Living Resources of the High Seas, Apr. 29, 1958, 17 U.S.T. 138, 559 U.N.T.S. 285. It is interesting that, as of 1982, only a quarter of the world's nations accepted the Convention on the Territorial Sea and Contiguous Zone, and half of those were land-locked states. A. Mpazi Sinjela, *Freedom of Transit and The Right of Access for Land-Locked States: The Evolution of Principle and Law*, 12 GA. J. INT'L & COMP. L. 31, 43 n.67 (1982).

40. ERIK JAAP MOLENAAR, COASTAL STATE JURISDICTION OVER VESSEL-SOURCE POLLUTION 46 (1998). UNCLOS II was convened in 1960 for the express purpose of determining a maximum limit to the territorial sea. It failed by one vote to establish a regime allowing a maximum 6-mile territorial sea with a maximum six-mile contiguous fishing zone. DAVID J. ATTARD, THE EXCLUSIVE ECONOMIC ZONE IN INTERNATIONAL LAW 13 (1987).

41. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW, 183-84 n.3 (3d ed. 1979).

42. HSC, *supra* note 39, art. 1, 13 U.S.T. at 2314, 450 U.N.T.S. at 82.

43. *Id.* art. 23, at 2318-19, 94-96.

44. *Id.*

45. HSC, *supra* note 39, art. 24, 13 U.S.T. at 2319, 450 U.N.T.S. at 96.

of the contiguous zone: a zone over which the coastal state may exercise control to prevent or punish infractions of those laws that would be offensive in its territorial sea. Distinguish this from the concept of a state exercising sovereignty within a particular zone: the state may not *punish* an offending ship for violations within the contiguous zone per se. It could, however, *prevent* from entry into its territorial sea an inbound ship conducting what would be infractions of fiscal, immigration, sanitation or customs laws had the ship been in the state's territorial sea. This concept will be addressed further in the context of the Convention on the Territorial Sea and Contiguous Zone and the Law of the Sea Convention.

Aside from acknowledging coastal state rights as just described, the HSC's main purpose is to delineate acceptable vessel action on the high seas,⁴⁶ and to lay out flag state responsibility in the administration of vessels flying its flag on the high seas.⁴⁷ It recognizes the traditional freedoms enjoyed by all states on the high seas, including the freedoms of navigation, fishing, laying submarine cables and pipelines, and overflight.⁴⁸ Every state "has the right to sail ships under its flag on the high seas."⁴⁹ Ships are thus subjected to the flag state's exclusive jurisdiction, except for where treaties or the HSC provide otherwise.⁵⁰

Marine environmental protection was not a significant issue at UNCLOS I.⁵¹ There is no expressed general duty calling for preservation and protection of the marine environment.⁵² The HSC contains two articles regarding pollution, articles 24 and 25.⁵³ Article 24 states that:

46. *E.g., id.* Ships shall fly under the flag of only one state and may not change flags during a voyage (art. 6), piracy defined (art. 15), warships are allowed to approach and board vessels suspected of piracy, slave trading, or if vessel refuses to show its flag, to check if it is the same nationality as the warship (art. 22).

47. *E.g., id.* states shall take measures for its ships to ensure safety at sea (art. 10), in event of collision involving penal or disciplinary responsibility of the master, only the flag state or the state of which that person is a national may institute proceedings (art. 11), states shall require masters of its ships to render assistance to persons and ships as necessary and shall promote establishment and maintenance of adequate and effective search and rescue service (art. 12), states shall adopt effective measures to prevent and punish slave transport (art. 13), states shall co-operate for the repression of piracy (art. 14), States shall draw up regulations to prevent pollution by oil from its ships (art. 24).

48. HSC, *supra* note 39, art. 2, 13 U.S.T. at 2314, 450 U.N.T.S. at 82.

49. *Id.* art. 4, at 2315, 84.

50. *Id.* art. 23, at 2318-19, 95-96. Article 23 provides one exception: in the case of hot pursuit that continues into the high seas after beginning in a coastal State's territorial sea. The 1969 Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties was an example of a treaty exception. *Done* Nov. 29, 1975, 26 U.S.T. 765 (entered into force May 6, 1975).

51. MOLENAAR, *supra* note 40, at 46.

52. Compare this with LOSC, *supra* note 9, art. 192, 1833 U.N.T.S. at 477.

53. HSC, *supra* note 39, arts. 24-25, at 406-07.

“[e]very state shall draw up regulations to prevent pollution of the seas by the discharge of oil from ships and pipelines . . . taking account of existing treaties on the subject.”⁵⁴ This language, taking into account the concept of generally exclusive flag state jurisdiction over ships flying its flag, requires states to enact regulations governing the conduct of ships flying that state’s flag.

The reference to existing treaties is a reference⁵⁵ to the 1954 Convention for the Prevention of Pollution of the Sea by Oil.⁵⁶ This convention, as it stood when the HSC was signed, set up “prohibited zones” where discharges from tankers (and other ships meeting certain criteria) were prohibited. As a general rule, the prohibited zones extended up to fifty miles from the coast. A 1962 amendment expanded the prohibited zones in some cases out to one hundred miles.⁵⁷ It called for the flag state to punish not only oil discharges within fifty or one hundred miles as applicable, but also prohibited larger ships (non-naval ships greater than 20,000 tons) constructed after entry of the amendment into force in 1967 from discharging oil or oily mixtures anywhere in the ocean.⁵⁸

The second pollution provision is Article 25, which requires cooperation with the International Maritime Commission for the prevention of ocean pollution resulting from activities with radioactive materials.⁵⁹ Articles 24 and 25 apparently reflect the two apparent main concerns of the day about marine pollution: oil and nuclear pollution from ships.

Thus, the structure of the HSC allocates near-exclusive jurisdiction over vessels sailing the high seas in the state whose flag the vessel flies, subject to exceptions which open it to universal jurisdiction⁶⁰ or which provide for continuation of hot pursuit started from a coastal state’s territorial sea or contiguous zone.⁶¹ By the provisions of the HSC, states have an express general obligation to prevent marine pollution through

54. HSC, *supra* note 39, art. 24, 13 U.S.T. at 2319, 450 U.N.T.S. at 96.

55. Yoram Dinstein, *Oil Pollution by Ships and Freedom of the High Seas*, 3 J. MAR. L. COMM. 363, 369 (1972).

56. 3 U.S.T. 2989 (1961). The Convention for the Prevention of Pollution of the Sea by Oil has been superseded, as between States that are parties to both, by the International Convention for the Prevention of Pollution from Ships, *done* Nov. 2, 1973, 12 I.L.M. 1319, and Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, 1973, *adopted* Feb. 17, 1978, 17 I.L.M. 546 [hereinafter MARPOL 73/78]. Both the Convention and 1978 Protocol make a single instrument.

57. *E.g.*, the 1962 amendment does not apply to naval vessels, or ships under 150 or 500 tons, depending on their classification by the ‘54 Oil Convention.

58. Dinstein, *supra* note 55, at 367.

59. HSC, *supra* note 39, art. 25, 13 U.S.T. at 2319, 450 U.N.T.S. at 96.

60. For universal prohibition against slave trade, see HSC, *supra* note 39, arts. 13, 22; for universal prohibition against piracy, see *id.*, arts. 14-22, 13 U.S.T. at 2317-18, 450 U.N.T.S. at 90-94.

61. *Id.* art. 23, 13 U.S.T. at 2318-19, 450 U.N.T.S. at 94-96.

regulation of ships flying their flag, while those states also party to the 1954 Oil Pollution Prevention Convention⁶² have a specific obligation to do the same.

2. CONVENTION ON THE TERRITORIAL SEA AND CONTIGUOUS ZONE

The Convention on the Territorial Sea and Contiguous Zone (hereinafter "TSC") codifies international law applicable to the territorial sea and contiguous zone.⁶³ It establishes the coastal state's sovereignty beyond its land territory and into a belt of ocean adjacent to its shore,⁶⁴ and into the airspace over that ocean belt.⁶⁵ The right of innocent passage of foreign vessels through the territorial sea limits this sovereignty.⁶⁶ The principal sections of the TSC include the establishment of the coastal state's sovereignty over the territorial sea, delineation of the territorial sea, to include limits and guidance for designating baselines from which to measure the territorial sea, rules regarding innocent passage, and the contiguous zone.

Article 24 sets the outer limit of a state's contiguous zone at twelve miles from the baseline⁶⁷ and allows states to "exercise the control necessary to: (a) prevent infringement of its customs, fiscal, immigration, or sanitary laws within its . . . territorial sea; [or](b) punish infringement of the above laws . . . committed within its . . . territorial sea."⁶⁸ The TSC makes it clear that the contiguous zone is part of the high seas.⁶⁹

Pertinent to the discussion is 1) the meaning of the term "sanitary;" and 2) whether or not it includes "pollution;" and thus 3) whether the contiguous zone may be used by a coastal state as authority to take action to prevent or punish instances of vessel source marine pollution within its contiguous zone.

The first point has been a topic of some discussion by commentators, and the question remains largely unresolved (except for the United States, which, as discussed in Section IV.C., based a 1970 amendment to the Federal Water Pollution Control Act on authority stemming from an interpretation that "sanitation" laws included "pollution" laws as a sub-

62. Or MARPOL 73/78, *see supra* note 56.

63. *See supra* note 9.

64. TSC, *supra* note 9, art. 1, 15 U.S.T. at 1608, 516 U.N.T.S. at 206.

65. *Id.* art. 2, at 1608, 208.

66. *Id.* art. 14, at 1610, 214.

67. The "baseline" is defined in both TSC, *supra* note 9, art. 3 and LOSC, *supra* note 9, art. 5, as "the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State." Further clarification is provided in LOSC, *supra* note 9, 1833 U.N.T.S. arts. 7-15, at 401-03.

68. *Supra* note 18.

69. TSC, *supra* note 9, art. 24, 15 U.S.T. at 1612, 516 U.N.T.S. at 220-22.

set⁷⁰). One researcher,⁷¹ however, after researching participants' discussions during ILC talks and UNCLOS I in the 1950s, concluded the issue was all but resolved, at least with regards to the ILC talks. In 1951, the ILC rejected a proposal, by a tie vote, to authorize a coastal state in a 200-mile contiguous zone to exercise the restrictions "necessary to prevent the pollution of those waters by fuel oil."⁷² In its final draft articles, submitted to the United Nations in 1956, the ILC made specific mention of the 1954 Convention for the Prevention of Pollution of the Sea by Oil,⁷³ stating that only an international solution could be effective, and unilateral state action would be inadequate. As Wulf says: "[i]n view of Commission's knowledge of the fifty mile prohibited zones established in the 1954 Convention, the twelve mile contiguous zone authorized by the draft article on the contiguous zone would not meet the Commission's view of the threat that oil pollution presented."⁷⁴

Wulf then examined the UNCLOS I preparatory materials. Included in these materials were a compilation of laws and a synoptic table⁷⁵ listing the breadths of members' claimed territorial seas and adjacent zones.⁷⁶ The table listed only two countries which included pollution laws as sanitary laws.⁷⁷ No other materials connected with UNCLOS I equated pollution with sanitation. Wulf concluded that it is doubtful that UNCLOS I intended to equate the two, but rather that it intended to limit sanitary issues to regulations designed to prevent importation of disease.⁷⁸ He notes, however, as evidenced by testimony before the United States Congress after the close of UNCLOS I, it is evident that states found enough flexibility to enact measures to enforce laws in their contiguous zones to protect significant coastal interests.⁷⁹

70. The Water Quality Improvement Act of 1970, P.L. 91-221, 84 Stat. 91 (1970).

71. NORMAN A. WULF, *CONTIGUOUS ZONES FOR POLLUTION CONTROL, AN APPRAISAL UNDER INTERNATIONAL LAW* (SEA GRANT TECHNICAL BULLETIN #13, (1971) (informally published LL.M. thesis, University of Miami School of Law) (in collection of University of Miami Baron Law Library).

72. 1951 INT'L L. COMM. Y.B. 308, *quoted in* WULF, *supra* note 71, at 143.

73. *See supra* note 48.

74. WULF, *supra* note 71, at 145.

75. The synoptic table used by Wulf was actually based on one prepared for use at UNCLOS II. This second table was based on the original, with updates. Wulf assumed that the second table was similar to the first, "with only minor changes not affecting the organization of the original synoptic table." WULF, *supra* note 71, at 149. Synoptic table, U.N. Doc. No. A/CONF.19/4, *reprinted in* Second U.N. Conference on the Law of the Sea Official Records, Annex, at 157, U.N. Doc. No. A/CONF.19/8, U.N. Sales No. 60. V. 6 (1960).

76. WULF, *supra* note 71, at 146-48.

77. *Id.* at 149-50.

78. *Id.* at 138, 142, 154-55.

79. *Id.* at 157-58. Again, he apparently is referring to the U.S. interpretation of "pollution" being included in the "sanitary" category of laws as justification for an amendment to the FWPCA.

This flexibility was the only authority, albeit tenuous, that coastal states had *at that time* to assert greater unilateral protection of their coastal interests. However, as will be discussed, the Exclusive Economic Zone (hereinafter "EEZ") regime gives coastal states' increased authority to ensure protection of their coastal interests through "sovereign rights" and "jurisdiction."⁸⁰ Although this additional authority in the EEZ is still limited because it is tied to international standards, thus limiting unilateral state action, coastal states nonetheless have more power to protect their coastal interests than they did after UNCLOS I. Thus, the stretched interpretation relied upon by the United States is no longer needed.

C. *The Third United Nations Conference on the Law of the Sea & The Law of the Sea Convention*⁸¹

Due in part to the growth within the United Nations of newly independent states, which had no say in negotiating the Geneva Conventions, and increasing concern about overfishing and marine pollution off states' coasts with no real solutions offered by the Geneva Conventions,⁸² the United Nations convened the Third Law of the Sea Conference (hereinafter "UNCLOS III"). It met in ten sessions from 1973 to 1982. The resulting Law of the Sea Convention (hereinafter "LOSC") was the result of an extraordinary process of international diplomacy and efforts.⁸³ The LOSC strikes a balance not only between flag and port states, but also concerns of coastal states about pollution prevention.

Essentially, the substantive portions of the LOSC purport to balance the three types of 'interests': the interest of the flag state to use the seas as a whole for all types of purposes; the interest of a coastal state in respect of the sea-areas adjacent to its coastline; and the interests of the international community as a whole, which to a certain extent coincide with the interest of either a flag state or a coastal state and, in some respects, are opposed to both.⁸⁴

80. See *infra* Part II.C.3.

81. The Second United Nations Conference on the Law of the Sea ("UNCLOS II") convened in 1960 to specifically address the issue of territorial sea breadth. It failed to pass a scheme allowing 6-mile territorial sea with a 6-mile contiguous zone by one vote. ATTARD, *supra* note 40, at 13.

82. CHURCHILL & LOWE, *supra* note 2, at 14. See also, e.g., Congo's general statement, Third U.N. Conference on the Law of the Sea Official Records, 2nd Sess., 28th mtg. ¶ 39-40, U.N. Sales No. E.75.V.3 (1975) [hereinafter UNCLOS III OR].

83. For an idea of the complexity involved, see ROBERT L. FRIEDHEIM, NEGOTIATING THE NEW OCEAN REGIME 4-6 (1993).

84. W. Riphagen, *Dispute Settlement in the 1982 United Nations Convention on the Law of the Sea*, in *The New Law of the Sea. SELECTED AND EDITED PAPERS OF THE ATHENS COLLOQUIUM ON THE LAW OF THE SEA, SEPTEMBER 1982* 218-301 (C.L. Rozakis and C.A. Stephanou, eds.,

The coastal states brought pressure to bear after their pollution concerns were heightened by a new generation of supertankers began transiting off their coasts.⁸⁵ As a coastal state, a state should not need to wait, or rely, on an offending ship calling at a port before acting (in which case it would be acting under its port state jurisdiction); it may now assert its jurisdiction to (or “its control necessary to . . .”) punish or prevent the infraction.⁸⁶

The LOSC opened for signature in 1982, and entered into force in 1994.⁸⁷ On the date it closed for signatures, 155 nations had signed it.⁸⁸ As of January 24, 2001, 135 states have ratified, acceded or succeeded to the LOSC.⁸⁹ The LOSC is acknowledged to be generally declarative of international law, and an “umbrella convention” because *most* of its provisions are *generally* worded, and can thus be made actionable only through specific operative provisions contained in other international agreements or domestic law.⁹⁰ The LOSC divides the ocean into numerous ocean “zones,” *inter alia*: the territorial sea and contiguous zone (covered in LOSC Part II), the exclusive economic zone (LOSC Part V), the continental shelf (LOSC Part VI), and the high seas (LOSC Part VII).⁹¹ Additionally, the LOSC includes an entire section on marine pollution (LOSC Part XII).⁹² A separate section for pollution was created distinct from the other sections addressing specified zones because issues of marine pollution are pertinent in each zone, but covered differently from an enforcement standpoint depending on the zone where the pollution occurred. This Comment looks at the structure of the LOSC in order to discuss the LOSC’s treatment of coastal state criminal jurisdiction over vessel-source pollutions in Part IV.

North-Holland, Elsevier Science Publishers B.V. 1983) as quoted in MOLENAAR, *supra* note 40, at 50.

85. CHURCHILL & LOWE, *supra* note 2, at 2. Such supertankers were built to maximize efficiency as a result of the closure of the Suez Canal during the 1967 Arab-Israeli conflict. *Id.*

86. By plain reading it is this authority as coastal state that the FWCPA/OPA '90 appears to rely upon in the context of vessel source pollution.

87. LOSC, *supra* note 9, at 394. The President has sent the LOSC to the Senate for its advice and consent to accession. See S.TREATY DOC. NO. 103-39 (1994). The status of the LOSC from the U.S. perspective is presented in Part III.B.

88. Table showing the current status of the United Nations Convention on the Law of the Sea and of the Agreement Relating to the Implementation of Part XI of the Convention, at <http://www.uh.org/Depts/los/los94st.htm> (last updated Jan. 24, 2001).

89. MOLENAAR, *supra* note 40, Annex 3.

90. United Nations, *Report of the Secretary-General, Oceans and the Law of the Sea: Impact of the Entry into Force of the 1982 United Nations' Convention on the Law of the Sea on Related Existing and Proposed Instruments and Programmes*, ¶12, U.N. Doc. No. A/52/491 (1997) (hereinafter *UN Impact Report*).

91. LOSC, *supra* note 9.

92. *Id.*

1. THE TERRITORIAL SEA

After UNCLOS I and II failed to fix the maximum breadth of a state's territorial sea, UNCLOS III adopted twelve miles as the maximum territorial sea breadth.⁹³ Like the TSC, the LOSC provided that coastal state sovereignty extends over the territorial sea and extends to the airspace over it and the bed and subsoil below it.⁹⁴ In this zone, coastal states exercise full legislative and enforcement jurisdiction to the extent that they does not affect foreign vessels' right to innocent passage.⁹⁵ Willful and serious acts of pollution contrary to the LOSC are considered prejudicial to the peace, good order, and security of the coastal state if done within the territorial sea.⁹⁶ This does not include acts of pollution done by the vessel outside a territorial sea that then affects (e.g., drifts into) the territorial sea.⁹⁷ Thus, the LOSC allows

93. LOSC, *supra* note 9, art. 3, 1833 U.N.T.S. at 400.

94. *Id.* art. 2 at 409. It is appropriate to briefly mention a fundamental difference between the LOSC and the '58 Geneva conventions. The '58 Geneva conventions codified accepted international law at that time, and left unsettled what was still unaccepted. ANAND, *supra* note 10, at 6. The TSC, HSC, and Convention on the Continental Shelf were based in large measure on customary international law. CHURCHILL & LOWE, *supra* note 2, at 13. In effect, at least these three of the '58 conventions were legal instruments. The LOSC went beyond the scope of the '58 conventions. Indeed, it had to. The laissez-faire regime embodied in the international law of the sea until UNCLOS III no longer served the interests of international justice. See ANAND, *supra* note 10 at 46; Thomas A. Clingan, *Legal Issues of Navigation*, PROCEEDINGS, MOSCOW SYMPOSIUM ON THE LAW OF THE SEA II (1988). The LOSC was still a legal instrument, but also a political document, declaring the rule of law as agreed by international consensus. See Bernard H. Oxman, *Summary of the Law of the Sea Convention*, in LAW OF THE SEA, U.S. POLICY DILEMMA 24 (Bernard H. Oxman, David D. Caron, Charles L.O. Buden eds., 1983). As such, it contains elements of both a law-making and codification document. See MOLENAAR, *supra* note 40, at 50.

The process also enhanced the possibility of acceptance by the majority of state governments, by offering something for everyone, including, e.g., land-locked states with no coast, maritime powers that were concerned about the increasing trend of creeping jurisdiction into the high sea seas by coastal states, and developing states that would receive a share of economic bounty beyond national jurisdiction. See James E. Bailey III, Comment, *The Exclusive Economic Zone: Its Development and Future in International and Domestic Law*, 45 LA. L. REV. 1269, 1269 (1985); David L. Larson, *Naval Weaponry and the Law of the Sea*, 19 PROC. L. SEA. INST. 41, 42 (1987).

The LOSC particularly impacted the understanding of state sovereignty. It limited sovereignty by creating a peaceful dispute settlement system as an integral part of the Convention, subjecting sovereign rights over resources to the duty of conservation and environmental protection, and imposing a duty to cooperate on the environment, marine scientific research, and technology. It transformed sovereignty by disaggregating sovereignty into a bundle of rights on a scale from "sovereignty" to "jurisdiction" to "control" [even to a greater extent than the Geneva conventions]. And it transcended sovereignty by declaring the Common heritage of mankind the seabed beyond national jurisdiction, in effect bestowing Sovereign rights on mankind as a whole: "The ultimate transcendence of the concept of the Sovereign State." Elisabeth Mann Borgese, *Ocean Governance: Strategies and Approaches for the 21st Century*, 28 PROC. L. SEA INST. 35 (Thomas A. Mensah, ed. 1994).

95. LOSC, *supra* note 9, Part II, sect. 3, 1833 U.N.T.S. at 404-10.

96. *Id.* art. 19(2), at 404-05.

97. Because the language of LOSC art. 19(2) states that such behavior is prejudicial "if in the

coastal state legislative and enforcement jurisdiction to proscribe and regulate acts of pollution done within its territorial sea, provided it does not infringe on innocent passage, which by definition does not include acts of willful and serious pollution.

2. THE CONTIGUOUS ZONE

The wording of LOSC Article 33, which defines the contiguous zone, is an almost verbatim of that of TSC Article 24.⁹⁸ At the time of the LOSC signing in 1982, the concept of the contiguous zone had become firmly entrenched in the international law of the sea.⁹⁹ Like the definition in the TSC, the LOSC definition does not include an explicit grant of pollution control or jurisdiction to the coastal state.¹⁰⁰ Also, the contiguous zone must be declared.¹⁰¹

Article 33(1) provides that within its contiguous zone, coastal states may exercise that control necessary to prevent infringement of the coastal state's customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea, or punish infringement of those laws and regulations committed within its territory or territorial sea.¹⁰² The distinction between "prevent" and "punish" reflects the difference between inbound and outbound ships, respectively.¹⁰³ By its plain language, under the LOSC, a coastal state may not exercise enforcement jurisdiction over infractions committed within the contiguous zone itself,¹⁰⁴ unless, 1) an inbound ship acts contrary to a state's fiscal, immigration, sanitary, or customs laws while in the contiguous zone and 2) the act would be unlawful in the state's territorial sea, or would affect the coastal state's territorial sea, or an outbound ship located in the contiguous zone violated those laws while transiting through the territorial sea.¹⁰⁵ The question here once again turns on the issue of whether the word sanitary includes pollution in the context of

territorial sea," a ship engages in "an act of wilful and serious pollution." *Id.* This does not preclude the Coastal State from taking action against an offending ship. *See id.* art. 220, at 488-89 and *infra* Part II.C.3.

98. Compare LOSC, *supra* note 9, art. 33, 1833 U.N.T.S. at 409 with TSC, *supra* note 9, art. 2, 15 U.S.T. at 1609, 516 U.N.T.S. at 208.

99. This statement does not reflect the debate at UNCLOS III over the continuing need for the contiguous zone with the advent of the EEZ. *See, e.g.,* UNCLOS III OR, *supra* note 82, 2nd Sess, 9th mtg., ¶ 2-32.

100. LOSC, *supra* note 9, art. 33, 1833 U.N.T.S. at 409.

101. Compare *id.* art. 2, at 400 (using declaratory language that a state's sovereignty extends to a territorial sea) with *id.* art. 33 at 409 (using permissive language that a state may exercise control in a contiguous zone).

102. *Id.*

103. MOLENAAR, *supra* note 40, at 276.

104. *Id.*

105. *See* LOSC, *supra* note 9, art. 2, 1833 U.N.T.S. at 400.

the LOSC. Again, as with the TSC, it most likely does not. As developed below, the coastal state is granted express jurisdiction over the protection and preservation of the marine environment in the EEZ.¹⁰⁶ The contiguous zone regime therefore appears irrelevant for coastal state jurisdiction over vessel-source pollution.¹⁰⁷ The weight of state practice seems to confirm this view.¹⁰⁸

3. THE EXCLUSIVE ECONOMIC ZONE & PROTECTION AND PRESERVATION OF THE MARINE ENVIRONMENT

LOSC Part V, encompassing Articles 55-75, deals with the EEZ.¹⁰⁹ LOSC Part XII, encompassing Articles 192-237, deals with the Protection and Preservation of the Marine Environment.¹¹⁰ In dealing with marine pollution in the EEZ, these two Parts of the LOSC must be looked at together. The LOSC grants every coastal state the right to establish an EEZ seaward of its territorial sea and extending out to a maximum of 200 miles from its baseline.¹¹¹ Two "separate sets of rights" exist in the EEZ: 1) those granted to the coastal state; and 2) those enjoyed by all other nations.¹¹² The division is by activity, not by zone or ship.¹¹³

Article 56(1) provides a summary of the coastal states rights and jurisdiction within the EEZ.¹¹⁴ In Article 56(1)(a), the coastal state is granted *sovereign rights* over exploration, exploitation, conservation, and management over living and non-living resources.¹¹⁵ It thus vests management and control of virtually all economically oriented activities within the zone in the coastal state.¹¹⁶ Article 56(1)(b) changes the terminology regarding the action the coastal state may exercise: it grants "*jurisdiction* as provided for in the relevant provisions of [the LOSC] with regard to . . . the protection and preservation of the marine environment."¹¹⁷ The "relevant provisions" phrase points one to Part XII of the LOSC, "Protection and Preservation of the Marine Environment."¹¹⁸

In Part XII, Articles 193 and 194 expressly charge all states with a

106. *Id.* art. 56(1)(b), at 418.

107. MOLENAAR, *supra* note 40, at 281.

108. *Id.*

109. LOSC, *supra* note 9, arts. 55-75, 1833 U.N.T.S. at 418-28.

110. *Id.* arts. 192-237, at 477-96.

111. *Id.* art. 57.

112. Oxman, *supra* note 94, at 147, 153.

113. *Id.*

114. ATTARD, *supra* note 40, at 46.

115. LOSC, *supra* note 9, art. 56, at 418.

116. ATTARD, *supra* note 40, at 46.

117. *Id.* at 485 (emphasis added).

118. LOSC, *supra* note 9, Part XII, 1833 U.N.T.S. at 477-94.

general duty to prevent and control marine pollution.¹¹⁹ Articles 211 and 220 apply to *coastal* state action towards vessel source pollution.¹²⁰ Article 211 delineates action states may take to reduce and control pollution from vessels.¹²¹ It also reflects a balance between coastal and maritime state interests by allowing coastal states the discretion to enact domestic laws and regulations to control vessel pollution through the exercise of the coastal state's sovereignty within its territorial sea. Article 211 also allows coastal states to adopt laws and regulations with regard to its EEZ, but limits the maximum scope of those laws to those "giving effect to generally accepted international rules and standards established through the competent international organization or general diplomatic conference."¹²²

Article 220 delineates the permitted enforcement measures.¹²³ Article 220(2) allows the coastal state to enforce its national laws against a foreign ship causing a pollution incident in its territorial sea.¹²⁴ For discharges in the EEZ, Article 220, subsections (3), (5), and (6), sets up a sliding scale that allows the coastal state to intervene to an increasing degree in the offending ship's transit depending on how severe a pollution discharge is.¹²⁵

For example, Article 220(3) allows the coastal state to require a vessel to give information regarding its identity and port of registry, its destination, and any other relevant information to establish whether a violation has occurred.¹²⁶ Article 220(6) provides that a coastal state has "the right to board, inspect, and when there is a threat of major damage, arrest a merchant ship suspected of discharging pollutants in the zone in violation of internationally approved standards."¹²⁷ This right is subject to substantial safeguards to protect shippers, outlined in Part XII, section 7.¹²⁸ For instance, states may not delay a foreign vessel longer than necessary for investigations;¹²⁹ even if an investigation of the ship indicates a violation, it must be released promptly on a reasonable bond.¹³⁰

Article 220 echoes the division seen in Article 211 regarding the

119. *Id.* arts. 193-94, at 478-79.

120. *Id.* arts. 211 & 220, at 483-85, 488-89.

121. *Id.* art. 211, at 483-85.

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. Oxman, *supra* note 94, at 154. The phrase "internationally approved standards" is a reference to MARPOL 73/78, *supra* note 56. UN Impact Report, *supra* note 90, ¶ 28.

128. Oxman, *supra* note 94, at 154.

129. LOSC, *supra* note 9, art. 226, 1833 U.N.T.S. at 491.

130. *Id.* See also Oxman, *supra* note 94, at 154.

scope of vessel-source pollution control laws that the coastal state may enact. Coastal states, with respect to violations within their territorial sea, may enforce *either* their national laws, or "violations of international rules and standards for the prevention, reduction, and control of pollution from vessels or laws and regulations of that state conforming to and giving effect to such rules and standards."¹³¹ On the other hand, for discharges within the coastal state's EEZ, the state may only enforce the international standards.

The phrase "competent international organization" is a reference to the International Maritime Organization (hereinafter "IMO"), a United Nations agency which deals with international shipping.¹³² The phrases "generally accepted international rules and standards" and "internationally approved standards" refer to the International Convention for the Prevention of Pollution from Ships and the Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, 1973 (hereinafter "MARPOL 73/78"),¹³³ or regional conventions drafted under the authority of MARPOL 73/78.¹³⁴ The original 1973 convention and the 1978 protocol are to be read together as a single instrument.¹³⁵ MARPOL 73/78 superseded the 1954 Oil Pollution Prevention Convention¹³⁶ for states that are parties to both, and requires that larger ships not discharge oil, inter alia, fifty miles of land and that smaller ships only discharge oil seaward of twelve miles from land.¹³⁷ Because UNCLOS III was being negotiated at the signing of MARPOL 73/78, Article 9(3) of MARPOL 73/78 gave an evolving meaning to the term "jurisdiction." Article 9(3) states that jurisdiction "shall be construed in the light of international law in force at the time of application or interpretation of [MARPOL 73/78]."¹³⁸ This foresight allows MARPOL 73/78 to be seamlessly integrated into the "umbrella" LOSC; note that LOSC Article 56(1)(b) uses the term "jurisdiction" when referring to the scope of authority the coastal state may exercise within its EEZ.¹³⁹

Article 58 provides a convenient summary of the rights of all other

131. *Id.* art. 220, at 488-89.

132. *United Nations, Report of the Secretary-General, Oceans and the Law of the Sea*, ¶ 305, U.N. Doc. No. A/52/487 (1997).

133. *UN Impact Report*, *supra* note 90, ¶ 28.

134. MARPOL 73/78, *supra* note 56.

135. *Id.* 1978 Protocol, art. 1.2.

136. *See supra* note 48.

137. This is an oversimplified characterization of MARPOL 73/78. MARPOL 73/78 contains five detailed and technical annexes to regulate various forms of potential vessel pollutants: oil (Annex I), noxious liquid substances in bulk (Annex II), harmful substances carried by sea in packaged forms (Annex III), sewage (Annex IV), and garbage (Annex V).

138. MARPOL 73/78, *supra* note 56.

139. LOSC, *supra* note 9, art. 56, 1833 U.N.T.S. at 418.

states within a coastal state's EEZ.¹⁴⁰ These rights include inter alia the freedoms of the high seas of navigation and overflight, and to lay submarine cables and pipelines.¹⁴¹ It explicitly refers to Article 87, which lists the freedoms exercised by all states on the high seas, but leaves some of those freedoms out in regards to the freedoms states may exercise in another state's EEZ.¹⁴² The reference to Article 87 would seem to indicate the drafters' intention to equate the quality of freedoms on the high seas to the freedoms allowed in EEZs.¹⁴³

One of the difficult compromises at UNCLOS III was this accommodation between the rights of a coastal state within its EEZ with those of other states on the high seas.¹⁴⁴ This accommodation may be seen in (1) the Article 220 sliding scale; (2) the limits on application of coastal state enforcement of their domestic laws to its territorial sea, and allowing only enforcement of domestic laws based on MARPOL 73/78 (or regional conventions drafted in accordance with MARPOL 73/78) within its EEZ as provided in Articles 211 and 220; and (3) the safeguard provisions of Part XII, section 7.¹⁴⁵

There was concern over the EEZ's effect on the traditional freedoms enjoyed on the high seas, which threatened maritime states' interests; such states objected to any potential limit on their use of the high seas.¹⁴⁶ This arose out the disagreement over the juridical nature of the EEZ.¹⁴⁷ Was the EEZ an extension of the coastal state territorial sea, part of the high seas in which the coastal state enjoyed enhanced rights over resources and jurisdiction over maritime pollution tools and maritime research, or a sui generis zone, of new and unique legal rules? The majority view was that it was a sui generis zone, having its own legal regime, and thus breaking with the juridical structure developed at UNCLOS I, which provided merely for states' territorial seas and the

140. Compare *id.* art. 58, at 419 (summarizing rights of other states within a coastal state's EEZ) with *id.* art. 56, at 418 (summarizing a coastal state's rights within its own EEZ). See also *supra* note 113, and accompanying text.

141. *Id.*

142. LOSC, *supra* note 9, art. 87, 1833 U.N.T.S. at 432-33.

143. ATTARD, *supra* note 40, at 63.

144. *Id.* at 71. For the freedoms as laid out in the HSC, *supra* note 39, see art. 2. The LOSC lays out the freedoms at art. 87. The freedoms are open ended, and not exhaustive, and include: freedom of navigation, freedom of overflight, freedom to lay submarine cables and pipelines; freedom to construct artificial islands and other installations permitted under international law, freedom of fishing, and freedom of scientific research. The last four freedoms are subject to other provisions in the LOSC. LOSC, *supra* note 9, art. 87, 1833 U.N.T.S. at 432-43.

145. E.g., coastal states investigating a foreign ship for pollution infractions shall not delay the vessel any longer than is essential for the investigation (art. 226); there are restrictions on instituting proceedings against a vessel (art. 228); and a requirement to notify the flag state (art. 231). *Id.* arts. 226, 228, 231, at 491-93.

146. ATTARD, *supra* note 40, at 73.

147. *Id.*

high seas.¹⁴⁸

D. *The Exclusive Economic Zone and Customary International Law*

Customary international law becomes established as international law by a custom of general state practice that is followed out of a perceived legal obligation (termed "opinio juris").¹⁴⁹ Therefore, it is possible for states to follow a general practice, but not follow that practice *as a result of* a perceived legal obligation, i.e., opinio juris is not yet present. In this case, the practice would not have the status of customary international law. However, once the practice is followed out of a perceived legal obligation, it would attain the status of customary international law.

Of course, the 1994 entry into force of the LOSC provides the obvious evidence that the concept of the EEZ has entered into international law, at least among states who are parties. However, the status of the EEZ in customary international law is important to determining the applicability of the EEZ regime towards states that are not parties.¹⁵⁰ Even before the LOSC came into force, judicial decisions and commentators, looking at state practice that resulted from UNCLOS III negotiations, lent strong support to the idea that one of the basic concepts behind the EEZ, that is, coastal state has sovereign rights over living marine resources while foreign ships may exercise freedom of navigation, had entered into customary international law by the late 1980s.¹⁵¹ For instance, in 1982, the International Court of Justice, and in 1984, a Chamber of the Court, in fact declared that the EEZ concept had become a part of customary international law.¹⁵² Again, these decisions were before the LOSC came into force. Now that it has entered into force, at

148. ATTARD, *supra* note 40, at 62.

149. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987) [hereinafter RESTATEMENT (THIRD)].

150. One article argues that signing of the Agreement Relating to the Implementation of Part XI of the LOSC and the subsequent wave of states becoming party to the LOSC, caused the whole of the LOSC to "instantly" enter into customary international law. L. Carr & Gary L. Scott, *Multilateral Treaties and the Environment: A Case Study in the Formation of Customary International Law*, 27 DENV. J. INT'L L. & POL'Y. 313 (1999). Three conditions must be met: (1) a sufficient number of states in the international system must accept the treaty (2) a significant number of states whose interests are substantially affected by the treaty are parties to the treaty, (3) the treaty does not allow reservations. *Id.* at 314. Note that with regards to condition (2), unanimity is not required, a mere "high degree of consensus" will do. *Id.* at 331.

151. ATTARD, *supra* note 40, at 308; Clingan, *supra* note 94, at 19, 20.

152. Stefan A. Riesenfeld, *High Seas and Navigational Rights: What Are They and Who May Assert Them in U.S. Courts*, 20 PROC. L. SEA INST. 41, 41 (1986), citing the ICJ Case Concerning the Continental Shelf (Tunisia/Libya Arab Jamahiriya), Judgment of 24.2.1982, par. 100, 1982 I.C.J.R. 74, and Case Concerning the Delimitation of the Maritime Boundary on the Gulf of Maine Area (Canada/United States of America), Judgment of 12.10.1984 given by the Chamber Constituted by the Court, par. 94, 1984 I.C.J.R. 294.

least the basic provisions of the EEZ, such as those provisions relating to coastal state sovereign rights over living marine resources within its EEZ,¹⁵³ and rights and freedoms of other states within a coastal state's EEZ¹⁵⁴ have a fortiori entered into customary international law.

Some commentators, however, considered the "non-traditional" rules (e.g., LOSC Article 56(2)) only "arguably reflective" of customary international law as of the mid-1980s.¹⁵⁵ Provisions covering the more ancillary jurisdictional aspects of the EEZ, such as marine science research and environmental protection and preservation, may not have yet "crystallized" into customary international law.¹⁵⁶ Now that the LOSC has entered into force, one can examine the document itself to see if any specific EEZ legal regime is given that may shed light on the issue. Article 55 provides:

The exclusive economic zone is an area beyond and adjacent to the territorial sea, subject to the specific legal regime established in this Part, under which the rights and *jurisdiction of the coastal state* and the *rights and freedoms of other states* are governed by the relevant provisions of this Convention.¹⁵⁷

By its plain language, Part V, which contains the governing provisions of the EEZ, establishes the legal regime by which the EEZ is to be administered. Recall also that Part V references Part XII (entitled "Protection and Preservation of the Marine Environment"). Based on Article 55, it was the drafters' intention to codify the EEZ as a singular juridical package, and to incorporate the applicable provisions of Part XII into that legal regime. However, to understand fully which parts of the EEZ regime have in fact become part of *customary* international law, one must analyze state practice with regard to the EEZ. If a "sufficient" number of states not party to the LOSC who have adopted an EEZ also included pollution laws into their EEZ juridical regime that are consistent with the LOSC's regime in Part V, and did so in a manner that indicated that this practice was done out of a perceived legal obligation (as evidenced through legislative language, official statements, etc.), then there would be a strong argument that coastal state jurisdiction over marine preservation and protection within an EEZ had entered into customary international law.¹⁵⁸

153. LOSC, *supra* note 9, art. 56, 1833 U.N.T.S. at 418.

154. *Id.* art. 58, at 419.

155. ATTARD, *supra* note 40, at 306.

156. LOSC, *supra* note 9, art. 55, 1833 U.N.T.S. at 418.

157. ATTARD, *supra* note 40, at 306, 307.

158. Cf. RESTATEMENT (THIRD), *supra* note 149, pt. VI, 102 (stating without supporting evidence that "[m]ost of the provisions of the [LOSC] concerning the protection of the marine environment reflect customary international law"); *but see* W.T. Burke, *Customary Law of the Sea: Advocacy or Disinterested Scholarship?*, 14 YALE J. INT'L L. 508 (1989) (arguing that the

An analysis along these lines is, however, outside the scope of this Comment. To understand the United States' interpretation of the EEZ under customary international law, it suffices to look at the United States' practice towards the EEZ, and the legal basis for this practice. This is discussed in section IV.A.

III. APPLICABLE DOMESTIC ACTS

A. *Domestic Law: The Federal Water Pollution Control Act*

FWPCA was originally enacted in 1948, and underwent a major amendment by the Oil Pollution Act of 1990 (hereinafter "OPA '90").¹⁵⁹ Congress meant for FWPCA to be a comprehensive approach to the elimination of pollution from waters, including coastal waters. Congress declared that the objective of the Act was to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."¹⁶⁰ The FWPCA includes prohibitions on pollution discharges in the contiguous zone, and defines "contiguous zone" as the "entire zone established or to be established by the United States under Article 24" of the TSC.¹⁶¹

The applicable enforcement provisions of the FWPCA are located in 33 U.S.C. § 1319(c), which defines the criminal penalties under the FWPCA.¹⁶² It provides for fines of between \$2,500 and \$25,000 per day or imprisonment of up to one year, or both, for negligent infractions of the FWPCA, and for fines of between \$5,000 and \$50,000 or imprisonment of up to three years for knowing violations of the FWPCA.¹⁶³

Violations of the FWPCA include discharging oil or hazardous substances upon the navigable waters of the United States¹⁶⁴ or its contigu-

RESTATEMENT's declaration, without support, is a pretext to allow the United States to adhere to most of the provisions of the LOSC while disregarding the deep seabed mining provisions of LOSC, Part XI).

159. Oil Pollution Act, P.L. 101-380, 104 Stat. 484 (1990). See generally Senate Rep. No. House Conf. Rep. No. 101-653 (1990), reprinted in 1990 U.S.C.C.A.N. 779.

160. 33 U.S.C.A. § 1251(a) (West 1986 & Supp. 1999).

161. §§ 1321(a)(9), 1362 (9).

162. § 1319(c).

163. It also provides for a fine of up to \$250,000 and 15 years imprisonment for knowingly placing a person in imminent danger of death or serious bodily injury. "Organizational" persons may be fined no more than \$1,000,000. 33 U.S.C.A. § 1319 (West 1986 & Supp. 1999).

164. 33 U.S.C.A. § 1321(b)(3)(i) (West 1986 & Supp. 1999). The term "navigable waters" is defined at 40 C.F.R. Part 110 (§ 110.1), which implements section 311 of the FWPCA, see 86 Stat. 862 (1972). The term includes the territorial seas, and generally all waters susceptible to use in interstate or foreign commerce, including all waters that are subject to the ebb and flow of the tide; interstate waters, intrastate lakes, rivers, streams (including intermittent streams), that are or could be used by interstate or foreign travelers for recreational or other purposes. The territorial seas is in turn defined by 33 U.S.C. § 1362 as a belt of water starting at the coast where the open sea comes into contact with it and extending 3 miles seaward.

ous zone;¹⁶⁵ discharging oil or hazardous substances in conjunction with activities under the Outer Continental Shelf Lands Act¹⁶⁶ or Deepwater Port Act of 1974;¹⁶⁷ and, if in such quantities as determined to be harmful by the EPA, discharges that “may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the U.S.”¹⁶⁸ Liability for discharges in this situation is excepted if the discharge is permissible under MARPOL 73/78.¹⁶⁹

B. *Domestic Law: Status of Law of the Sea Treaties*

The United States signed, ratified, and deposited the instruments of ratification for both the High Seas Convention and Convention on the Territorial Sea and Contiguous Zone.¹⁷⁰ Under the U.S. Constitution they are the law of the land.¹⁷¹

Despite the intensive, ten-year negotiation process at UNCLOS III, the United States did not sign the LOSC due to concerns about the seabed-mining regime.¹⁷² In July 1994, the United States and twenty-one other states signed the “Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982” (“the Agreement”).¹⁷³ This Agreement addressed the concerns of the United States, and other nations about the LOSC seabed-mining regime. Later that year, President Clinton sent the LOSC and the Agreement to the Senate for its advice and consent on accession and

165. Note the term “navigable waters” includes “territorial seas”, but does not include “waters of the contiguous zone” or “the oceans.” These terms are cited separately from “navigable waters” later in 33 U.S.C.A. § 1251(a)(6).

166. 43 U.S.C.A. § 1331.

167. 33 U.S.C.A. § 1501.

168. This includes resources under the Magnuson-Stevens Fishery Conservation and Management Act (codified principally in 16 U.S.C.A. § 1801 et seq.) Some functions vested in the President by the FWPCA *as amended* by OPA '90, were delegated to the EPA by Exec. Ord. No. 12777, Oct. 18, 1997, 56 F.R. 54757, *reprinted in* Executive Orders, 33 U.S.C.A. § 1321 (West 1986 & Supp. 1999).

169. MARPOL 73/78, *supra* note 56. Liability may also be excepted if a discharge is within guidelines defined by the EPA through regulation. 33 U.S.C.A. § 1321(b)(3)(ii)(B) (West 1986 & Supp. 1999).

170. The United States signed the TSC, *supra* note 9, on April 29, 1958, ratified it March 24, 1961, and deposited the TSC ratification with the Secretary-General of the United Nations on April 12, 1961. It entered into force September 10, 1964. 15 U.S.T. 1606, 1606 (1964).

171. U.S. CONST. art. II, § 2.

172. LOSC, *supra* note 9, Part XI, 1833 U.N.T.S. at 445-77.

173. There are difficulties with the implementation of the Agreement. The Agreement was to enter into force when forty states consented to be bound by it. If the agreement did not enter into force on the day the LOSC entered into force (Nov. 16, 1996), it applied provisionally. Agreement art. 7. If certain conditions were not meant, the provisional application of the Agreement terminates on Nov. 16, 1998. Agreement, art. 8. RENATE PLATZÖDER, *THE 1994 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA, BASIC DOCUMENTS WITH AN INTRODUCTION* v (Renate Platzöder ed. 1994).

ratification respectively.¹⁷⁴ However, since the Senate has yet to give its advice and consent, the United States has not yet acceded to the LOSC.

This does not preclude the United States from being obligated under portions of the LOSC which have become part of customary international law. This is discussed in Section IV.A.

C. *Presidential Proclamations*

In 1983, President Reagan issued Proclamation No. 5030 (hereinafter "Proc. 5030"), proclaiming the existence of the United States' Exclusive Economic Zone.¹⁷⁵ In the prefatory clauses before proclaiming the zone, President Reagan referenced the United States'

desire to facilitate the wise development and use of the oceans consistent with international law . . . [that international law recognized an Exclusive Economic Zone where a coastal state] may assert certain sovereign rights over natural resources and related jurisdiction . . . [and] the establishment of the U.S. EEZ will . . . promote the protection of the marine environment, while not affecting the other lawful uses of the zone . . . by other states.¹⁷⁶

The White House released a concurrent statement on the United States' ocean policy which elaborated on the topic.¹⁷⁷ As discussed above, although the LOSC was signed in 1982, with 155 states signing the convention by the date it closed for signature, it did not enter into force until sixty nations ratified it, in 1994. In Proc. 5030, President Reagan asserted that the EEZ had in fact become established in customary international law based on UNCLOS III negotiations, even though the LOSC had not yet entered into force. This was a controversial statement. Other states objected to it because they believed the United States, which in 1982 stated it would not sign the LOSC due to concerns about the undersea mining provisions, was breaking up the singular "package" that was the LOSC, in effect picking and choosing among the provisions it liked and rejecting those it did not.¹⁷⁸ Acceptance of the "package deal" concept was established early in the negotiations, and was considered the foundation upon which the entire LOSC was built.¹⁷⁹

174. See S.TREATY DOC. NO. 103-39 (1994).

175. Proc. 5030, *supra* note 5.

176. *Id.*

177. Statement by the President on United States Ocean Policy, PUB. PAPERS 378-79 (Mar. 10, 1983) [hereinafter Ocean Policy Statement].

178. The USSR objected to the U.S. unilateral establishment of its EEZ. U.N. Doc. A/38/175 (1983). The Group of 77 made similar objections. U.N. Doc. LOS/PCN/5 (1983), *as quoted in* Restatement Reporters' Note 8 of § 511.

179. This idea is open to argument. First, the "package deal" concept, despite its importance and necessity being agreed upon early in the LOSC negotiations, did not preclude the rapid development of the EEZ in customary international law: as of 1982 over fifty states declared an

In 1988, President Reagan extended the United States' territorial sea by issuing Proclamation No. 5829 (Proc. 5829).¹⁸⁰ Proc. 5829 moved the territorial sea boundary for purposes of international law only.¹⁸¹ It did so by including an exception phrase: "[n]othing in this proclamation (a) extends or otherwise alters existing Federal or State law or any jurisdiction, rights, legal interest, or obligations derived therefrom"¹⁸² Thus, the definition of the territorial sea, as provided in existing statutes, would remain unchanged until Congress specifically changed the statutory definition.¹⁸³

The most recent assertion of the United States' rights over the oceans was President Clinton's Proc. 7219, discussed in Section I. An exception phrase was also included in this proclamation, in that "nothing in [Proc. 7219] alters or modifies domestic law."¹⁸⁴ Thus, any mention of the contiguous zone in United States domestic law remains unchanged until Congress or appropriate regulatory agencies specifically redefine the breadth of the contiguous zone as it applies to a specific law or regulation.

EEZ; by 1993 the number grew to 87. Riesenfeld, *supra* note 153, at 41; Introduction, THE LAW OF THE SEA: NATIONAL LEGISLATION ON THE EXCLUSIVE ECONOMIC ZONE iii, U.N. Sales No. E.93.V.10., Division for Ocean Affairs and the Law of the Sea, UN, NY (1993).

Second, at a 1986 forum one expert asserted that people who had interests in promoting the "package deal" overextended by the concept, while other members of UNCLOS III took the view that only certain things were tied together. Riesenfeld, *supra* note 152, at 41.

Note, however, that early in the UNCLOS III the conference passed a resolution stating that the "problems of ocean space are closely inter-related and need to be considered as a whole . . .". UNCLOS III OR, 2nd Sess., 19th mtg., ¶ 2. Additionally, the package deal is widely cited as a highly significant precedent of international negotiation.

The author does not mean to downplay the significance of the package deal, but point out that there is disagreement on the significance of the concept.

180. Proc. 5829, *supra* note 5.

181. One of the resulting effects from this Proclamation was that the United States could now move Soviet intelligence ships farther off the United States' coast. In fact, this was one of express purposes.

182. Proc. 5829, *supra* note 5.

183. For an idea of the impact on domestic law, see *supra* note 7.

184. Interestingly, the language is different than that used in Proc. 5928. Compare the phrase used in Proc. 5928: "Nothing in this proclamation: (a) extends or otherwise alters existing Federal or State law or any jurisdiction, rights, legal interests, or obligations derived therefrom; or (b) impairs the determination, in accordance with international law, of any maritime boundary of the United States with a foreign jurisdiction," Proc. 5928, *supra* note 5, with that used in Proc. 7219:

Nothing in this proclamation:

(a) amends existing Federal or State law;

(b) amends or otherwise alters the rights and duties of the United States or other nations in the [EEZ] of the United States established by Proclamation 5030 . . . ; or

(c) impairs the determination, in accordance with international law, or any maritime boundary of the United States with a foreign jurisdiction.

Proc. 7219, *supra* note 2. Whether there is any substantive reason for the different wording has not been made public. The author acknowledges and thanks Professor B.H. Oxman for pointing this out.

IV. ANALYSIS

A. *The United States' Customary International Law Interpretation of the Exclusive Economic Zone*

In Proc. 5030, establishing the EEZ, President Reagan expressed the United States' recognition of customary international law regarding coastal states' jurisdiction over artificial islands, installations and structures having economic purposes, and jurisdiction to protect and preserve the marine environment.¹⁸⁵ In his Statement on United States Ocean Policy, released concurrently with Proc. 5030, President Reagan elaborated upon this, stating that the United States, in effect, accepted the EEZ as conceived in the LOSC, with one exception: the United States would not assert any jurisdiction over marine scientific research within its EEZ, but would respect the right of other coastal states to do so, as the LOSC provides. He admitted that the EEZ,

"[e]nable[s] the U.S. to take *limited* additional steps to protect the marine environment." In this connection, the United States will continue to work through the International Maritime Organization and other appropriate international organizations to develop *uniform international* measures for the protection of the marine environment while imposing no unreasonable burdens on international shipping."¹⁸⁶

One additional issue regarding the scope of the United States' adherence to the LOSC's EEZ regime is the United States' practice regarding limits that international law places on coastal state criminal enforcement jurisdiction pertaining to pollution regulation in the EEZ. The FWPCA allows for criminal liability in the EEZ, if a negligent or knowing pollution discharge occurs in connection with activities under the Outer Continental Shelf Lands Act or Deepwater Port Act of 1974, or if pollution negligently or knowingly discharged affects resources managed under the Magnuson-Stevens Fishery Conservation Management Act.¹⁸⁷ Activities under all these statutes could occur anywhere within the 188-mile breadth of the U.S. EEZ.¹⁸⁸ Thus Congress, by passing this legislation, is assuming *prescriptive* jurisdiction out to the 200-mile seaward limit of the EEZ.

185. Proc. 5030, *supra* note 5.

186. Ocean Policy Statement, *supra* note 177. (emphasis added).

187. 33 U.S.C.A. § 1321(b)(3) (West Supp. 2000).

188. The EEZ starts seaward of the coastal State's territorial sea. LOSC, *supra* note 9, art. 57, 1833 U.N.T.S. at 419. Assuming, for international purposes, a twelve-mile U.S. territorial sea, and applying a maximum 200-mile EEZ as measured from the same baseline as the territorial sea, the U.S. EEZ comes to 188 miles.

However, 33 U.S.C. § 1321(m), an administrative provision for vessels, provides that:

(1) Anyone authorized by the President to enforce the provisions of this section with respect to any vessel may, except as to public vessels-

(A) board and inspect any vessel upon the navigable waters of the U.S. or the waters of the contiguous zone

(B) with or without a warrant, arrest any person who in the presence or view of the authorized person violates the provisions of this section or any regulation issued thereunder.¹⁸⁹

In § 1321(m)(1)(A), Congress has enacted more limited *enforcement* jurisdiction to take action enforcing the criminal provisions of the FWPCA, authorizing the United States Coast Guard, the agency charged with enforcement, to board and inspect only vessels *inshore* of the contiguous zone's twelve-mile outer limit.¹⁹⁰ On the other hand, § 1321(m)(1)(B), seems to allow the United States Coast Guard to arrest anyone violating the FWPCA anywhere a discharge occurs, out to the 200-mile limit of the EEZ.¹⁹¹ These sections can however be read to be consistent with international law and internal practices of the United States Coast Guard. Interpreted this way, 33 U.S.C. § 1321(m)(1)(B) merely provides the Coast Guard with enforcement jurisdiction against a foreign vessel seaward of the contiguous zone, after obtaining flag state permission to take action against a ship flying a foreign flag. This assumes that the Coast Guard follows its normal internal practice.¹⁹² In this latter interpretation, 33 U.S.C. § 1321(m)(1)(B) merely gives the Coast Guard legal competence to act under United States domestic law, by giving enforcement jurisdiction to enforce United States domestic law when and if the flag state grants the United States permission to take action against one of the flag state's vessels found violating the FWPCA in the United States' EEZ.

In fact, under United States law, this is the only way this statute can be read. Where two interpretations are possible, as Chief Justice Mar-

189. 33 U.S.C.A. § 1321(m) (West Supp. 2000).

190. Exec. Order No. 12,777, *reprinted in* Note 33 U.S.C.A. § 1321 (West 1986 & Supp. 2000). Recall that until statutes are changed to reflect the extension of the contiguous zone, it remains defined by TSC, art. 24, at twelve miles from the base line. TSC, *supra* note 9, 15 U.S.T. at 1612-13, 516 U.N.T.S. at 220-22.

191. Recall, for example, that it is prohibited to discharge oil or hazardous substances which may affect natural resources under the exclusive management authority of the United States, which includes fish under the management of the Magnuson-Stevens Fishery Management and Conservation Act, *see* 33 U.S.C. § 1321(b)(3).

192. *See* Rachel Canty, *Limits of Coast Guard Authority to Board Foreign Flag Vessels on the High Seas*, 23 TUL. MAR. L.J. 123, 137 (1998).

shall wrote in *Murray v. Schooner Charming Betsy*,¹⁹³ "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."¹⁹⁴ Thus, it can be said that the United States has taken legislative action that recognizes the principal that international law does not allow a coastal state to enforce its unilaterally enacted domestic laws seaward of twelve-miles from its baseline, which happens to be the seaward limit of states' territorial seas as defined by the LOSC, and the current seaward limit of the United States' contiguous zone for purposes of the FWPCA.

The impact of this legislative interpretation can be reconciled with statements by the United States delegation to UNCLOS III. In the United States' general statement made at the beginning of the Caracas session of UNCLOS III, delegation head Ambassador Stevenson, while noting "with satisfaction the growing consensus on the limits of national and international jurisdiction,"¹⁹⁵ expressed support for an international regime for pollution control within a 200-mile economic zone. Elaborating on the United States' position regarding the to-be-developed EEZ, he said:

[c]oastal States would have a duty not only to prevent unjustifiable interferences with navigation, overflight and other non-resource uses, but also to respect international environmental obligations with respect to the zone as a whole . . . it was clear that many delegations, including [the United States] although prepared to accept conditionally a 200-mile economic zone, would not accept the requirement of . . . plenary coastal state control over vessel-source pollution within the zone.¹⁹⁶

In this regard, the LOSC must have alleviated Ambassador Stevenson's concerns, for LOSC Article 211(5) is clear:

Coastal States, for the purpose of enforcement as provided for in section 6, may in respect of their exclusive economic zones adopt laws and regulations for the prevention, reduction and control of pollution from vessels conforming to and giving effect to generally accepted international rules and standards established through the competent international organization or general diplomatic conference.¹⁹⁷

Recalling that "generally accepted international rules and standards" is a reference to MARPOL 73/78,¹⁹⁸ coastal states may, per Article 211(5), only enact laws within their EEZ that give effect to

193. 6 U.S. (2 Cranch.) 64 (1804).

194. *Id.* at 118.

195. UNCLOS III OR, *supra* note 82, 2nd Sess., 38th mtg., ¶ 26.

196. *Id.* ¶ 32, 34.

197. LOSC, *supra* note 9, art. 211(5), 1833 U.N.T.S. at 483-85.

198. *Supra* note 132 and accompanying text.

MARPOL 73/78, to the exclusion of “plenary coastal state control over vessel-source pollution” within the EEZ.¹⁹⁹

The United States has thus accepted the concept of the EEZ, as evidenced by congressional legislation giving substance to the EEZ.²⁰⁰ Additional evidence is found in President Reagan’s 1983 Ocean Policy Statement in which the United States commits to work with the IMO to develop uniform international standards to protect the marine environment, per LOSC Article 211.²⁰¹ These examples provide evidence that the United States acts as if the EEZ has become customary international law. The United States thus aspires to act in accordance with the EEZ, as set by the entirety of the legal regime set in Part V of the LOSC, which, for the first time, conceptualized the very existence of an EEZ. This regime includes the requirements of a coastal state to recognize other states’ rights in its EEZ, including the freedoms of navigation and overflight, and the laying of submarine cables.²⁰² Based on these rea-

199. The issue then arises about what states may do bilaterally, as has been past United States’ practice to get flag State permission to take action against offending foreign vessels based on a variety of unilateral national laws. For example, laws concerning immigration or drugs. *See* Canty, *supra* note 192. Where the United States is not yet a party to the LOSC, the question would be whether this sort of ad hoc bilateral agreement had entered into customary international law. It most likely has not. However, assuming that one day the United States will accede to the LOSC, this question will need to be addressed.

This provision may be contrary to the LOSC if the United States accedes to the LOSC. Assuming that 33 U.S.C. § 1321(m)(1)(B) would only come into play provided that the United States got prior flag State authorization to take action against an offending vessel, is this action permitted under the LOSC? LOSC Article 311(3) provides guidance:

Two or more States Parties may conclude agreements modifying or suspending the operation of provisions of this Convention, applicable solely to the relations between them, provided that such agreements do not relate to a provision derogation from which is incompatible with the effective execution of the object and purpose of this Convention, and provided further that such agreements shall not affect the application of the basic principles embodied herein, and that the provisions of such agreements do not affect the enjoyment by other States Parties of their rights or the performance of their obligations under this Convention.

LOSC, *supra* note 9, art. 311(3), 1833 U.N.T.S. at 519. The question to be answered, if the United States was a party to the LOSC: Is this sort of ad hoc bilateral agreement between a flag state and the United States, where the United States is seeking flag state authorization to enforce the FWPCA (a unilaterally enacted domestic law) against a flag state’s vessel, constitute “derogation from which is incompatible with the effective execution of the object and purpose of this Convention?” On one hand, it is unilateral coastal state action, precisely what the LOSC sought to preclude. On the other hand, the flag state could deny the U.S. request. Also, this ad hoc bilateral agreement could not effect the rights or performance of obligations of other states-parties. A mutually convenient solution would be for the United States to agree to suspend any resulting proceedings, provided the flag State commence similar proceedings under its laws. *See* LOSC *supra* note 10, Part XII, section 7, 1833 U.N.T.S. at 490-93.

200. *See, e.g.*, Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C.A. § 1801 *et seq.*

201. Ocean Policy Statement, *supra* note 177.

202. *See, e.g.* LOSC, *supra* note 9, art. 58, 1833 U.N.T.S. at 419, which also includes the

sons, the United States, in addition to being bound by the TSC and HSC, has obligated itself as a result of its interpretation that the entire EEZ regime of the LOSC has entered into customary international law.

B. *Nexus Between the Exclusive Economic Zone and the Contiguous Zone to Marine Pollution Under the Law of the Sea Convention*

The concept of “preservation and protection of the marine environment” and its possible application to the contiguous zone must be evaluated in the larger context of the entire LOSC and development of the international law of the sea. Article 31 (hereinafter “General Rule of Interpretation”) of The Vienna Convention on the Law of Treaties (hereinafter “Vienna Convention”) provides that, “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty *in their context* and in the light of its object and purpose.”²⁰³ Therefore, if the wording is not plain, the context of how pollution is addressed within the LOSC may be discerned by examining of the LOSC’s structure or individual articles. Any patterns, per Article 31 of the Vienna Convention, have interpretive force on how the LOSC was meant to apply pollution measures.

First, the LOSC has dedicated all of Part XII, “Protection and Preservation of the Marine Environment,” to the concept of pollution. The terms “territorial sea” and “exclusive economic zone” are mentioned throughout LOSC Part XII where applications of state jurisdiction or control in various zones are discussed.²⁰⁴ Additionally, in Part V, (covering the EEZ), the LOSC grants the coastal state jurisdiction expressly *within its EEZ* to protect and preserve the marine environment by cross-referencing to Part XII. Meanwhile, the term “contiguous zone” is not mentioned at all throughout the forty-five articles that make up Part XII. Nor is any reference made establishing a nexus between the contiguous zone and Part XII.

Construction of individual LOSC articles is consistent with a distinction between marine pollution control and the four categories of laws (fiscal, immigration, customs and sanitation) that expressly provide a

recognition of all states to enjoy internationally lawful uses of the sea relating to the freedoms delineated in the text, including “those associated with the operations of ships, aircraft and submarine cables and pipelines, and compatible with other provisions of [the LOSC].” *Id.*

203. Vienna Convention on the Law of Treaties, May 23, 1969, U.N. Doc. A/CONF.39/27, *entered into force* Jan. 27, 1990. (emphasis added) Although the United States is not a party, the ALI has asserted that the treaty codifies international law. RESTATEMENT [THIRD], *supra* note 149, Pt. I Ch. 1 Intro. Note; *id.* at § 102 cmt. f.

204. See, e.g., LOSC, *supra* note 9, art. 210, 1833 U.N.T.S. at 483-89. Pollution by Dumping; art. 211, Pollution by vessels; art. 216, Enforcement with Respect to Pollution by Dumping; art. 218, Enforcement by Port States; art. 220, Enforcement by Coastal States.

basis for coastal state control within its contiguous zone. For example, LOSC Article 19, "Meaning of Innocent Passage," differentiates between the concepts of 1) violating a coastal state's sanitary laws and 2) doing an act of "wilful and serious pollution" as two of the twelve specific acts that violate the concept of innocent passage within a coastal state's territorial sea.²⁰⁵

Likewise, Article 21, Laws and Regulations of the Coastal State relating to innocent passage, makes a similar distinction, separately categorizing on one hand "customs, fiscal, immigration or sanitary laws,"²⁰⁶ and, on the other hand, laws to control pollution in the territorial sea, as separate classes of laws or regulations that a coastal state may enact relating to foreign ship's innocent passage through the coastal state's territorial sea.²⁰⁷ It would hardly make sense for sanitary to mean pollution, where, in reference to these two articles, which both relate to the relationship between innocent passage and coastal state control, the terms are listed under separate and distinct labels.

LOSC Article 220(3) provides that

Where there are clear grounds for believing that a vessel navigating in the exclusive economic zone or the territorial sea of a state has, in the exclusive economic zone, committed a violation of applicable international rules and standards for the prevention, reduction and control of pollution from vessels or laws and regulations of that state conforming and giving effect to such rules and standards, that state may require the vessel to give information regarding its identity and port of registry, its last and its next port of call and other relevant information required to establish whether a violation has occurred.²⁰⁸

Articles 220(5) and (6) refer back to Article 220(3), and provide a greater range of responses a coastal state may take, depending if the violation is a discharge causing (or threatening) significant damage to the marine environment or major damage to the coastline or related interests.²⁰⁹ The plain language of Article 220 indicates that, seaward of the territorial sea, coastal state enforcement action may only be taken where there are clear grounds (or, in the case of Article 220(6), "clear objective evidence") for believing an infraction occurred in the EEZ.²¹⁰ No mention is made, however, of coastal state allowance to make laws similar to Article 220(3), (5), and (6) applicable to a contiguous zone.

205. *Id.* art. 19, at 404-05.

206. *Id.* art. 21, at 405-06.

207. *Id.*

208. *Id.* art. 220(3), at 489.

209. *Id.* arts. 220(5) & (6), at 489.

210. LOSC Article 211(6) provides procedures coastal States may take to enact more stringent pollution control due to special circumstances within their EEZ. *Id.* art. 211, at 484-85.

Under Article 31 of the Vienna Convention, a coastal state that has only declared a contiguous zone, and not an EEZ, most likely may not, by a plain reading of Article 220, assert the "sanitary" term as a basis for action because an infraction occurred in its contiguous zone within the provisions of that article. The contiguous zone is not provided as a zone in which pollution laws may be enforced in Article 220(3), (5), or (6), because Article 220 mentions both "territorial sea" and "exclusive economic zone" to the exclusion of "contiguous zone."

The LOSC contains important modifications to the contiguous zone.²¹¹ The most obvious change is the expansion in breadth from twelve miles in the TSC to twenty-four miles in the LOSC.²¹² Next, the juridical nature of the contiguous zone is seemingly changed.²¹³ In the TSC, the contiguous zone is expressly designated as part of the high seas.²¹⁴ The LOSC does not provide whether the contiguous zone is part of the high seas or part of the EEZ. It merely states, "[i]n a zone contiguous to its territorial sea, described as the contiguous zone"²¹⁵ Also in the LOSC, unlike the EEZ, the contiguous zone does not make reference to any specific legal regime.²¹⁶

These seem to indicate the drafters' desire to separate the EEZ and contiguous zone. One can readily see the importance of keeping the zones autonomous, particularly where the LOSC balances the creeping jurisdiction of the coastal state against the traditional freedoms of the high seas. Recall that states must declare the existence of each zone.²¹⁷ So a state may have only a contiguous zone, or only an EEZ, or may have both. If the two zones are declared by a state, a question arises as to whether the EEZ subsumes the contiguous zone. If the two zones merged, then the next step on the slippery slope would be for the concepts of control that the coastal state could exercise in the contiguous zone would be extended for the 200-mile breadth of the EEZ and would be diluted, because the EEZ was conceived as an economic zone for which the coastal state exercised sovereign rights and jurisdiction over specifically granted rights out of the "bundle" of rights available under the LOSC. "Indeed, one reason why some states wanted to retain the contiguous zone was to emphasize the *economic* function of the

211. ATTARD, *supra* note 40, at 128.

212. TSC, *supra* note 9, art. 24 15 U.S.T. at 1612, 516 U.N.T.S. at 220-22; LOSC, *supra* note 9, art. 33, 1833 U.N.T.S. at 409.

213. ATTARD, *supra* note 40, at 128.

214. TSC, *supra* note 9, art. 24, 15 U.S.T. at 1612, 516 U.N.T.S. at 220-22.

215. LOSC, *supra* note 9, art. 33(1), 1833 U.N.T.S. at 409.

216. ATTARD, *supra* note 40, at 128. LOSC, *supra* note 9, art. 55, 1833 U.N.T.S. at 418, provides that the EEZ is subject to the specific legal regime provided for in Part V.

217. The language of the TSC seems to assume that all states have a territorial sea. See BROWNIE, *supra* note 41, at 183-84.

EEZ.²¹⁸

This overview of the applicable provisions of the LOSC's use of the territorial sea and exclusive economic zone in the context of laws and regulations over the preservation and protection of the marine environment seems to rule heavily against the assertion of a contiguous zone legal regime as a basis for state action against a pollution offender. Add to this assertion the historical probability that learned societies and conferences from the 1920s to the 1960s also did not mean for a contiguous zone to be a regime in which marine pollution is regulated by the coastal state, and this assertion is strengthened even more.

The development of the international law of the sea as reflected in the LOSC addresses a need for pollution control that was lacking in the UNCLOS I Geneva treaties. While pollution concerns were increasing worldwide in the late 1960s-70s, there was an argument to stretch the meaning of sanitary in the context of the Geneva treaties.²¹⁹ This could be why the United States stretched the meaning of sanitary to include pollution; to fill a void. But where this need is addressed by direct language by a forum of such widespread participation and support such as UNCLOS III, in a manner entirely consistent with the United States delegation's statements made early in UNCLOS III, and as accepted by the United States as evidenced by President Reagan's statement upon establishment of the EEZ, certainly the support for the interpretation that sanitary means pollution is gone.

An additional side note is that where the UNCLOS III negotiators wanted to stretch the contiguous zone, they did so in a direct manner. Specifically, later in UNCLOS III, concerns were voiced over underwater cultural heritage. LOSC Article 303 was added to expand the meaning of LOSC Article 33 (covering the contiguous zone). Article 303 expresses the presumption that removal of UCH from the contiguous zone would be an infraction of the coastal state's laws applicable in the territorial sea and therefore within the scope of Article 33. One may again ask why, if the negotiators at UNCLOS III did this for underwater cultural heritage, did they not do it for pollution? The answer is: because they did not have to; it was already addressed in a manner consistent with the international consensus.

218. ATTARD, *supra* note 40, at 128.

219. This concern was reflected in the statements made by the LOSC negotiators at the beginning of the Caracas session in July-August 1974. The UNCLOS III OR, *supra* note 82, indicate over thirty States mentioned the need for UNCLOS III to consider pollution: e.g. Egypt (2nd Sess., 23rd mtg. ¶ 67, 73), United Kingdom (2nd Sess., 29th mtg. ¶¶ 37-38), Lebanon (2nd Sess., 33rd mtg. ¶ 25), Nigeria (2nd Sess., 34th mtg. ¶ 8), and Japan (2nd Sess., 41st mtg. ¶ 53).

C. *The United States' Interpretation of Pollution Control in the Contiguous Zone*

An interpretation equating "sanitary" with "pollution", however, is exactly what the United States used as a basis upon which it first regulated oil pollution within the contiguous zone under the TSC. As stated in a memorandum from the United States Department of State Office of the Legal Advisor:

The authority under which the United States may regulate, with regard to pollution by oil, the conduct of foreign vessels beyond the territorial sea and impose sanctions for violation of such regulations is confined in article 24 of the [TSC]. Article 24(1)(a) allows the coastal state [in its contiguous zone] to exercise the control necessary to "prevent infringement of its . . . sanitary regulations within its territory or territorial seas."²²⁰

A short time later, Congress exercised its perceived legislative jurisdiction. In 1970 it passed the Water Quality Improvement Act (hereinafter "WQIA"). The WQIA amended the FWPCA, and extended the prohibition on oil discharges inside the three-mile territorial sea out to the twelve-mile limit of the contiguous zone, unless the discharge was permitted under the 1954 Convention for the Prevention of Pollution of the Sea by Oil, as amended in 1962.²²¹

As pointed out above, there is no overt connection between the contiguous zone and pollution in the LOSC. This specific nexus between the EEZ and pollution control, to the exclusion of any nexus between the contiguous zone and pollution control, has to weigh decisively since the contiguous zone is not mentioned once in the LOSC Part V (covering the EEZ) or Part XII (covering the Protection and Preservation of the Marine Environment). It is thus safe to assert that it is highly unlikely that the contiguous zone had anything to do with pollution in the context of international law as stated in the LOSC.

So why the assertion by the Secretary of State Office of Legal Advisor that the United States could rely on the term sanitary to assert jurisdiction over pollution regulations in the contiguous zone? Again, evidence points to the answer being "to fill a void." The historical context provides insight. In considering these possible explanations, it

220. Memorandum from Louis P. Georgantas, Office of the Legal Advisor, Department of State, to Honorable George H. Fallon, Chairman, Public Works Committee, House of Representatives (Mar. 24, 1969), as quoted in WULF, *supra* note 71, at 36-37. The definition of the contiguous zone in the LOSC, *supra* note 9, art. 33, 1833 U.N.T.S. at 409, echoes the definition of the contiguous zone in the TSC, *supra* note 9, art. 24, 15 U.S.T. at 1612, 516 U.N.T.S. at 220-22.

221. P.L. 91-224, 84 Stat. 91 (1970).

becomes apparent, and will be addressed in Part V, that it is time to amend the FWPCA.

Interestingly, other instruments used the contiguous zone in a way not intended by the negotiators of the TSC. This may be because these instruments' drafters saw the contiguous zone as a mutually convenient recognized distance for their desired end, or, under international law, a convenient surrogate for an assumed-soon-to-become twelve-mile territorial sea. For example, in 1966, the United States extended its exclusive fisheries zone seaward from its three-mile territorial sea out to a twelve-mile limit, but did not base this move on the applicable UNCLOS I Convention on Fishing and Conservation of the Living Resources of the High Seas.²²² The Treaty on the Prohibition of Emplacement of Nuclear Arms and Other Weapons of Mass Destruction on the Seabed and Ocean Floor and in the Subsoil Thereof (more commonly known as the "Seabed Arms Control Treaty") used the contigu-

222. P.L. 89-658, 80 Stat. 908 (1966). Article 7 of the Convention on Fishing and Conservation of the Living Resources of the High Seas, *supra* note 39, permits coastal states to take unilateral conservation measures in zones contiguous to coastal States' territorial seas. This unilateral action is conditioned on (1) the coastal State attempting to negotiate with other concerned States, and those negotiations had not led to an agreement within six months, (2) there is a need for "urgent application of conservation measures in light of the existing knowledge of the fishery," (3) the measures are based on scientific findings, (4) the measures do not discriminate against any foreign fishermen. *Id.* Nothing in the legislative history indicates that the United States initiated any negotiations in this regard. See 2 U.S.C.C.A.N. 3282-91 (1966). Additionally, nothing indicates an *urgent* need for the legislation. *Id.* at 3284. Also, the legislative history appears to specifically intend to prejudice Soviet fishermen, who in reality were using fishery activities as subterfuge for "snooping purposes." *Id.* at 3284, 3291. The legislative history indicates the need for the legislation is based on general conservation requirements: "over the past few years, but more particularly the past several months, there has been a tremendous increase in the taking of fishery resources by foreign vessels within 12 miles of U.S. shores." *Id.* at 3284. However, Assistant Secretary of the Interior Stanley A. Cain wrote, with regards to the proposed legislation: "[i]t should be pointed out that the extension of the fisheries jurisdiction of the United States would in most cases be of relatively little value in solving conservation problems. *Id.* at 3292. The legislative history seems to devote as much print to the status of U.N. member nations' trend toward establishing twelve mile exclusive fisheries zones for their nationals: "[s]ince the 1960 Law of the Sea Conference [UNCLOS II] there has been a trend toward the establishment of a 12-mile fisheries rule in international practice." Letter from Asst. Secretary for Congressional Relations, for the Secretary of State, to the Chairman, House Committee on Merchant Marine and Fisheries, *reprinted at id.* 3294-95. See also *id.* at 3286-3289 (including mention that more than sixty out of ninety-nine coastal nations in the U.N. membership as of 1966 "have a 12-mile fishery zone, either as territorial sea—some are 12-mile territorial sea countries—or as territorial seas of less than 12-miles, plus a contiguous zone which will make a total of 12 miles exclusive fishery jurisdiction.") Note that contiguous zone in this context refers merely to a zone *next* to, or *contiguous* to, the territorial sea, and not contiguous zone as defined in TSC, *supra* note 9, art. 24, 15 U.S.T. at 1612-13, 516 U.N.T.S. at 220-22. These legislative history provisions are evidence that the United States did not base the expansion of exclusive fisheries zone on the Convention on Fishing and Conservation of Living Resources of the High Seas.

ous zone, by name, for a limit.²²³ In fact, it specifically defined the contiguous zone by referencing Article 24 ("Contiguous Zone") of the TSC. By the end of 1974, fifty-four parties ratified or acceded to this treaty.²²⁴

Use of the twelve-mile breadth in these additional contexts, when considered with the United States' "interpreting" the word sanitary to include pollution, all of which were beyond the scope of fiscal, immigration, sanitation and customs laws, at least suggests that the future uses of the twelve-mile limit would become less objectionable as time went on. At most, they signify greater ammunition for establishing a uniform a twelve-mile maximum limit on a sovereign territorial sea.

The twelve-mile maximum territorial sea limit was recognized early in the UNCLOS III negotiations. In the general statements made by nations at the beginning of the substantive discussions held at the 1974 Caracas Session of UNCLOS III, the Soviet Union noted, "the 12-mile limit for the territorial sea was recognized by approximately 100 states and was in keeping with the overwhelming majority of coastal states."²²⁵ Additionally, seventy nations, including the United States, specifically noted either their support for a twelve-mile maximum territorial sea limit or that they had already established one at that breadth.²²⁶

The United States' interpretation of "sanitary" to include pollution in the context of the contiguous zone as provided in the TSC does not indicate an insistence that the contiguous zone be a zone for coastal states' right to assert unilateral pollution control laws. It, instead, merely indicates the United States' acceptance of the twelve-mile territorial sea. Indeed, this is the only meaning consistent with the development of the international law of the sea, when one considers 1) the United States interpreted the contiguous zone provision of the TSC in a context outside of its apparent intended meaning when adopted, but within the clear international trend of adopting a twelve-mile territorial sea, and 2) the United States' statement at UNCLOS III and those made by President Reagan in 1983 on the EEZ.²²⁷

223. 23 U.S.T. 701, 955 U.N.T.S. 115, *opened for signature* Feb. 11, 1971.

224. OFFICE OF THE LEGAL ADVISOR, U.S. DEP'T OF STATE, PUB. NO. 8798, TREATIES IN FORCE 409 (1975).

225. UNCLOS III OR, *supra* note 82, 2nd Sess., 22nd mtg., ¶ 35.

226. The United States statement can be found at *id.*, 38th mtg., ¶ 25-39.

227. One last argument for the proposition that the United States acknowledges an obligation to not unilaterally create enforcement jurisdiction beyond twelve miles from their shores is discussed *supra*, the limit Congress placed on the United States' enforcement jurisdiction found at 33 U.S.C. § 1321(m).

D. *Pollution Discharges Between Twelve and Twenty-Four Miles from the Baseline*

This belt of coastal ocean is the area absorbed into the contiguous zone by Proc. 7219. As discussed, the EEZ and contiguous zone are most likely *sui generis* zones with separate legal regimes. Thus, where the United States has declared the existence of both zones, both legal regimes apply within this belt.

Under international law, sanitary most likely does not encompass pollution. Therefore the rights granted to the coastal state to exercise the control necessary to punish/prevent violations of fiscal, immigration, sanitation and customs laws and regulations may not be used as a basis of coastal state jurisdiction against foreign vessel source pollution. Also discussed *supra*, there is no need for the United States to continue with its interpreting sanitary to include pollution. But, even if the United States continued with this unique interpretation, the FWPCA still references the TSC (which is still in force for the United States) definition of the contiguous zone, i.e., a zone that extends only twelve miles from the baseline. Recall also the exclusion clause in Proc. 7219, in that “nothing in [Proc. 7219] alters or modifies domestic law.” For the FWPCA to apply in this belt of ocean, the FWPCA would therefore have to be amended to expressly refer to a twenty-four-mile contiguous zone. Therefore, as it stands now, Proc. 7219 has *no* effect on this zone of ocean under the FWPCA.

An argument may be made that the FWPCA should be amended to allow increased enforcement jurisdiction out to the seaward 200-mile limit of the EEZ, to gain the full power of potential pollution authority gained from the declaration of the EEZ by the Proc. 5030. Recall, that either all of the EEZ regime, or only the more general provisions as provided for in LOSC Articles 56 and 58, have entered into customary international law. Either way, Part XII would apply, because Part V is cross-referenced into Part XII by Article 56. More on point, however, is that the United States, through Proc. 5030 establishing the EEZ, and the related Statement on Ocean Policy, has declared its adherence to the *entire* EEZ regime as set in the LOSC.²²⁸

Under LOSC Article 220(3) (included in LOSC Part XII), coastal states may enact *national* laws with respect towards pollution control within their *territorial sea*, provided that they not hamper innocent passage. However, the coastal state’s legislative jurisdiction against pollution discharges within its *EEZ* as provided by the LOSC is limited by Articles 211(5), 220(5) and 220(6) to the application of “*international*

228. Proc. No. 5030, *supra* note 5. Ocean Policy Statement, *supra* note 176.

rules and standards,” and this phrase is a reference to MARPOL 73/78. Therefore, the United States should not amend the FWPCA to proscribe in blanket fashion pollution over the entire EEZ. This would be contrary to the LOSC as unilateral coastal state legislation that oversteps the attempt at uniformity around the world’s oceans, and contrary to prior declarations by the United States. While the tools available to the coastal state may be more limited than environmentalists would prefer, the uniformity provided by the umbrella LOSC and more detailed implementing conventions, such as MARPOL 73/78, provide at least an increasing incremental approach to world recognition of the importance of the protection of the marine environment, where one did not exist before the LOSC.

MARPOL 73/78 calls for states-parties to enact laws proscribing violation of that convention. This is not done within the FWPCA, however. It has been done at 33 U.S.C. § 1901—MARPOL 73/78 requires that larger ships not discharge oil within fifty miles of land, while smaller ships can only discharge seaward of twelve miles from land. So, it again may be asserted, that Proc. 7219 does nothing for enhancement of pollution control under the FWPCA within the ocean belt between twelve- and twenty-four miles from the United States baseline.

Once some provisions of the FWPCA are used against a polluter, the action could very well be contrary to international law. But merely passing a law does not make it contrary to international law; it actually has to be enforced to breach international law. If the United States prosecuted an offending ship outside the provisions of MARPOL 73/78 (i.e., 33 U.S.C. § 1901 *et seq.*), for pollution discharge beyond its territorial sea but within its EEZ, and that ship’s flag state was 1) a party to MARPOL 73/78, and 2) there was no ad hoc bilateral agreement between the flag state and United States, that flag state would have grounds to protest the action as contrary to international law.²²⁹

V. CONCLUSION

Proclamation No. 7219 does nothing to increase the ability of United States to deal with pollution in its contiguous zone. It is thus not clear what the Vice President meant when he hailed the contiguous zone extension as a counter to “would-be polluters.”²³⁰ This assertion regard-

229. Since parties to MARPOL 73/78 administer over 93% of the world’s gross registered shipping tonnage, it would be a good probability that the flag state was a party to MARPOL 73/78. Maria Valenzuela, *Enforcing Rules Against Vessel-Source Degradation of the Marine Environment: Coastal, Flag, and Port State Jurisdiction*, in *ORDER FOR THE OCEANS AT THE TURN OF THE CENTURY 188* (Davor Vidas & Willy Østreng eds., 1999).

230. *Supra* note 3 and accompanying text.

ing Proc. 7219 is true, unless the unique interpretation by the United States in 1970 of sanitary as meaning pollution carries any weight in international law. Since this interpretation is not supported by historical development, subsequent official United States' statements, or the current international law of the sea, as provided under the Law of the Sea Convention, it simply could not. Additionally, this assertion is strengthened where this interpretation is no longer needed given the current legal regime of the international law of the sea.

The LOSC contains express provisions on a pollution regime, agreed to in an international convention of unprecedented participation and duration, which yielded a strongly supported multilateral treaty. When the international law of the sea was governed by the 1958 Geneva treaties, which hardly mentioned pollution, along with the 1954 Convention for the Prevention of Pollution of the Sea by Oil, it may have been permissible to stretch an interpretation of sanitary to bring order to an area that needed it. In fact, the concept may have gained momentum and become an established part of international law. However, that need has been addressed directly by the LOSC.

The FWPCA provides for criminal fines and jail time for offenses seaward of twelve miles from the United States' coasts. Jail is contrary to the LOSC Article 230 (except in a case of willful and serious act of pollution in the territorial sea). Where the United States accedes to the general EEZ regime, and the regime incorporates a pollution control scheme, which includes Article 230, if the FWPCA was unilaterally enforced by the United States in its EEZ and its most stringent punishments of jail imposed, the flag state of the offending ship would have a strong claim that the action was contrary to customary international law. The proper recourse by the United States would be enforcement under 33 U.S.C. 1901 *et seq.*, which codifies MARPOL 73/78, the "international rules and standards" referred to throughout the LOSC Part XII. Should the offending ship's flag state not be a party to MARPOL 73/78, the United States should seek flag state authorization to take action; to do otherwise may be contrary to the overall scheme of the EEZ and coastal state pollution control as under customary international law.

To account for the current state of the international law of the sea, the FWPCA should be amended to define the United States' territorial sea as twelve miles from the coast, to appreciate the full force of coastal state sovereignty over its territorial sea. It should also be amended to provide for legislative and enforcement jurisdiction out to the seaward limit of the twelve-mile territorial sea. For pollution offenses seaward of that twelve-mile boundary, the FWPCA should be enforced only against vessels whose flag state is not a party to MARPOL 73/78. The United

States should deal with vessels whose flag state is a state-party to MARPOL 73/78 under the provisions of that convention. Any enforcement against a flag state-party to MARPOL 73/78 beyond the provisions of that convention should be done with that state's concurrence, and subject to the safeguards in LOSC Part XII, Section 7. A coastal state's hand is not necessarily tied by the LOSC. Where special circumstances dictate more stringent pollution control is needed within a defined area of the EEZ due to traffic, or certain ecological or oceanographical conditions, a mechanism is in place under LOSC Article 211(6) where the coastal state may enact more stringent regulations.

Consideration should also be given to amending the FWPCA to define United States' enforcement jurisdiction over threatened or actual significant damage to the marine environment or major damage to the coastline or related interests (to mirror language in LOSC Article 220 (5) and (6), respectively) caused by vessel-source pollution incidents out to 200 miles. This should include a proviso that that jurisdiction would not be exercised unless the vessel's flag state concurs in the action, and again, the action should be subjected to the safeguards provided for in LOSC Part XII, section 7.

These amendments would 1) strengthen both the development of the international law of the sea and the United States' desire to be a leader in this area despite political problems with the LOSC, and 2) provide the United States, or any coastal state who chooses to follow suit, with an extra tool to protect their coastal interests, always subjected, however, to the concurrence of the offending vessels flag state. Should the United States ultimately accede to the LOSC, these amendments would seamlessly integrate into the LOSC regime.

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