

WHOI-76-95

THE EXTENT TO WHICH MARINE TRANSPORTATION  
WITHIN THE ECONOMIC ZONE WILL BE AFFECTED BY  
ENFORCEMENT OF THE PROPOSED  
POLLUTION CONTROLS

by

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TECHNICAL REPORT

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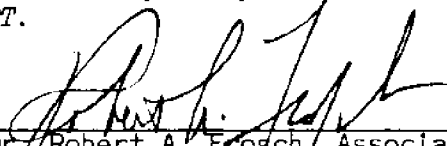
  
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ABSTRACT

This study provides a detailed analysis of the provisions of Chapter I, Part III of the Single Revised Negotiating Text, which was produced at the Fourth Session of the Third United Nations Conference on the Law of the Sea. The purpose of the analysis is to determine how navigation will be restricted in the proposed economic zone because of controls relating to pollution or preservation and protection of the marine environment. A new form of jurisdiction has been established within the economic zone in order to regulate transportation for the purpose of the prevention of pollution. The conflict created in the negotiation concerning the content of the regulation results from the differing interests of the maritime powers, states which border on international straits, and other states with a strong interest in protection of the marine environment. The maritime powers seek universal standards which would be applied with a high degree of uniformity through enforcement mechanisms. Environmental interests and straits' states seek an extension of coastal state sovereignty to establish strong pollution controls. Briefly, the present compromise states that if a violation is believed to occur in the economic zone the vessel may be the subject of inquiry; however, it may continue its voyage. Proceedings may be initiated for flagrant violation of international standards which cause major damage or the threat of major damage. However, in most cases physical detention of the vessel may be avoided through action by the flag state.

## I. INTRODUCTION

The creation of new jurisdiction to regulate transportation, for the purpose of prevention of pollution, is one of the most interesting aspects of the work of the present United Nations Law of the Sea Conference. Many diverse interests have negotiated seriously in order to make a convention which is both meaningful in terms of environmental protection and acceptable to maritime powers.

While the environmental interests seek strong pollution controls, the primary interest of the maritimes appears to be predictability through uniformity. They seek a goal of uniform application of a universal standard. Let us examine this statement more closely. How uniform will the application of the standard be? How universal will the standard be? Will it be simplified, straightforward and intelligible to both the navigators of commercial transports and to military men (government officers) who are charged with enforcement, or will it become a hydra-headed tool to delay and obstruct transport, perhaps even becoming a revenue getting device?<sup>1</sup> In a nightmare, one might envision a toll bridge type of mechanism where a substantial deposit is required upon entry into an economic zone; once the navigation of the zone is safely completed, the deposit is returned minus service charges, etc. This scenario conflicts directly with the number of rights, freedom of navigation, freedom of transit passage and innocent passage; rights which have been explicitly defined outside of the pollution provisions in Part III of the Revised Single Negotiating Text (RSNT). An example of this kind is mentioned only to demonstrate that the LOS text, though divided into several parts, is really a unit and must be read as a whole in spite of some internal inconsistencies.

## II. UNIVERSALITY OF THE STANDARDS

Chapter I, Part III of the RSNT concerning the preservation and protection of the marine environment represents an attempt at ordering many types of marine pollution controls, i.e., land-based and atmospheric pollution, unintentional discharge from vessels, dumping and pollution related to activities at sea. It establishes finite jurisdictions for the enforcement of various pollution controls, including coastal state jurisdiction. The standards upon which the pollution controls are

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1. This appears doubtful in view of Article 25, Part II of the Revised Single Negotiation text, hereinafter called the RSNT, which states that no charge may be levied for passage only, but may be for services rendered. A/Conf. 62/WP.8/Rev.1/Part II.

based refer to definitions in many previous international agreements. For example, the definition of dumping refers to the definition used in the 1972 London Convention on Dumping.<sup>2</sup> However, the extent to which these prior conventions are incorporated by reference is controversial. Naturally, states are not bound by conventions which they have not signed. And they may not wish to be bound to prior conventions as a consequence of signing the LOS treaty. Nevertheless, the general formulation for the economic zone throughout the RSNT is that national laws and regulations shall conform to and give effect to international rules, standards and recommended practices and procedures.<sup>3</sup> In general, this refers to standards established by international organizations in which interested states are represented such as International Maritime Consultative Organization. The general formulation for the establishment of future standards is:

States, acting in particular through competent international organizations or diplomatic conference, shall establish global and regional rules, standards and recommended practices and procedures to prevent, reduce and control pollution of the marine environment. . . .<sup>4</sup>

Always attached to the provisions concerning the formulation of future standards is a sentence which has come to be known as the revision clause. It states:

Such rules, standards and recommended practices and procedures shall be re-examined from time to time as necessary.<sup>5</sup>

The revision clause appears for the first time in the RSNT. It is an outgrowth of the New York session which attempts to balance the desire of the established maritime nations for a definite standard, which is universally accepted and acts as a status quo, with the desire of developing and coastal states to have law in this area which is constantly evolving through new and increased participation among nations and which is continually being re-evaluated in the light of new knowledge and technology. This tension between the desire for a status quo, to which private arrangements can conform and the desire for flexibility is one which

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2. Convention of the Prevention of Marine Pollution by Dumping of Wastes and other Matter, done at London, 29 Dec. 1972.
  3. Art. 20(4) RSNT. "Shall be no less effective than" is the phrase used for the territorial areas, 20(6), 21(2) RSNT.
  4. Art. 18(5), 21(1), 22(1) "shall establish."; 17(4), 20(4), "shall endeavor to establish" RSNT. Art. 19 refers to action "in accordance with the provisions of. . . this convention" rather than through "competent international organization" for standards concerning the international seabed area.
  5. Art. 17(4), Art. 18(5), Art. 19, Art. 20(4), Art. 21(1) RSNT.

is repeated throughout the pollution text. The complexity of the private international financial business arrangements of shipbuilders, shipowners, users and insurers of marine transport require a system that once established will not be transformed radically without due notice.

### III. UNIFORMITY OF ENFORCEMENT MECHANISMS

#### a. Dumping

Dumping, to the extent that it may be an activity of marine transportation, is regulated by the coastal state in its territorial sea and economic zone according to national law which shall be not less effective in preventing pollution than global rules. This provides a minimum standard, especially since adjoining states must be consulted if by reason of their geographic situation they may be adversely affected. However, the global rules that have been established to date, i.e., the London Convention on Dumping<sup>6</sup>, have only recently come into force, and many nations are not signatories. Therefore, although the Dumping Convention<sup>7</sup> is international law in the sense that it is a treaty in force, it is by no means settled that its provisions are incorporated by reference in the LOS convention. The phrase "as soon as possible and to the extent they are not already in existence,"<sup>8</sup> which was mentioned in the first text was left out of the RSNT, so an open question exists as to when the already established rules will be considered the minimum standard. This is a problem which will probably be resolved with time, as the convention becomes generally accepted international law.

The coastal state has complete jurisdiction concerning dumping in its territorial sea, economic zone, over its continental shelf, and in a zone around and including its offshore terminals. However, it is not obliged to act with respect to any violation, if proceedings have been commenced by another state, i.e., the flag state.<sup>9</sup> This would seem to include both civil liability and criminal penalties for such intentional discharges; however, the open-ended nature of the jurisdiction is ameliorated to a certain extent by the allowance of flag state pre-emption for criminal matters. Because of the intentional nature of this activity

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6. See, note 2 supra.

7. Id.

8. Art. 19(2), Single Negotiating Text, hereafter called SNT. A/Conf.62/WP.8/Part III (1975).

9. Art. 26 RSNT.

and the ability of the flag state to control it, dumping does not appear to be a problem that presents an impediment to the free flow of transportation in the economic zone.

b. Vessel Source Pollution

Vessel source pollution is a more difficult problem; it is to be regulated according to the convention by many parties, in many different ways. Again, the international standards are to be established and revised, while in the meantime states may establish national laws which conform to international standards for the economic zones,<sup>10</sup> and which are in accordance with the international standards governing innocent passage for their territorial seas.<sup>11</sup> Flag state laws must also be no less effective than international standards.<sup>12</sup>

Within the economic zone, special areas may be established in which special mandatory methods for the prevention of pollution may be established including laws and navigational practices, which implement international practices. The reason for the establishment of such areas is primarily due to heavy navigational traffic. Concerning the special areas the state may enact laws formulated by the competent international organization after consultation with other countries concerned; however, the competent international organization may nullify the laws and regulations in relation to foreign vessels if it believes the conditions in the area do not warrant such laws.

The special areas provision received a great deal of input from the maritime powers who insisted on conformity to an international standard. In fact, the vessel source pollution article concerning standards was rewritten completely. The maritimes insisted on explicit use of the phrase "would not hamper innocent passage" when referring to the right of coastal states to establish sea lanes and traffic separation systems within their territorial sea.

IV. EXTENT OF JURISDICTION TO ENFORCE

Enforcement jurisdiction for dumping violations is extensive; it covers the territorial sea, economic zone, and continental shelf. It is exceptional because it requires express prior approval of the coastal state, granted according to the regulations established by the national laws, which must be no less effective than

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10. Art. 21(4) RSNT.

11. Art. 21(3) RSNT.

12. Art. 21(2) RSNT.

international standards. It is interesting to note that the enforcement article which tends to stress enforcement of international standards neglects to mention national laws which are the primary means mentioned in the article on standards. This difference in emphasis may be a reflection of the fact mentioned earlier that few states have as yet ratified the 1972 London Convention on Dumping.<sup>13</sup> Because of the reasonable suspicion clause, one would assume that if a discharge were reasonably believed to be intentional, the coastal state would have complete jurisdiction over the vessel in the economic zone and on the continental shelf.

a. Flag State Enforcement

Again, in the enforcement article for vessel source pollution, international standards are mentioned first then laws established in accordance with the provisions of the Convention,<sup>14</sup> meaning national laws varying in degree from international standards depending on the extent of the authorized jurisdiction.

Flag states, in return for the right of innocent passage for their vessels, are charged with the responsibility of effective enforcement of their laws, especially requirements in respect of design, construction, equipment and manning (DCEM) of vessels.<sup>15</sup> These DCEM requirements represent an area where the territorial states asserted a demand for coastal state sovereignty; however, the issue was ignored by neither mentioning nor disclaiming such jurisdiction. A disclaimer amendment which was rejected read, "Such laws and regulations shall not apply to or affect the design, construction, manning or equipment of foreign ships or matters regulated by generally accepted international rules unless specifically authorized by such rules."<sup>16</sup> However, that language is precisely the language of Article 20(2) in Part II, therefore, no rules which affect DCEM of foreign ships or other matters regulated by generally accepted international standards may be established by the coastal states.

Also, certificates, which are periodically verified by inspection of the vessel, shall be accepted as evidence of condition unless clear grounds exist for substantial non-compliance.<sup>17</sup> Such a rule comes out strongly for the universal acceptability of flag state certification, even in the territorial sea. So, concerning matters of DCEM and certification international practices seem firmly entrenched. Naturally, the flag state is obliged to immediately investigate and initiate proceedings for

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13. It recently came into force. See note 2, supra.

14. Art. 27(1) RSNT.

15. Art. 27(2) RSNT.

16. From a working paper on coastal state enforcement powers.

17. Art. 27(3) RSNT.



violations of vessels of its registry, and must respond to requests of other states including informing the coastal state of action taken.

b. Port State Enforcement

Universal port state jurisdiction exists when a vessel is voluntarily in port for violation of international standards no matter where the violation occurred. This represents no advancement of presently existing international law. However, a port state may also initiate proceedings for the violation of international standards if the damaged state so requests and the discharge violations accrued, within the economic zone of the requesting state. The requesting state may be any state whose territory is threatened by the discharge wherever it occurred. If the violation is within the economic zone of the port state and "is likely to cause pollution" (this sounds like a violation of national law) the port state may institute proceedings.<sup>18</sup> This is the equivalent of coastal state jurisdiction. Note that for the above-mentioned proceedings jurisdiction may be civil or criminal. Bond may be required for judicial proceedings only; it, along with any permanent records, may be transferred to the coastal state if it requests a transfer of the proceedings. Concerning violations of international laws relating to seaworthiness or that threaten damage to the environment, the port state may take administrative steps to discontinue its voyage until repairs are made, either by permitting the vessel to proceed to the nearest appropriate repair yard or to rectify the violation at once. Therefore, once in port, a vessel may be detained for lack of seaworthiness or threat of environmental damage; however, proper certification would appear to overcome this impediment.

c. Coastal State Enforcement

The coastal state may institute proceedings for a violation of national laws or international standards accruing within its economic zone if the vessel is voluntarily in port or in an offshore terminal.<sup>19</sup>

In the territorial sea, a vessel navigating may be inspected on clear grounds for belief of a violation of national law made in accordance with this convention, meaning the inspection must be made according to laws that do not hamper the rights of innocent passage. This seems a bit tautological since the grounds for inspection may be considered as prejudicing innocent passage; nevertheless, if evidence of a violation warrants it, proceedings, including arrest, may be commenced against the vessel. Although the rights of innocent passage are to be preserved, a coastal

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18. Art. 28 RSNT.

19. Art. 30(1) RSNT.

state has complete jurisdiction over vessels in its territorial sea for the purpose of pollution control. This appears to be an increase in the power given the coastal state for the SNT allows this power only in the case of a violation of international standards.

The coastal state may also take measures, in accordance with international law, beyond the territorial sea for the protection of coastlines or fisheries, etc., and for imminent danger of pollution or threat of pollution following a maritime casualty.<sup>20</sup> These measures are extraordinary, as befits the individual situation; therefore, the outward limit of impediment resulting in these situations cannot be ascertained except to say the intervention must be proportionate to the damage caused. This provision seems to allow for unusual operations such as the destruction of vessels, i.e., the Torrey Canyon.<sup>21</sup>

In the economic zone where a violation of national law, which conforms to or gives effect to international law, occurs the coastal state may simply ask for information including the identification and registry of the vessel, the next port of call, and other information to determine whether a violation occurred. Technically, this cannot be considered a hindrance to navigation through the zone, for theoretically all the data could be obtained while the vessel is moving forward toward its destination.

However, where the violation has resulted in a substantial discharge and significant pollution in the economic zone, a second degree of enforcement exists. Physical inspection is obligatory if the vessel refuses to give information or if the information given is manifestly at variance with the evident facts. This right of inspection also would be carried out while the vessel is continuing its forward progress, therefore, it does not represent an actual obstruction to navigation.

The third degree of enforcement exists only for flagrant violations of national laws conforming to or implementing international standards. Such violations occur when the discharge causes major damage or the threat of major damage to the coastline or resources of the economic zone. The right of enforcement through initiating proceedings exists here. Note, however, that no mention is made of the right of arrest or of physical detention. But, the word proceedings seems to include both civil and criminal proceedings and may require the posting of bond as described

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20. Art. 31 RSNT.

21. C. Trabant, Intervention on High Seas, 7 L. & Pol. in I. Bus. 305 (1975).

in Article 36. If the flag state assumes liability for its vessels or provides a compulsory insurance scheme, and ensures compliance, in advance, with the coastal state jurisdiction, the vessel may proceed unrestrained.<sup>22</sup>

d. Safeguards

Rights granted and duties imposed under national legislation must be meted out in a non-discriminatory manner.<sup>23</sup> Enforcement is through government officials, naval vessels or military aircraft, or other identifiable ships or aircraft or authorized government service.<sup>24</sup> No method of enforcement may cause a hazard to the vessel or to safe navigation.<sup>25</sup>

Detention of vessels is expressly mentioned in Article 35 of the SNT, followed by a statement of immediate release upon payment of fine. However, the words "a vessel may be detained only by virtue of a court order..."<sup>26</sup> have been deleted in the RSNT. The new phrase is a "state shall not delay a foreign vessel longer than essential for purposes of investigation,"<sup>27</sup> the investigation can be no greater in extent than outlined in Articles 28 and 30 on port state and coastal state jurisdiction. Because of this, detention, in the sense of arrest, would be restricted to violation in the territorial sea according to Article 30(2). No detention would be allowed in the economic zone; however, the coastal state may "cause proceeding to be taken according to its laws"<sup>28</sup> for a flagrant violation or one causing major damage. Nevertheless, if the flag state has assumed liability or provides a compulsory insurance scheme, the vessel must be allowed to proceed.<sup>29</sup>

All civil liabilities and criminal penalties are monetary,<sup>30</sup> except for criminal violations within the internal waters of a state. Since criminal proceedings are subject to flag state pre-emption, any violations occurring outside the territorial sea, incarceration of the crew or forfeiture of the vessel can be avoided except in the case of major damage.

e. Criminal Proceedings

Flag state pre-emption is permitted for criminal violation occurring beyond the territorial sea until six months after the initiation of proceedings, unless the damage is major or the flag state falls into the bad boy category, i.e., it has re-

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22. Art. 30 RSNT.  
23. Art. 33 RSNT.  
24. Art. 34 RSNT.  
25. Art. 35 RSNT.

26. Art. 35 SNT.  
27. Art. 36 RSNT.  
28. Art. 30(6) RSNT.  
29. Art. 30(7) RSNT.  
30. Art. 39(1) RSNT.

peatedly disregarded its obligations.<sup>31</sup> The record of the proceedings shall be made available to the prosecuting state and they in turn shall release any bond posted in connection with the proceedings. A three year statute of limitations exists on criminal matters.<sup>32</sup> And "recognized" rights of the accused are to be observed.<sup>33</sup> Although this is not amplified, one must assume these include the right to notice and hearing, confrontation with witnesses, right against self-incrimination, protection against illegal search and seizure, excessive bond and cruel and unusual punishment, and the right to be represented by counsel.

The flag state pre-emption provision in no way affects the right of the coastal state to institute civil proceedings in respect of any claim for loss or damage connected with any incident involving a violation of applicable laws and regulations or international rules and standards.<sup>34</sup> The phrase "...connected with any incident involving a violation..." does not have the legal precision one might hope for and sounds rather open ended. Here again, though, applicable laws must be in conformity with international standards in the economic zone outside the territorial sea; therefore, a definite line can be drawn at the limit of the territorial sea, where, in general, no new obligation will be incurred.

The flag state, its consular officers or diplomatic representatives and, where possible, the maritime authority shall be notified of any enforcement measures taken.<sup>35</sup> Note, the addition of the maritime authority to the list of authorities notified directly; this may be extremely important when time factors exist such as the six-month period within which flag state pre-emption may occur.

Another protection afforded the commercial transport is the liability provisions for coastal or port state enforcement measures where unlawful or excessive.<sup>36</sup> This would include damage or loss attributable to the state from possible inspection, seizure, or scuttling of a vessel, etc. However, the recourse is limited to the courts of the states against which the liability is claimed.

One problem which occurs throughout the text is that national laws may differ from international standards within the territorial sea. Now, with the extension of the territorial sea to 12 miles, over 100 straits will be overlapped.<sup>37</sup> Many of these straits form territorial waters of a single state, many are archipelagic waters;

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31. Art. 38(1) RSNT.  
32. Art. 38(2) RSNT.  
33. Art. 39 RSNT.  
34. Art. 38(3) RSNT.

35. Art. 40 RSNT.  
36. Art. 41 RSNT.  
37. G. Grandison, U. Meyer, Intern'l Straits, Global Communication and Evolving Law of the Sea, Vanderbilt J. of Transnational Law, 411 (1975).

however, a significant number are international straits. Article 42 of the RSNT repeats the text of the SNT that no pollution provisions concerning standards, enforcement or safeguards shall affect the legal regime of straits used for international navigation. However, this creates a conflict because straits' areas, due to intense use, heavy congestion, and proximity to shore, are the very areas which can benefit most from strict regulations of pollution. Some straits are suited to the special area designation; however, these areas will be established only in the economic zone. In the territorial sea according to Part II Article 20 RSNT, the state may make laws for "preservation of the marine environment and the prevention of the pollution thereof."<sup>38</sup> Article 21 elaborates, stating that sea lanes and traffic separation schemes may be established where necessary having regard to the safety of navigation. However, where the territorial sea is part of a strait, the state may not make regulations concerning a matter pre-empted by generally accepted international standards, and must give effect to international law. Innocent passage cannot be suspended in an international strait.<sup>39</sup> In archipelagic straits, national law shall not discriminate against foreigners.<sup>40</sup>

f. Ice-covered areas, liability, and sovereign immunity

It is interesting to note that provisions for ice-covered areas,<sup>41</sup> which were formerly mentioned following special areas, now have a free standing position outside the umbrella provisions of standards, enforcement, and safeguards. They are controlled solely by national law. This may be due to the fact that these areas are small, fairly well delineated, fall within the sovereignty of a few states, and have unique and vulnerable conditions which have not been fully studied as yet, therefore, no international standards exist presently. Security reasons may also exist for their special designation.

States, particularly flag states, must provide legal mechanisms to allow suits for compensation for damage caused by marine pollution by persons under their jurisdiction. Such states are also liable in accordance with international law for damages attributable to them.<sup>42</sup> This is far short of making the states themselves liable for the damage caused by their constituents, a goal desired by some countries, and mentioned in Article 30(7) on coastal state jurisdiction.

Of course, all warships, naval auxiliary, other vessels and aircraft owned or operated by a state and used, for the time being, only on government non-commercial

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38. Art. 20(1) Part II RSNT.            41. Art. 43 RSNT.  
39. Art. 43 Part II RSNT.            42. Art. 44 RSNT.  
40. Art. 126 Part II RSNT.

service are excepted<sup>43</sup> from the pollution regulation enforcement, but are admonished to conform to it. The article states the provisions of this convention regarding pollution shall not apply; however, this seems implausible as some provisions especially in Part II deal directly with such a class of ships.

g. Settlement of Disputes

Disputes are to be settled in the manner outlined in Part IV. If voluntary measures do not effect a settlement, the provisions of Annex IIB<sup>44</sup> will come into effect when requested by one of the parties. A special committee composed of five experts shall be agreed upon by the parties to the dispute. The experts shall be chosen from a list of experts on scientific and technical marine pollution problems established by the United Nations Environment Programme. The special committee, once formed, establishes its own procedures, including the opportunity for each party to be heard. The decision of the special committee is binding; however, matters relating to the interpretation of the Convention shall be submitted for a finding by other procedures, including the International Court of Justice and the Law of the Sea Tribunal or an arbitral tribunal. The decision of the special committee is final except that it may be appealed when one of the parties claims the decision was invalid due to an excess of jurisdiction, infringement of basic procedural rights or a violation of the Convention. This appears to present a fairly wide area of appeal including both procedure and substantive matters of interpretation.

It is interesting to note that the RSNT includes the establishment of a new special committee chosen by Inter-Governmental Maritime Consultative Organization (IMCO) whose jurisdiction consists of application of the articles relating to navigation. These two committees will invariably have some degree of overlapping jurisdiction which will virtually assume a right of appeal.

V. CONCLUSION

To summarize, in the economic zone if a violation is believed to occur, the vessel may be the subject of inquiry and information getting. However, it may continue the voyage. If a substantial discharge of significant pollution occurs, or the vessel refuses to give information, or gives manifestly false information, inspection may be made. Theoretically the vessel may continue its voyage during this type of inspection. Proceedings may be initiated for flagrant violations of

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43. Art. 45 RSNT.

44. Art. 1-9 Part IV RSNT.

international standards which cause major damage or the threat of major damage to the coastline. Here, however, physical detention can be avoided by flag state assumption of liability. The only exception is the case of major damage to coastline or related interests from pollution or the threat of pollution related to a maritime casualty.

The main threat of obstruction is in Article 30(2), concerning the territorial sea. For no right of preemption exists for a criminal prosecution stemming from a violation within the territorial sea.

In order to get civil jurisdiction to prosecute national laws, either a person or res is needed; such jurisdiction can only be acquired in the territorial sea except for cases of major damage. However, once civil jurisdiction is acquired the liability applies to damage "connected with an incident involving a violation."<sup>45</sup> This seems open-ended. In matters of certification, transport is completely unimpeded while in conformance to international standards. However, once in port, administrative measures may be taken with regard to seaworthiness.

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45. Art. 38(3) RSNT.

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This study provides a detailed analysis of the provisions of Chapter I, Part III of the Single Revised Negotiating Text, which was produced at the Fourth Session of the Third United Nations Conference on the Law of the Sea. The purpose of the analysis is to determine how navigation will be restricted in the proposed economic zone because of controls relating to pollution or preservation and protection of the marine environment. A new form of jurisdiction has been established within the economic zone in order to regulate transportation for the purpose of the prevention of pollution. The conflict created in the negotiation concerning the content of the regulation results from the differing interests of the maritime powers, states which border on international straits, and other straits with a strong interest in protection of the marine environment. The maritime powers seek universal standards which would be applied with a high degree of uniformity through enforcement mechanisms. Environmental interests and straits states seek an extension of coastal state sovereignty to establish strong pollution controls. Briefly, the present compromise states that if a violation is believed to occur (Cont. on back)

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2. Legal Restrictions on Transportation
3. Economic Zone
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