

PART III

STRAITS USED FOR INTERNATIONAL NAVIGATION

Section 1

General provisions

Article 34

Legal status of waters forming straits used for international navigation

1. The regime of passage through straits used for international navigation established in this Part shall not in other respects affect the legal status of the waters forming such straits or the exercise by the States bordering the straits of their sovereignty or jurisdiction over such waters and their air space, bed and subsoil.

2. The sovereignty or jurisdiction of the States bordering the straits is exercised subject to this Part and to other rules of international law.

Bibliography: *Robin R. Churchill/Alan V. Lowe*, *The Law of the Sea* (3rd edn. 1999); *Bing Bing Jia*, *The Regime of Straits in International Law* (1998); *Satya N. Nandan/David H. Anderson*, *Straits Used for International Navigation: A Commentary on Part III of the United Nations Convention on the Law of the Sea*, BYIL 60 (1989), 159–204; Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), *United Nations Convention on the Law of the Sea 1982: A Commentary*, vol. II (1993); *Donat Pharand*, *The Arctic Waters and the Northwest Passage: A Final Revisit*, ODIL 38 (2007), 3–69; *Michael C. Stelakatos-Loverdos*, *The Contribution of Channels to the Definition of Straits Used for International Navigation*, IJMCL 13 (1998), 71–89; *Sir Ian Sinclair*, *The Vienna Convention on the Law of Treaties* (2nd edn. 1984)

Documents: Canada Ministry of Foreign Affairs, Statement by Secretary of State for External Affairs Joe Clark, 1985, reproduced in: CYIL 24 (1986), 418; UN DOALOS, *Straits Used for International Navigation: Legislative History of Part III of the United Nations Convention on the Law of the Sea*, vol. II (1992)

Contents

I. Purpose and Function	1
II. Historical Background	4
III. Elements	5
1. Legal Status of Waters Forming Straits	5
2. Extent of the Coastal State's Powers	7
3. Limitation of the Coastal State's Powers	9

I. Purpose and Function

- 1 This article is intended to safeguard the coastal sovereignty over territorial waters, above all. In a broader sense, it secures the legal status of any water area that may form part of such a strait as regulated by Part III of the UNCLOS. The effect of this article is that autonomy has been recognised for the regime of straits in relation to other regimes stipulated by the Convention.
- 2 On its face, the article does not, however, define what a strait used for international navigation is, and no criteria are mentioned. But this is a question that cries out for an answer. While straits are not all identical in terms of geography and usefulness for naviga-

tion,¹ the notion suitable for use in our inquiry may be defined on the basis of a categorization of such straits by reference to the specific regimes of passage that occur within them. The regimes are recognised as being based in treaty or customary law. Only those straits in which a regime of international law applies are relevant to a juridical study of the regime of international straits. For the present purposes, the phrase 'international straits' refers to a regime based in customary law, generally considered equivalent to other appellations such as 'straits used for international navigation'.² The UNCLOS is silent in places such as this, which are to be examined in the light of customary law not codified in the convention.³ The presumption is therefore that, when a multilateral treaty like the UNCLOS has apparently left certain notions undefined, it implies a continuing role for customary law.⁴ There is authority for the view that this is a common feature of today's multilateral treaties.⁵

There may be another reading of the silence of this article over the definition of a strait used for international navigation. Given the principal aim of this article that the legal status of waters forming international straits is not to be affected by the regimes of passage that are applicable in them, there is no need to set out a general definition of such waterways unless their waters are concerned, in the following provisions of the part, with the right of passage for international shipping. In international straits, in the sense as understood here, there are areas of sea that are not subject to the regimes of passage the UNCLOS seeks to establish. A categorical tag of 'international strait' in certain straits may overstate the reality as far as the rights and duties of the coastal State and flag State are concerned. This reading seems to be the better one.⁶

II. Historical Background

Art. 34, in more or less its present form, was adopted in 1975,⁷ following the proposal submitted by the Private Group on Straits, or the Fiji/UK Group,⁸ to the third session of UNCLOS III.⁹ The root of the provision, however, had a lot to do with Spain's proposal made to the conference in 1974, which sought to emphasize its view that straits involved in the negotiations were part of territorial waters.¹⁰ Spain's proposal¹¹ predated a similar one from several East European countries led by Bulgaria.¹² One interesting development during the negotiation process was the deletion of an earlier expression of 'strait State' that appeared only in the Informal Single Negotiation Text of 1975.¹³ The expression soon afterwards gave way to that of 'States bordering the straits', although its brevity may still be welcome.¹⁴

¹ It may be called, geographically, a channel, a passage or a minch. Cf. Michael C. Stelakatos-Loverdos, The Contribution of Channels to the Definition of Straits Used for International Navigation, IJMCL 13 (1998), 71, 74-75.

² Bing Bing Jia, The Regime of Straits in International Law (1998), 32, 56-58.

³ Robin R. Churchill/Alan V. Lowe, The Law of the Sea (3rd edn. 1999), 24-25.

⁴ See Lagoni on Preamble para. 8.

⁵ Sir Ian Sinclair, The Vienna Convention on the Law of Treaties (2nd edn. 1984), 10.

⁶ See Jia on Art. 37 MN 10-13.

⁷ UNCLOS III, Working Papers of the Plenary, UN Doc. A/CONF.62/WP.8/Part II (1975), OR IV, 145.

⁸ Satya N. Nandan/David H. Anderson, Straits Used for International Navigation: A Commentary on Part III of the United Nations Convention on the Law of the Sea, BYIL 60 (1989), 159, 163.

⁹ UN DOALOS, Straits Used for International Navigation: Legislative History of Part III of the United Nations Convention on the Law of the Sea, vol. II (1992), para. 146.

¹⁰ Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. II (1993), 296 (MN 34.3).

¹¹ Second Committee UNCLOS III, Spain: Draft Articles on the Nature and Characteristics of the Territorial Sea, UN Doc. A/CONF.62/C.2/L.6 (1974), OR III, 187.

¹² Second Committee UNCLOS III, Bulgaria *et al.*: Draft Articles on Straits Used for International Navigation, UN Doc. A/CONF.62/C.2/L.11 (1974), OR III, 189.

¹³ Nordquist/Nandan/Rosenne (note 10), 297 (MN 34.4).

¹⁴ A language consideration was behind this development: *ibid.*, 300 (MN 34.8(g)).

III. Elements

1. Legal Status of Waters Forming Straits

- 5 The issue of the legal status of the waters that form straits is central to the understanding and classification of straits that are relevant to international law. However, the wording of Art. 34 gives an inescapable impression that it does not unambiguously state the legal status which it purports to clarify. Interpretation is certainly open in respect of such wording. The powers of the coastal State, or a State bordering a strait, are probably of two kinds: those of sovereignty and those of jurisdiction. It follows that the waters concerned may be of at least two types: territorial waters, including those newly enclosed internal waters as a result of the application of Art. 7, and other waters, such as waters forming the contiguous zone or exclusive economic zone (EEZ), which are subject to coastal jurisdiction in accordance with the relevant parts of the UNCLOS.
- 6 While a strait with a high sea or EEZ corridor does not require the application of the regime of passage provided in Part III, the fact that a strait is recently enclosed by straight baselines may result in a change in the regime of navigation that had applied prior to the enclosure, with the waters forming it becoming internal waters. Art. 34, in itself, does not address the issue of the impact of the changed status of the waters forming an international strait upon the regime of passage that had existed beforehand or exists thereafter.¹⁵ There has been the argument that the changed status of such waters can lead to the conclusion that, in respect of particular cases, there will be no longer the right of innocent passage through straits after the change of the status of the waters forming them.¹⁶ One such case is the Canadian Arctic Archipelago,¹⁷ which was encircled by Canadian straight baselines prescribed in a statute in 1985, with the purported effect that the waters enclosed, comprising the Northwest Passage, and became Canada's 'historic internal waters'.¹⁸ Having said that, the terms of Art. 34 hint strongly at a parallelism between the legal status of the waters forming an international strait and the regime of passage applicable to it. For whatever may be the regime of passage, the status of these waters is not affected by that regime. However, the status of these waters is a narrower-than-normal concept in this context, in that the legal regime, the content of which is normally determined in other parts of the sea by the legal status of the waters, is no longer determined by a change in the status of the waters forming international straits. This is supported by the terms of Art. 34 (2), which subjects coastal sovereignty and jurisdiction to the provisions of Part III and other rules of international law, and of course, Art. 35 (a). It may be inferred that the consequences of a change in the legal status of the waters comprising international straits are limited by the rules of Part III, and that a previously existing regime of passage remains after the change of the status under discussion. The existing rules of Part III are adequate to deal with the change in question such that there seems to be no need to discuss the possible role, if any, of Art. 8 (2) that preserves the right of innocent passage in territorial waters now enclosed as internal waters.¹⁹ It may be concluded that the regime of international straits under Part III, with its components of rules for transit and innocent passage, is of a both *sui generis* and *sui juris* nature. Between the legal nature of the body of waters forming such straits and the applicable regime of passage as laid down in Part III, the latter takes precedence over rules associated with the former.

¹⁵ Arts. 34 and 35 (a) both look at this matter from the angle of the regime of navigation impacting upon the legal status of the waters forming international straits.

¹⁶ *Donat Pharand*, *The Arctic Waters and the Northwest Passage: A Final Revisit*, ODIL 38 (2007), 3, 43.

¹⁷ *Ibid.*, 15.

¹⁸ Canada Ministry of Foreign Affairs, Statement by Secretary of State for External Affairs Joe Clark, 1985, reproduced in: CYIL 24 (1986), 418; for earlier developments, see *Pharand* (note 16), 10–11.

¹⁹ *Cf. Jia* on Art. 35 MN 7–9; see further Nordquist/Nandan/Rosenne (note 10), 307 (MN 35.8(a)).

2. Extent of the Coastal State's Powers

It is submitted that the coastal State's powers under Art. 34 (1) are those recognised under the regimes of internal waters, the territorial sea, the EEZ, and the continental shelf. They also affect the superjacent airspace. The distinction between sovereignty and jurisdiction derives from the difference between the powers exercisable in the territorial sea and internal waters, and those in the EEZ and the continental shelf.²⁰ Those powers are, however, hemmed in by the applicable regime of passage provided under Part III. Only where those powers are not so limited by the UNCLOS can they be extended to matters on the basis of general international law.²¹ An example in support of this interpretation may be found in Egypt's declaration upon ratification of the UNCLOS in 1983, which stated that:

'The provisions of the 1979 Peace Treaty between Egypt and Israel concerning passage through the Strait of Tiran and the Gulf of Aqaba come within the framework of the general régime of waters forming straits referred to in part III of the Convention, wherein it is stipulated that the general régime shall not affect the legal status of waters forming straits and shall include certain obligations with regard to security and the maintenance of order in the State bordering the strait.'²²

The point is rather that the legal status of the waters forming international straits referred to in that statement will be qualified by Part III, above all. The regulatory powers of the coastal State in international straits are defined, in particular, by Art. 42, regardless of their subject-matters being perceived to be of greater importance by the coastal State. This is argued on the premise that the coastal State concerned must of course be a party to the UNCLOS, since it is not absolutely settled that Art. 42 reflects customary law. But outside the scope of Part III, the coastal State naturally retains other powers over the waters forming the straits, whatever the scope of those remaining powers may be. For instance, where an international strait contains an EEZ corridor and international shipping can only pass through the part of the strait comprising territorial sea, by reason of necessity, the coastal State has all the powers in the corridor as recognised by the UNCLOS in respect of the EEZ.

3. Limitation of the Coastal State's Powers

As the coastal State's powers are over the waters forming a coastal strait that meets the requirements of Part III, the superjacent airspace, and the subjacent seabed and subsoil, interference with the right of transit passage and the right of non-suspendable innocent passage, as enshrined in the UNCLOS, are inevitably deemed a concern for the user States. A particular view was expressed by the International Civil Aviation Authority in 1984 that the exercise by the coastal State of its powers 'in no circumstances' entailed the suspension or limitation of the right of transit passage; nor could it result in the imposition by the coastal State of its own rules of the air.²³ As will be shown in the remaining commentaries to this part, Part III contains overlapping provisions to ensure non-interference with, and non-hampering of, the rights of passage and overflight set forth in it.

²⁰ Nordquist/Nandan/Rosenne (note 10), 295 (MN 34.1).

²¹ *Jia* (note 2), 149.

²² Egypt's Declaration made upon Ratification of the UNCLOS in 1983, available at: http://treaties.un.org/Pages/ViewDetailsIII.aspx?&src=TREATY&mtmsg_no=XXI-6&chapter=21&Temp=mtmsg3&lang=en.

²³ Nordquist/Nandan/Rosenne (note 10), 299 (MN 34.8(f)).

Article 35
Scope of this Part

Nothing in this Part affects:

- (a) any areas of internal waters within a strait, except where the establishment of a straight baseline in accordance with the method set forth in article 7 has the effect of enclosing as internal waters areas which had not previously been considered as such;
- (b) the legal status of the waters beyond the territorial seas of States bordering straits as exclusive economic zones or high seas; or
- (c) the legal regime in straits in which passage is regulated in whole or in part by long-standing international conventions in force specifically relating to such straits.

Bibliography: *Hugo Caminos*, The Legal Regime of Straits in the 1982 United Nations Convention on the Law of the Sea, RdC 205 (1987-V), 9–246; *Milen Dyoulgerov*, Navigating the Bosphorus and the Dardanelles: A Test for the International Community, IJMCL 14 (1999), 57–100; *Lauri Hannikainen*, The Continued Validity of the Demilitarised and Neutralised Status of the Åland Islands, ZaöRV 54 (1994), 614–651; *María Teresa Infante*, Straits in Latin America: The Case of the Strait of Magellan, ODIL 26 (1996), 175–187; *Marie Jacobsson*, Sweden and the Law of the Sea, in: Tullio Treves/Laura Pineschi (eds.), The Law of the Sea: The European Union and its Member States (1997), 495–520; *Bing Bing Jia*, The Regime of Straits in International Law (1998); *Anatolii L. Kolodkin/Vasilii N. Gutsuliak/Iulia V. Bobrova*, The World Ocean: International Legal Regime (translated by William Butler, 2010); *Martti Koskenniemi/Marja Lehto*, Finland and the Law of the Sea, in: Tullio Treves/Laura Pineschi (eds.), The Law of the Sea: The European Union and its Member States (1997), 127–150; Stephen Houston Lay/Robin Churchill/Myron Nordquist (eds.), New Directions in the Law of the Sea: Documents, vol. II (1973); *Djamchid Momtaz*, La Régime de Passage dans le Détroit d’Hormuz, in: Rafael Casado Raigón (ed.), L’Europe et la mer (pêche, navigation et environnement marin) (2005), 167–174; *John N. Moore*, The Regime of Straits and the Third United Nations Conference on the Law of the Sea, AJIL 74 (1980), 77–121; *Satya N. Nandan/David H. Anderson*, Straits Used for International Navigation: A Commentary on Part III of the United Nations Convention on the Law of the Sea, BYIL 60 (1989), 159–204; Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. II (1993); *William M. Reisman/Gayl S. Westerman*, Straight Baselines in Maritime Boundary Delimitation (1992); *Hugo Tibergh*, Mysteries of Water Boundaries: Baselines and Boundaries around Sweden’s Coasts, in: Ove Bring/Said Mahmoudi (eds.), Current International Law Issues: Nordic Perspectives (1994), 195–217; *Hugo Tibergh*, The Practice and Value of Compromise in Ocean Boundary Law: The Experience of Sweden, in: David D. Caron/Harry N. Scheiber (eds.), Bringing New Law to Ocean Waters (2004), 419–425; *Nihan Ünlü*, The Legal Regime of the Turkish Straits (2002)

Documents: IMO, Ships’ Routeing (2010); IMO Res. A.827(19) of 23 November 1995; UN DOALOS, The Law of the Sea: National Legislation on the Territorial Sea, the Right of Innocent Passage and the Contiguous Zone (1995); US Department of State, Continental Shelf Boundary: Finland – Sweden, Limits in the Seas No. 71 (1976); US Department of State, United States Responses to Excessive National Maritime Claims, Limits in the Seas No. 112 (1992); US Department of State, Digest of United States Practice in International Law (2008); US Naval War College, Annotated Supplement to the Commander’s Handbook on the Law of Naval Operations, International Law Studies 73 (1999)

Cases: Reference re: Ownership of the Bed of the Strait of Georgia and Related Areas [1984] 8 DLR (4th) 161 (Canada); ICJ, Corfu Channel Case (United Kingdom of Great Britain and Northern Ireland v. Albania), Merits, Judgment of 9 April 1949, ICJ Reports (1949), 4; ICJ, Case Concerning Passage through the Great Belt (Finland v. Denmark), Order of 10 September 1992, ICJ Reports (1992), 348; ICJ, Fisheries Case (United Kingdom v. Norway), Judgment of 18 December 1951, ICJ Reports (1951), 116

Contents

I. Purpose and Function	1
II. Historical Background	4
III. Elements	7
1. Previously Territorial Waters	7
2. Maritime Zones Excluded From Part III	10
3. Existing Treaties Relating Specifically to Passage Through Straits	12

I. Purpose and Function

This article expands on what has already been set out as a principle in Art. 34.¹ The title of this article, 'Scope of this Part', may not clearly indicate the gist of the provision, because the title may have two connotations. On the one hand, it may be concerned with the question as to whether the rules of this Part have such a scope of applicability as to affect the legal status of other maritime zones within straits as established under the UNCLOS. This interpretation is supported by the content of this article. On the other, it may be on the question of which regimes are applied to which categories of strait. This interpretation is only partly supported by Art. 35 (c). Actually, the article in substance seems to be inclusive of both connotations.

Another point about this article is that it implicitly reinforces the view, which impacts upon the understanding of Art. 34, that international straits, to which Part III applies, are those in which there is an overlap of the territorial sea of the coastal State or States.² This is confirmed by the existence of provisions excluding straits with high-sea or exclusive economic zone (EEZ) routes through them, or those formed by internal waters.

However, a third point regarding the purpose of this article should also be made. International straits in terms of Part III are those in which a specific regime of passage applies in pursuance of that part. This presumption does not exclude at all the fact that international straits are of more types than are recognized by Part III. International straits, as a category, include not only Part III-type straits,³ but also straits excluded from Part III. This latter sub-category covers, of course, the types of straits envisaged in Art. 35 (c) and Art. 36. But it is argued here that the sub-category may also include straits that meet the description of Art. 35 (a), as long as they have been used for international navigation. In other words, a strait used for international navigation may be one composed of internal waters, even without anything to do with the establishment of straight baselines. The Kerchensk Strait, linking the Sea of Azov and the Black Sea, is an example. It seems that this narrow strait has been part of the internal waters of formerly the USSR, and now Ukraine and Russia, in the same way that the Sea of Azov has been so.⁴ This evolvement has seldom attracted much interest from outside the two countries,⁵ but it seems to be an interesting case of an international strait composed of internal waters.⁶ It may also be speculated that international straits may link a part of the high seas or EEZ not only with the territorial sea of a foreign State, but with the internal waters of a foreign State.⁷ An example is the Strait of Juan de Fuca between Canada and the US. It has been recognized by both States that the strait is an international strait, even though the Canadian half of the strait has been deemed part of Canadian internal waters by judicial decision.⁸ This scenario is to be expected, since Part III is not supposed to exhaust the rules of passage through, nor the list of, international straits.

¹ See *Jia* on Art. 34 MN 5–6.

² Cf. UNCLOS III, Canada, Chile and Norway: Aide Memoire, 30 April 1975 (1975, mimeo.), reproduced in: Renate Platzöder (ed.), Third United Nations Conference on the Law of the Sea: Documents of the Geneva Session 1975 (1975), 208–209.

³ It should be noted that the type of straits envisaged in Art. 38 (1) are **not** excluded from Part III. For further details see *Jia* on Art. 38 MN 10–15.

⁴ Anatolii L. Kolodkin/Vasilii N. Gutsuliak/Iulia V. Bobrova, *The World Ocean: International Legal Regime* (2010), 191.

⁵ It was subject to a study on historic bays in 1957, see UNCLOS I, Historic Bays: Memorandum by the Secretariat of the United Nations, UN Doc. A/CONF.13/1 (1957), OR I, 1, 3 (para. 12). No objection was recorded from other States.

⁶ See the bilateral agreement between Russia and Ukraine of 2003 on, *inter alia*, the passage regime applicable to the strait: Kolodkin *et al.* (note 4), 191.

⁷ For those putting in at Mariupol (Ukraine) or Taganrog (Russia), the Kerchensk Strait has its main navigable route through the Ukrainian part of the strait, known as the Kerch-Enikul Canal: Kolodkin *et al.* (note 4), 187–188.

⁸ Reference re: *Ownership of the Bed of the Strait of Georgia and Related Areas* DLR 8 (1984) (4th)161, 163 (Canada) (per Justice Dickson); for further analysis, see Bing Bing Jia, *The Regime of Straits in International Law* (1998), 17.

II. Historical Background

- 4 When the ‘Consensus Text’ of the Private Group on Straits, dated 18 April 1975, came out, its definition of straits used for international navigation followed the criteria laid down in the *Corfu Channel Case*⁹.¹⁰ Yet, it gave rise to disquiet on the part of Canada, Chile and Norway, which jointly submitted an *aide-memoire* on 30 April 1975.¹¹ The main contention of the three countries was that the definition in the Consensus Text ‘clearly envisages the characterization of stretches of internal waters as international straits’, thus negating the regime of internal waters ‘already established by 41 States on the basis of the straight baseline system along their coasts especially where there is a fringe of islands in accordance with the decision’ of the ICJ in the *Fisheries Case*¹² and the Convention on the Territorial Sea and the Contiguous Zone of 1958¹³ (CTSCZ).¹⁴ This concern was addressed by the Informal Single Negotiation Text, and eventually by Art. 35 (a).
- 5 It has been noted before that, prior to 1949, treaties related to specific straits were often the basis on which general rules for regulating international straits were formulated, but that the 1930 Hague Conference and especially the 1949 *Corfu Channel Case* had revealed a growing trend in State practice in separating general rules from existing treaties.¹⁵ Turkey, for one, had succeeded in prompting the International Law Commission to insert an exclusionary clause in the commentary on its 1956 Draft Articles concerning the Law of the Sea.¹⁶ Art. 25 CTSCZ states:

‘The provisions of this Convention shall not affect conventions or other international agreements already in force, as between States Parties to them.’

- 6 Art. 35 (c) has, therefore, reproduced what had been known to States during the negotiation of the CTSCZ.¹⁷ Indeed, many of the early proposals tabled at UNCLOS III contained provisions to this effect, showing that a consensus had emerged even at the early stages of the negotiations.¹⁸ One change in wording may be noteworthy, namely, the addition of the phrase ‘in part’, in the ‘Consensus Text’ of 1975 mentioned above. The phrase did not appear until this paper came out, after, among others, Denmark expressed its concern with the Baltic Straits in the scheme of things.¹⁹ This phrase would allow the Baltic Straits to be exempted from Part III, even though the relevant treaties were only partly concerned with passage.²⁰

⁹ ICJ, *Corfu Channel Case* (United Kingdom of Great Britain and Northern Ireland v. Albania), Merits, Judgment of 9 April 1949, ICJ Reports (1949), 4.

¹⁰ UNCLOS III, Consensus Text of Private Group on Straits, 18 April 1975 (1975, mimeo.), reproduced in: Platzöder (note 2), 204.

¹¹ Canada, Chile and Norway: Aide Memoire (note 2), 208–209.

¹² ICJ, *Anglo-Norwegian Fisheries Case* (United Kingdom v. Norway), Judgment of 18 December 1951, ICJ Reports (1951), 116.

¹³ 516 UNTS 205

¹⁴ *Ibid.*, Canada, Chile and Norway: Aide Memoire (note 2) 208.

¹⁵ *Jia* (note 8), 109.

¹⁶ ILC, Report of the International Law Commission: Commentaries to the Articles Concerning the Law of the Sea, UN Doc. A/3159 (1956), GAOR 11th Sess. Suppl. 9, 12, 22–23 (Art. 24, para. 5).

¹⁷ *Jia* (note 8), 101.

¹⁸ Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. II (1993), 302–303 (MN 35.2–35.3).

¹⁹ Satya N. Nandan/David H. Anderson, Straits Used for International Navigation: A Commentary on Part III of the United Nations Convention on the Law of the Sea, BYIL 60 (1989), 159, 175.

²⁰ *Jia* (note 8), 116–117. Art. 1 of the 1857 Copenhagen Convention envisaged the possibility that further treaties might be entered into force between Denmark and third States to the treaty to regulate fiscal and customs matters, further information on the 1857 Copenhagen Convention are available at: <http://unterm.un.org/dgaacs/unterm.nsf/8fa942046ff7601c85256983007ca4d8/e2ceeeb0f547b4138525708b006e50ec?OpenDocument>.

III. Elements

1. Previously Territorial Waters

Art. 35 (a) provides one particular detail to what has been generally stated in Art. 34 (1): that any of the regimes of passage provided in Part III cannot change the legal status of the waters forming an international strait. Over such waters, the States bordering the straits are entitled to exercise whatever powers allowed under the UNCLOS. However, there is one exception to this general injunction, namely, where the existence of internal waters in the strait comes about as a result of the establishment of local straight baselines. The language of Art. 35 (a) takes a sharp turn in those circumstances. While it does not say in what manner that provision will *affect* newly established internal waters, the implication seems to be that reference is to be made to Art. 8 (2),²¹ which regulates the immediate consequence of drawing straight baselines for passage in former territorial waters. That consequence is modified by Art. 8 (2) in preserving the existing right of innocent passage in the waters. In Part III, the negotiating States also found it necessary to incorporate a similar provision to Art. 8 (2), namely, Art. 35 (a).²² Two questions arise: first, there is the question of whether the geographical criterion can dominate the choice of a regime of passage; secondly, whether the continued right of passage has retroactive effect in respect of a system of straight baselines already established by a State prior to its becoming a party to the UNCLOS.

The first question arises because there may be straits linking areas of the high sea or EEZ regardless of their being enclosed by straight baselines or not. The case of the Northwest Passage could be an example. As a route rendered usable by local navigational aids, it could constitute a strait in geographical sense, lying between two parts of the high seas or EEZ.²³ Following the establishment of Canadian straight baselines in 1986 around the archipelago that includes the Passage, the status of the waters forming the straits of the Passage has changed from that of territorial sea to one of internal waters. It may be said that, whether before or after 1986, the routes of the Passage have always linked two areas of the EEZ or the high seas between the Chukchi Sea and the North Atlantic. In the light of that geographical situation, the Passage could constitute an Art. 38-type strait. This question was not dealt with thoroughly in the UNCLOS negotiations and has not been comprehensively addressed in the literature.²⁴

As to the second question, it has been suggested that the regime applicable under Art. 35 (a) may be that of transit passage.²⁵ But the regime of transit passage came into existence as a treaty-based regime only with the adoption of the UNCLOS in 1982, and further, only with the entry into force of the Convention for a particular State party. It is known that the US has deemed the transit passage regime as reflective of customary law, which it has asserted in its use of the Northwest Passage, and that it has never recognized Canadian's straight baselines of 1986.²⁶ While it may be possible to see Art. 35 (a) as bolstering a trend initiated in Art. 5 (2) CTSCZ, two possible scenarios exist. First, if the trend signifies a rule of customary law, the US could be justified in asserting the right of transit passage, as understood by itself, through the Northwest Passage covered by Canadian internal waters. The condition is of course that the right has been in existence. Secondly, if the trend is not yet a customary rule, the US vessels could still carry on passing through the waters on the basis of a claim of a customary right of transit passage, because the right is merely reflected in the UNCLOS, and

²¹ Nordquist/Nandan/Rosenne (note 18), 306 (MN 35.7(a)). It should be noted that Art. 35 (a) explicitly refers to Art. 7.

²² *Jia* (note 8), 8-9.

²³ Cf. *Jia* on Art. 37 MN 8-9.

²⁴ Canada, Chile and Norway: Aide Memoire (note 2), 208; *Nandan/Anderson* (note 19), 173-174.

²⁵ Nordquist/Nandan/Rosenne (note 18), 307 (MN 35.7(a)).

²⁶ US Department of State, Digest of United States Practice in International Law (2008), 631 (citing a speech by Mr. Roach, Office of the Legal Adviser, of March 2008).

it has a separate existence outside of the scope of the treaty. Both claims could well be opposed by Canada in insisting on the conventional nature of that right of transit passage. In this latter case, Art. 35 (a) is likely to be irrelevant to the dispute. If the US became a party to the UNCLOS in the near future, however, it could rely on Art. 35 (a) to maintain its right of transit passage. But then Canada may argue that the provision did not even exist as a treaty rule when its Arctic straight baselines were established, and that it could not be retroactively applied.²⁷ The question will boil down to whether the term ‘establishment’ means an action in accordance with the method set forth in Art. 7 unilaterally employed by a coastal State, or unilaterally used by it but with international acquiescence. However, between two States parties to the UNCLOS, Art. 35 (a) will be in force only in those *newly* enclosed internal waters following the entry into force of the UNCLOS for the States concerned.

2. Maritime Zones Excluded from Part III

- 10 This is an issue that partly goes to the classification of straits covered by the regimes of Part III.²⁸ In straits which are affected by the extension of internal waters or territorial sea, there may still be pockets of high seas or EEZ left, which may even form a thoroughfare through the whole length of a strait, as envisaged in Art. 36. Art. 35 (b) moves a step further than Art. 34, in that it implies the existence of straits wider than 24 NM at the narrowest. But it also expresses the rule that the regimes of passage in Part III do not affect any waters beyond the territorial sea, so that the regimes for those wider waters, be them high seas or parts of the EEZ, apply instead.
- 11 In this regard, it may be useful to take another look at the issue of internal waters, as opposed to the EEZ or high seas, within a strait subject to Part III. As was said above, internal waters within such a strait are generally excluded from Part III’s rules of passage. The way Art. 35 (a) operates will therefore create a legal restriction upon foreign shipping and aircraft such that they have to confine their movement within or over the strait to the territorial stretches, since their rights of transit or overflight cannot affect the legal status of areas of sea that lie beyond territorial waters within the strait. In those areas, different rules of the UNCLOS and international law apply. Thus, no passage may be conducted by foreign shipping or aircraft within or over internal waters, for example. It may be wondered how much of this was understood at the time when the issue was brought up in the ‘Consensus Text’ in 1975.²⁹ While the saving clause in Art. 35 (a) could deal with cases after the UNCLOS came into force for the States concerned, it must be plain that even then, there may be straits whose internal waters come with the application of the normal baseline system. It follows that internal waters, the EEZ, and the high seas within the straits retain their respective status and the associated legal regimes, to the exclusion of Part III.

3. Existing Treaties Relating Specifically to Passage Through Straits

- 12 Art. 35 (c) leaves individual regimes based on existing treaties related to certain international straits intact. To qualify for such exemption from Part III, four conditions are laid down in Art. 35 (c) for any putative treaty-based regime. First, the treaty concerned must be related to passage. Second, that treaty may regulate passage in a strait in whole or in part. Third, the treaty must be long-standing and still in force. Fourth, the treaty must be ‘specifically relating to such straits’. The first condition implies that, as long as the treaty relates to passage, the *whole* regime in force for the strait would be exempted from Part III. The details of the regime and its further development are for the States involved to determine. The fourth condition may

²⁷ Art. 28 Vienna Convention on the Law of Treaties (VCLT).

²⁸ *Jia* (note 8), 15.

²⁹ But this is not uniformly accepted by States, and the US for one regards that the regime of straits applies to the whole area throughout them, see: US Naval War College, *Annotated Supplements to the Commander’s Handbook on the Law of Naval Operations*, International Law Studies 73 (1999), 175.

state the obvious, but it guards against any mistaken belief, which may arise from a loose reading of evidence of State practice, that the CTSCZ, for instance, could be such a treaty, being long-standing and regulating passage. That treaty is obviously not specifically related to a particular strait, but to all straits that may come under the scope of its Art. 16 (4) CTSCZ. As between parties to both the CTSCZ and the UNCLOS, Art. 45 takes the place of Art. 16 (4) CTSCZ (→ Art. 311 (1)), and does not give rise to the application of Art. 35 (c). Two further points regarding Art. 35 (c) are to be discussed below.

First, the phraseology of Art. 35 (c) may still require clarification. On the one hand, the phrase ‘in whole or in part’ seems to have by now become free of further complications since its inclusion in the final text of the UNCLOS, in that it is understood to require relevant treaties to be concerned, to all or some degrees, with the regime of passage that is applicable to a certain strait.³⁰ As this type of treaty does not contemplate overflight, they regulate the use of the straits ‘in part’.³¹ Further, a partial influence of existing international treaties may assume some significance in application. For it is reasonable to say that in a strait, it is entirely possible that the treaties relating to the strait are confined in scope of application to only a part of the water area concerned. For instance, the part of the area concerned is where the main navigable channel lies or where the deepest channel runs. In fact, there is no reason why even an area where international traffic does not ply cannot be regulated by international treaties for a variety of historical reasons. Either of those two areas would meet the requirement of ‘in part’ without difficulty. On the other hand, the question remains as to the interpretation of the phrase ‘long-standing’. This task has been helped by the qualification that the treaties must be ‘in force’, at the time when the UNCLOS was concluded. Retroactivity in time is implied by the wording. The phrase ‘long-standing’ is perhaps not any clearer than such a term as ‘existing’, unless it was intended, at the time it appeared for the first time in the ‘Consensus Text’, to be specific as to particular straits. But that is not obvious from either the wording of that text or the subsequent documents circulated at the conference. It also follows from the preceding that the 1979 Peace Treaty between Israel and Egypt may not come under Art. 35 (c).³² But there is no denying its consistence with Art. 311 (2).³³ Indeed, for parties to the UNCLOS, any future treaty regime for an international strait will have to be assessed by reference to Art. 311 (2), rather than Art. 35 (c).

Secondly, it has been noted that there has emerged a tendency in practice, with the adoption of the UNCLOS, for the coastal State to apply such general law as set forth in Part III and the special treaties without distinction.³⁴ This tendency seems to grow ever stronger.³⁵ An example would be of Turkey’s regulations regarding the Turkish Straits. The 1994 Regulations, with a view to regulating especially the passage of tankers of oil or other toxic substances, or nuclear-powered ships, included not only rules on compulsory use of designated sea lanes in the straits, but also temporary suspension of passage on account of local drilling activities, enforcement actions, and combat of marine pollution.³⁶ The traffic separation scheme currently applicable in the Turkish Straits, while not envisaged in the Montreux Convention³⁷ (regarded as the special treaty for the straits)³⁸, has been implemented by Turkey since 1994 following recommendations of the International Maritime Organization’s (IMO) Maritime

³⁰ Nandan/Anderson (note 19), 175; Nordquist/Nandan/Rosenne (note 18), 307 (MN 35.7(c)).

³¹ *Maria Teresa Infante*, *Straits in Latin America: The Case of the Strait of Magellan*, ODIL 26 (1996), 175, 183.

³² Peace Treaty Between the State of Israel and the Arab Republic of Egypt, 26 March 1979, available at: <http://unispal.un.org/UNISPAL.NSF/0/3A159C13D5084C1085256CED00746FAA>; further, see *Jia* (note 8), 127.

³³ Cf. Egypt’s Declaration made upon Ratification of the UNCLOS in 1983, available at: http://treaties.un.org/Pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XXI~6&chapter=21&Temp=mtdsg3&lang=en.

³⁴ *Jia* (note 8), 110.

³⁵ ICJ, *Case Concerning Passage through the Great Belt* (Finland v. Denmark), Counter-Memorial submitted by the Government of the Kingdom of Denmark of 18 May 1992, paras. 659, 670.

³⁶ *Nihan Ünlü*, *The Legal Regime of the Turkish Straits* (2002), 66–70.

³⁷ Montreux Convention Regarding the Regime of the Straits, 20 July 1936, LNTS 173, 213.

³⁸ *Hugo Caminos*, *The Legal Regime of Straits in the 1982 United Nations Convention on the Law of the Sea*, RdC 205 (1987-V), 9, 130.

Safety Committee.³⁹ By Resolution of 23 November 1995, the IMO Assembly also adopted certain rules and recommendations regarding issues other than traffic separation in the straits, which were not intended by the Assembly to affect or prejudice the right of any ship using the straits under international law, including the UNCLOS and the Montreux Convention.⁴⁰ It may be said that a legal regime contemplated by Art. 35 (c) would grow independently of the UNCLOS, taking on board practices and rules that may seem appropriate for a better management and implementation of existing rules with respect to passage. This growth of the legal regime is inevitably a multilateral process in reality, considering the layered interests of the coastal and user States. Thus, when the 1994 Turkish Regulations met with strong opposition from user States, Turkey amended them in 1998.⁴¹ At times when, as in the case of the Turkish Straits, IMO rules and recommendations differ from local regulations in various respects, it should perhaps be borne in mind that those straits are special even under the UNCLOS, so that Part III does not bear on them. It would follow that the local regulations may well be more stringent than Part III allows. The question is rather whether local regulations conflict with certain long-standing treaties still in force for the waterways, together with relevant treaties concluded under the auspices of the IMO, rather than Part III. In any case, it must be added that Turkey is not to become a party to the UNCLOS in the short term, having voted against the treaty in 1982. In this light, Turkey is a third State that benefits from an exclusionary right conferred by a multilateral treaty.⁴² Alternatively, it is probably also safe to say that the right has a parallel in customary law, not only because of Art. 25 CTSCZ, and the common understanding during the negotiation of the UNCLOS,⁴³ but also because of recognition in other venues that the Turkish Straits are regulated by special treaties.⁴⁴

- 15 Art. 35 (c) is not without controversy in its implementation. It is recalled, for example, that the US has not recognized Sweden's claim that the Aaland Strait falls within the scope of that provision.⁴⁵ The 1921 Convention Respecting the Non-Fortification and Neutralization of the Aaland Islands⁴⁶ (Aaland Convention) prohibits the entry and stay of, among others, foreign warships in the zone defined under Art. 2, but allows their innocent passage through the territorial waters of the Islands, i.e. Finnish territorial waters.⁴⁷ This treaty, still in force,⁴⁸ does impact on overall passage through the strait, in that it specifies innocent passage as the regime applicable to the territorial waters concerned. Since the territorial sea of Finland is limited to 3 NM in the strait by Art. 2 (II) Aaland Convention, and before 1979 Sweden adhered to a 4 NM, and thereafter, 12 NM territorial sea, there could have never been a corridor of the high seas through the strait, because of the presence of the Märket Skerry, through which the borders between Sweden and Finland run,⁴⁹ later adjusted from the provision under the Aaland Convention. The skerry has been a base point for the drawing of

³⁹ *Ünlü* (note 36), 64; cf. IMO, *Ships' Routeing* (2010), III-19 – III-23.

⁴⁰ IMO Res. A.827(19) of 23 November 1995.

⁴¹ *Ünlü* (note 36), 65–66; further, see *Milen Dyoulgerov*, *Navigating the Bosphorus and the Dardanelles: A Test for the International Community*, IJMCL 14 (1999), 57, 89–96.

⁴² Art. 36 (1) VCLT provides that '[A] right arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to accord that right either to the third State, or to a group of States to which it belongs, or to all States, and the third State assents thereto. Its assent shall be presumed so long as the contrary is not indicated, unless the treaty otherwise provides'.

⁴³ *John Norton Moore*, *The Regime of Straits and the Third United Nations Conference on the Law of the Sea*, AJIL 74 (1980), 77, 111.

⁴⁴ E.g., IMO Res. A.827(19) of 23 November 1995.

⁴⁵ US Department of State, *United States Responses to Excessive National Maritime Claims, Limits in the Seas No. 112* (1992), 67; but note that Finland's view agrees with the Swedish position, see the Finnish Declaration made upon Signature, and Confirmed upon Ratification of the UNCLOS, available at: http://treaties.un.org/pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XXI~6&chapter=21&Temp=mtdsg3&lang=en.

⁴⁶ Convention Respecting the Non-Fortification and Neutralization of the Aaland Islands, 6 April 1921, AJIL 17 (1923), 1.

⁴⁷ Art. 5 Aaland Convention.

⁴⁸ Art. 8 Aaland Convention in fact provides for its perpetual validity.

⁴⁹ Art. 2 (i) Aaland Convention.

the demilitarized and neutralized zone pursuant to the Åland Convention,⁵⁰ from one side of which the sea extends for about 7 NM to the rocks marking Sweden's baselines.⁵¹ The Swedish territorial sea was extended to 12 NM in 1979, subject to any frontier agreed with Finland between their overlapping continental shelves or fishing zones, and the median line between the two countries.⁵² Finland extended its territorial sea from 4 NM to 12 NM in 1995, and also left the outer limit of the territorial sea in accordance with the boundary of Finland's fishing zone and the continental shelf as agreed with Sweden in 1972.⁵³ The result of this extension did not affect the fact that the Åland Strait, or, in real terms, its western and navigable channel, falls mainly within the territorial sea of Sweden,⁵⁴ and that the waters to the east of the Märket Skerry are considered Finnish internal waters.⁵⁵ That fact probably accounts for the Swedish interest in maintaining the innocent passage regime in the strait, not to mention its will to avoid the regime of transit passage completely in at least some of its straits.⁵⁶

While it may be true that since 1995 Sweden has given up on asking for prior notice for foreign ships to conduct innocent passage through its territorial sea,⁵⁷ it is still the case that the Åland Strait is subject to a more restrictive regime of navigation than that of transit passage. However, it is important that a case can be made for Sweden's reliance on Art. 35 (c), as the passage through the strait in question is affected in part by the Åland Convention. Without the Åland Convention, it would be possible to argue that the regime of transit passage as laid down in the UNCLOS may be applicable to the waterway due to the geographical situation of the strait and the fact of its use for international navigation.⁵⁸ But as it stands, passage through that waterway, as a geographical whole, is partly affected by a long-standing international treaty, whether the navigable route lies in Swedish or Finnish territorial sea. The preceding analysis does not cover the separate question as to whether Art. 35 (c) should be regarded as a customary law rule, supposing there is a parallel argument that the right of transit passage as provided by the UNCLOS reflects customary law. The preliminary suggestion is that the answer to that question is in the affirmative.⁵⁹

⁵⁰ Cf. *Lauri Hannikainen*, The Continued Validity of the Demilitarised and Neutralised Status of the Åland Islands, *ZaöRV* 54 (1994), 614, 617.

⁵¹ *Hugo Tibergh*, Mysteries of Water Boundaries: Baselines and Boundaries Around Sweden's Coasts, in: Ove Bring/Said Mahmoudi (eds.), *Current International Law Issues: Nordic Perspectives* (1994), 195, 216; cf. Stephen H. Lay/Robin R. Churchill/Myron H. Nordquist (eds.), *New Directions in the Law of the Sea: Documents*, vol. II (1973), 888; US Naval War College (note 29), 121–122 (footnote 36), the US also regarded the strait at the narrowest as of 16 NM across.

⁵² S. 3 Act Concerning the Territorial Waters of Sweden, 3 June 1966, Royal Notice No. 375.

⁵³ S. 5 and 5 (a) Act on the Delimitation of the Territorial Waters of Finland, 18 August 1956; Decree No. 463; cf. *William Reisman/Gayl S. Westerman*, *Straight Baselines in Maritime Boundary Delimitation* (1992), 109–111.

⁵⁴ Cf. US Department of State, *Continental Shelf Boundary: Finland – Sweden, Limits in the Seas No. 71* (1976), 5; Agreement Between Finland and Sweden Concerning the Delimitation of the Continental Shelf in the Gulf of Bothnia, The Åland Sea and the Northernmost Part of the Baltic Sea, 29 September 1972, available at <http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/SWE-FIN1972CS.PDF>; also see *Martti Koskenniemi/Marja Lehto*, Finland and the Law of the Sea, in: Tullio Treves/Laura Pineschi (eds.), *The Law of the Sea: The European Union and its Member States* (1997), 127, 131.

⁵⁵ Art. 2 (i) Åland Convention.

⁵⁶ *Marie Jacobsson*, Sweden and the Law of the Sea, in: Treves/Pineschi (note 54), 495, 500–501.

⁵⁷ *Ibid.*, 500.

⁵⁸ For a more drastic view, see *Hugo Tibergh*, The Practice and Value of Compromise in Ocean Boundary Law: The Experience of Sweden, in: David D. Caron/Harry N. Scheiber (eds.), *Bringing New Law to Ocean Waters* (2004), 419, 422.

⁵⁹ *Passage through the Great Belt* (note 35), para. 739.

Article 36

High seas routes or routes through exclusive economic zones through straits used for international navigation

This Part does not apply to a strait used for international navigation if there exists through the strait a route through the high seas or through an exclusive economic zone of similar convenience with respect to navigational and hydrographical characteristics; in such routes, the other relevant Parts of this Convention, including the provisions regarding the freedoms of navigation and overflight, apply.

Bibliography: *Bing Bing Jia*, The Regime of Straits in International Law (1998); *Martti Koskenniemi/Marja Lehto*, Finland and the Law of the Sea, in: *Tullio Treves/Laura Pineschi* (eds.), The Law of the Sea: The European Union and its Member States (1997), 127–150; *Satya N. Nandan/David H. Anderson*, Straits Used for International Navigation: A Commentary on Part III of the United Nations Convention on the Law of the Sea, BYIL 60 (1989), 159–204; *Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne* (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. II (1993); *Choon-Ho Park*, The Korea Strait, in: *Jon M. Van Dyke/Lewis M. Alexander/Joseph R. Morgan* (eds.), International Navigation: Rocks and Shoals Ahead? (1988), 173; *Jon M. Van Dyck*, The Aegean Disputes in International Law, ODIL 36 (2005), 63–117

Documents: IMO, Ships’ Routeing (2010); US Department of the Navy, The Commander’s Handbook on the Law of Naval Operations (2007); US Department of State, Straight Baseline and Territorial Sea Claims: Japan, Limits in the Seas No. 120 (1998)

Contents

I. Purpose and Function	1
II. Historical Background	3
III. Elements	4
1. One Type of Strait as Excluded from Part III	4
2. The Regime of Passage Applicable in this Type of Strait.....	7

I. Purpose and Function

- 1 Art. 36 came into existence during the negotiations at the UNCLOS III Conference. Its inclusion in the UNCLOS reflects the understanding among the negotiating States with regard to the scope of Part III, that international straits are not equivalent to the exclusive economic zone (EEZ) or high seas in terms of navigation, and that for even a State bordering a strait, such as the former Yugoslavia, freedoms of navigation and overflight over the high seas must not be affected by a potential EEZ.¹ The right of transit passage, for all its potency in favour of foreign ships and aircraft within a strait overlapped by territorial waters, was not, and is still not, regarded as synonymous to the freedom of navigation and overflight that is generally recognized within the EEZ or on the high seas.²
- 2 It goes without saying that, for Art. 36 to be applicable, the prior condition must be fulfilled that through a strait a route or corridor exists in the high seas or the EEZ that provides similar navigational and hydrographical convenience to ships in passage. Where the route referred to in Art. 36 is formed even partly by territorial sea or internal waters, Art. 36 gives way to the regime of transit passage or innocent passage.

¹ *Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne* (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. II (1993), 312 (MN 36.5).

² *Bing Bing Jia*, The Regime of Straits in International Law (1998), 134–145; US Department of the Navy, The Commander’s Handbook on the Law of Naval Operations (2007), S. 2.5.3.

II. Historical Background

Art. 36 was developed at UNCLOS III following the UK proposal of 1974, which excluded the application of the right of transit passage in waters within a strait that constituted part of the high seas.³ One basic feature of straits falling under this article has been unchanged ever since, namely, the straits being those through which there exists a high seas route in comparable conditions to other parts of the strait. This feature underwent only drafting changes during the Conference to clarify the nature of the high seas route. In 1975, the Private Group, in its Consensus Text, used the phrase 'of similar convenience' for this purpose.⁴ When the Informal Single Negotiating Text came out on 7 May 1975,⁵ two new elements could be identified in the draft of Art. 36. The first was the exclusion of Part III, as distinct from the right of transit passage alone, from such high seas routes, and the second was that the routes could lie within the EEZ.⁶ The former drafting change made good sense, in that there would be no reason otherwise, simply due to inelegant drafting in the course of intensive negotiations over a wide range of topics, to impose the regime of non-suspendable innocent passage on Art. 36-type straits, which contain high sea or EEZ routes whose legal status requires the application of the freedoms appropriate to those waters. It would run counter to the customary law relating to the high seas freedoms, which have been of fundamental importance to the modern law of the sea. In the Revised Single Negotiating Text 'similar convenience' was further qualified by the added phrase 'with respect to navigational and hydrographical characteristics'.⁷ The article took its final shape in 1982, when the Yugoslav proposal to explicitly refer, in the context of Art. 36, to the applicability of Part V and Part VII was adopted, which were later revised to 'other relevant Parts'.⁸

III. Elements

1. One Type of Strait as Excluded from Part III

One type of strait is excluded from Part III, as opposed to being excluded from the regime of transit passage under Section 2 of this Part. It is noted that this article lies outside both Section 2 of Part III, which applies to the category of straits between parts of the high seas or EEZ, and Section 3 of Part III that concerns two particular types of strait. Yet, it still applies to 'straits used for international navigation', which supports the view expressed elsewhere in this commentary that the use of straits for international navigation may turn all geographical straits into international straits.⁹ But straits excluded by Art. 36 do not as such require a special regime to be agreed for them, unlike those straits that are covered by Part III. The excluded straits remain juridical straits, because either EEZ or high seas are still legal notions giving rise to different legal regimes. There is obviously a question lingering. If Art. 36-type straits are not relevant to the regimes of straits prescribed by Part III, they are effectively part

³ Second Committee UNCLOS III, United Kingdom: Draft Articles on the Territorial Sea and Straits, UN Doc. A/CONF.62/C.2/L.3 (1974), OR III, 183, 186.

⁴ UNCLOS III, Consensus Text of Private Group on Straits, 18 April 1975 (1975, mimeo.), reproduced in: Renate Platzöder (ed.), Third United Nations Conference on the Law of the Sea: Documents of the Geneva Session 1975 (1975), 204.

⁵ UNCLOS III, Informal Single Negotiating Text (Part II), UN Doc. A/CONF.62/WP.8/PART II (1975), OR IV, 152.

⁶ Satya N. Nandan/David H. Anderson, Straits Used for International Navigation: A Commentary on Part III of the United Nations Convention on the Law of the Sea, BYIL 60 (1989), 159, 176-177.

⁷ UNCLOS III, Revised Single Negotiating Text (Part II), UN Doc. A/CONF.62/WP.8/REV.1/PART II (1976), OR V, 151, 159.

⁸ Nordquist/Nandan/Rosenne (note 1), 312-313, 315 (MN 36.5-36.7(d)).

⁹ See *Jia* on Art. 37 MN 10-13.

of the EEZ or high seas. Should they not then be disqualified as ‘straits used for international navigation’? They merely provide routes used for international navigation, as other routes of shipping that span the oceans, including the EEZ.

- 5 In practice, the utility of Art. 36 is clear. For ease of use, several States bordering straits restrain their claims for the territorial sea to a narrower width than 12 NM. Thus, Japan and the Republic of Korea have each claimed a 3 NM territorial sea within the Korea Strait.¹⁰ In fact, Japan has since 1977 adhered to this limit in five international straits adjacent to its coasts: Korea or Tsushima Strait,¹¹ Tsugaru Strait, Soya or La Perouse Strait, and Osumi Strait.¹² The reason for this continuing practice is said to lie in Japan’s dislike for the regime of transit passage as far as those five straits are concerned, since by preserving areas of territorial sea in them, Japan as the coastal State may resort to the rules regulating the territorial sea to control the waters abutting its coasts.¹³ The attitude of Japan with regard to the treatment of those straits in the course of ratification of the UNCLOS in 1996 seems to support the preceding view.¹⁴ While, at first sight, to substitute the regime of the high seas for that of transit passage on this basis may not be that convincing, it makes sense if a closer look is taken at the way in which straight baselines are drawn in those waters.¹⁵ They are the result of a calculated exercise in marking out areas which are considered to fall under the sovereignty and jurisdiction of Japan. Thus, the width of the high sea corridors left in those straits vary from 7 to 10 NM, with the one in the Soya Strait still uncertain due to the fact that it is bordered by both Japan and Russia.¹⁶
- 6 It may be noted that at some point during the Conference there was the suggestion that transit passage should apply to straits wider than 6 NM, i.e. the combined width of certain coastal States’ territorial waters.¹⁷ The exclusion of straits narrower than 6 NM was not, however, accepted by the negotiating States. The rules adopted for the UNCLOS may well have to do with the action by certain coastal States in restraining their claims to a wider territorial sea.¹⁸

2. The Regime of Passage Applicable in this Type of Strait

- 7 Art. 36 is specific as to two parts of the UNCLOS that are applicable to straits excluded from Part III: the regimes of the EEZ and of the high seas. It may be wondered whether this regime of passage prevails over a reporting system established in such waters, as in the case of the International Convention for the Safety of Life at Sea (SOLAS 1974)¹⁹-based reporting regimes. It is not uncommon to see international straits being sectorised by traffic separation schemes crosswise, and such measures for the sake of maritime safety also exist at the approaches to such straits.²⁰ While straits under Art. 36 are generally wider than 24 NM throughout, they are not as wide as the open sea. The local concern with pollution and other hazards may remain in such straits. Considering the term of Reg. 11 (9), Ch. V SOLAS

¹⁰ Jon M. Van Dyke, *The Aegean Disputes in International Law*, ODIL 36 (2005), 63, 93.

¹¹ Choon-Ho Park, *The Korea Strait*, in: Jon M. Van Dyke/Lewis M. Alexander/Joseph R. Morgan (eds.), *International Navigation: Rocks and Shoals Ahead?* (1988), 173–176.

¹² *Jia* (note 2), 182; also see US Department of State, *Straight Baseline and Territorial Sea Claims: Japan, Limits in the Sea No. 120* (1998), 13–15.

¹³ *Ibid.*, 11.

¹⁴ *Jia* (note 2), 182–183.

¹⁵ US Department of State (note 12), 33 *et seq.* (Navigational Maps 1–4).

¹⁶ *Ibid.*, 14–15.

¹⁷ Second Committee UNCLOS III, Denmark and Finland: Amendment to Document A/CONF.62/C.2/L.3, UN Doc. A/CONF.62/C.2/L.15 (1974), OR III, 191 (Article 1 (3)).

¹⁸ It is recalled that Finland and Estonia have pursued a similar approach to that of Japan and the Republic of Korea in regard to the Gulf of Finland, preserving a high-sea corridor 6 NM wide along the median line through the Gulf, see *Martti Koskenniemi/Marja Lehto*, *Finland and the Law of the Sea*, in: Tullio Treves/Laura Pineschi (eds.), *The Law of the Sea: The European Union and its Member States* (1997), 127, 131.

¹⁹ International Convention for the Safety of Life at Sea 1974, as amended (SOLAS 1974).

²⁰ Cf. IMO, *Ships’ Routeing* (2010), VII/3-1 and VII/3-7 (Puget Sound and its Approaches).

1974²¹, it may be right to say that the high seas regime prevails over the SOLAS-based reporting system established by the coastal State.

Section 2

Transit passage

Article 37

Scope of this section

This section applies to straits which are used for international navigation between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone.

Bibliography: *R. Douglas Brubaker*, The Russian Arctic Straits (2005); *Bing Bing Jia*, The Regime of Straits in International Law (1998); *Anatolii L. Kolodkin/Vasilii N. Gutsuliak/Iulia V. Bobrova*, The World Ocean: International Legal Regime (translated by William Butler, 2010); *James Kraska*, The Law of the Sea Convention and the Northwest Passage, *IJMCL* 22 (2007), 257–282; *Marian Nash (Leich) (ed.)*, Cumulative Digest of United States Practice in International Law 1981–1988, Book II (1994); *Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.)*, United Nations Convention on the Law of the Sea 1982: A Commentary, vol. II (1993); *Donat Pharand*, The Arctic Waters and the Northwest Passage: A Final Revisit, *ODIL* 38 (2007), 3–69; *Donat Pharand/Leonard H. Legault*, The Northwest Passage: Arctic Straits (1984); *George P. Politakis*, The Aegean Dispute in the 1990s: Naval Aspects of the New Law of the Sea Convention, in: *Theodore C. Kariotis (ed.)*, Greece and the Law of the Sea (1997), 292–323

Documents: Canada Ministry of Foreign Affairs, Our Sovereignty in the Arctic: A Priority for the Government of Canada, No. 2009/14 (2009); Turkey Ministry of Foreign Affairs, The Outstanding Aegean Issues, available at: <http://www.mfa.gov.tr/maritime-issues---aegean-sea---the-outstanding-aegean-issues.en.mfa>; UN DOALOS, Straits Used for International Navigation: Legislative History of Part III of the United Nations Convention on the Law of the Sea, vol. I (1992); US Department of the Navy, The Commander's Handbook on the Law of Naval Operations (2007); US Department of State, Territorial Regimes and Related Issues, Digest of United States Practice in International Law (2006), 805–851; US Senate, Report Together With Minority Views on the Convention on the Law of the Sea, 19 December 2007

Cases: ICJ, *The Corfu Channel Case* (United Kingdom of Great Britain and Northern Ireland v. Albania), Merits, Judgment of 9 April 1949, ICJ Reports (1949), 4; ICJ, *Fisheries Case* (United Kingdom v. Norway), Judgment of 18 December 1951, ICJ Reports (1951), 116

Contents

I. Purpose and Function	1
II. Historical Background	3
III. Elements	6
1. Straits between Parts of the High Seas or EEZ	6
2. Use for International Navigation	10

I. Purpose and Function

This is the first article in Section 2 of Part III, providing for the regime of transit passage. 1
The regime applies to a specific type of strait only. While the UNCLOS does not contain a definition of international straits, there were some efforts in that direction,¹ and Art. 37 is what

²¹ Reg. 11 (9), Ch. V SOLAS 1974 states: 'Nothing in this regulation or its associated guidelines and criteria shall prejudice the rights and duties of Governments under international law or the legal regimes of straits used for international navigation and archipelagic sea lanes.'

¹ For instance, Second Committee UNCLOS III, United Kingdom: Draft Articles on the Territorial Sea and Straits, UN Doc. A/CONF.62/C.2/L.3 (1974), OR III, 183; Second Committee UNCLOS III, Canada: Draft Article on a Definition of an International Strait, UN Doc. A/CONF.62/C.2/L.83 (1974), OR III, 241.

came from those efforts. It stands as a criterion for straits that are open to the right of transit passage laid down in Section 2, Part III. In a way, it loyally follows what the International Court of Justice (ICJ) stated in 1949 to be the decisive criterion for international straits in which innocent passage may not be suspended.² As will be shown below, the legal status of the water areas connected by a strait seems to have been the determining factor in prompting the US and the former USSR in advocating the notion of a right of free transit within straits to be enclosed by a 12 NM territorial sea.

- 2 While straits' geographical relations may be decisive in giving them the status of international straits, there is no denying that they also have to be used for international navigation. The use of the straits is a necessary corollary to their geographical situation. A better view is therefore that the geographical side of this consideration is decisive to open straits to a particular regime of navigation, whereas the functional aspect does not of itself necessarily justify the establishment of a particular regime for them. A legal regime is always wrought by synthesizing multiple factors of fact, interests, and law. That is perhaps the sense best suited to a sound understanding of the ICJ's criterion for international straits.

II. Historical Background

- 3 In the contemporary law of the sea, the criterion that an international strait must be one that links parts of the high seas was established in the *Corfu Channel Case* of 1949.³ But it had theretofore been well known in State practice and literature,⁴ and the ICJ's judgment merely reflected that general understanding. The significance of that judgment, however, was felt immediately afterwards with the adoption of Art. 16 (4) of the Convention on the Territorial Sea and the Contiguous Zone of 1958 (CTSCZ), and subsequently, with the emergence of the notion of transit passage in the late 1960s.
- 4 In 1971, the US submitted an important proposal to the UN Sea-Bed Committee.⁵ In its proposal, the US envisaged the right of transit passage to be synonymous with the freedom of the high seas for navigation and overflight. In addition, that freedom was to be exercised in straits between two parts of the high seas or between one part of the high seas and the territorial sea of a foreign State. It was a drastic change to the existing regime of innocent passage recognised at the time by the CTSCZ. The US view was supported by the former USSR which, however, dropped the category of straits between a part of the high seas and the territorial sea of a foreign State from the discourse.⁶ The restriction of straits open to transit passage to those between parts of the high seas was also supported by the UK at that time.⁷
- 5 It therefore came as no surprise that the UK reflected its understanding of the geographical scope of the right of transit passage accordingly in its proposal to the second session of UNCLOS III.⁸ In it, relevant straits were those linking two parts of the high seas. This feature remained when the Private Group on Straits circulated its Consensus Text in April 1975.⁹

² ICJ, *The Corfu Channel Case* (United Kingdom of Great Britain and Northern Ireland v. Albania), Judgment of 9 April 1949, ICJ Reports (1949), 4, 28.

³ *Ibid.*

⁴ Bing Bing Jia, *The Regime of Straits in International Law* (1998), 23 (footnote 190), 24.

⁵ Sea-Bed Committee, Draft Articles on the Breadth of the Territorial Sea, Straits and Fisheries Submitted by the United States, UN Doc. A/AC.138/SC.II/L.4 (1971), 2 (Article II (1)).

⁶ Sea-Bed Committee, USSR: Draft Articles on Straits Used for International Navigation, UN Doc. A/AC.138/SC.II/L.7 (1972), 1.

⁷ UN DOALOS, *Straits Used for International Navigation: Legislative History of Part III of the United Nations Convention on the Law of the Sea*, vol. I (1992), 50 (referring to Sea-Bed Committee, Summary Record of the Twenty-Seventh Meeting, UN Doc. A/AC.138/SC.II/SR.24-32 (1972), 25, 30).

⁸ UK Draft Articles (note 1), 185 (Ch. 3).

⁹ UNCLOS III, Consensus Text of Private Group on Straits, 18 April 1975 (1975, mimeo.), reproduced in: Renate Platzöder (ed.), *Third United Nations Conference on the Law of the Sea: Documents of the Geneva Session 1975* (1975), 204.

However, the Informal Single Negotiation Text polished it up with the addition of a reference to the new concept of the exclusive economic zone (EEZ).¹⁰ The formulation was to remain largely unchanged, bar minor drafting amendments, through to its finalization in the UNCLOS.¹¹

III. Elements

1. Straits between Parts of the High Seas or EEZ

The geographical fact of straits linking two otherwise separated bodies of larger sea areas is decisive in giving them legal significance in terms of navigational rights for foreign ships and of security concerns of the coastal States. Where straits link waters beyond coastal sovereignty, there is little problem for the States concerned to agree on a passage regime that applies to foreign shipping and air traffic. In those straits, rights of navigation and overflight may be easy to accept by all parties. However, with the extension of the width of the territorial sea to 12 NM as a right of customary law and under Art. 3, what formerly appeared to be a non-existent problem has become a real one, in that straits may nowadays connect largely reduced high seas or even pockets of the high seas, ringed by territorial waters of States in the area. The choice of legal regimes in that situation becomes a tough task, considering that geographical proximity could well pit neighbouring countries against each other. No further evidence is needed for proving this alarming prospect than a glance at the Aegean Sea, where any potential claim to a 12 NM territorial sea by Greece could set off a confrontation with Turkey.¹² That situation alone may counsel further examination of the terms of Art. 37.

The basic conception of a strait linking parts of the high seas may beg another question as to whether the strait has to link the parts immediately or whether it may suffice for the purposes of Part III, to simply link the parts in a general direction, leapfrogging foreign territorial sea belts in between. Again this question may be illustrated by the case of the Aegean Sea mentioned above. Even now, passage or overflight in the Aegean to reach the Black Sea may have to negotiate Greek territorial waters and the superjacent Greek airspace. If Greece extended its territorial sea to 12 NM, the high seas area of the whole region could be reduced significantly.¹³ In those circumstances, should Art. 37 remain in force for the straits concerned, could Art. 45 have a role to play, if passage were only for the purposes to enter local ports on the Cyclades Islands, the East Aegean islands, or the Turkish Anatolian coast? It is submitted that the condition of a strait linking two larger areas of sea means, normally, that the waterway connects those two areas directly and immediately. The regime of straits deals with each international strait, but not with a route formed by several such straits, except where the existence of the route is determined by usage which is, in turn, determined by geography. A case in point is the route formed by the Straits of Malacca and Singapore, and for shipping plying between Japan and the Middle East, the route may extend beyond those two straits to include other expanses of the oceans. In that sense, a route is often one that is followed by shipping that traverses several geographical areas, such as straits, archipelagic sea lanes, routes lying within EEZs or the high seas, etc. But otherwise, straits are known as separate geographical entities in most situations.

¹⁰ UNCLOS III, Informal Single Negotiating Text (Part II), UN Doc. A/CONF.62/WP.8/PART II (1975), OR IV, 152 (Article 37), referring to UNCLOS III, Revised Single Negotiating Text (Part II), UN Doc. A/CONF.62/WP.8/REV.1/PART II (1976), OR V, 151. But the Private Group on Straits had anticipated this polishing in its Consensus Text: *ibid.*, 204 (footnote to Article 1 (1)(b)).

¹¹ Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. II (1993), 319–320 (MN 37.6).

¹² George P. Politakis, The Aegean Dispute in the 1990s: Naval Aspects of the New Law of the Sea Convention, in: Theodore C. Kariotis (ed.), Greece and the Law of the Sea (1997), 292, 313 (a map is attached, showing hypothetically the consequence of applying a 12 NM territorial sea by Greece to the Aegean Sea).

¹³ Turkey Ministry of Foreign Affairs, The Outstanding Aegean Issues, available at: <http://www.mfa.gov.tr/maritime-issues-aegean-sea-the-outstanding-aegean-issues.en.mfa>.

The scenario of 'composite' straits has, to a large extent, become suitably covered under the aegis of the archipelagic regime, since the adoption of Part IV. But there are situations in which Part IV does not apply, including the Aegean Sea, even though the Greek islands in question are approximate in many respects to a geographical archipelago. In case the notion of composite straits is invoked, it should be proved by its advocate that it is a composite strait in question, not a sea lane in the sense of Part IV.

- 8 The preceding view may assume a wider significance when applied to such a feature as the Northwest Passage in the Arctic or the Indreleia in northwest Norway. Where geography is altered through human use, there may occur a 'composite strait' formed by separate geographical straits. In such waters, human use may turn the group of channels into one geographical strait, and such use manifests itself in the provision of navigational aids in the waters.¹⁴ It is recognized that the ICJ has taken a different view in this respect, that the Indreleia route was not a strait at all, but a navigational route formed by means of artificial aids to navigation provided by Norway.¹⁵ However, the Court's view was specifically tied to the situation of the Indreleia route. It did not foreclose the possibility that other routes of similar outlook, with more navigability and with little help from the coastal State for navigational aids, may exist in reality.¹⁶ The Northwest Passage, consisting of seven routes, each of which is composed of several geographical channels or bays,¹⁷ is open to passage by foreign ships only with the help of icebreakers and pilotage, among other forms of assistance.¹⁸ Leaving aside the fact that up to this point foreign transit has been made through the Passage with Canada's consent,¹⁹ it may be wondered whether non-dependence on local icebreaking and pilotage, as in the case of the Polar Sea, will affect the assessment conducted here. Foreign ships may, in future, rely more on their own icebreaking capacity or the ever warmer climate in the Arctic to navigate the Passage.²⁰ The necessity of relying on Canadian assistance by commercial ships may soon become unnecessary. While the fact remains that each of the separate channels forming Route 1 and Route 2 in the Northwest Passage opens to larger areas of sea than 24 NM in width,²¹ foreign shipping may encounter a legal difficulty in the form of the existing Canadian straight baselines that envelope the Canadian Arctic Archipelago, together with the Northwest Passage. The US has not recognized the baselines.²² However, if any of the routes of the Northwest Passage can be navigated in the changed navigational and hydrographical conditions of the not too distant future,²³ the routes linking two parts of the high seas or Canadian EEZ could be a decisive factor in turning it into an Art. 37-type international strait.²⁴ The US position has thus been put forward:

'The Northwest Passage is a strait used for international navigation. Therein, all ships and aircraft enjoy the right of transit passage, in accordance with international law as reflected in the 1982 Law of the Sea Convention.'²⁵

¹⁴ *Jia* (note 4), 28–32.

¹⁵ ICJ, *Fisheries Case* (United Kingdom v. Norway), Judgment of 18 December 1951, ICJ Reports (1951), 116, 132.

¹⁶ See *Jia* on Art. 43 MN 4–8.

¹⁷ *Donat Pharand*, *The Arctic Waters and the Northwest Passage: A Final Revisit*, ODIL 38 (2007), 3, 29–30.

¹⁸ *Donat Pharand/Leonard H. Legault*, *The Northwest Passage: Arctic Straits* (1984), 113.

¹⁹ *Pharand* (note 17), 30–33, 37–42.

²⁰ Canada for one has thought this over, as its foreign minister stated in 2009 that 'some experts, for example, predicted recently that the entire Arctic could be ice free in summer by 2013; others say this will not happen until 2050. Our own Canadian Ice Service, however, believes that the Northwest Passage will likely not be a reliable commercial shipping route for decades owing to extreme ice variability': Canada Minister of Foreign Affairs, *Our Sovereignty in the Arctic: A Priority for the Government of Canada*, 27 March 2009, No. 2009/14 (per Minister of Foreign Affairs Lawrence Cannon).

²¹ *Pharand* (note 17), 6.

²² *Marian Nash (Leich)*, *Cumulative Digest of United States Practice in International Law 1981–1988*, Book II (1994), 1783–1785, showing that the US expressly regarded the baselines as inconsistent with the law of the sea.

²³ *James Kraska*, *The Law of the Sea Convention and the Northwest Passage*, IJMCL 22 (2007), 257, 258.

²⁴ The US has asserted this to be the case since the adoption of the UNCLOS, see *Nash (Leich)* (note 22), 2043.

²⁵ US Department of State, *Territorial Regimes and Related Issues*, Digest of United States Practice in International Law 2006, 815: reporting on a letter from the US Ambassador to Canada's Department of Foreign Affairs and International Trade in October 2006.

This situation will remain notwithstanding the fact that at least some stages of passage through the Northwest Passage by any of the known routes must take place in Canadian territorial sea.²⁶ Be that as it may, the routes have been used by foreign shipping with prior consent of Canada, and they may allow designation on the basis of an agreement between Canada and user States in the future. In any case, the question surrounding passage through the Northwest Passage is different from the question of designation of routes in the Aegean Sea, in that the existing routes in the Northwest Passage rely on Canadian assistance for their use by foreign commercial shipping, but that passage in the Aegean Sea has so far not been known to rely on Greek aids. To claim the right to establish sea routes in this latter case may therefore encounter more resistance from other States concerned.

2. Use for International Navigation

The criterion of use is integral to the concept of international strait. But two questions remain. First, the degree of use varies from strait to strait, giving rise to queries as to what is the state of customary law on the point, if the UNCLOS is silent. Secondly, there is no requirement that the use of a strait cannot include that of passage for the purpose of reaching a local port beyond or within the strait, as the history surrounding the adoption of such a provision as Art. 45 (1)(b) can prove. But what is the role of a port in this context, access to which is secured by bilateral agreements between the coastal State and the user State?

The first question is concerned with the scale of use that may lead to the recognition that an international regime rather than a national statute is to be applied to a certain strait. Not to rehash what has been said about this aspect,²⁷ it is emphasized here that the use of a strait for international navigation is important as a criterion for a legal notion, but that when determining the legal status of a particular strait, this criterion of use is not sufficient for that purpose. Otherwise, the criterion of use would become equally decisive to the geographical criterion. Considering the existence of straits used for international navigation but by reason of their containing a high sea or EEZ corridor in the middle and throughout their length, or by virtue of their being regarded by the coastal States as such, i.e. used for international navigation, this caution in relation to importance to be attached to the criterion of use is entirely justified. Although the use of a strait remains a question for determining its legal status in practice.²⁸

The second question arises where passage through a strait is based on treaties of commerce and friendship or the like, where prior consent to reach a port beyond the strait has been granted once-for-all by the port State to the other parties to such treaties. Whether this port State sits on the strait that links the waters on the coast of which its ports are situated is not decisive for the determination of its state of being used for international navigation. Even if the strait is used for access to ports outside of it, it is still one used for international navigation. This interpretation of the phrase ‘use for international navigation’ may show that use by international traffic is not perhaps as decisive as the fact that the strait, serving this traffic, links two parts of larger water bodies in the navigation of which

²⁶ *Pharand/Legault* (note 18), 100. It should also be borne in mind that the dispute has been long-standing involving the Canadian legislation that seeks to control all shipping in the Canadian arctic waters: the Arctic Waters Pollution Prevention Act (Canada), S.C. 1970, c. 47, and the Act to Amend the Territorial Sea and Fishing Zones Act (Canada), S.C. 1970, c. 68; US Department of State, US Statement on Canada’s Proposed Legislation, ILM 9 (1970), 605–606; the US challenging the Canadian legislation acts; and the Oceans Act (Canada), S.C. 1996, c. 31, last amended 5 October 2005, available at: <http://laws-lois.justice.gc.ca/eng/acts/O-2.4/>.

²⁷ *Jia* (note 4), Ch. 3.

²⁸ R. Douglas Brubaker, *The Russian Arctic Straits* (2005), 148–151. This has not prevented the US from claiming, *inter alia*, the waters of the straits beyond the lawfully claimed territorial seas of the littoral countries as international, open to navigation and overflight pursuant to, presumably, the transit regime reflected in Part III UNCLOS: US Department of the Navy, *The Commander’s Handbook on the Law of Naval Operations* (2007), S. 2.6.5.1.

the ships in traffic through the strait find their ultimate aims to come to this part of the sea. The legal status of the water bodies connected by the strait seems to be far more important in deciding the regime of passage that is applicable. Supposing the preceding argument is accepted, it is worth remembering, however, that international use of the strait necessitated by virtue of even bilateral treaties with the port State in this scenario is very much grounded in a legal right of passage. That right may well be granted by the port State to other States in similar treaties, rendering the port an international one in terms of commerce. That in turn brings more international traffic to the strait concerned. Reference is made to the case of the Kerchensk Strait between Ukraine and Russia, through which the annual traffic figure stands at about 8,000 to 8,500 ships, including foreign-flagged ships, most of which are headed for ports on the coast of the Sea of Azov.²⁹ However, it must be stressed that the legal right of passage referred to above is chiefly one granted by customary law or multilateral treaties, thus of a general nature and scope, and that its being granted by bilateral agreements is not decisive for determining whether it is subject to the legal regime of international straits that is being discussed in relation to Part III. In other words, the fact that certain straits provide access to important ports, in itself, does not mean that these straits necessarily attract the legal regime of international straits. Since there are necessarily treaties of commerce and friendship involved in respect of these straits, they may be international straits in a broad, functional sense, but not those that are regulated by the legal regime of international straits in the sense of the UNCLOS. In this light, ports in straits or beyond may enhance the importance of the straits, but access to them on the basis of bilateral treaties can only be counted, at most, as supplementary evidence of the intensity of their use for international navigation. This may explain why acknowledgement of the existence of straits supplying access to the territorial sea of a foreign State is the farthest extent to which the law of the sea is prepared to go in regulating this particular type of strait.³⁰ Again, the general right of navigation which applies in the bodies of water beyond the straits determines that the straits must be subjected to an international regime that complements that general right. It may even be arguable that this complementary right of passage through straits sustains the effectiveness of the general right.

- 13 As the preponderant trend of State practice shows, potential use, per se, is not sufficient to turn a geographical strait into a juridical one.³¹ Conversely, actual use of straits for international navigation, on a certain legal basis, may factually turn all geographical straits into international waterways, but this is probably a description of a reality, without necessarily involving legal implications. A strait that meets to requirements of Art. 36 can be a strait used for international navigation, but one that is irrelevant to the rest of Part III. The use aspect itself does *not* necessarily mean the internationalization of a strait to make it a focus of international interest. Whether internationalization arises as an issue depends on actual circumstances concerning the legal right *vel non* of passage through a particular strait.

²⁹ Cf. Anatolii L. Kolodkin/Vasilii N. Gutsuliak/Iulia V. Bobrova, *The World Ocean: International Legal Regime* (2010), 188. The Russian port of Taganrog, on the Sea of Azov, serves regular visits by merchant ships from Greece, Turkey, Italy, Cyprus, Israel, Spain, Egypt, and other Mediterranean countries, further information about the City of Taganrog are available at: <http://www.taganrogcity.com/seaport.html>.

³⁰ See further *Jia* on Art. 45 MN 10–12.

³¹ *Jia* (note 4), 50. That practice is not uniform, however, as, for instance, both the US and Canada recognise the potential of the Northwest Passage for commercial passage: see further *Jia* on Art. 35 MN 8–9 and *Jia* on Art. 43 MN 4–8. But the US Senate's Foreign Relations Committee, in recommending the UNCLOS for the Senate's advice and consent in December 2007, added a declaration that the term 'used for international navigation' includes all straits capable of being used for international navigation: US Senate, Report Together With Minority Views on the Convention on the Law of the Sea, 19 December 2007, available at: <http://www.gc.noaa.gov/documents/UNCLOS-Sen-Exec-Rpt-110-9.pdf>.

Article 38

Right of transit passage

1. In straits referred to in article 37, all ships and aircraft enjoy the right of transit passage, which shall not be impeded; except that, if the strait is formed by an island of a State bordering the strait and its mainland, transit passage shall not apply if there exists seaward of the island a route through the high seas or through an exclusive economic zone of similar convenience with respect to navigational and hydrographical characteristics.

2. Transit passage means the exercise in accordance with this Part of the freedom of navigation and overflight solely for the purpose of continuous and expeditious transit of the strait between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone. However, the requirement of continuous and expeditious transit does not preclude passage through the strait for the purpose of entering, leaving or returning from a State bordering the strait, subject to the conditions of entry to that State.

3. Any activity which is not an exercise of the right of transit passage through a strait remains subject to the other applicable provisions of this Convention.

Bibliography: *Ram P. Anand*, Navigation through Territorial Sea and Straits-Revisited, *Indian JIL* 36 (1996), 13–38; *Hugo Caminos*, Categories of International Straits Excluded From the Transit Passage Regime Under Part III of the United Nations Convention on the Law of the Sea, in: *Tafsir Malick Ndiaye/Rüdiger Wolfrum* (eds.), *Law of the Sea, Environmental Law and Settlement of Disputes* (2007), 583–592; *Robin R. Churchill/Alan V. Lowe*, *The Law of the Sea* (3rd edn. 1999); *Richard J. Grunawalt*, United States Policy on International Straits, *ODIL* 18 (1987), 445–458; *Ann Hollick*, U.S. Foreign Policy and the Law of the Sea (1981); *Bing Bing Jia*, The Regime of Straits in International Law (1998); *Syméon Karagiannis*, Les détroits internationaux reliant la mer territoriale d'un État à la haute mer ou à la zone économique exclusive d'un autre État, *AnDrMer* XII (2007), 141–226; *Stuart B. Kaye*, The Torres Strait (1997); *Katharina Kummer*, The International Regulation of Transboundary Traffic in Hazardous Wastes: The 1989 Basel Convention, *ICLQ* 41 (1992), 530–562; *Ana G. López Martín*, International Straits (2010); *Argiro L. Morgan*, The New Law of the Sea: Rethinking the Implications for Sovereign Jurisdiction and Freedom of Action, *ODIL* 27 (1996), 5–29; *Satya N. Nandan/David H. Anderson*, Straits Used for International Navigation: A Commentary on Part III of the United Nations Convention on the Law of the Sea, *BYIL* 60 (1989), 159–204; *Myron H. Nordquist/Shabtai Rosenne/Louis B. Sohn* (eds.), *United Nations Convention on the Law of the Sea 1982: A Commentary*, vol. V (1989); *Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne* (eds.), *United Nations Convention on the Law of the Sea 1982: A Commentary*, vol. II (1993); *Michael Reisman*, The Regime of Straits and National Security: An Appraisal of International Law Making, *AJIL* 74 (1980), 48–76; *Emmanuel Roucouas*, Greece and the Law of the Sea, in: *Tullio Treves/Laura Pineschi* (eds.), *The Law of the Sea: The European Union and its Member States* (1997), 225–259; *Tullio Scovazzi/Irini Papanicolopulu/Giampiero Francalanci*, Boundary Report 8–21 (Greece-Albania), in: *David Colson/Robert Smith* (eds.), *International Maritime Boundaries*, vol. VI (2011), 4462–4478; *Anastasia Strati*, The Ratification by Greece of the UN Convention on the Law of the Sea, *LJIL* 9 (1996), 99–121; *Anastasia Strati*, Greece and the Law of the Sea: A Greek Perspective, in: *Aldo Chircop/André Gerolymatos/John O. Iatrides* (eds.), *The Aegean Sea after the Cold War* (2000), 89–102; *Jon M. Van Dyck*, The Aegean Disputes in International Law, *ODIL* 36 (2005), 63–117; *José A. de Yturriaga*, Straits Used for International Navigation: A Spanish Perspective (1991)

Documents: US Senate, Report Together With Minority Views on the Convention on the Law of the Sea (2007); UN DOALOS, Straits Used for International Navigation: Legislative History of Part III of the United Nations Convention on the Law of the Sea, vol. I (1992); UN DOALOS, Straits Used for International Navigation: Legislative History of Part III of the United Nations Convention on the Law of the Sea, vol. II (1992); US Department of State, The Department of State Bulletin 62 (April 1970); US Department of State, Use of Force, Arms Control and Disarmament, and Nonproliferation, *Digest of United States Practice in International Law* (2008)

Cases: ICJ, *The Corfu Channel Case* (United Kingdom of Great Britain and Northern Ireland v. Albania), Merits, Judgment of 9 April 1949, *ICJ Reports* (1949), 4

Contents

I. Purpose and Function	1
II. Historical Background	4
III. Elements	10
1. One Type of Strait Excluded from the Regime of Transit Passage	10
2. The Nature of the Right of Transit Passage	16
3. Transit Passage Includes Entry to or Exit from Local Ports	20
4. The Saving Clause	21

I. Purpose and Function

1 This article sets forth the innovative right of transit passage, which includes not only passage by ships, but also overflight by aircraft. It establishes a regime of passage that had not been known to international law prior to the conclusion of the UNCLOS. It is a half-way house between the freedom of navigation and overflight on the high seas and the innocent passage through the territorial sea. Compared with Art. 16 (4) of the Convention on the Territorial Sea and the Contiguous Zone 1958 (CTSCZ), Art. 38 has advanced as a foundational article to a new legal regime by defining the notion of transit passage. Further, it leaves any activity of non-transit passage to the regulatory powers based in other parts of the UNCLOS, which include, for instance, Art. 233.¹

2 The regime of transit passage has been strongly supported by the United States, even though it has yet to ratify the UNCLOS.² On many occasions, the right of transit passage has been asserted by US warships, and the US Government has not shied from stating that it regards the right as part of international law.³ But, as will be shown below, the US, when developing this policy in the early 1970s, did not see the right as one of customary law. On the contrary, it saw it as a new right in the law of the sea. It may be important to note that at that time, the US, on insisting on the preservation of existing practices of navigation and overflight in international straits susceptible to the claim for a 12 NM territorial sea, did no more than maintain those practices as based in the freedoms of the high sea which, however, as practice has since proved with the advent of the regime of exclusive economic zone (EEZ), can be curtailed by way of treaty or new customary law.⁴

3 On the other hand, the question remains as to whether the right of transit passage has come to represent customary law since 1982. Any subsequent practice is important where a treaty is not intended to reflect customary law during its negotiation. The situation in this regard until 1998 has been dealt with elsewhere.⁵ State practice since 1998 has not progressed more quickly than that of the preceding period in confirming the customary status of the right.⁶ Some States parties still do not indicate whether their laws reflect customary law or simply the UNCLOS as a treaty, with the latter most likely to be the case. Spain, for instance, promulgated a Royal Decree in 2007 regarding the discharge of pollutants in its waters by foreign ships passing through, and the scope of the decree

¹ See *Becker-Weinberg* on Art. 233.

² But the Senate's Committee on Foreign Relations recommended that the Senate to give its consent and advised accession by the US to the UNCLOS and ratification of the 1994 Agreement Relating to the Implementation of Part XI on the United Nations Convention on the Law of the Sea: US Senate, Report Together With Minority Views on the Convention on the Law of the Sea (2007), available at: <http://www.gc.noaa.gov/documents/UNCLOS-Sen-Exec-Rpt-110-9.pdf>. The report containing the recommendations, however, did not refer to the transit right as customary law, and no question was raised on this point in the report.

³ US Department of State, Use of Force, Arms Control and Disarmament, and Nonproliferation, Digest of United States Practice in International Law (2008), 862-863; reporting on the statement by the Department of Defense and by the US Navy on an incident that took place in the Straits of Hormuz in January 2008.

⁴ *Richard J. Grunawalt*, United States Policy on International Straits, ODIL 18 (1987), 445, 458.

⁵ *Bing Bing Jia*, The Regime of Straits in International Law (1998), Ch. 8.

⁶ *Ana G. López Martín*, International Straits (2010), 192-198.

includes straits subject to the regime of transit passage and under Spanish jurisdiction, without any reference to the UNCLOS in this regard.⁷

II. Historical Background

The idea of transit passage originated in the talks between the US and the former USSR before 1970.⁸ Although the position as agreed between those two countries did not receive instant recognition in the world, the practice of the US in particular had been geared towards its creation even before the commencement of UNCLOS III.⁹ The rationale for a right of transit passage was expounded by both the US and the former USSR. It is recalled that, in the ocean-policy statement of 23 May 1970, reflecting the agreed position with the former USSR as mentioned above, the US President NIXON declared:

'The United States is currently engaged with other states in an effort to obtain a new law of the sea treaty. This treaty would establish a 12-mile limit for territorial seas and provide for free transit through international straits'.¹⁰

Before the UN Sea-Bed Committee, the US expressly stated, in 1971, that:

'The right to transit should be regarded in law for what it is in fact: an inherent and inseparable adjunct of the freedoms of navigation and overflight on the high seas themselves. [...] The new right of free transit would only apply in international straits, using the definition that was adopted at the 1958 Law of the Sea Conference'.¹¹

At the time, therefore, the US regarded the proposed right of transit as something new, in comparison to the existing regime as enshrined in the CTSCZ.¹² This was taken note of by other delegations, for instance, Spain.¹³

In 1972, the former USSR representative explained to the Sea-Bed Committee that the existing regime of innocent passage was established by the CTSCZ for straits that were already in the territorial sea, but that, for other straits whose median line was in the high seas, the extension of the territorial sea to 12 NM by the coastal States must not result in a change in their status as free routes for passage by merchantmen and warships alike, as they had been.¹⁴ He considered that the US proposal, which introduced the idea of a freedom of transit through and over international straits,¹⁵ could serve as a basis for an article on straits, but that passage through the straits was not completely comparable to navigation on the high seas.¹⁶ This explanation echoed what had been stated by the UK delegation at the same time.¹⁷ The balance between this freedom of navigation and overflight and the concern of the State bordering the strait with pollution and maritime safety had been noted by the US, the former USSR, and the UK on all those occasions.

⁷ Spanish Royal Decree 394/2007, Measures Applicable to Ships in Transit which Commit Pollution Offences in Spanish Maritime Waters, BOE No. 81 of 4 April March 2007; *López Martín* (note 6), 168–169. Spain ratified the UNCLOS in 1997.

⁸ *Ann Hollick*, U.S. Foreign Policy and the Law of the Sea (1981), 234.

⁹ *Jia* (note 5), 130–131.

¹⁰ US Department of State, The Department of State Bulletin 62 (April 1970), 737–738.

¹¹ Sea-Bed Committee, Summary Record of the Eighth Meeting, UN Doc. A/AC.138/SC.II/SR.8 (1971), 45, 51.

¹² *Michael Reisman*, The Regime of Straits and National Security: An Appraisal of International Law Making, *AJIL* 74 (1980), 48, 68.

¹³ Sea-Bed Committee, Summary Record of the Twenty-Eighth Meeting, UN Doc. A/AC.138/SC.II/SR.28 (1972), 43, 52–53, referring to 'a new standard of international law'.

¹⁴ UN DOALOS, Straits Used for International Navigation: Legislative History of Part III of the United Nations Convention on the Law of the Sea, vol. I (1992), 51.

¹⁵ Sea-Bed Committee, United States of America: Draft Articles on the Breadth of the Territorial Sea, Straits and Fisheries, UN Doc. A/AC.138/SC.II/L.4 (1971), 2.

¹⁶ UN DOALOS (note 14), 51.

¹⁷ *Ibid.*, 50.

- 7 The phrase ‘transit passage’ emerged in Art. 1 of the UK proposal to the second session of UNCLOS III in July 1974.¹⁸ Together with the terminology came an article that provided a basis for the development of Art. 38. The UK proposal included the basic features of the right of transit passage in three aspects. First, the right of transit passage meant the freedom of navigation and overflight, which should not be impeded. Second, it would apply in a special type of international strait. Third, it could not be exercised in two types of strait, including that of straits formed by an island and the coast of a State, paralleled by an ‘equally suitable’ high sea route seaward of the island. What may be noted of the UK proposal is that it argued for a right of transit passage on the ground that it corresponded to the ‘best international practice at that time’.¹⁹ However, this new right of transit passage came up against strong resistance by a large number of delegations, which preferred to retain the regime of innocent passage.²⁰
- 8 When the Private Group on Straits circulated its Consensus Text in April 1975, the article presented incorporated the UK proposal, by reordering the paragraphs,²¹ with the addition of a new paragraph 5 concerning any activity that was not an exercise of the right.²² By the time the Informal Single Negotiating Text (ISNT) was presented to the conference, Art. 38, after some drafting changes, had settled, more or less, into its final form.²³ The island-mainland exception was moved to paragraph 1.
- 9 Before the Revised Single Negotiating Text was circulated at the Conference in 1976, Spain and Greece, respectively, tried to move for the deletion of all references to overflight from the draft article, but failed to obtain support for the suggestions.²⁴ Subsequent efforts by Spain, Malaysia, and Morocco, well into 1978, to modify the article were not successful.²⁵

III. Elements

1. One Type of Strait Excluded from the Regime of Transit Passage

- 10 Curiously, an exclusionary proviso has been included in Art. 38 (1). It has been suggested that by including this proviso, the UNCLOS has omitted a type of strait as exemplified by the Corfu Channel, thus giving rise to serious doubts and discrepancies.²⁶ Be that as it may, the wording of the provision is clear, in that it is directed at a strait formed by the mainland and an island of the same State. Thus, Kalmar Sound has been mentioned as an example that fits the terms of Art. 38 (1), whereas the Corfu Channel is not relevant to it.²⁷ The question would, of course, remain of which is the regime for today’s Corfu Channel.
- 11 It is recalled that, at the time of the important *Corfu Channel Case*, the fatal explosion involving the British flotilla took place in Albanian territorial waters within the North Corfu Channel.²⁸ The British warships were heading for the northern exit of the strait, having

¹⁸ Second Committee UNCLOS III, United Kingdom: Draft Articles on the Territorial Sea and Straits, UN Doc. A/CONF.62/C.2/L.3 (1974), OR III, 183, 185.

¹⁹ Legislative History, vol. I (note 14), 34.

²⁰ *Jia* (note 5), 135 (footnote 54); UN DOALOS, Straits Used for International Navigation: Legislative History of Part III of the United Nations Convention on the Law of the Sea, vol. II (1992), 36 (Denmark).

²¹ The order of the paragraphs in the United Kingdom proposal was altered to that of 3, 1, 2, 4: UK Draft Articles (note 18), 1–4.

²² UNCLOS III, Consensus Text of Private Group on Straits, 18 April 1975 (1975, mimeo.), reproduced in: Renate Platzöder (ed.), Third United Nations Conference on the Law of the Sea: Documents of the Geneva Session 1975 (1975), 204.

²³ Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. II (1993), 326.

²⁴ *Ibid.*, 327 (MN 38.5).

²⁵ *Ibid.*, 327–328 (MN 38.6–38.7).

²⁶ López Martín (note 5), 66–67.

²⁷ *Jia* (note 5), 142.

²⁸ ICJ, *The Corfu Channel Case* (United Kingdom of Great Britain and Northern Ireland v. Albania), Judgment of 9 April 1949, ICJ Reports (1949), 4, 14.

earlier left the port of Corfu.²⁹ The northern channel is narrow, between 1 and 6 1/2 NM across.³⁰ In this case, Albania argued that there was an alternative route west of the island of Corfu, which was more direct and part of more open areas of sea.³¹ However, the International Court of Justice (ICJ) thought otherwise, stating that:

‘But in the opinion of the Court the decisive criterion is rather its geographical situation as connecting two parts of the high seas and the fact of its being used for international navigation. Nor can it be decisive that this Strait is not a necessary route between two parts of the high seas, but only an alternative passage between the Aegean and the Adriatic Seas.’³²

What satisfied the ICJ, as far as the usefulness of the strait was concerned, was that it had been used by international traffic. The conclusion of the ICJ was sufficiently clear, admitting of no extended interpretation that might equate a strait like the Corfu Channel with a strait like that of Messina. If straits existed in a geographical situation like that of the Corfu Channel, they would qualify, just like that Channel, as international straits, regardless of whether there are parallel sea routes on the high seas side of islands flanking them. The ‘Messina exception’,³³ as enshrined in Art. 38 (1), has no applicability in the case of the Corfu Channel and the like.³⁴

It should be added that on 27 April 2009 Greece and Albania concluded the Agreement on the Delineation of the Continental Shelf and the Maritime Zone Between the Republic of Albania and the Hellenic Republic, an agreement delimiting their boundary within, among other areas, the Corfu Channel.³⁵ The agreement declared that the maritime boundary between the two countries ‘shall be determined on the principle of equidistance that is expressed by the median line’.³⁶ Art. 5 of that agreement provided that none of the articles of the agreement ‘shall affect the navigational rights and freedoms, provided for in the’ UNCLOS. It is therefore assumed that transit passage may be exercised in the Corfu Channel.³⁷ However, for various reasons, the agreement has not entered into force.³⁸

One remaining question that may not be susceptible to an easy answer is what should the solution be to a strait bordered by two States respectively on each of its sides, with one State’s territory represented by an island, and the other by a continental coast. The Greek island of Samos, for instance, lies west to the coast of the Turkish Asia Minor, separated by the Mycale Strait with a width of 1.6 km at the narrowest. It is submitted that the Art. 38 (1) exclusion does not apply to this feature. One thought, in case it presents a question as to the legal regime applicable in it, would be to assess whether it is a strait used for international navigation. If it stays off the normal route of passage in this area, it may not even qualify as an international strait. In that case, innocent passage applies as the strait forms part of territorial waters. On the contrary, if it is used for international navigation, there is a case for the regime of transit

²⁹ *Ibid.*, 12.

³⁰ ICJ, *The Corfu Channel Case* (United Kingdom of Great Britain and Northern Ireland v. Albania), Memorial Submitted by the Government of the United Kingdom of Great Britain and Northern Ireland – Part I of 30 September 1947, para. 5, available at: <http://www.icj-cij.org/docket/files/1/1489.pdf>.

³¹ ICJ, *The Corfu Channel Case* (United Kingdom of Great Britain and Northern Ireland v. Albania), Counter-Memorial Submitted by the Government of the People’s Republic of Albania of 15 June 1948, para. 6, available at: <http://www.icj-cij.org/docket/files/1/1492.pdf>.

³² *Corfu Channel Case* (note 28), 28.

³³ Sea-Bed Committee, Italy: Draft Articles on Straits, UN Doc. A/AC.138/SC.II/L.30 and Corr.1 (1973).

³⁴ *Emmanuel Roucouas*, Greece and the Law of the Sea, in: Tullio Treves/Laura Pineschi (eds.), *The Law of the Sea: The European Union and its Member States* (1997), 225, 236.

³⁵ As to the agreement see further Tullio Scovazzi/Irini Papanicolopulu/Giampiero Francalanci, Boundary Report 8-21 (Greece-Albania), in: David Colson/Robert Smith (eds.), *International Maritime Boundaries*, vol. VI (2011), 4462, 4470.

³⁶ *Ibid.*, Preamble of the agreement.

³⁷ Similarly, see Hugo Caminos, Categories of International Straits Excluded from the Transit Passage Regime under Part III of the United Nations Convention on the Law of the Sea, in: Tafsir Malick Ndiaye/Rüdiger Wolfrum (eds.), *Law of the Sea, Environmental Law and Settlement of Disputes* (2007), 583, 592.

³⁸ The Albanian Constitutional Court annulled the agreement on 26 January 2010, further information is available at: http://www.dur.ac.uk/ibru/news/boundary_news/?itemno=9534&rehref=%2Fibru%2Fnews%2F&re-subj=Boundary+news%20Headlines.

passage to apply therein. This latter possibility may meet the concerns of both Turkey and Greece.³⁹ Turkey has thus stated that ‘with the limited exceptions provided in articles 35, 36, 38, paragraph 1, and 45, all straits used for international navigation are subject to the regime of transit passage.’⁴⁰ In response, Greece, in defending its interpretative declaration subject to the Turkish objection, has professed no intention ‘to circumvent the provisions of the Convention, in any manner’.⁴¹ One Greek writer has noted the negative impact of the regime of transit passage upon Greek interests,⁴² but it may be wondered whether it is acceptable to implement, for instance, the regime of innocent passage in this case.⁴³ This situation will be discussed further below Art. 41.⁴⁴

- 15 The strictly drafted language of Art. 38 (1) also excludes from its scope straits such as the Canal of Minorca, between Spain’s Island of Majorca and Island of Minorca. The exclusionary effect of the clause in this regard has been criticized.⁴⁵

2. The Nature of the Right of Transit Passage

- 16 The nature of this right is understood to be a freedom, an expression which is normally linked with the regime of the high seas that recognises the freedom to carry out certain activities (→Art. 87).⁴⁶ But the right has been part of an elaborate regime of associated rules, which distinguish it from the freedoms of navigation and overflight prescribed in Part V and Part VII. It has been included in the UNCLOS as a new right.⁴⁷
- 17 It is equally clear that the right described in Art. 38 (2) differs from Art. 18 (2) in respect of activities deemed to be incidental to passage.⁴⁸ The latter provision allows stopping and anchoring in the territorial sea, including them as part of the notion of innocent passage, whereas the former does not. Stopping and anchoring under Art. 38 (2) constitute activities that are not in exercise of the right of transit passage, and are subject to Art. 38 (3). It is not correct to suggest that they should therefore be subject to the innocent passage regime, since they are ancillary to the right of transit passage whose existence is not affected by them, as made clear by the independence of Art. 39 (1).⁴⁹
- 18 The injunction not to impede transit passage somewhat overlaps with the duty of the coastal State not to hamper such passage as provided by Art. 44.⁵⁰ Impediment of transit passage may include the requirement to seek prior authorization by the coastal State for ships intending to pass through their straits. In parallel to the UNCLOS, other treaties may include rules that seem to permit such a request for prior consent for passage. An example is Art. 6 (4) of the Basel Convention on the Control of Transboundary Movements of Hazardous Waste and its

³⁹ *Jia* (note 5), 143; *Jon M. Van Dyck*, *The Aegean Disputes in International Law*, ODIL 36 (2005), 63, 92.

⁴⁰ The full text of the Greek Declaration and Turkey’s objection to the declaration are available at: http://treaties.un.org/pages/ViewDetailsIII.aspx?&src=UNTSOnline&mtmsg_no=XXI-6&chapter=21&Temp=mtmsg3&lang=en#18.

⁴¹ The full text of Greece’s note dated 30 June 1997 regarding the Turkish notification dated 22 February 1996 on the interpretative statement made by Greece at the time of both signature and ratification of the United Nations Convention on the Law of the Sea is available at: http://treaties.un.org/pages/ViewDetailsIII.aspx?&src=UNTSOnline&mtmsg_no=XXI-6&chapter=21&Temp=mtmsg3&lang=en#18.

⁴² *Anastasia Strati*, *Greece and the Law of the Sea: A Greek Perspective*, in: Aldo Chircop/André Gerolymatos/John O. Iatrides (eds.), *The Aegean Sea after the Cold War* (2000), 89, 94.

⁴³ *Anastasia Strati*, *The Ratification by Greece of the UN Convention on the Law of the Sea*, LJIL 9 (1996), 99, 106.

⁴⁴ See further *Jia* on Art. 41 MN 6–8.

⁴⁵ *José A. de Yturriaga*, *Straits Used for International Navigation: A Spanish Perspective* (1991), 303.

⁴⁶ *Satya N. Nandan/David H. Anderson*, *Straits Used for International Navigation: A Commentary on Part III of the United Nations Convention on the Law of the Sea*, BYIL 60 (1989) 159, 181.

⁴⁷ *Ram P. Anand*, *Navigation through Territorial Sea and Straits-Revisited*, Indian JIL 36 (1996), 13, 35; *Argiro L. Morgan*, *The New Law of the Sea: Rethinking the Implications for Sovereign Jurisdiction and Freedom of Action*, ODIL 27 (1996), 5, 17.

⁴⁸ See *Barnes* on Art. 18.

⁴⁹ See further *Jia* on Art. 39 MN 7–8.

⁵⁰ See further *Jia* on Art. 44 MN 4–8.

Disposal (Basel Convention). That provision stipulates, in part, that '[T]he State of export shall not allow the transboundary movement to commence until it has received the written consent of the State of transit.'⁵¹ The application of the provision is subject to Art. 4 (12) of the Basel Convention, which provides:

'Nothing in this Convention shall affect in any way the sovereignty of States over their territorial sea established in accordance with international law, and the sovereign rights and the jurisdiction which States have in their exclusive economic zones and their continental shelves in accordance with international law, and the exercise by ships and aircraft of all States of navigational rights and freedoms as provided for in international law and as reflected in relevant international instruments.'

This latter provision gives precedence over the Basel Convention to, *inter alia*, 'the exercise by ships and aircraft of all States of navigational rights and freedoms as provided for in international law and as reflected in relevant international instruments'. It follows that such rights and freedoms, conventional or customary, shall prevail over measures established on the basis of the Basel Convention. 19

3. Transit Passage Includes Entry to or Exit from Local Ports

The scope of transit passage is stipulated in Art. 38 (2) to include visit of local ports of a coastal State bordering an international strait. It is possible that the ports are situated within the strait or beyond, though at the negotiations at UNCLOS III, ports within a strait were particularly thought of in this respect.⁵² It follows that transit passage, once initiated, covers every stage of it within the limits of an Art. 37-type strait. It is the overall nature of passage that counts under Art. 38 (2). This meaning of transit passage does not contradict the provision of Art. 45, in that the strait concerned here still links two parts of the high seas or EEZ. That geographical situation of the strait determines the status of the strait as an Art. 37-strait, rather than an Art. 45-strait. The geographical situation is 'the decisive criterion', after all.⁵³ There is another point. The entry into local ports on an Art. 37-strait by ships or aircraft is not understood as breaking the continuity and expeditiousness of the passage, in that the ships or aircraft are not required under Art. 38 (2) to resume passage after visiting local ports in order to complete the transit passage. This seems to suggest that return transit is quite conceivable as a form of the exercise of the right of transit passage. The ports lying along the route within a strait often enhance the international use of the strait as a whole.⁵⁴ 20

4. The Saving Clause

Art. 38 (3) subjects activities not of the exercise of transit passage to other 'applicable provisions' of the Convention. Depending on the area in which such an activity takes place, the regime of territorial sea, first of all, is one of the default legal frameworks for that contingency.⁵⁵ In addition, Art. 38 (3) also gives rise to the application of such general provisions as Art. 304, or other specific provisions of the UNCLOS regarding responsibility and liability. It may be recalled that Art. 304 was adopted in 1980 by the delegations at the Conference in order to facilitate acceptance by the Spanish and Moroccan delegations of the 21

⁵¹ As for the vagueness of the wording in this regard, see Katharina Kummer, The International Regulation of Transboundary Traffic in Hazardous Wastes: The 1989 Basel Convention, ICLQ 41 (1992), 530, 545–546.

⁵² Nordquist/Nandan/Rosenne (note 23), 324.

⁵³ *Corfu Channel* (note 28), 28.

⁵⁴ Stuart B. Kaye, The Torres Strait (1997), 72. This effect can also be observed in Art. 45-type straits: Syméon Karagiannis, Les détroits internationaux reliant la mer territoriale d'un État à la haute mer ou à la zone économique exclusive d'un autre État, AnDrMer 12 (2007), 141, 183–184.

⁵⁵ Cf. Robin R. Churchill/Alan V. Lowe, The Law of the Sea (3rd edn. 1999), 107.

whole draft convention, including Part III on straits.⁵⁶ That article may fill in the blank left by the ISNT's removal of a specific provision from the Consensus Text of the Private Group on Straits.⁵⁷ The remaining question of Art. 38 (3) is its relationship with Art. 39 (1) will be dealt with below.

Article 39

Duties of ships and aircraft during transit passage

1. Ships and aircraft, while exercising the right of transit passage, shall:
 - (a) proceed without delay through or over the strait;
 - (b) refrain from any threat or use of force against the sovereignty, territorial integrity or political independence of States bordering the strait, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations;
 - (c) refrain from any activities other than those incident to their normal modes of continuous and expeditious transit unless rendered necessary by *force majeure* or by distress;
 - (d) comply with other relevant provisions of this Part.
2. Ships in transit passage shall:
 - (a) comply with generally accepted international regulations, procedures and practices for safety at sea, including the International Regulations for Preventing Collisions at Sea;
 - (b) comply with generally accepted international regulations, procedures and practices for the prevention, reduction and control of pollution from ships.
3. Aircraft in transit passage shall:
 - (a) observe the Rules of the Air established by the International Civil Aviation Organization as they apply to civil aircraft; state aircraft will normally comply with such safety measures and will at all times operate with due regard for the safety of navigation;
 - (b) at all times monitor the radio frequency assigned by the competent internationally designated air traffic control authority or the appropriate international distress radio frequency.

Bibliography: *Ian Brownlie*, International Law and the Use of Force by States (1963); *Yoram Dinstein*, War, Aggression and Self-Defence (3rd edn. 2001); *Bing Bing Jia*, The Regime of Straits in International Law (1998); *Nicolas M. Matte*, Treatise on Air-Aeronautical Law (1981); *Michael Milde*, United Nations Convention on the Law of the Sea: Possible Implications for International Air Law, *Annals of Air and Space Law* 8 (1983), 167–201; *Satya N. Nandan/David H. Anderson*, Straits Used for International Navigation: A Commentary on Part III of the United Nations Convention on the Law of the Sea, *BYIL* 60 (1989), 159–204; *Nilüfer Oral*, Straits Used in International Navigation, *User Fees and Article 43 of the 1982 Law of the Sea Convention*, *Ocean Yearbook* 20 (2006), 561–594; *Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne* (eds.), *United Nations Convention on the Law of the Sea 1982: A Commentary*, vol. II (1993); *Myron H. Nordquist/Shabtai Rosenne/Louis B. Sohn* (eds.), *United Nations Convention on the Law of the Sea 1982: A Commentary*, vol. V (1989); *Jennifer Trahan*, The Rome Statute's Amendment on the Crime of Aggression: Negotiations at the Kampala Review Conference, *Int Crim Law Rev* 11 (2011), 49–104; *José A. de Yturriaga*, Straits Used for International Navigation: A Spanish Perspective (1991)

Documents: ICAO, ICAO Working Paper, Report by Rapporteur Arnold Kean, ICAO Council C-WP/8077 (1985); Review Conference of the Rome Statute, Resolution RC/Res.6 of 11 June 2010; UN DOALOS, Straits Used for International Navigation: Legislative History of Part III of the United Nations Convention on the Law of the Sea, vol. II (1992); US Naval War College, Annotated Supplement to the Commander's Handbook on the Law of Naval Operations, *International Law Studies* 73 (1999)

⁵⁶ Myron H. Nordquist/Shabtai Rosenne/Louis B. Sohn (eds.), *United Nations Convention on the Law of the Sea 1982: A Commentary*, vol. V (1989), 164 (MN 304.4); Art. 304 provides that 'The provisions of this Convention regarding responsibility and liability for damage are without prejudice to the application of existing rules and the development of further rules regarding responsibility and liability under international law'.

⁵⁷ Consensus Text (note 22), 207 (Article 4 (6)).

Contents

I. Purpose and Function	1
II. Historical Background	3
III. Elements	4
1. Art. 39 (1): Two Notable Features	4
2. Art. 39 (1) In Relation to the Notion of Transit Passage	7
3. Two Duties for Ships	9
4. Two Duties for Aircraft	12

I. Purpose and Function

This article includes various conditions that are to be complied with by ships and aircraft in transit passage. The coastal interest in controlling foreign ships or aircraft passing through or over coastal waters forming international straits has been long-standing, with the concern for the security of the coastal State top of all others. Without proper safeguards in this respect, it would hardly be possible to persuade a majority of negotiating States at the UNCLOS III Conference to embrace the new regime of transit passage. A balance of those conflicting interests had to be struck, and fortunately this was achieved at the Conference.

Art. 39 sets forth certain duties to be observed by passing ships or aircraft in these circumstances. It is, as it stands, independent of the provision of Art. 38 that provides for the right of transit passage.

II. Historical Background

This article seems to have had its origin in the former USSR's proposal of 1972.¹ It took up a more advanced look with the UK proposal of 1974.² The Consensus Text of the Private Group on Straits further refined the provisions by adding the clause that ships and aircraft in transit 'shall...comply with other relevant provisions of this Chapter', and splitting the two duties to proceed without delay and to refrain from activities other than those incidents to the exercise of transit passage.³ The Informal Single Negotiating Text made slight changes to the order and some wording of the provisions.⁴ Neither Greece's proposal to require submarines to transit on surface with flags shown, nor Spain's proposal to omit any reference to aircraft, was adopted in subsequent negotiations.⁵ In 1976, Malaysia and Morocco's proposals to assimilate Art. 39 to Art. 19 (2) by adding a list of activities forbidden in the exercise of transit passage were not adopted.⁶ There was, however, no attempt with those proposals to make such forbidden activities equivalent to non-exercise of transit passage. It seems that the distinction between Art. 38 (2) and Art. 39 was well understood even at that time. But, as will be discussed below, the question as to the relationship between those two articles is not easily solved.

¹ Sea-Bed Committee, USSR: Draft Articles on Straits Used for International Navigation, UN Doc. A/AC.138/SC.II/L.7 (1972).

² Second Committee UNCLOS III, United Kingdom: Draft Articles on the Territorial Sea and Straits, UN Doc. A/CONF.62/C.2/L.3 (1974), OR III, 183 (Ch. III, Article 2).

³ UNCLOS III, Consensus Text of Private Group on Straits, 18 April 1975 (1975, mimeo.), reproduced in: Renate Platzöder (ed.), Third United Nations Conference on the Law of the Sea: Documents of the Geneva Session 1975 (1975), 205.

⁴ UNCLOS III, Informal Single Negotiating Text (Part II), UN Doc. A/CONF.62/WP.8/PART II (1975), OR IV, 152 (Article 39).

⁵ Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. II (1993), 338 (MN 39.5).

⁶ *Ibid.*, 339 (MN 39.6).

III. Elements

1. Art. 39 (1): Two Notable Features

- 4 The first feature is that Art. 39 (1)(b) reflects Art. 2 (4) UN Charter. It may be wondered whether the carrying of explosives by a ship passing through an international strait could constitute a threat of force.⁷ It is felt that for an action to be regarded as for threat or use of force proof of intention is probably required, above all, in pursuing those two courses of action.⁸ In this regard, it may be noted that the Rome Statute of the International Criminal Court has just been amended to include the crime of aggression under the jurisdiction of the International Criminal Court. The crime has been so defined as to reflect Art. 2 (4) UN Charter.⁹ An individual concerned in that crime is one that ‘planned, prepared, initiated or executed an act of aggression’.¹⁰ The captain of a ship or aircraft in transit may not meet this requirement, as defined by the Rome Statute’s amendment, as he is probably not the one in a position ‘effectively to exercise control over or to direct the political or military action of the State which committed the act of aggression’.¹¹ But the action by the ship or aircraft will constitute the *actus reus* of the alleged act of aggression. In addition, it has been suggested that ‘the principles of international law embodied in the UN Charter’ include not only the principles referred to in Art. 2 of the Charter, but in other parts of the Charter, including the rule and principle of self-defence under Art. 51 of the Charter.¹² Violations of these principles may be manifested in other forms.
- 5 The second notable feature of Art. 39 (1)(c) is that it refers to the ‘normal modes of continuous and expeditious transit’ of ships and aircraft. This has been taken to mean the following:

‘This means that submarines are free to transit international straits submerged, since that is their normal mode of operation, and that surface warships may transit in a manner consistent with sound navigational practices and the security of the force, including formation steaming and the launching and recovery of aircraft’.¹³
- 6 During the negotiation of the provision, the preceding understanding was already borne in mind by many participants.¹⁴ But actual passage may require a different course of action from passing ships, thus making it the normal mode for a particular type of ship in a particular strait.¹⁵ There is one noteworthy difference between Art. 39 (1)(c) and Art. 18 (2), in that

⁷ *Niliifer Oral*, *Straits Used in International Navigation, User Fees and Article 43 of the 1982 Law of the Sea Convention*, *Ocean Yearbook* 20 (2006), 561, 568, referring to an incident of a foreign ship carrying 16 tons of explosives, which grounded while in passage through the Turkish Straits.

⁸ *Cf. Ian Brownlie*, *International Law and the Use of Force by States* (1963), 377–378; *Yoram Dinstein*, *War, Aggression and Self-Defence* (3rd edn. 2001), 125.

⁹ Art. 8bis (2) Rome Statute of the International Criminal Court now provides, in respect of the meaning of ‘act of aggression’, that it ‘means the use of *armed force* by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations’. See further, Review Conference of the Rome Statute, Resolution RC/Res.6 of 11 June 2010, Annex I (Amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression); *cf. Jennifer Trahan*, *The Rome Statute’s Amendment on the Crime of Aggression: Negotiations at the Kampala Review Conference*, *Int Crim Law Rev* 11 (2011), 49, 61.

¹⁰ Review Conference of the Rome Statute, Resolution RC/Res.6 of 11 June 2010, Annex II (Amendments to the Elements of Crimes).

¹¹ *Ibid.*, Annex I (Art. 8bis (1)).

¹² Myron H. Nordquist/Shabtai Rosenne/Louis B. Sohn (eds.), *United Nations Convention on the Law of the Sea 1982: A Commentary*, vol. V (1989), 154 (MN 301.5).

¹³ US Naval War College, *Annotated Supplement to the Commander’s Handbook on the Law of Naval Operations*, *International Law Studies* 73 (1999), 125.

¹⁴ *Satya N. Nandan/David H. Anderson*, *Straits Used for International Navigation: A Commentary on Part III of the United Nations Convention on the Law of the Sea*, *BYIL* 60 (1989), 159, 184.

¹⁵ *Bing Bing Jia*, *The Regime of Straits in International Law* (1998), 150–152.

activities incident to transit passage, when undertaken legally, must be such that they are rendered necessary by *force majeure* or by distress; whereas activities incidental to innocent passage in the form of stopping and anchoring in the territorial sea are not so qualified.¹⁶ Stopping and anchoring in Art. 37 straits are not part of the conduct of transit passage.

2. Art. 39 (1) in Relation to the Notion of Transit Passage

The wording of Art. 39 (1) echoes Arts. 18 (2), 19 (2)(a) and 19 (2)(l). As has been pointed 7
out elsewhere, it relates intimately to the concept of transit passage.¹⁷ However, the concept is given under Art. 38 (2). It is plain that Art. 39 (1)(a) is not different from Art. 38 (2) in any significant way.¹⁸ Indeed, it merely expresses in different words the requirement of continuity and expeditiousness of transit passage under Art. 38 (2). Whether this was necessary or not has not previously received much attention. But a more important query is as to whether the obligation to refrain from activities referred to under Art. 39 (1)(b) and (c) plays a similar role as Art. 39 (1)(a), i.e. to further clarify Art. 38 (2). The answer is in the affirmative. A threat or use of force against the coastal State's sovereignty, or in violation of the principles of international law embodied in the UN Charter, by a passing ship or overflying aircraft could hardly justify the flag State or the State of registry to support the continued enjoyment by the ship or aircraft of the right of transit passage under the UNCLOS. However, stop of transit passage before turning into a traffic separation scheme or inshore traffic zone is often seen in reality due to the nature and design of such schemes, even though that may not be consistent with the literal wording of Art. 39 (1)(c). In this situation, the provision should perhaps be read expansively to allow the ships in that situation to retain their right of transit passage, as their stops happen as a result of complying with traffic separation schemes which are always aimed at, among other things, protecting the coastal environment.

Art. 39 (1) is concerned with the manner of transit passage, in that it concerns acts that are 8
performed or enjoined to perform during the exercise of the right of transit passage. In comparison, Art. 38 (2) describes the concept of transit passage, namely, what constitutes transit passage. If, during such passage, activities not essential to transit take place on board the ship or aircraft, it is Art. 38 (3), rather than Art. 39 (1), that shall provide the coastal State with a solution. It is arguable that Art. 39 (1)(b) could have been part of Art. 38, with the other three paragraphs of Art. 39 (1) staying where they are, as they deal with activities which may not necessarily end the exercise of the right of transit passage.

3. Two Duties for Ships

The wording of Art. 39, in general, reminds one of the language used by treaties like 9
International Convention for the Safety of Life at Sea (SOLAS 1974)¹⁹, in that the provisions are directed at ships and aircraft in transit, rather than flag States or States of registry. Ship masters or captains of the aircraft are the immediate addressees of the duties imposed by this article (except for an alleged breach of Art. 39 (1)(b)). There is therefore a need to disseminate this article and other relevant articles of the UNCLOS among those persons, in addition to national legislation and regulations relating to international straits. In addition it may be noted that, with regard to Art. 39 (2) in particular, the UNCLOS is not designed to limit the regulations, procedures and practices that may be relevant to the provision.

Ships in transit shall comply with generally accepted international regulations, procedures 10
and practices for safety at sea, including the International Regulations for Preventing Collisions at Sea (COLREGS). It is recalled that 'generally accepted' was a condition suggested by the US at

¹⁶ See *Barnes* on Art. 18.

¹⁷ *Jia* (note 15), 147.

¹⁸ See further *Jia* on Art. 38 MN 16–19.

¹⁹ International Convention for the Safety of Life at Sea 1974, as amended.

the UN Sea-Bed Committee in 1972 to avoid unilateral standards by coastal States.²⁰ It was not controversial even at the time, as the role of the International Maritime Organisation and the treaties it sponsored in shoring up maritime safety in this regard had been widely recognized. The COLREGs have to date been ratified or acceded to by 153 countries, representing 98.36 % of the world's merchant fleet's tonnage.²¹ The SOLAS is also of much relevance in this regard.

- 11 The same can be said of Art. 39 (2)(b), which stipulates the obligation for ships in transit to comply with generally accepted international regulations, procedures and practices for the prevention, reduction and control of pollution from ships. It is believed that this clause refers chiefly to the Annex I, II Protocol of the Convention for the Prevention of Pollution from Ships. Similarly, this treaty has enjoyed general support among States, with 150 contracting parties as of 31 May 2011, representing 99.14 % of the world's merchant fleet's tonnage.²²

4. Two Duties for Aircraft

- 12 The issue of overflight of international straits by State aircraft caused some controversy during the negotiation of Art. 39.²³ Spain for one had insisted until 1978 that 'aircraft' should be deleted from Art. 38's regime of transit passage without success.²⁴ Later, it proposed that overflight by State aircraft should be regulated on the same footing as other aircraft, but failed to get the suggestion accepted by the necessary majority.²⁵ What this highlights is the differing treatments accorded to State aircraft and other aircraft under Art. 39 (3)(a), as far as the Rules of the Air (the Rules of the Air) established by the International Civil Aviation Organization (ICAO) are concerned.²⁶ The Rules of the Air are applicable to flight over the high seas, and over national territories to the extent that they do not conflict with the rules of the State being overflown. However, the terms of Art. 39 (3)(a) are such that, over Art. 37-type straits, the application of the Rules of the Air are no longer affected by the rules of the State being overflown, which would otherwise be the case, considering the right of 'any State' to do so under Art. 38 of the 1944 Convention on the International Civil Aviation (Chicago Convention).²⁷ While the contracting parties to the Chicago Convention must comply without exception with the Rules over the high seas, pursuant to Art. 12 of, and Annex II to, that Convention,²⁸ they could have filed differences allowed under Art. 38 in respect of national territory including territorial waters, but for Art. 39 (3)(a). It makes sense that Art. 39 (3)(a) then stops short of requiring State aircraft to comply with the Rules of the Air.
- 13 While Art. 39 (3)(a) permits different rules for State aircraft and other aircraft, Art. 39 (3)(b) does not. Aircraft without distinction must 'at all times' monitor the radio frequency assigned by the 'competent internationally designated air traffic control authority', namely, the authorities 'listed in the appropriate Regional Air Navigation Plan approved by the ICAO Council',²⁹ or 'the appropriate international distress radio frequency', i.e. the VHF (or Very High Frequency) emergency frequency 121.5 MHz.³⁰ It is recalled that this alternative requirement under Art. 39 (3)(b) does not reflect 'firmly established practice and international standards

²⁰ Sea-Bed Committee, Summary Record of the Thirty-Ninth Meeting, UN Doc. A/AC.138/SC.II/SR. 39 (1972), 33, 40.

²¹ Information on the status of the COLREGs is available at: <http://www.imo.org/About/Conventions/StatusOfConventions/Pages/Default.aspx>.

²² *Ibid.*

²³ José A. de Yturriaga, *Straits Used for International Navigation: A Spanish Perspective* (1991), 216–221.

²⁴ UN DOALOS, *Straits Used for International Navigation: Legislative History of Part III of the United Nations Convention on the Law of the Sea*, vol. II (1992), 107 (para. 175 referring to an informal proposal by the Spanish delegation).

²⁵ Nordquist/Nandan/Rosenne (note 5), 340 (MN 39.9).

²⁶ Rules of the Air, Annex II to the 1944 Convention on International Civil Aviation.

²⁷ ICAO, ICAO Working Paper, Report by Rapporteur Arnold Kean, ICAO Council C-WP/8077 (1985), para. 15.

²⁸ Nicolas Mateesco Matte, *Treatise on Air-Aeronautical Law* (1981), 212.

²⁹ Michael Milde, *United Nations Convention on the Law of the Sea: Possible Implications for International Air Law*, *Annals of Air and Space Law* 8 (1983), 167, 187.

³⁰ Chicago Convention, Annex 10 (Aeronautical Telecommunications, vol. II).

adopted by the ICAO Council’ that the two frequencies are to be cumulatively observed as a matter of obligation.³¹ It has been held that the ICAO rules apply as *lex specialis*.³² That view may just be consistent with the rule stipulated in Art. 311 (2).³³ In any case, uncontrolled flight by State aircraft is probably permissible under Art. 39 (3).³⁴

Article 40

Research and survey activities

During transit passage, foreign ships, including marine scientific research and hydrographic survey ships, may not carry out any research or survey activities without the prior authorization of the States bordering straits.

Bibliography: *Robin R. Churchill/Alan V. Lowe*, The Law of the Sea (3rd edn. 1999); *Erik Franckx*, American and Chinese Views on Navigational Rights of Warships, Chinese JIL 10 (2011), 187–206; *Zhang Haiwen*, Is it Safeguarding the Freedom of Navigation or Maritime Hegemony of the United States?—Comments on Raul (Pete) Pedrozo’s Article on Military Activities in the EEZ, Chinese JIL 9 (2010), 31–47; *Satya N. Nandan/David H. Anderson*, Straits Used for International Navigation: A Commentary on Part III of the United Nations Convention on the Law of the Sea, BYIL 60 (1989), 159–204; Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. II (1993); Myron H. Nordquist/Shabtai Rosenne/Alexander Yankov (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. IV (1991); *Raul (Pete) Pedrozo*, Preserving Navigational Rights and Freedoms: The Right to Conduct Military Activities in China’s Exclusive Economic Zone, Chinese JIL 9 (2010), 9–29; *Wolf Plesmann/Volker Röben*, Marine Scientific Research: State Practice versus Law of the Sea?, in: Rüdiger Wolfrum (ed.), Law of the Sea at the Crossroads: The Continuing Search for a Universally Accepted Régime (1991), 373–392; *J. Ashley Roach*, Marine Data Collection: Methods and the Law, in: Myron H. Nordquist/Tommy T.B. Koh/John N. Moore (eds.), Freedom of Seas, Passage Rights and the 1982 Law of the Sea Convention (2009)

Contents

I. Purpose and Function	1
II. Historical Background	2
III. Elements	3
1. Ships Included	3
2. Consequences of Violating Art. 40	4

I. Purpose and Function

This article stands alone but does not differ in effect from those prohibitive rules set forth in Art. 39 (1). It may have been included in Part III for purposes of emphasis of the general injunction applicable within the territorial sea in respect of research and survey activities as provided under Art. 245.¹ If its role is to supplement other articles, such as Art. 38 (3), Art. 39 (1) and Art. 245,² it may be wondered whether it was necessary to include the article in the UNCLOS separately. The content of the research and survey activities prohibited is not defined under Art. 40, and may well include hydrographical survey, military survey, and even operational oceanography.³ On the other hand, this also shows, from one angle, that the regime of

³¹ *Milde* (note 29), 187.

³² *Ibid.*

³³ See further *Matz-Lück* on Art. 311 MN 10–12.

³⁴ *Jia* (note 15), 157.

¹ *Satya N. Nandan/David H. Anderson*, Straits Used for International Navigation: A Commentary on Part III of the United Nations Convention on the Law of the Sea, BYIL 60 (1989) 159, 187.

² Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. II (1993), 352 (MN 40.9(b)).

³ Cf. *J. Ashley Roach*, Marine Data Collection: Methods and the Law, in: Myron H. Nordquist/Tommy T.B. Koh/John N. Moore (eds.), Freedom of Seas, Passage Rights and the 1982 Law of the Sea Convention (2009), 171, 175.

Part III is separate from the regime of Part II. This particular provision avoids the difficulty encountered in interpreting Part XIII in respect of other areas of the sea, in particular the exclusive economic zone.⁴ On the whole, Art. 40 is identical to Art. 245 in its direction and purpose,⁵ and may well have the same effect as the latter in directing general State practice to comply with the UNCLOS.⁶

II. Historical Background

- 2 It seems that the origin of Art. 40 lay in the concern of certain countries with regards to the conduct of marine survey or research by foreign warships through straits as part of the territorial sea.⁷ However, some of those States touched upon this aspect of the regulatory power of the coastal State on the premise that international straits would be treated as part of the territorial sea, in which the regime of innocent passage should apply without exception.⁸ The provision did not feature in either the Consensus Text⁹ or the Informal Single Negotiating Text (ISNT) Part II, both circulated in 1975 at UNCLOS III. Spain tried to include this provision in Art. 39 of the ISNT/Part II in 1976, but did not succeed.¹⁰ But this effort finally paid off in 1977, when Spain joined Malaysia and Morocco to push for the inclusion of the provision in the then Art. 38 Revised Single Negotiating Text Part II, which was to be re-numbered as Art. 39.¹¹ But the provision appeared as Art. 40 in the Informal Composite Negotiating Text.¹² Without trouble, it went on to become Art. 40 of the Convention.

III. Elements

1. Ships Included

- 3 With its original aim to cover warships in transit, Art. 40, by employing the phrase of 'foreign ships' suitably covers both non-military vessels and warships. Furthermore, it specifies one type of ship as subject to its regulation, namely, marine scientific research and hydrographic survey ships. Moreover, Art. 40 is only concerned with foreign ships, and not aircraft, that are exercising the right of transit passage.

⁴ Raul Pedrozo, Preserving Navigational Rights and Freedoms: The Right to Conduct Military Activities in China's Exclusive Economic Zone, Chinese JIL 9 (2010), 9, 21-22; Zhang Haiwen, Is it Safeguarding the Freedom of Navigation or Maritime Hegemony of the United States?—Comments on Raul Pedrozo's Article on Military Activities in the EEZ, Chinese JIL 9 (2010), 31, 35; Erik Franckx, American and Chinese Views on Navigational Rights of Warships, Chinese JIL 10 (2011), 187, 199-200.

⁵ See further Huh/Nishimoto on Art. 245 MN 1.

⁶ Wolf Plesmann/Volker Röben, Marine Scientific Research: State Practice versus Law of the Sea?, in: Rüdiger Wolfrum (ed.), Law of the Sea at the Crossroads: The Continuing Search for a Universally Accepted Régime (1991), 373, 387-388.

⁷ Sea-Bed Committee, USSR: Draft Articles on Straits Used for International Navigation, UN Doc. A/AC.138/SC.II/L.7 (1972), 1 (para. 2 (a)); Sea-Bed Committee, Cyprus *et al.*: Draft Articles on Navigation Through the Territorial Sea Including Straits Used for International Navigation, UN Doc. A/AC.138/SC.II/L.18 (1973), 8 (Article 22 (2)(e)).

⁸ Cyprus *et al.*: Draft Articles (note 7), which was in the sub-section regarding 'Warships'.

⁹ UNCLOS III, Consensus Text of Private Group on Straits, 18 April 1975 (1975, mimeo.), reproduced in: Renate Platzöder (ed.), Third United Nations Conference on the Law of the Sea: Documents of the Geneva Session 1975 (1975), 204.

¹⁰ Nordquist/Nandan/Rosenne (note 2), 351 (MN 40.5).

¹¹ UNCLOS III, Revised Single Negotiating Text (Part II), UN Doc. A/CONF.62/WP.8/REV.1/PART II (1976), OR V, 151, 159.

¹² UNCLOS III, Informal Composite Negotiating Text, UN Doc. A/CONF.62/WP.10 (1977), OR VIII, 11.

2. Consequences of Violating Art. 40

It is useful to speculate on the consequences of a foreign ship in transit through an Art. 37-type strait violating Art. 40. The article itself is silent in this regard, but has been suggested as complementing Art. 19 (2)(j).¹³ However, it is not certain that conducting the forbidden activities of research and survey will necessarily lead to the cessation of the right of transit passage. Such violations are therefore similar in effect to violations of Art. 39 (1)(a) or (c).¹⁴ The independence of Art. 39 from Art. 38 (2) is again copied by that of Art. 40 from Art. 38 (2). The applicable provision in that situation is Art. 38 (3). Under this latter provision, four points arise. First, the research or survey activities are not covered by national laws of the coastal State as specified in Art. 42, but the quite useful Art. 42 (5) can be resorted to by the coastal State in respect of research or survey activities by ships entitled to sovereign immunity. Second, it is not thought that Art. 19 (2)(j) may have any role to play, but that Art. 245 does bear on this situation. The two articles underlie two different approaches in this respect, and Art. 245 is to be preferred. Third, it follows from the preceding point that Art. 263 may prove equally useful in that situation.¹⁵ Fourth, as a last resort, Art. 304 can be a catch-all clause.¹⁶

Article 41

Sea lanes and traffic separation schemes in straits used for international navigation

1. In conformity with this Part, States bordering straits may designate sea lanes and prescribe traffic separation schemes for navigation in straits where necessary to promote the safe passage of ships.

2. Such States may, when circumstances require, and after giving due publicity thereto, substitute other sea lanes or traffic separation schemes for any sea lanes or traffic separation schemes previously designated or prescribed by them.

3. Such sea lanes and traffic separation schemes shall conform to generally accepted international regulations.

4. Before designating or substituting sea lanes or prescribing or substituting traffic separation schemes, States bordering straits shall refer proposals to the competent international organization with a view to their adoption. The organization may adopt only such sea lanes and traffic separation schemes as may be agreed with the States bordering the straits, after which the States may designate, prescribe or substitute them.

5. In respect of a strait where sea lanes or traffic separation schemes through the waters of two or more States bordering the strait are being proposed, the States concerned shall cooperate in formulating proposals in consultation with the competent international organization.

6. States bordering straits shall clearly indicate all sea lanes and traffic separation schemes designated or prescribed by them on charts to which due publicity shall be given.

7. Ships in transit passage shall respect applicable sea lanes and traffic separation schemes established in accordance with this article.

¹³ Nordquist/Nandan/Rosenne (note 2), 351 (MN 40.1); see further *Barnes* on Art. 19 MN 27.

¹⁴ Cf. *Robin R. Churchill/Alan V. Lowe*, *The Law of the Sea* (3rd edn. 1999), 107 (referring to Art. 39 (1)(b) as 'an obligation ancillary' to the right of transit passage).

¹⁵ Myron H. Nordquist/Shabtai Rosenne/Alexander Yankov (eds.), *United Nations Convention on the Law of the Sea 1982: A Commentary*, vol. IV (1991), 642 (MN 263.8). The wording of Art. 263 is somewhat less clear as to the responsibility and liability arising from marine research conducted in contravention of the UNCLOS by States or competent international organizations or on their behalf, as opposed to that conducted by others to which they respond in violation of the UNCLOS. The latter situation involving their response is addressed by Art. 263 (2).

¹⁶ See further, *Tams/Devaney* on Art. 304 MN 6–16.

Bibliography: *Hugo Caminos*, The Legal Regime of Straits in the 1982 United Nations Convention on the Law of the Sea, Rdc 205 (1987, V), 9–246; *Wolff Heintschel von Heinegg*, The Law of Military Operations at Sea, in: Terry D. Gill/Dieter Fleck (eds.), The Handbook of the International Law of Military Operations (2010), 325–374; *Bing Bing Jia*, The Regime of Straits in International Law (1998); *Constance Johnson*, A Rite of Passage: The IMO Consideration of the Indonesian Archipelagic Sea-Lanes Submission, IJMCL 15 (2000), 317–332; *Stuart B. Kaye*, The Torres Strait (1997); *Dalchoong Kim/Jin-Hyun Paik*, Relation Between User States and Coastal States with Respect to International Navigation, in: Tadao Kuribayashi/Edward L. Miles (eds.), The Law of the Sea in the 1990s: A Framework for Further International Cooperation (1992), 51–67; *Harilaos Kontoyiannis/Efstathios Balopoulos/Olympia Gotsis-Skretas/Alexandra Pavlidou/Georgia Assimakopoulou/Emmanuel Papageorgiou*, The Hydrology and Biochemistry of the Cretan Straits (Antikithira and Kassos Straits) Revisited in the Period of June 1997–May 1998, Journal of Marine Systems 53 (2005), 37–57; *Djamchid Momtaz*, La régime de passage dans le détroit d’Hormuz, in: Rafael Casado Raigón (ed.), L’Europe et la mer: pêche, navigation et environnement marin (2005), 167–174; Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. II (1993); Daniel O’Connell/Ivan Shearer (eds.), The International Law of the Sea, vol. I (1982); *John Papadimas*, The Dodecanese and the Aegean Issue: Historical Background, in: Aldo Chircop/André Gerolymatos/John O. Iatrides (eds.), The Aegean Sea after the Cold War (2000), 7–16; *George P. Politakis*, The Aegean Dispute in the 1990s: Naval Aspects of the New Law of the Sea Convention, in: Theodore C. Kariotis (ed.), Greece and the Law of the Sea (1997), 292–323; *Nicholas M. Poulantzas*, The New International Law of the Sea and the Legal Status of the Aegean Sea, Revue Hellenique de Droit International 44 (1991), 251–272; *Anastasia Strati*, Greece and the Law of the Sea: A Greek Perspective, in: Aldo Chircop/André Gerolymatos/John O. Iatrides (eds.), The Aegean Sea after the Cold War (2000), 89–102; *Hugo Tiberg*, Mysteries of Water Boundaries: Baselines and Boundaries Around Sweden’s Coasts, in: Ove Bring/Said Mahmoudi (eds.), Current International Law Issues: Nordic Perspectives (1994), 195–217; *Nihan Ünü*, The Legal Regime of the Turkish Straits (2002)

Documents: IMO, Ships’ Routing (2010); IMO Res. A.572(14) of 20 November 1985; US Naval War College, Annotated Supplement to the Commander’s Handbook on the Law of Naval Operations, International Law Studies 73 (1999); US Department of State, National Claims to Maritime Jurisdictions, Limits in the Seas No. 36 (2000)

Cases: Court of Arbitration, *Case Concerning a Dispute between Argentina and Chile Concerning the Beagle Channel* (Argentina v. Chile), Judgment of 18 February 1977, RIAA XXI, 53

Contents

I. Purpose and Function	1
II. Historical Background	4
III. Elements	6
1. Establishment of Traffic Separation Schemes and Sea Lanes.....	6
2. Control by the Competent International Organization.....	10
3. No Designated Routes for Aircraft	13
4. Consequences for Violation of Art. 41 (7).....	14

I. Purpose and Function

1 The right of States bordering straits to establish traffic separation schemes (TSS) within the straits they border has its origin in a customary practice among shipping companies¹ and is concerned with the choice of a particular form of ships’ routing.² As other similarly designed systems, a TSS is established to contribute to safety of life at sea, safety and efficiency of navigation, and/or protection of the marine environment.³ During the UNCLOS III Conference, the initial position of some States in insisting on a regime of innocent passage in international straits gave way to what has since been referred to as the regime of transit passage enshrined in the UNCLOS. That the interests of the coastal States bordering straits in safety and environ-

¹ IMO, Ships’ Routing (2010), xi.

² *Ibid.*, 1, setting forth the General Provisions on Ships’ Routing as adopted by IMO Res. A.572(14) of 20 November 1985, amended in 2000. The customary practice has never attracted particular problems of general relevance to the regime of international straits: Court of Arbitration, *Case Concerning a Dispute between Argentina and Chile Concerning the Beagle Channel* (Argentina v. Chile), Judgment of 18 February 1977, RIAA XXI, 53 (paras. 84, 87, 88, 96).

³ Reg. 10, Ch. V International Convention for the Safety of Life at Sea 1974, as amended (SOLAS 1974).

mental protection were recognised through the adoption of Art. 41, facilitated Part III in becoming accepted by the majority of States participating in the negotiations at the conference.⁴

It may be wondered whether a strait with a TSS in it, or in its approaches,⁵ as adopted and 2 recommended by the International Maritime Organization (IMO), is *prima facie* a strait used for international navigation.⁶ It is known that a ships' routing system is established to enhance 'the safety of life at sea, safety and efficiency of navigation, and/or protection of the marine environment'.⁷ In addition, the IMO is recognized as 'the only international body for developing guidelines, criteria and regulations on an international level for ships' routing systems'.⁸ At the international level, ships' routing systems proposed by States parties to the SOLAS 1974 shall be referred to the IMO for adoption. While the SOLAS 1974 recognizes that there are coastal States that may still establish such systems which are not proposed first to, or adopted by the IMO, the dominant trend is that represented by the States parties to the SOLAS 1974 which, with 159 parties as of 31 May 2011 representing 99.04 % of the world tonnage, have adopted systems pursuant to the SOLAS 1974.⁹ The IMO holds the view that, in straits used for international navigation, among other areas, governments are requested to establish routing systems in accordance with the IMO guidelines and criteria and to submit them to the IMO for adoption.¹⁰ There is a good case for the view that ships' routing is the predominant trend of State practice in relation to congested areas of sea, of which straits are the most typical. Hence, the supposition that a strait with a ships' routing system is *prima facie* one used for international navigation. Whether it falls under Part III depends on its geographical situation. Currently, straits with TSS in them or in their approaches number about 16, including the Aaland Strait, Dover Strait, the Straits of Malacca and Singapore, of Bab-el-Mandeb, Gibraltar, Juan de Fuca, Georgia, and Hormuz, the North Channel, the Great Belt, the Sound, the Turkish Straits, entrance to the Gulf of Finland, the Santa Barbara Channel, the Windward Channel, the Strait of Magellan.¹¹ If account is taken of other routing measures, such as mandatory reporting systems, many others can be added to this list, like the Torres Strait, the Little Minch, and the Strait of Bonifacio.¹² But it is immediately cautioned that this is a helpful rule of thumb, rather than a legal criterion. To assess whether there is an international strait involved requires more than just a look at the presence of TSS.

It is necessary to emphasize that the TSS or sea lanes referred to in Art. 41 are to be 3 followed by not only foreign ships, but ships of the coastal State. The terms of Art. 41 (7) are quite clear on this.

II. Historical Background

In terms of the contemporary law of the sea, the schemes envisaged in Art. 41 have been a 4 fixture for international shipping since the 1960s.¹³ By the time the UNCLOS negotiations first began in the UN Sea-Bed Committee, and then at UNCLOS III itself, the necessity and

⁴ *Djamchid Momtaz*, La régime de passage dans le détroit d'Hormuz, in: Rafael Casado Raigón (ed.), *L'Europe et la mer: pêche, navigation et environnement marin* (2005), 167, 168–171, on the differing positions of Iran and Oman towards the Hormuz Strait. See further Daniel O'Connell/Ivan Shearer (eds.), *The International Law of the Sea*, vol. I (1982), 330–331.

⁵ The approaches to a strait are considered as subject to the regime of international straits: US Naval War College, *Annotated Supplement to the Commander's Handbook on the Law of Naval Operations*, International Law Studies 73 (1999), 175–178.

⁶ As to straits used for international navigation, see further *Jia* on Art. 37 MN 10–13.

⁷ Reg. 10 (1), Ch. V SOLAS 1974, as amended.

⁸ Reg. 10 (2), Ch. V SOLAS 1974.

⁹ Further information available at: <http://www.imo.org/About/Conventions/StatusOfConventions/Pages/Default.aspx>.

¹⁰ IMO Ships' Routing (note 1), para. 3.14 (Part A, General Provisions on Ships Routing).

¹¹ *Ibid.*, Parts B–G.

¹² *Ibid.*

¹³ *Ibid.*, xi; cf. *Bing Bing Jia*, *The Regime of Straits in International Law* (1998), 157.

desirability of traffic separation schemes was already beyond dispute.¹⁴ The main structure of Art. 41 took shape with the UK proposal to the second session of the Conference in 1974, which, however, was without current paragraphs 3 (conformity with international regulations) and 5 (cooperation by two or more States in formulating proposals for TSS) of Art. 41.¹⁵ In the proposal, all TSS proposed by coastal States must be approved by the IMO.

- 5 But when the Consensus Text of the Private Group on Straits was circulated in April 1975, Art. 41 was more or less complete with its present clauses.¹⁶ Even the requirement that TSS must be approved by the IMO before their designation was revised to a rule that the IMO might adopt only such a TSS as agreed with the strait State concerned. That version of Art. 41 was duly adopted by the Informal Single Negotiating Text Part II. In 1976, Greece made an interesting suggestion that sea lanes could be established for straits among a group of islands.¹⁷ This was to become part of Greece's interpretative declaration made upon its signature of, and confirmed upon ratification (on 21 July 1995) of the UNCLOS.¹⁸ Subsequently, the text of the draft Art. 41 remained unchanged in substance.¹⁹

III. Elements

1. Establishment of Traffic Separation Schemes and Sea Lanes

- 6 With a primary emphasis on securing maritime safety for vessels navigating congested areas of sea, the existence of TSS and sea lanes may have taken on more significance than was first thought at the time of its inclusion in the UNCLOS. The thorny problem of the multiple routes into the Aegean Sea from the Mediterranean or the Black Sea is relevant to this point. Greece has made an interpretative declaration upon signature and confirmed on ratification of the UNCLOS. The declaration states:

‘The present declaration concerns the provisions of Part III on straits used for international navigation and more especially the application in practice of articles 36, 38, 41 and 42 of the Convention on the Law of the Sea. In areas where there are numerous spread out islands that form a great number of alternative straits which serve in fact one and the same route of international navigation, it is the understanding of Greece, that the coastal state concerned has the responsibility to designate the route or routes, in the said alternative straits, through which ships and aircraft of third countries could pass under transit passage regime, in such a way as on the one hand the requirements of international navigation and overflight are satisfied, and on the other hand the minimum security requirements of both the ships and aircraft in transit as well as those of the coastal state are fulfilled.’²⁰

- 7 The reference to Art. 41 shows the Greek intention to put the device of traffic separation scheme to effect in areas of direct concern to it. There is a balance, as indicated in the declaration, between the security of navigation and overflight, as well as that of the coastal State and the ‘requirements of international navigation and overflight’. This, depending on

¹⁴ Sea-Bed Committee, United States: Draft Articles on the Breadth of the Territorial Sea, Straits and Fisheries, UN Doc. A/AC.138/SC.II/L.4 (1971), 2 (Article II (1)); Sea-Bed Committee, USSR: Draft Articles on Straits Used for International Navigation, UN Doc. A/AC.138/SC.II/L.7 (1972), 1; Sea-Bed Committee, Cyprus *et al.*: Draft Articles on Navigation Through the Territorial Sea Including Straits Used for International Navigation, UN Doc. A/AC.138/SC.II/L.18 (1973), 8 (Art. 6 (a)).

¹⁵ Second Committee UNCLOS III, United Kingdom: Draft Articles on the Territorial Sea and Straits, UN Doc. A/CONF.62/C.2/L.3 (1974), OR III, 183, 186 (Ch. III, Art. 3).

¹⁶ UNCLOS III, Consensus Text of Private Group on Straits, 18 April 1975 (1975, mimeo.), reproduced in: Renate Platzöder (ed.), Third United Nations Conference on the Law of the Sea: Documents of the Geneva Session 1975 (1975), 204.

¹⁷ Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. II (1993), 360.

¹⁸ See *infra* MN 6.

¹⁹ Nordquist/Nandan/Rosenne (note 17), 361–362 (MN 41.6–41.7).

²⁰ The full text of Greece declaration is available at: http://treaties.un.org/pages/ViewDetailsIII.aspx?&src=UNTSOnline&mtdsg_no=XXI~6&chapter=21&Temp=mtdsg3&lang=en#EndDec.

perspective,²¹ seemingly expands on the scope of Art. 41, which was intended to be applied to ships in transit. On the one hand, it touches on the possibility of establishing air routes of transit. On the other, it is also likely to broaden the scope of Art. 41 by reflecting a concern with the security of the coastal State, i.e. Greece in this case, rather than with 'the safe passage of ships' as stipulated in the article.

The geographical and legal situation in the Aegean Sea is indisputably complex.²² While the Greek declaration signals its intention to simplify the routes of passage and overflight through the sea area in which its islands and islets are widely scattered, thus showing a willingness to facilitate the use of local passages, it should be noted that the potential routes envisaged by Greek writers might all fall within a territorial sea of 12 NM, if it ever claimed that width in this area.²³ The two routes singled out for this purpose are the one comprising Antikithira Strait, between Antikithira and Crete Islands, and the other, Kassos Strait between Crete and Kassos Islands.²⁴ Both routes link the Aegean Sea and the wider Mediterranean to the south of the Island of Crete. At the moment, Greece has maintained its 6 NM territorial sea in the Aegean Sea, even though it is suggested that it retains the right to extend to 12 NM under the UNCLOS.²⁵ As such, the two routes leave in their midst a corridor of high seas or exclusive economic zone (EEZ).²⁶ However, even now a designation of routes of transit in the Aegean Sea will have to face the difficulty that the existence of the Greek Cyclades Islands and the Greek territorial sea of 6 NM surrounding them effectively cut in two the high seas of the Aegean Sea along a north-south axis. Any ship or aircraft heading for the Black Sea may have to negotiate, at some points, Greek territorial waters and the superjacent airspace.²⁷

This case-study raises the question as to whether ships' routing measures, such as the TSS and designated sea lanes, may broaden the category of Art. 37-type straits. It is submitted that the existence of a TSS in a strait may prove the appeal of the strait to international shipping, but that it is not intended to join two or more straits by such a system, as a TSS is tailored to the shipping pattern in a particular geographical strait. But, occasionally, designated sea lanes, by linked TSS, may link geographical straits along one and the same route.²⁸ If the TSS linked number more than three, the route or sea lane so formed could be very similar in effect to an archipelagic sea lane, which is itself a routing system.²⁹ Between convenience for shipping and efficiency of management, on the one hand, and the legal questions associated with transit passage in or over off-shore archipelagos separated by narrow straits on the other, a balanced solution is still to be struck on the basis of Part III. Another point is that a TSS also has to take

²¹ Cf. Turkey's Objection to the Declaration made by Greece upon Signature and Ratification of the Convention: Turkey considers the Greek declaration as creating a new category of straits and contrary to the ICAO rules regulating the establishment of air routes; and Greece's Note dated 30 June 1997 Regarding the Turkish Notification dated 22 February 1996 on the Interpretative Statement made by Greece at the Time of both Signature and Ratification of the United Nations Convention on the Law of the Sea: Greece considers its interpretation as in line with the spirit and true meaning of the UNCLOS, both texts are available at: <http://treaties.un.org/pages/ViewDetailsIII.aspx?&src=UNTS&no=XXI-6&chapter=21&Temp=mt&lang=en#18>.

²² Not to mention the historical evolvement of the regional relationship, as described by John Papadimas, The Dodecanese and the Aegean Issue: Historical Background, in: Aldo Chircop/André Gerolymatos/John O. Iatrides (eds.), *The Aegean Sea after the Cold War* (2000), 7-13.

²³ George P. Politakis, *The Aegean Dispute in the 1990s: Naval Aspects of the New Law of the Sea Convention*, in: Theodore C. Karotis (ed.), *Greece and the Law of the Sea* (1997), 292, 301.

²⁴ The former has a minimum width of 16.2 NM, and the latter 32.4 NM: Harilaos Kontoyiannis et al., *The Hydrology and Biochemistry of the Cretan Straits (Antikithira and Kassos Straits) Revisited in the Period of June 1997-May 1998*, *Journal of Marine Systems* 53 (2005), 37, 38.

²⁵ Nicholas M. Poulantzas, *The New International Law of the Sea and the Legal Status of the Aegean Sea*, *Revue Hellenique de Droit International* 44 (1991), 251, 263.

²⁶ Cf. the attitude of Greece on the claim to an EEZ: Anastasia Strati, *Greece and the Law of the Sea: A Greek Perspective*, in: Chircop/Gerolymatos/Iatrides (note 22), 89 (footnote 32).

²⁷ Politakis (note 23), 313 (the map).

²⁸ IMO Ships' Routing (note 1), V/6-V/9: such as the case with the TSS in the Straits of Malacca and Singapore.

²⁹ Cf. IMO Ships' Routing (note 1), Part H: Indonesian archipelagic sea lanes adopted in 1998; also see Constance Johnson, *A Rite of Passage: The IMO Consideration of the Indonesian Archipelagic Sea-Lanes Submission*, *IJMC* 15 (2000), 317, 326-327, containing a list of Indonesia's considerations in proposing the sea lanes.

into account the navigability of a strait for which it is established, thus confining international shipping to designated channels for navigation by reason of the varying depth of the water body of a strait. For ships, international straits may simply mean the navigable routes delineated by TSS.³⁰ While the interests of the coastal State lie with all the waters forming an international strait it borders, those of foreign ships in transit are necessarily confined to the routes open to navigation.

2. Control by the Competent International Organization

- 10 Art. 41 (4) refers to ‘the competent international organization’ in relation to the designation of traffic separation schemes within straits. The organization is understood to be the IMO. According to Reg. 10 (2), Ch. V SOLAS, the IMO is recognized ‘the only international body for developing guidelines, criteria and regulations on an international level for ships’ routing systems’. That recognition is also acknowledged by States and the IMO itself.³¹
- 11 The role of the IMO is largely recommendatory in relation to its member States, as far as it concerns

‘regulations and guidelines concerning maritime safety, the prevention and control of marine pollution from ships and other matters concerning the effect of shipping on the marine environment assigned to the Organization by or under international instruments, or amendments to such regulations and guidelines which have been referred to it.’³²

It has been observed that IMO recommendations, while not legal binding, are ‘widely accepted and implemented’.³³

- 12 Two points are noteworthy in this respect. First, the establishment or substitution of a TSS or the like is subject to agreement between the proposing State and the IMO. Neither may proceed unilaterally.³⁴ In comparison, the coastal State’s power is limited under Art. 22 (3)(a).³⁵ Secondly, the sea lanes or TSS referred to in Art. 41 must conform to ‘generally accepted international regulations’. This originated in the Consensus Text of the Private Group on Straits³⁶, in which the regulations were referred to those mentioned in the preceding article. This preceding article has since become Art. 39. Art. 39 (2) specifically mentions the International Regulations for Preventing Collisions at Sea.

3. No Designated Routes for Aircraft

- 13 Art. 41 applies solely to shipping in Art. 37-type straits. It is recalled that, during the negotiations of the UNCLOS, there were proposals to establish ‘air straits’ over this type of strait.³⁷ This was echoed by Spain in its criticism of the Informal Composite Negotiating Text.³⁸ In comparison, air routes may be established along the same axis lines followed by the designated archipelagic sea lanes, pursuant to Art. 53 (5).³⁹ In view of this situation, it may be wondered whether extension of the territorial sea to 12 NM could be tempered, in suitable conditions, with a restraint from attempting such extension in international straits, which will

³⁰ Stuart B. Kaye, *The Torres Strait* (1997), 14–15.

³¹ Hugo Caminos, *The Legal Regime of Straits in the 1982 United Nations Convention on the Law of the Sea*, RdC 205 (1987-V), 9, 166; further, see IMO, *Implications of the United Nations Convention on the Law of the Sea for the International Maritime Organization*, Study by the Secretariat, IMO Doc. LEG/MISC/1 (1986, mimeo.).

³² Arts. 2 (a) and 15 (j) Convention on the International Maritime Organization, as amended 1995.

³³ Nihan Ünlü, *The Legal Regime of the Turkish Straits* (2002), 64.

³⁴ Art. 41 (2) and (4); Nordquist/Nandan/Rosenne (note 17), 363 (MN 41.9(a)).

³⁵ See further *Barnes* on Art. 22 MN 11–13.

³⁶ Consensus Text (note 16).

³⁷ UNCLOS III, Greece: Amendments, UN Doc. A/CONF.62/L.123 (1982), OR XVI, 232.

³⁸ UNCLOS III, Statement by the Delegation of Spain Dated 26 August 1980, UN Doc. A/CONF.62/WS/12 (1980), OR XIV, 149, para. 5.

³⁹ See further *Barnes/Massarella* on Art. 53 MN 14.

leave a high sea or EEZ corridor through the straits.⁴⁰ It is not certain whether the practice of Japan and the Republic of Korea in the Tsushima or Korea Strait will have a wider following in practice,⁴¹ with a preserved high sea corridor for navigation and overflight.⁴² The practice of Sweden and Denmark with regard to the extent of their respective territorial seas in the Kattegat and Bornholm areas is similarly minded.⁴³

4. Consequences for Violation of Art. 41 (7)

There is the possibility that ships in transit passage ignore the sea lanes or TSS established 14 by the coastal State, which Art. 41 (7) obligates the ships to respect. There is no consequence spelt out under Art. 41 for any such violations by the ships, but reference is made to Arts. 42 (5) and 233, on the basis of which the coastal State may find remedy against the violations.⁴⁴

Article 42

Laws and regulations of States bordering straits relating to transit passage

1. Subject to the provisions of this section, States bordering straits may adopt laws and regulations relating to transit passage through straits, in respect of all or any of the following:

- (a) the safety of navigation and the regulation of maritime traffic, as provided in article 41;
- (b) the prevention, reduction and control of pollution, by giving effect to applicable international regulations regarding the discharge of oil, oily wastes and other noxious substances in the strait;
- (c) with respect to fishing vessels, the prevention of fishing, including the stowage of fishing gear;
- (d) the loading or unloading of any commodity, currency or person in contravention of the customs, fiscal, immigration or sanitary laws and regulations of States bordering straits.

2. Such laws and regulations shall not discriminate in form or in fact among foreign ships or in their application have the practical effect of denying, hampering or impairing the right of transit passage as defined in this section.

3. States bordering straits shall give due publicity to all such laws and regulations.

4. Foreign ships exercising the right of transit passage shall comply with such laws and regulations.

5. The flag State of a ship or the State of registry of an aircraft entitled to sovereign immunity which acts in a manner contrary to such laws and regulations or other provisions of this Part shall bear international responsibility for any loss or damage which results to States bordering straits.

⁴⁰ Cf. the case of the Strait of Gibraltar over which, in 1973 and 1986, respectively, US military aircraft flew: *Jia* (note 13), 183, 188–189. Also see *Wolff Heintschel von Heinegg*, The Law of Military Operations at Sea, in: Terry D. Gill/Dieter Fleck (eds.), *The Handbook of the International Law of Military Operations* (2010), 325, 335.

⁴¹ US Department of State, *National Claims to Maritime Jurisdictions, Limits in the Seas* No. 36 (2000), 83: Japan has, since 1977, with further clarification in 1996, maintained a 3 NM territorial sea in the Soya, Tsugaru, and Osumi straits, and the Eastern and Western Channels of Tsushima; *ibid.*, 88: Republic of Korea has since 1977, with further clarification in 1995, maintained a 3 NM territorial sea in the Korea Strait.

⁴² *Dalchoong Kim/Jin-Hyun Paik*, Relation Between User States and Coastal States with Respect to International Navigation, in: Tadao Kuribayashi/Edward L. Miles (eds.), *The Law of the Sea in the 1990s: A Framework for Further International Cooperation* (1992), 51, 62–63.

⁴³ *Hugo Tibergh*, Mysteries of Water Boundaries: Baselines and Boundaries Around Sweden's Coasts, in: Ove Bring/Said Mahmoudi (eds.), *Current International Law Issues: Nordic Perspectives* (1994), 195, 208–212.

⁴⁴ See *Jia* on Art. 45 MN 19–20; *Becker-Weinberg* on Art. 233.

Bibliography: Robert C. Beckman, PSSAs and Transit Passage: Australia's Pilotage System in the Torres Strait Challenges the IMO and UNCLOS, ODIL 38 (2007), 325–357; R. Douglas Brubaker, The Russian Arctic Straits (2005); Milen Dyoulgerov, Navigating the Bosphorus and the Dardanelles: A Test for the International Community, IJMCL 14 (1999), 57–100; David W. Abecassis/Richard L. Jarashow (eds.), Oil Pollution from Ships: International, United Kingdom and United States Law and Practice (2nd edn. 1985); Bing Bing Jia, The Regime of Straits in International Law (1998); Stuart B. Kaye, The Torres Strait (1997); Katherina Kummer, International Management of Hazardous Wastes (1995); Cynthia Lamson/David Van der Zwaag, Arctic Waters: Needs and Options for Canadian-American Cooperation, ODIL 18 (1987), 49–99; Satya N. Nandan/David H. Anderson, Straits Used for International Navigation: A Commentary on Part III of the United Nations Convention on the Law of the Sea, BYIL 60 (1989), 159–204; Patrick J. Neher, Compulsory Pilotage in the Torres Strait, in: Myron H. Nordquist/Tommy T. B. Koh/John Norton Moore (eds.), Freedom of Seas, Passage Rights and the 1982 Law of the Sea Convention (2009), 339–355; Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. II (1993); Myron H. Nordquist/Shabtai Rosenne/Alexander Yankov (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. IV (1991); Brian Smith, State Responsibility and the Marine Environment: The Rules of Decision (1988); Jon M. Van Dyck, Legal and Practical Problems Governing International Straits, Ocean Yearbook 12 (1996), 109–125; Elaine B. Weinstein, The Impact of Regulation of Transport of Hazardous Waste on Freedom of Passage, IJMCL 9 (1994), 135–172

Documents: Australian Maritime Safety Authority, Revised Pilotage Requirements for Torres Strait, Marine Notice 8/2006 (2006); Italian Ministry of Infrastructure and Transport, VTS Messina Straits: User Manual (2009); UN DOALOS, Baselines: An Examination of the Relevant Provisions of the United Nations Convention on the Law of the Sea (1989); UN DOALOS, Straits Used for International Navigation: Legislative History of Part III of the United Nations Convention on the Law of the Sea, vol. II (1992); US Department of State, Territorial Regimes and Related Issues, Digest of United States Practice in International Law (2006), 805–851

Contents

I. Purpose and Function	1
II. Historical Background	3
III. Elements	5
1. Legislative Competences of the Coastal State	5
2. Non-Discrimination and No Hampering	12
3. Due Publicity	18
4. The Obligation and Responsibility of Foreign States	19

I. Purpose and Function

- 1 This article provides for a list of competences for the coastal State to regulate transit passage through straits on which it borders. It relates mainly to ships in transit. Aircrafts are included within its ambit, but in a secondary way. Considering that Art. 41 has already dealt with the power of the coastal State to put in place traffic separation schemes (TSS), this article supplements this power further by adding other competences. The competences listed in Art. 42 (1) are believed to be exhaustive, as proposals for additional powers of the coastal State have either been rejected during the negotiations at UNCLOS III, or incorporated elsewhere in the UNCLOS.¹
- 2 Art. 42 (5) also allows the coastal State to invoke the international responsibility of the flag State of a ship or the State of registry of an aircraft entitled to sovereign immunity for any loss or damage caused due to violations of the laws and regulations or other provisions of Part III. Leaving aside breaches of local laws, the reference to responsibility for violating 'other provisions of Part III' is quite important for compliance purposes, even though the reference is confined to a particular category of ship and aircraft.

¹ Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. II (1993), 375 (MN 42.10(a)).

II. Historical Background

Art. 42 appeared first as a simple provision regarding the liability of the flag State for the damage done to the coastal State by its ship in transit passage.² The UK proposal of 1974 further added the competence of the coastal State to legislate in respect of two matters in particular: the implementation of the TSS and oil pollution.³ It is also noteworthy that the UK proposal did not include any reference to aircraft at the time. However, reference to aircraft-incurred damage to the coastal State during the transit of the aircraft was included in the proposal from six East European countries.⁴ The Private Group on Straits expanded on the legislative competencies of the coastal State,⁵ and its Consensus Text⁶ was incorporated in the Informal Single Negotiating Text Part II, which included a reference to aircraft. In 1976, Spain and Greece both sought to delete the reference to aircraft from Art. 42, without success.⁷ Among the failed proposals to build on the existing text of Art. 42, Greece proposed in 1978 to include 'the safety of air traffic and the rules, regulations and procedures of the ICAO', showing a willingness to compromise on the transit by aircraft, but the proposal was not adopted at the conference.⁸

In 1982, Spain proposed to replace the word 'applicable' in Art. 42 (1)(b) by the phrase 'generally accepted', on the ground that the applicability of a regulation could depend on the flag of the ship concerned, thus making it impossible to maintain the objectivity of this regime.⁹ The proposal was not adopted.

III. Elements

1. Legislative Competences of the Coastal State

The coastal State finds its competences to regulate ships and aircraft in transit in this article. These competencies are legislative in nature.¹⁰ Art. 42 (1)(a) and (b) are complementary as far as prevention of pollution is concerned, but the former also deals with the safety issue generally. Art. 42 (1)(b) tackles one particular type of pollution: ship-based pollution from discharging oil, oily wastes, or other noxious substances. Contemporary practice has shown that ship-based pollution (esp. of oil) has always been top of the concerns of the State bordering the strait. However, there may be a concern that the competences granted by Art. 42 in this regard are very limited.¹¹ Art. 233 in fact exacerbates this limiting effect by further conditioning the exercise of coastal enforcement power upon the showing that a violation of the laws and regulations referred to in Art. 42 (1)(a) and (b) is 'causing or

² Sea-Bed Committee, USSR: Draft Articles on Straits Used for International Navigation, UN Doc. A/AC.138/SC.II/L.7 (1972), 2.

³ Second Committee UNCLOS III, United Kingdom: Draft Articles on the Territorial Sea and Straits, UN Doc. A/CONF.62/C.2/L.3 (1974), OR III, 183, 186 (Ch. III, Article 4).

⁴ Second Committee UNCLOS III, Bulgaria *et al.*: Draft Articles on Straits Used for International Navigation, UN Doc. A/CONF.62/C.2/L.11 (1974), OR III, 189 (Article 3 (2)(c)).

⁵ Satya N. Nandan/David H. Anderson, *Straits Used for International Navigation: A Commentary on Part III of the United Nations Convention on the Law of the Sea*, BYIL 60 (1989) 159, 190–191.

⁶ UNCLOS III, Consensus Text of Private Group on Straits, 18 April 1975 (1975, mimeo.), reproduced in: Renate Platzöder (ed.), *Third United Nations Conference on the Law of the Sea: Documents of the Geneva Session 1975* (1975), 204.

⁷ Nordquist/Nandan/Rosenne (note 1), 372–373 (MN 42.5).

⁸ *Ibid.*, 374 (MN 42.8).

⁹ UN DOALOS, *Straits Used for International Navigation: Legislative History of Part III of the United Nations Convention on the Law of the Sea*, vol. II (1992), 136.

¹⁰ Bing Bing Jia, *The Regime of Straits in International Law* (1998), 160.

¹¹ Brian Smith, *State Responsibility and the Marine Environment: The Rules of Decision* (1988), 209.

threatening major damage to the marine environment of the straits'.¹² Bar an eventuality of a major damage, therefore, coastal enforcement powers will not be exercisable.

- 6 Among the competencies is one that requires foreign ships to report of prospective passage, which does not necessarily link with TSS as regulated by Art. 41. On 1 January 1996, an amendment of Reg. 11 (1), Ch. V International Convention for the Safety of Life at Sea 1974 (SOLAS)¹³ came into force by making ship reporting systems compulsory for 'all ships', when 'adopted and implemented in accordance with the guidelines and criteria developed by the Organization pursuant to this regulation'. This amendment marks the shift from voluntary reporting to mandatory reporting for the sake of 'safety of life at sea, safety and efficiency of navigation and/or protection of the marine environment',¹⁴ which is the aim for legislation adopted under Art. 42 (1)(a). Such reporting systems are to be proposed by coastal States to the IMO for adoption pursuant to Reg. 11 (2), Ch. V SOLAS before establishment by the States (Reg. 11 (3), Ch. V SOLAS), but may also be established without submitting them first to the IMO under Reg. 11 (4), Ch. V SOLAS.
- 7 Art. 42 (1)(b) refers to local regulations in respect of prevention of pollution that may be caused by, in particular, 'oil, oily wastes and other noxious substances in the strait'. To single out the first two material sources of pollution reflects a particular concern on the part of coastal States. It may be said that relevant international instruments will be the standard against which national legislation is to be designed. Such instruments include, for instance, the Basel Convention on the Control of Transboundary Movements of Hazardous Waste and its Disposal of 1989 (Basel Convention), which applies to transport of oily waste and other noxious substances.¹⁵ They also include the International Convention for the Prevention of Pollution from Ships together with its annexes, and possibly the International Maritime Dangerous Goods Code,¹⁶ and the International Code for Construction and Equipment of Ships Carrying Dangerous Chemicals in Bulk.¹⁷
- 8 Regarding the phrase 'applicable international regulations' in Art. 42 (1)(b), the US Department of State, in its consideration of a protest against Spain's declaration made upon signature of the UNCLOS in 1984,¹⁸ reasoned that

'Spain's declaration number 4 declares that article 42 does not preclude it from also applying to such vessels legislation that gives effect to "generally accepted international regulations." The difference, of course, is that regulations that are "generally accepted" because a number of states are parties to the relevant conventions may not be "applicable" to a particular vessel because its flag state is not a party. The distinction is a real one that appears elsewhere in the Convention, and the fact that article 42 speaks only of the coastal [s]tate giving effect to the more limited category of "applicable" international regulations implies rather clearly that coastal [s]tate does not have the right to require transiting vessels to comply with the broader category of "generally accepted" international regulations.'

- 9 The fishing activities in terms of Art. 42 (1)(c) that may incur the ire of the coastal State are not infrequently observed within straits,¹⁹ even though their scale may not be the same as

¹² Further *Becker-Weinberg* on Art. 233 MN 11–13.

¹³ International Convention for the Safety of Life at Sea (SOLAS 1974), as amended.

¹⁴ At 30 April 2012 SOLAS 1974 had 161 contracting States, further information available at: <http://www.imo.org/About/Conventions/StatusOfConventions/Pages/Default.aspx>.

¹⁵ Cf. *Elaine B. Weinstein*, The Impact of Regulation of Transport of Hazardous Waste on Freedom of Passage, *IJMCL* 9 (1994), 135, 154.

¹⁶ IMO International Maritime Dangerous Goods Code, available at: http://www.imo.org/blast/mainframe.asp?topic_id=158.

¹⁷ IMO International Code for Construction and Equipment of Ships Carrying Dangerous Chemicals in Bulk, further information available at: <http://www.imo.org/OurWork/Environment/PollutionPrevention/ChemicalPollution/Pages/IBCCode.aspx>.

¹⁸ The full text of the Spanish declaration is available at: http://treaties.un.org/Pages/ViewDetailsIII.aspx?&src=-TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&lang=en#10.

¹⁹ Italian Ministry of Infrastructure and Transport, VTS Messina Straits: User Manual (2009), 6, where it was noted that intensive fishing has been part of the local scene along and within the strait, available at: www.guardiacostiera.it/servizi/documents/manualivts/manualeutentemessina_inglese.pdf.

that in EEZs. Such activities are not incidental to the transit passage carried out by fishing vessels. Fishing in the territorial sea, ultimately, is a matter regulated by the regime of the territorial sea pursuant to Art. 19 (2)(i).²⁰

Art. 42 (1)(d) parallels what has been provided by Arts. 21 (1)(h) and 33 (1)(a),²¹ and again any activities regulated by Art. 42 (1)(d) is not incidental to the exercise of the right of transit passage. The clause's reference to 'States bordering straits' may not be open to a broad interpretation that can allow one of such States to legislate against ships in transit through a strait bordered by it and other States, if the ships do not violate the terms of Art. 42 (1)(d) against the interest of that State.²²

From the preceding, it may be inferred that Art. 42 provides further particulars to Arts. 38 (3) and 39 (1)(c).²³ In respect of the activities specified under Art. 42 (1), the coastal State has been granted legislative powers. But as far as enforcement power is concerned, recourse may be had by States parties to the UNCLOS to Part XII. In that part, Art. 233 is directly concerned with international straits covered by Part III in respect of violations of Art. 42 (1)(a) and (b) that are causing or threatening major damage to the marine environment of the straits.²⁴ Only then may enforcement measures be taken by the coastal State against the ship in question, which results in the end of the transit passage.²⁵ While pollution of straits may result from pollution from or through the atmosphere, Art. 233 is not applicable in that instance. In addition, the ship in question cannot be one covered by Section 10 of Part XII. Additionally, Art. 234 may provide another venue for enforcement actions by the coastal State in designated areas of the oceans, which will be dealt with below.

2. Non-Discrimination and No Hampering

Having granted the coastal State four types of power under Art. 42 (1)(a), excluding for instance the power to impose compulsory pilotage,²⁶ Art. 42 quickly redresses any potential imbalance of powers by prohibiting discriminatory application of the laws or regulations by the coastal State among foreign ships or an application of such laws or regulations with the effect of denying, hampering or impairing the right of transit passage as defined in the relevant section. The non-discriminatory treatment required under Art. 42 (2) is not controversial, but there are pending questions associated with the second obligation under that clause against denying, hampering or impairing the right of transit passage.

The prohibited effects may take the form of increasing waiting time before entry into a strait due to procedures laid down by the coastal State in legislation, which in turn increases the risk of grounding or collision in the waiting area.²⁷ It may also take the form of measures promulgated by the coastal State in controversial circumstances, such as the compulsory pilotage instituted by Australia in the Torres Strait in 2006.²⁸ Strict liability, accompanied by a heavy fine, awaits the master or owner of a ship transiting the strait without a pilot under

²⁰ Further *Barnes* on Art. 19 MN 26.

²¹ See *Barnes* on Art. 21 MN 19 and *Khan* on Art. 33 MN 25.

²² *Jon M. Van Dyck*, Legal and Practical Problems Governing International Straits, *Ocean Yearbook* 12 (1996) 109, 124: on the issue of gambling ships passing through the Malacca Strait.

²³ See *Jia* on Art. 38 MN 21 and on Art. 39 MN 5–6.

²⁴ See *infra*, MN 15–16.

²⁵ For criticism of the ambiguity of the provision, see David W. Abecassis/Richard L. Jarashow (eds.), *Oil Pollution from Ships: International, United Kingdom and United States Law and Practice* (2nd edn. 1985), 107.

²⁶ *Stuart B. Kaye*, *The Torres Strait* (1997), 85.

²⁷ *Milen Dyoulgerov*, Navigating the Bosphorus and the Dardanelles: A Test for the International Community, *IJMCL* 14 (1999), 57, 90: local regulations were said to hamper passage by causing significant delays on entry into straits.

²⁸ Australian Maritime Safety Authority, Revised Pilotage Requirements for Torres Strait (2006), Marine Notice 8/2006, available at: <http://www.intertanko.com/upload/25553/Marine.pdf>.

the relevant Australian regulations.²⁹ The legal basis for the regulations, as claimed by Australia, is in Resolution MEPC.133(53), adopted on 22 July 2005, by the Marine Environment Protection Committee of the IMO.³⁰ However, the resolution was adopted by consensus as recommendatory in nature.³¹ On 7 June 2006, the US lodged its protest at Canberra, in which it was stated:

‘[...] it is the firm position of the United States that there is no basis in the international law of the sea as reflected in the Law of the Sea Convention for the institution of a system of compulsory pilotage in a strait used for international navigation, such as the Torres Strait, applicable to ships exercising the right of transit passage.’³²

- 14 The main question in relation to the Australian measure is whether it is consistent with Art. 42 (1) and (2), with Art. 44 as a residual rule.³³ There is a case, *prima facie*, that the measure in question may hamper transit passage through the strait, as the ships in transit have to stop to take on board a licensed pilot before proceeding with passage, thus interrupting the continuous and expeditious transit as defined under Art. 38 (2).
- 15 Art. 42 (2) is further augmented in two ways. First, the hampering effect of coastal States’ regulation is also prohibited under Art. 44. Second, the prohibition under Art. 42 (2) is strengthened by other relevant treaties on pollution prevention. Thus, Art. 4 (12) of the Basel Convention expressly stipulates that ‘the exercise by ships and aircraft of all States of navigational rights and freedoms as provided for in international law and as reflected in relevant international instruments’ is not to be affected by the provisions of that convention. Priority is therefore clearly assigned to the law of the sea.³⁴ Another point of interest is that Art. 42 (2) obviously has a narrower scope than Art. 4 Basel Convention, in that the latter clearly envisages the application of the Convention to not only land territory and marine area of a State, but also the airspace above them, over which the State exercises ‘administrative and regulatory responsibility in accordance with international law in regard to the protection of human health or the environment’, in terms of Art. 2 (9) Basel Convention.
- 16 With Art. 233 in force, it is noted, impairing or even impeding passage may happen when ships in transit passage are causing or threatening major damage to the marine environment of the straits they are passing through. In practice, the under-keel clearance enforced by Malaysia, Indonesia, and Singapore provides a practical interpretation of Art. 233.³⁵ Among the appropriate measures to be taken against violations of Art. 233 is the prevention of passage of a ship which fails to meet the under-keel-clearance required by IMO Res. A.375(X).³⁶ This interpretation has been accepted generally by the coastal and user States of the Malacca and Singapore Straits.³⁷ Inspection or even detention of such ships under Arts. 220 and 226 may be undertaken by coastal States in those circumstances.³⁸ In these circumstances, it may still be arguable that transit passage is not hampered except in the exceptional situation envisaged by Art. 233.³⁹

²⁹ Patrick J. Neher, *Compulsory Pilotage in the Torres Strait*, in: Myron H. Nordquist/Tommy T.B. Koh/John N. Moore (eds.), *Freedom of Seas, Passage Rights and the 1982 Law of the Sea Convention* (2009), 339, 341 (footnote 2), citing S. 186 I of Navigation Act 1912.

³⁰ IMO Res. MEPC.133(53) of 22 July 2005.

³¹ *Ibid.*, Preamble; Robert C. Beckman, *PSSAs and Transit Passage: Australia’s Pilotage System in the Torres Strait Challenges the IMO and UNCLOS*, ODIL 38 (2007), 325, 330–336; Neher (note 29), 352–353.

³² US Department of State, *Territorial Regimes and Related Issues, Digest of United States Practice in International Law* (2006), 805, 811; further, see Beckman (note 31), 337.

³³ Beckman (note 31), 345.

³⁴ Katherina Kummer, *International Management of Hazardous Wastes* (1995), 53.

³⁵ See further International Hydrographic Office, *Underkeel Clearance*, IHO Doc. SNPWG13 14.3 (2011), available at: http://www.iho.int/mtg_docs/com_wg/SNPWG/SNPWG13/SNPWG13-14.3_UnderKeelClearance.pdf.

³⁶ IMO Res. A.375(X) of 14 November 1977.

³⁷ UNCLOS III, Letter Dated 28 April from the Representative of Malaysia to the President of the Conference, UN Doc. A/CONF.62/L.145 (1982), OR XVI, 251 (Annex, para. 2); see also, Jia (note 10), 161–162.

³⁸ Myron H. Nordquist/Shabtai Rosenne/Alexander Yankov (eds.), *United Nations Convention on the Law of the Sea 1982: A Commentary*, vol. IV (1991), 391 (MN 233(f)).

³⁹ But see Nandan/Anderson (note 5), 192.

While it has been suggested that Art. 233 is separate from Art. 234, because the two articles were aimed by the delegations at the Conference at achieving different balances of interest,⁴⁰ there is lingering doubt as to whether the interests so balanced are indeed different. Further, to argue that Art. 233 does not apply to Section 8 Part XII requires more than just an examination of the terms of Art. 233.⁴¹ For the terms of that article only exclude Sections 5 to 7 of Part XII with regard to straits, but not Section 8. Moreover, it is not settled that Art. 234 cannot be applied to straits subject to Part III.⁴² What has been said about the Northwest Passage is the proof of this.⁴³ Indeed, Canada has already stated its position that this article represents customary law.⁴⁴ Under Art. 234, the coastal State can surely enforce anti-pollution regulations within an ice-covered route of straits that exists between two parts of the high seas or EEZ and within the limits of the coastal State's EEZ.⁴⁵ There will be therefore the possibility that transit passage may be stopped, even if due regard to the passage is paid by the coastal State.⁴⁶ On the other hand, it may be that any action to enforce the laws of the coastal State under Art. 42 and Art. 234 has to follow the rules in Section 6 of Part XII, which are however excluded by Art. 233 from affecting the regime of straits under Part III. Art. 233 does not directly apply to Art. 234, but indirectly it could. Otherwise, Art. 234 may have the effect of denying the existence of Art. 37-type straits in ice-covered areas, which may not be what was intended by the countries involved in the negotiation of Art. 234: the US, for instance.⁴⁷

3. Due Publicity

The obligation to give due publicity is common to many parts of the UNCLOS, including the one provided under Art. 42 (3) in which coastal States in particular are envisaged to exercise regulatory or enforcement powers. It is suggested that due publicity means 'notification of a given action for general information through appropriate authorities within a reasonable amount of time in a suitable manner'.⁴⁸ The same duty has been included under Art. 41 (2) and (6). Due publicity may be given in the form of publication of the relevant laws and regulations in the official gazette of the coastal State or in the Law of the Sea Bulletin and the like.

4. The Obligation and Responsibility of Foreign States

Art. 42 (5) was important for the joining in the consensus on Part III by several States bordering international straits.⁴⁹ Its effect is similar to that of Arts. 235, 263 and 304.⁵⁰ But it is still an interesting fact that, while this clause can stand on its own, it remains part of an article that is focused on something not entirely coextensive with it in terms of scope. On the other hand, while Art. 42 (5) is concerned with ships and aircraft entitled to sovereign immunity, other ships and aircraft in violation of the laws and regulations of the coastal State promulgated according to Art. 42 (1) or in breach of Part III will be subject to Art. 34. At this

⁴⁰ Nordquist/Rosenne/Yankov (note 38), 393 (MN 234.1).

⁴¹ Cf. R. Douglas Brubaker, *The Russian Arctic Straits* (2005), 134–135.

⁴² Cynthia Lamson/David Van der Zwaag, *Arctic Waters: Needs and Options for Canadian-American Cooperation*, ODIL 18 (1987), 49, 81.

⁴³ See further *Jia* on Art. 35 MN 8–9.

⁴⁴ *Jia* (note 9), 174.

⁴⁵ See *Franckx/Boone* on Art. 234 MN 14–15.

⁴⁶ *Jia* (note 9), 163.

⁴⁷ Nordquist/Rosenne/Yankov (note 38), 393 (MN 234 (1)); see also *Jia* (note 10), 174, 200–201: Canada has indeed maintained that the Northwest Passage is not an international strait.

⁴⁸ Nordquist/Nandan/Rosenne (note 1), 149 (MN 16.8(c)); UN DOALOS, *Baselines: An Examination of the Relevant Provisions of the United Nations Convention on the Law of the Sea* (1989), 54.

⁴⁹ See further, *Jia* on Art. 38 MN 18–19.

⁵⁰ See *Stephens* on Art. 235 MN 7–23, further *Tams/Devaney* on Art. 263 MN 9–20 and *Tams/Devaney* on Art. 304 MN 6–16.

juncture, the separation of the obligation of compliance with local laws and regulations from the notion of transit passage assumes significance for the following reason: if they are separated, as is the case from a consideration of the full context of Part III, the enforcement powers of the coastal State are very limited. If they are not separated, the ships at fault could lose the right of transit passage, which in turn triggers the regime of the territorial sea. For their passage takes place in the confines of the territorial sea of the coastal State, and Arts. 19 (2), 27 and 28 may come into play.

- 20 If compliance (or lack thereof) with local laws and regulations does not affect the right of transit passage because they are separated, the ships in transit passage cannot be stopped in spite of non-compliance with local laws.⁵¹ While delegations at UNCLOS III were concerned with the behaviour of State vessels and aircraft, it seems that Part III is silent as to the consequences of the illegal activities of non-State vessels and aircraft in transit.⁵² The inference is that the legislative power of the coastal State under Art. 42 is not only restricted by the non-suspension and non-impediment obligations, but also given a more limited scope in comparison with the powers conferred under Art. 21.⁵³ The limitation imposed by Art. 42 itself is probably determined by reason of the distinct aim and nature of the regime of straits established in Part III.⁵⁴

Article 43

Navigational and safety aids and other improvements and the prevention, reduction and control of pollution

User States and States bordering a strait should by agreement cooperate:

- (a) in the establishment and maintenance in a strait of necessary navigational and safety aids or other improvements in aid of international navigation; and
- (b) for the prevention, reduction and control of pollution from ships.

Bibliography: *Bing Bing Jia*, The Regime of Straits in International Law (1998); *Douglas M. Johnston*, The Northwest Passage Revisited, ODIL 33 (2002), 145–164; *Steven B. Kempton*, Ship Routing Measures in International Straits, Ocean Yearbook 14 (2000), 232–250; Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. II (1993); *Nilüfer Oral*, Straits Used in International Navigation, User Fees and Article 43 of the 1982 Law of the Sea Convention, Ocean Yearbook 20 (2006), 561–594; *Bernard Oxman*, Observations on the Interpretation and Application of Article 43 of the United Nations Convention of the Law of the Sea with Particular Reference to the Straits of Malacca and Singapore, SYBIL 3 (1999), 408–426; *Horace B. Robertson*, Passage through International Straits: A Right Preserved in the Third United Nations Conference on the Law of the Sea, VJIL 20 (1980), 801–857; *Hiroshi Terashima*, Transit Passage and Users' Contributions to the Safety of the Straits of Malacca and Singapore, in: Myron H. Nordquist/Tommy T.B. Koh/John N. Moore (eds.), Freedom of Seas, Passage Rights and the 1982 Law of the Sea Convention (2009), 357–368

Documents: Canadian Ministry of Foreign Affairs, Canada's Arctic Foreign Policy, No. 2009/11 (2009); GA, Letter Dated 22 October 2007 from the Permanent Representatives of Indonesia, Malaysia and Singapore to the United Nations Addressed to the Secretary-General, UN Doc. A/62/518 (2007); US Department of State, Territorial Regimes and Related Issues, Digest of United States Practice in International Law (2006), 805–851

Cases: ICJ, *Case Concerning Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge* (Malaysia v. Singapore), Judgment of 23 May 2008, ICJ Reports (2008), 12

⁵¹ See further, *Jia* on Art. 44 MN 11.

⁵² Cf. Nordquist/Nandan/Rosenne (note 1), 378 (MN 42.10(j)–(k)), the reference on that page to Art. 229, is helpful, but that article does not cover violations of Art. 42 (1)(a), (c) and (d) that do not necessarily result in marine pollutions to which Art. 229 is applicable.

⁵³ See further *Barnes* on Art. 21.

⁵⁴ Nordquist/Nandan/Rosenne (note 1), 377 (MN 42.10(g)).

Contents

I. Purpose and Function	1
II. Historical Background	3
III. Elements	4
1. Necessary Aids and Aids Improving Navigational Conditions	4
2. The Concern with Pollution	9
3. Charges and Taxes	10

I. Purpose and Function

Navigational aids, long indispensable to seafaring, do not present problems in straits used for international navigation if they are used for the purpose of *enhancing* the usefulness of the waterways, by virtue of their inherent convenience to navigators. Where there exists a degree of dependence on such aids on the part of foreign shipping, however, a problem will arise as to whether the strait concerned can still be regarded as a geographical waterway. That dependence may also make the State bordering the strait wary of existing aids or any future additions with respect to the legal status of the strait concerned. If a user State's vessels do not abide by local regulations within the strait, may the coastal State cease to provide navigational aids?

Art. 43 is hortatory in wording. It points out the way in which the issue of navigational aids is to be handled between user and coastal States, i.e. by agreement. It is specific as to the function of aids that may be installed in a strait. The actual method of establishing the aids has been left for the coastal State to determine and initiate, hopefully with a consensus reached with the user States. As such, it contains no duty upon the coastal State to provide navigational aids. In addition, cooperation is also encouraged between the coastal and user States in the combat against pollution from ships within the straits.

II. Historical Background

The legal issue that has been associated with navigational aids is in relation to charges and levies that the coastal State may impose on ships plying its straits.¹ It was the case with the Maltese proposal to the UN Sea-Bed Committee in 1973.² The charges for navigational aids provided by the coastal State were expected to be collected by the coastal State through a fund administered by 'international ocean space institutions'. The level of charges was to be determined by treaties between the States concerned and the institutions. However, the UK proposal of 1974 to UNCLOS III set the tone for the future Art. 43, with a generally worded provision encouraging user and strait States to cooperate in this matter.³ The aids provided were those of navigation or for the prevention and control of pollution from ships. The proposal left the matter to single agreements between the two groups of States concerned. The proposal was incorporated in the Consensus Text of the Private Group on Straits, the ISNT/Part II, and RSNT/Part II, with little change, and the attempts at expanding the scope of the article all failed.⁴

¹ *Bing Bing Jia*, *The Regime of Straits in International Law* (1998), 115–116 (the Sound Dues); also see, ICJ, *Case Concerning Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge* (Malaysia v. Singapore), Judgment of 23 May 2008, ICJ Reports (2008), 12, paras. 170–178.

² Sea-Bed Committee, Malta: Preliminary Draft Articles on the Delimitation of Coastal State Jurisdiction in Ocean Space and on the Rights and Obligations of Coastal States in the Area Under Their Jurisdiction, UN Doc. A/AC.138/SC.II/L.28 (1973), 19–20 (Article 40).

³ Second Committee UNCLOS III, United Kingdom: Draft Articles on the Territorial Sea and Straits, UN Doc. A/CONF.62/C.2/L.3 (1974), OR III, 183, 186 (Ch. III, Article 5).

⁴ Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), *United Nations Convention on the Law of the Sea 1982: A Commentary*, vol. II (1993), 382–383 (MN 43.4–43.6).

III. Elements

1. Necessary Aids and Aids Improving Navigational Conditions

- 4 The approach of the UNCLOS in this regard is somewhat innovative, in that navigational aids often come into existence for the benefit of local users that frequent narrow parts of the sea. It has been doubtful that navigational aids could be demanded, as a matter of a general right, by foreign ships. Conversely, there is the likelihood that reliance upon existing aids may be developed over the long run by foreign ships, to the extent that their change or removal by the coastal State could disrupt existing patterns of traffic. The distinction between necessary and facilitating aids assumes significance in these cases. The assumption here is that navigational aids may generate international traffic, but not necessarily so. For international use of a strait exists as a result of the geographical situation of a strait, even without aids in place. But where aids are provided by the coastal State as a matter of necessity, as opposed to a legal duty, for passage to happen in the strait, and consequently the geographical situation alone cannot attract foreign shipping, it is doubtful that the strait can be one subject to the law of international straits. The strait becomes effectively an artificial waterway like the Suez Canal. This argument is of course tentative, and the case of the Northwest Passage may show why it is so.⁵ In the Passage, pilotage and icebreaking capability are always necessary for surface transit, but they are not necessarily rendered in practice by the coastal State, Canada. As for foreign warships, and submarines in particular, there has been no need for such assistance to be sought.
- 5 The Agreement between the Government of the United States and the Government of Canada on Arctic Cooperation, concluded on 11 January 1988, has left intact the positions of the two parties regarding the law of the sea in this or other maritime areas.⁶ It is known that the US regards the Passage as an international strait, possibly falling under Art. 37.⁷ The uncertainty of the status of this waterway, composed of a series of straits forming several routes, remains even with the 1988 Agreement existent.⁸ On the other hand, the Agreement, signed between two strait States, partly lends support to the importance of Art. 43 without, however, any reference to the article. The problem that surrounds this waterway has been partly dealt with elsewhere.⁹ Based on Canada's own assessment, the Northwest Passage

[is] not predicted to become a viable, large-scale transit route in the near term, in part because mobile and unpredictable ice in the Passage poses significant navigational challenges and other routes are likely to be more commercially viable.¹⁰
- 6 Navigational aids, in particular local information on ice conditions from, for instance, the Arctic Canada Traffic System or NORDREG, may remain the norm to be followed by any transiting commercial vessel for the foreseeable future. The complexity of the issue as to the legal status of the Passage is plain to see.

⁵ Douglas M. Johnston, *The Northwest Passage Revisited*, ODIL 33 (2002), 145, 148–149.

⁶ Art. 4 Agreement between the Government of the United States and the Government of Canada on Arctic Cooperation, 11 January 1988, ILM 28 (1989), 141, 142–143.

⁷ Johnston (note 5), 148.

⁸ Cf. the *Polar Star* incident of October 1988, in which the US Government sought consent from the Canadian counterpart to allow the eponymous US icebreaker to pass through the Northwest Passage to exit the Arctic at Newfoundland, and in which consent was granted by the Canadian Government, US Note No. 425, ILM 28 (1989), 144–145.

⁹ See Jia on Art. 37 MN 8–9.

¹⁰ Canadian Ministry of Foreign Affairs, *Canada's Arctic Foreign Policy*, No. 2009/11 (2009) (per Minister of Foreign Affairs Lawrence Cannon).

It is recognised that gradually, the provision of navigational aids by the coastal State may become a legal obligation under various international treaties.¹¹ For instance, Reg. 13, Ch. 5 International Convention for the Safety of Life at Sea 1974 (SOLAS)¹², provides as follows:

‘Each Contracting Government undertakes to provide, as it deems practical and necessary, either individually or in co-operation with other Contracting Governments, such aids to navigation as the volume of traffic justifies and the degree of risk requires.’

While the obligation under SOLAS is qualified by certain conditions, it is a treaty undertaking nevertheless.¹³ Such provisions are not inconsistent with any article of the UNCLOS. On the contrary, they complement by strengthening the latter in creating a legal obligation. However, it may be pointed out that the duty to provide navigational aids in the Northwest Passage does not affect the applicability of the law of international straits to the Passage, as the aids are often facilitative in nature.

2. The Concern with Pollution

Art. 43 only looks at the matter of pollution from the angle of cooperation between user Straits and States bordering Art. 37-type international straits. While this exhortatory provision speaks specifically to the question of pollution, it contains no obligation to either enter into negotiation of an agreement between those States or indicate any possible design for such an agreement. In addition, it is linked with the provision and maintenance of navigational aids in the straits. This aim to enhance safety of navigation does not overlap completely with the aim to prevent pollution, as ships may pass through the same strait with a great variety of goods on board and with markedly different lengths. It is felt that this is the reason behind the reference in Art. 43 to pollution. Practice shows that the International Maritime Organization will continue to have a role to play in this respect, as this is closely linked to its expertise and competence.¹⁴

3. Charges and Taxes

Art. 43 is silent on levies which may be charged by the coastal State. It certainly permits levies to be charged on the basis of an agreement between the user and coastal States. In practice, charges are not completely banned in international straits. For straits under individual treaty regimes, for instance, the coastal State may well be allowed by the relevant treaty to charge a levy on passages through their waterways.¹⁵ A similar concession could be found in Art. 26 (2), pursuant to which charges may be levied for specific services rendered to the ship in passage.¹⁶ Art. 43 leaves some space for the States concerned to sort this out among themselves, without expressly permitting the coastal State to deal with this matter in the same way that it may within its territorial sea beyond Art. 37-type straits.¹⁷ In a contemporary case, the coastal and user States of the Malacca and Singapore Strait has set a useful precedent for the application of

¹¹ In this regard, the concerns for safety of navigation are being mixed with those for security: US Department of State, *Territorial Regimes and Related Issues*, Digest of United States Practice in International Law (2006), 805, 807; citing the US' legal position at the IMO's meeting in Kuala Lumpur in 2006.

¹² International Convention for the Safety of Life at Sea (SOLAS 1974), as amended.

¹³ The treaty entered into force for both Canada and the US on 25 May 1980.

¹⁴ Cf. *Steven B. Kempton*, Ship Routing Measures in International Straits, *Ocean Yearbook* 14 (2000), 232, 243, 248.

¹⁵ *Niliifer Oral*, Straits Used in International Navigation, User Fees and Article 43 of the 1982 Law of the Sea Convention, *Ocean Yearbook* 20 (2006), 561, 574–575, where it is noted that the 1936 Montreux Convention Regarding the Regime of the Straits, by Art. 2 and Annex I to the Convention, permitted Turkey to collect a set tax, based on tonnage, from passing foreign ships to defray the costs in maintaining standard aids, such as lighthouses, buoys and life-saving services.

¹⁶ See further *Barnes* on Art. 26 MN 6–7.

¹⁷ *Horace B. Robertson*, Passage Through International Straits: A Right Preserved in the Third United Nations Conference on the Law of the Sea, *VJIL* 20 (1980), 801, 834–835.

Art. 43.¹⁸ While Japan has been cooperating with the coastal States of the straits financially and technically for years, a new Cooperative Mechanism has been shaping up since 2006,¹⁹ with more user States, the shipping industry, and other stakeholders to be drawn in to the cause of enhancing safety, security, and environmental protection in the straits.²⁰ The financial burden in maintaining safe, efficient, and environmentally low-risk maritime transport through these busy waterways has gradually been shared by non-coastal States, which, after all, had been one of the concerns at the Conference to coastal States bordering international straits.

Article 44
Duties of States bordering straits

States bordering straits shall not hamper transit passage and shall give appropriate publicity to any danger to navigation or overflight within or over the strait of which they have knowledge. There shall be no suspension of transit passage.

Bibliography: *Hugo Caminos*, The Legal Regime of Straits in the 1982 United Nations Convention on the Law of the Sea, RdC 205 (1987, V), 9–246; *Erik Franckx*, Coastal State Jurisdiction with respect to Marine Pollution: Some Recent Developments and Future Challenges, IJMCL 10 (1995), 253–280; *Bing Bing Jia*, The Regime of Straits in International Law (1998); *Syméon Karagiannis*, Les détroits internationaux reliant la mer territoriale d'un État à la haute mer ou à la zone économique exclusive d'un autre État, AnDrMer XII (2007), 141–226; *Stuart B. Kaye*, The Torres Strait (1997); *Satya N. Nandan/David H. Anderson*, Straits Used for International Navigation: A Commentary on Part III of the United Nations Convention on the Law of the Sea, BYIL 60 (1989) 159–204; Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. II (1993); *Sandrine Piaskowski-Rafowicz*, Les ponts sur les détroits, AnDrMer IX (2004), 319–345.; *Nihan Ünlü*, The Legal Regime of the Turkish Straits (2002)

Documents: Decree of the Minister of Merchant Marine of 26 February 1993 relating to the Straits of Boniface (in Official Gazette of the Italian Republic No. 50 of 2 March 1993); IMO, Mandatory Ship Reporting System 'The Torres Strait Region and the Inner route of the Great Barrier Reef', IMO Res. MSC.52(66) of 30 May 1996; Prefectural Order No. 1/93 (France), 15 February 1993, Prohibiting the Movement in the Bouches de Bonifacio of Tankers Carrying Oil and Ships Carrying Dangerous or Toxic Substances

Contents

I. Purpose and Function	1
II. Historical Background	3
III. Elements	4
1. No Hampering of Transit Passage; Dangers to Transit Passage.....	4
2. Non-Suspension of Transit Passage	9

I. Purpose and Function

- 1 The obligation not to impede transit passage is set forth in Art. 38 (1). Art. 44 seems to complement this, and other earlier provisions in Part III, such as Art. 42 (2). It adds another element to the duty of publicity given to any dangers to navigation and overflight within straits which the coastal State borders. To further clarify the supremacy of the right of transit passage, it adds the non-suspension obligation.¹

¹⁸ GA Res. 64/71 of 4 December 2009, para. 87.

¹⁹ GA, Letter Dated 22 October 2007 from the Permanent Representatives of Indonesia, Malaysia and Singapore to the United Nations Addressed to the Secretary-General, UN Doc. A/62/518 (2007), formally establishing the Mechanism.

²⁰ *Hiroshi Terashima*, Transit Passage and Users' Contributions to the Safety of the Straits of Malacca and Singapore, in: Myron H. Nordquist/Tommy T.B. Koh/John N. Moore (eds.), Freedom of Seas, Passage Rights and the 1982 Law of the Sea Convention (2009), 357, 360, 363–367.

¹ *Bing Bing Jia*, The Regime of Straits in International Law (1998), 166.

The injunction against hampering transit passage may give rise to queries as to what is precisely involved: physical impediment or constructive restrictions resulting from the requirements of the national legislation of the coastal State. There is the question as to the proliferation of terms in this and other related provisions of Part III that may confuse rather than clarify.² Conversely, it may be inferred from the repeated emphasis carried by those similar terms used in Part III that the supremacy of the right of transit passage in the context of the part is beyond any doubt.

II. Historical Background

The origin of this article probably lay with the proposal of the former USSR, submitted to the UN Sea-Bed Committee in 1972.³ At UNCLOS III, the UK proposal of 1974 provided the basic ingredients for Art. 44.⁴ Other straits States were at least not averse to the idea of non-suspension of innocent passage through international straits.⁵ The UK proposal was incorporated in the Consensus Text by the Private Group on Straits and the Informal Single Negotiating Text Part II.⁶ The provision has since remained unchanged in substance.

III. Elements

1. No Hampering of Transit Passage; Dangers to Transit Passage

Part III includes words with similar connotations to the word 'hampering', and this parallelism makes it less easy to distinguish between them for different purposes.⁷ If hampering means to delay or complicate the exercise of transit passage, the reporting system, just as coastal States' regulations on various matters,⁸ imposed on passing ships may be relevant to this consideration.⁹ In practice, States, while being aware of the usefulness of this system, have been reluctant to make it compulsory in general, and in international straits in particular.¹⁰ However, the situation may be different now that the contracting States of the International Convention for the Safety of Life at Sea (SOLAS 1974)¹¹ have already recognized the mandatory nature of such systems as long as the latter fulfil the requirements of Reg. 11, Ch. V SOLAS 1974. Reg. 11 (9), Ch. V however, cautions:

² Cf. Satya N. Nandan/David H. Anderson, *Straits Used for International Navigation: A Commentary on Part III of the United Nations Convention on the Law of the Sea*, BYIL 60 (1989), 159, 195.

³ Sea-Bed Committee, USSR: Draft Articles on Straits Used for International Navigation, UN Doc. A/AC.138/SC.II/L.7 (1972), 2 (para. 2 (e)); *ibid.*, 3 (para. 2 (d)).

⁴ Second Committee UNCLOS III, United Kingdom: Draft Articles on the Territorial Sea and Straits, UN Doc. A/CONF.62/C.2/L.3 (1974), OR III, 183, 186 (Ch. III, Article 6).

⁵ Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), *United Nations Convention on the Law of the Sea 1982: A Commentary*, vol. II (1993), 386-387 (MN 44.3-44.4); cf. Art. 15 Convention on the Territorial Sea and the Contiguous Zone.

⁶ UNCLOS III, Consensus Text of Private Group on Straits, 18 April 1975 (1975, mimeo.), reproduced in: Renate Platzöder (ed.), *Third United Nations Conference on the Law of the Sea: Documents of the Geneva Session 1975* (1975), 204; UNCLOS III, Informal Single Negotiating Text (Part II), UN Doc. A/CONF.62/WP.8/PART II (1975), OR IV, 152 (Article 43).

⁷ Cf. the wording of Art. 38 (1): 'impeded', see *Jia* on Art. 38 MN 18, and the wording of Art. 42 (2): 'denying, hampering or impeding', see also *Jia* on Art. 42 MN 12-17.

⁸ Nordquist/Nandan/Rosenne (note 5), 365 (MN 41.9(g)).

⁹ Cf. IMO, *Mandatory Ship Reporting System 'The Torres Strait Region and the Inner route of the Great Barrier Reef'*, IMO Res. MSC.52(66) of 30 May 1996; further, see *Stuart B. Kaye, The Torres Strait* (1997), 85-86.

¹⁰ Erik Franckx, *Coastal State Jurisdiction With Respect to Marine Pollution: Some Recent Developments and Future Challenges*, IJMCL 10 (1995), 253, 266-272.

¹¹ International Convention for the Safety of Life at Sea (SOLAS 1974), as amended.

‘Nothing in this regulation or its associated guidelines and criteria shall prejudice the right and duties of Governments under international law or the legal regimes of straits used for international navigation and archipelagic sea lanes.’

- 5 It may be inferred, therefore, that the rights of passage through international straits prevail over a reporting system established by the coastal State in accordance with the SOLAS 1974, and that in case of a dispute involving the rights and the reporting duty by ships, the flag State, supposing also a party to the SOLAS 1974, will probably be in a better position, consequently. It may also be inferred from the wording of the aforementioned provision that the legal regimes for straits probably include those based in long-standing treaties as referred to in Art. 35 (c).¹²
- 6 The hampering effect may also arise where a strait is crossed by a bridge of a certain height in clearance.¹³ This problem has so far occurred in two straits which are excluded from the ambit of the regime of transit passage,¹⁴ but may affect more straits in future.¹⁵ The precedent of the Great Belt Project in Denmark could be helpful in engendering similar cases of settlement.
- 7 It goes without saying that local laws that are consistent with ‘applicable international regulations’ under Art. 42 (1)(b) are not hampering transit passage.
- 8 Art. 44 also requires ‘appropriate publicity’ given to any dangers to navigation and overflight within the straits that may be in the knowledge of the coastal State. Where publicity fails to come forth due to *dolus* or *culpa* on the part of the coastal State, Art. 304 comes into play.¹⁶ It may not be of practical importance to distinguish appropriate and due publicity employed by Art. 44 and Art. 42 (4), respectively.

2. Non-Suspension of Transit Passage

- 9 The obligation of non-suspension of transit passage is a general and absolute prohibition imposed on the coastal States bordering international straits. It probably strengthens the delinking of Arts. 38 and 39 in the interpretation and application of those articles,¹⁷ since the 1974 British proposal set the tone for that separation of the right of transit passage from the duties of the flag States in exercise of the right.¹⁸
- 10 The Strait of Bonifacio is an interesting case in this regard.¹⁹ From the late 1970s, the two coastal States, France and Italy, have been gradually moving towards a prohibition of oil, gas, and chemicals tankers from passing through this waterway. Under the UNCLOS, this strait belongs to the category of Art. 37-type international straits. The two coastal States, in view of the environmental vulnerability of the waterway, have persuaded the International Maritime Organization (IMO) to work with them in adopting relevant resolutions which eventually recommend to the member States of the IMO not to send their oil tankers or chemical carriers to pass through the strait.²⁰ It is for the user States bar Italy and France to

¹² Cf. Nihan Ünü, *The Legal Regime of the Turkish Straits* (2002), 76–78; see further *Jia* on Art. 35 MN 12–16.

¹³ *Jia* (note 1), 165–166.

¹⁴ Further *Jia* on Art. 45 MN 16.

¹⁵ Symeon Karagiannis, *Les détroits internationaux reliant la mer territoriale d’un État à la haute mer ou à la zone économique exclusive d’un autre État*, AnDrMer XII (2007), 141, 200: on a project for a bridge over, among other places, the Tiran Strait. Other projects exist, see Sandrine Piaskowski-Rafowicz, *Les ponts sur les détroits*, AnDrMer IX (2004), 319, 329–334, 341–345.

¹⁶ See further *Tams/Devaney* on Art. 304 MN 6–16.

¹⁷ *Jia* (note 1), 166.

¹⁸ Hugo Caminos, *The Legal Regime of Straits in the 1982 United Nations Convention on the Law of the Sea*, RdC 205 (1987, V), 9, 149–150.

¹⁹ *Franckx* (note 10), 272–274.

²⁰ Prefectural Order No. 1/93 (France), 15 February 1993, Prohibiting the Movement in the Bouches de Bonifacio of Tankers Carrying Oil and Ships Carrying Dangerous or Toxic Substances, available at: <http://www.premar-mediterranee.gouv.fr/arretes.html?frame=download-arretes.php&fichier=436>; Decree of the Minister of Merchant Marine of 26 February 1993 relating to the Straits of Bonifacio (in Official Gazette of the Italian Republic No. 50 of 2 March 1993).

voluntarily follow the recommendations of the IMO in this regard. The coastal States have not suspended transit passage as such.

Another point in this respect is that the obligation of the coastal State not to suspend transit passage pursuant to Art. 44 cl. 2 bolsters the obligations for the State bordering the strait not to impede (→Art. 38 (1)), and not to hamper, deny, or impair (→Art. 42 (2) and →Art. 44 cl. 1) transit passage. But, as has been discussed above, in respect of Arts. 42²¹ and 233²², transit passage may in fact be suspended in a specified situation. While, with regard to innocent passage through international straits, an identical prohibition is included under Art. 45 (2), it is clear that the applicability of the identical prohibition is conditioned by the requirement that the ships concerned are in fact conducting either innocent passage or transit passage. Suspension can be affected by the coastal State where the ships' passage is losing or has lost its character as being either innocent or transit passage.

Section 3 Innocent passage

Article 45 Innocent passage

1. The regime of innocent passage, in accordance with Part II, section 3, shall apply in straits used for international navigation:

- (a) excluded from the application of the regime of transit passage under article 38, paragraph 1; or
- (b) between a part of the high seas or an exclusive economic zone and the territorial sea of a foreign State.

2. There shall be no suspension of innocent passage through such straits.

Bibliography: *Ian Brownlie*, Principles of Public International Law (7th edn. 2008); *Władysław Czapliński*, International Legal Aspects of the Relations of Poland with Neighbouring States, AVR 36 (1998), 425–443; *Ali A. El-Hakim*, The Middle Eastern States and the Law of the Sea (1979); *Eric Franckx*, Report Number 10-6 (1) and (2), in: Jonathan I. Charney/Lewis M. Alexander (eds.), International Maritime Boundaries, vol. II (1993); *Philip Jessup*, The Law of Territorial Waters and Maritime Jurisdiction (1927); *Bing Bing Jia*, The Regime of Straits in International Law (1998); *Syméon Karagiannis*, Les détroits internationaux reliant la mer territoriale d'un État à la haute mer ou à la zone économique exclusive d'un autre État, AnDrMer XII (2007), 141–226; *Louise de La Fayette*, Access to Ports in International Law, IJMCL 11 (1996), 1–22; *Stephen C. McCaffrey*, The Law of International Watercourses (2nd edn. 2007); *Satya N. Nandan/David H. Anderson*, Straits Used for International Navigation: A Commentary on Part III of the United Nations Convention on the Law of the Sea, BYIL 60 (1989), 159–204; *Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne* (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. II (1993); *Horace B. Robertson*, Passage through International Straits: A Right Preserved in the Third United Nations Conference on the Law of the Sea, VJIL 20 (1980), 801–857; *Fabio Spadi*, The Bridge on the Strait of Messina: 'Lowering' the Right of Innocent Passage, ICLQ 50 (2001), 411–419; *Tullio Treves*, Navigation, in: René-Jean Dupuy/Daniel Vignes (eds.), A Handbook on the New Law of the Sea, vol. II (1991), 835–976; *Rüdiger Wolfrum*, Germany and the Law of the Sea, in: Tullio Treves/Laura Pineschi (eds.), The Law of the Sea: The European Union and its Member States (1997), 199–224; *Romain Yakemtchouk*, Le régime de la navigation à travers le détroit de Baltiysk, Revue du Marché commun et de l'Union européenne 467 (2003), 225–230

Documents: Italian Ministry of Infrastructure and Transport, VTS Messina Straits: User Manual, December 2009; UN DOALOS, Second Ordinance for the Implementation of the Law on the State Frontier of the German Democratic Republic (Frontier Ordinance), 20 December 1984, LOSB 4 (1985), 41–42; UN DOALOS, National Legislation on the Territorial Sea, the Right of Innocent Passage and the Contiguous Zone (1995); US Naval War College, Excessive Maritime Claims, International Law Studies 66 (1994)

²¹ See further, *Jia* on Art. 42 MN 15.

²² See further, *Becker-Weinberg* on Art. 233.

Cases: ICJ, *Case Concerning Passage through the Great Belt* (Finland v. Denmark), Order of 10 September 1992, ICJ Reports (1992), 348; ITLOS, *Case Concerning Land Reclamation by Singapore in and around the Straits of Johor* (Malaysia v. Singapore), Provisional Measures, Order of 8 October 2003, ITLOS Reports (2003), 10

Contents

I. Purpose and Function	1
II. Historical Background	6
III. Elements	9
1. Straits Subject to Article 45	9
2. The Regime of Innocent Passage in this Context.....	14
3. The Injunction against Suspension of Innocent Passage	15

I. Purpose and Function

- 1 While Art. 45 expands on what has been established by Art. 16 (4) of the 1958 Convention on the Territorial Sea and the Contiguous Zone (CTSCZ), it merely reflects the existing law that prevents coastal States from closing international straits by claiming adverse impact from what they perceive to be non-innocent passage by foreign ships. As has been pointed out before,¹ Art. 45 is probably one of the provisions of Part III that is generally declaratory in nature, as far as is concerned at least the particular type of strait between a part of the high seas or of the exclusive economic zone (EEZ) and the territorial sea of a foreign State.
- 2 As has been indicated elsewhere,² Art. 16 (4) CTSCZ, gave way at UNCLOS III to a gradual emergence of the consensus on the regime of transit passage. However, due to the compromises underlying the consensus, the text of Art. 45 had undergone certain changes before it settled into the final form that we know of today. There is, not surprisingly, a cross-reference to Part II that provides for the regime of innocent passage in the territorial sea (→Arts. 17 *et seq.*).
- 3 Another question in this regard is whether Art. 45 represents customary law or is in the course of becoming such. The acceptance at the conference of the regime of transit passage was so closely linked with the extension of the territorial sea to 12 NM that the final compromise achieved at the time embodied both of those factors. The regime established under Art. 45, however, was secondary to the achievement of the compromise mentioned above, in the light of the foremost aim of Part III in establishing the new regime of transit passage. The regime now under Art. 45 has in fact seen no drastic changes to it since its embodiment in the UK proposal of 1974.³ For those straits covered by Art. 45 (1)(a), there is little difficulty in applying the non-suspendable innocent passage as a matter of customary law. But, as regards the straits covered by Art. 45 (1)(b), doubts linger about the existence of a customary right of non-suspendable innocent passage in such straits. In this respect the opposition from the Arab States has been constant since 1958,⁴ and in any case, advocates for the regime of transit passage, in the run-up to UNCLOS III in the early 1970s, no longer recognised the regime embodied in Art. 16 (4) CTSCZ as reflecting what they perceived to be the general law for international straits linking parts of the high seas.⁵ The most that may be said at this moment is that those Arab States which have ratified or acceded to the UNCLOS probably regard Art. 45 (1)(b) as treaty-based. Yet, Egypt has made it clear, upon ratification of the UNCLOS in 1983, that:

¹ Bing Bing Jia, *The Regime of Straits in International Law* (1998), 129.

² See further, Jia on Art. 38 MN 1.

³ Second Committee UNCLOS III, United Kingdom: Draft Articles on the Territorial Sea and Straits, UN Doc. A/CONF.62/C.2/L.3 (1974), OR III, 183, 186 (Article 8).

⁴ Ali A. El-Hakim, *The Middle Eastern States and the Law of the Sea* (1979), 156–157; Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), *United Nations Convention on the Law of the Sea 1982: A Commentary*, vol. II (1993), 396 (MN 45.7); Jia (note 1), 21–22.

⁵ Cf. Tullio Treves, *Navigation*, in: René-Jean Dupuy/Daniel Vignes (eds.), *A Handbook on the New Law of the Sea*, vol. II (1991), 835, 971.

‘The provisions of the 1979 Peace Treaty between Egypt and Israel concerning passage through the Strait of Tiran and the Gulf of Aqaba come within the framework of the general régime of waters forming straits referred to in Part III of the Convention, wherein it is stipulated that the general régime shall not affect the legal status of waters forming straits and shall include certain obligations with regard to security and the maintenance of order in the State bordering the strait.’⁶

There is the presumption that the statement sought to align the navigation provisions of the 1979 treaty with Part III, thus recognising the conventional nature of the regime established under Part III. On the other hand, reference is also made to the 1994 Peace Treaty between Jordan and Israel, which apparently provides, in respect of bilateral relations, for navigational rights close to those of transit passage: 4

‘International waterways will be open to all nations for unimpeded and non-suspendable freedom of navigation and overflight. The parties will respect each other’s right to navigation and overflight for access to either Party through the Straits of Tiran and the Gulf of Aqaba.’⁷

However, the weight of this recognition of navigational and overflight rights is balanced by the fact that neither party is a coastal State on the Straits of Tiran, and that the treaty merely refers to mutual respect for the rights of the parties to the straits and the gulf beyond. 5

II. Historical Background

At the UNCLOS I in 1958, the International Court of Justice (ICJ) judgment in the *Corfu Channel Case* proved to be of great persuasiveness in moulding the rule for non-suspendable innocent passage through international straits.⁸ However, the discussion of Art. 16 (4) CTSCZ at UNCLOS I was unfortunately entangled with that of the right of foreign ships to innocent passage through the territorial sea, and that resulted in the removal of any reference to warships from the text of two articles that were relevant in this regard: Art. 24 and Art. 17 of the International Law Commission Draft Articles concerning the Law of the Sea.⁹ Further, the issue of the Israeli port city Elat in the general context of the situation in the region did not endear this rule to the Arab States.¹⁰ But the situation did not forestall the emergence of a customary right for all ships to enjoy the right of non-suspendable innocent passage through international straits.¹¹ After the first conference in 1958, State practice had been inconclusive with regards to the customary status of Art. 16 (4) CTSCZ.¹² 6

This inconclusiveness was further evidenced by developments during the run-up to the conference. In 1973, Cyprus, Greece, Indonesia, Malaysia, Morocco, Philippines, Spain and Yemen, jointly submitted to the UN Sea-Bed Committee that: 7

⁶ Egypt’s Declaration made upon Ratification of the UNCLOS in 1983, available at: http://treaties.un.org/Pages/ViewDetailsIII.aspx?&src=TREATY&mtmsg_no=XXI-6&chapter=21&Temp=mtmsg3&lang=en.

⁷ Art. 14 (3) Treaty of Peace between the Hashemite Kingdom of Jordan and the State of Israel, 26 October 1994, ILM 34 (1995), 43, also available at: <http://www.kinghussein.gov.jo/peacetreaty.html>.

⁸ Cf. Statement of Dean (United States), UNCLOS I, Summary Records of Meetings and Annexes, UN Doc. A/CONF.13/39 (1958), OR III, 78, 79 (27th Meeting); Statement of Kusumaatmadja (Indonesia), UNCLOS I, Summary Records of Meetings and Annexes, UN Doc. A/CONF.13/39 (1958), OR III, 92, 94 (32nd Meeting); Statement of Cardoso (Portugal), UNCLOS I, Summary Records of Meetings and Annexes, UN Doc. A/CONF.13/39 (1958), OR III, 92, 94 (32nd Meeting); Statement of Shukairi (Saudi Arabia), UNCLOS I, Summary Records of Meetings and Annexes, UN Doc. A/CONF.13/39 (1958), OR III, 95, 96 (33rd Meeting).

⁹ ILC, Report of the International Law Commission, UN Doc. A/3159 (1956), GAOR 11th Sess. Suppl. 9, 12: Art. 17 later became Art. 16 (4) of the CTSCZ, and Art. 24, regarding passage of warships through the territorial sea, was simply deleted from the draft CTSCZ.

¹⁰ Syméon Karagiannis, Les détroits internationaux reliant la mer territoriale d’un État à la haute mer ou à la zone économique exclusive d’un autre État, *AnDrMer* XII (2007), 141, 182–183. The port is situated in the Gulf of Aqaba, which is connected to the Red Sea by the Strait of Tiran that falls within the territorial waters of Egypt, see further *Jia* (note 1), 20.

¹¹ *Jia* (note 1), 102–108.

¹² *Ibid.*, 22. The writers’ opinions are divided: Karagiannis (note 10), 183 (footnote 163).

‘(1) Navigation through the territorial sea and through straits used for international navigation should be dealt with as an entity, since the straits in question are or form part of territorial seas.

(2) Regulation of navigation should establish a satisfactory balance between the particular interests of coastal States and the general interests of international maritime navigation. This is best achieved through the principle of innocent passage, which is the basis of the traditional regime for navigation through the territorial sea.’¹³

- 8 That proposal made no particular distinction between the regimes for territorial straits and for the territorial sea. It also drew back from the position established by way of Art. 16 (4) CTSCZ. All this adjustment did not, of course, meet fully the requirements of the US and the former USSR in this connection.¹⁴ Once the idea of transit passage began to take root in the negotiations, the regime of innocent passage through international straits was reduced in its applicability to two types of strait.¹⁵ The UK proposal that effected this change was incorporated in the Consensus Text of the Private Group on Straits.¹⁶ In both those documents, there was the provision referring to the power of the coastal State to establish traffic separation schemes and sea lanes. But this latter provision was dropped from the Informal Single Negotiating Text Part II.¹⁷ Another interesting development in this process was the removal from the UK proposal of straits between a part of the high seas and the territorial sea of a foreign State from under the regime of transit passage, which was part of the original US proposal for the freedom of navigation and overflight for the purpose of transit through and over international straits.¹⁸

III. Elements

1. Straits Subject to Article 45

- 9 Two types of strait are specified under Art. 45 as falling under the regime of innocent passage as contained in the UNCLOS. The first is the type of strait that has a parallel route seaward of an island that, together with its mainland, forms the strait. The route lies in the high seas or EEZ, having similar convenience with respect to hydrographical and navigational characteristics. The second type involves straits linking a part of the high seas or EEZ and the territorial sea of a foreign State. The first type Art. 45 (1)(a) refers to Art. 38 (1), is relatively free of controversy, as far as the interpretation of the provision is concerned. But it is not so in its implementation, as shown in the case of Messina Strait, to be discussed below.
- 10 But the second type, in spite of its origin in Art. 16 (4) CTSCZ, may not be free of questions in application. Among them is the one that envisages a ship in passage that ends in the territorial sea of a foreign State after passing through an international strait, before it recommences, for example, the return voyage after the visit of the local port. It is recalled that the crux of a solution for this question lies in the legal status of the immediate water bodies connected by a strait.¹⁹ If this type of strait always ends in local ports of a coastal State beyond the strait that links them with the high seas in the other direction, the type may even include, it has been suggested, the narrow channels that link the Baltic Sea and the Oder

¹³ Sea-Bed Committee, Cyprus *et al.*: Draft Articles on Navigation Through the Territorial Sea Including Straits Used for International Navigation, UN Doc. A/AC.138/SC.II/L.18 (1973), 1.

¹⁴ Horace B. Robertson, *Passage through International Straits: A Right Preserved in the Third United Nations Conference on the Law of the Sea*, VJIL 20 (1980), 801, 816–817.

¹⁵ UK Draft Articles (note 3), 186 (Article 8).

¹⁶ UNCLOS III, Consensus Text of Private Group on Straits, 18 April 1975 (1975, mimeo.), reproduced in: Renate Platzöder (ed.), *Third United Nations Conference on the Law of the Sea: Documents of the Geneva Session 1975* (1975), 204, 206 (Article 7).

¹⁷ UNCLOS III, Informal Single Negotiating Text (Part II), UN Doc. A/CONF.62/WP.8/PART II (1975), OR IV, 152 (Article 44).

¹⁸ Sea-Bed Committee, United States: Draft Articles on the Breadth of the Territorial Sea, Straits and Fisheries, UN Doc. A/AC.138/SC.II/L.4 (1971), 2 (Article II (1)).

¹⁹ See further, *Jia* on Art. 37 MN 6–7.

lagoon (or Bay of Szczecin or Stettiner Haff).²⁰ The fact that this type of strait always leads international shipping to a local port beyond the straits may enhance the importance of ports in the determination of the status of those straits.²¹ In this regard, there may be room for the view that Art. 45 has a role to play in respect of the Peenestrom between the Baltic and the Oder lagoon.²² In the German Democratic Republic-Poland treaty of 22 May 1989,²³ Art. 6 expressed that:

‘Navigation on the navigational routes and approaches which lead to the ports of Szczecin and Swinoujscie and which are situated within the territorial sea of the German Democratic Republic east of Ruegen island shall be governed by the generally accepted principles of the international law of the sea. No permission of the German Democratic Republic shall be required for the passage of warships and government ships flying the Polish flag.’

The wording of the article suggests that general international law would regulate the use of the navigational routes in this area.²⁴ The omission of authorization for the passage of Polish warships also suggested that the passage envisaged was that of innocent passage, since prior consent would have been required otherwise in accordance with the law of German Democratic Republic.²⁵ In the 1990 Federal Republic of Germany-Poland treaty confirming their frontier,²⁶ Art. 1 referred to the 1989 treaty mentioned above, but did not reaffirm the part of Art. 6 regarding navigation.²⁷ However, it may be noted that the routes referred to above do not provide similar convenience geographically, as the Świna channel, east to the Peenestrom and flanked solely by Polish territory, shoulders most of the shipping to the Polish ports inland. If that situation persists, the application of Art. 45 would not be required to regulate access by foreign shipping to the Polish ports. The provision, therefore, has only a potential role in respect of this particular case.

A word of caution is in order. It is felt that, beyond geographical straits, waterways of mixed fresh and sea waters, such as the waterway of Western Scheldt (leading to the port of Antwerp, among others) or the like, that end in a river inland do not attract the regime of international straits, let alone Art. 45 (1)(b). Instead, they are regulated by the law of rivers as a distinct category.²⁸ It may also be recalled that the UNCLOS is not concerned with the regime of internal waters, including rivers that empty into the sea, except for the rules in relation to the delimitation of internal waters (→Art. 8).²⁹ The landward applicability of the UNCLOS ends at the baselines defined by it. In any case, to unilaterally introduce the regime of innocent passage in this context of international fluvial waterways, including waterways that provide sole access to the open sea for the riparian State concerned, may well run counter to the basic principle of the law of rivers. This principle states that such a river belongs to all riparian States for free

²⁰ Karagiannis (note 10), 172–174.

²¹ *Ibid.*, 182.

²² *Ibid.*, 213.

²³ Treaty between the German Democratic Republic and the Polish People's Republic on the Delimitation of the Sea Areas in the Oder Bay, 22 May 1989, the full text of the treaty is available at: <http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/DEU-POL1989DS.PDF>. Also see, *Eric Franckx*, Report Number 10-6 (1) and (2), in: Jonathan I. Charney/Lewis M. Alexander (eds.), *International Maritime Boundaries*, vol. II (1993), 2005–2028.

²⁴ Cf. *Rüdiger Wolfrum*, Germany and the Law of the Sea, in: Tullio Treves/Laura Pineschi (eds.), *The Law of the Sea: The European Union and its Member States* (1997), 199, 212.

²⁵ UN DOALOS, Second Ordinance for the Implementation of the Law on the State Frontier of the German Democratic Republic (Frontier Ordinance), 20 December 1984, LOSB 4 (1985), 41, 42.

²⁶ Treaty between the Federal Republic of Germany and the Republic of Poland on the confirmation of the frontier between them, 14 November 1990, the full text of the treaty is available at: <http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/DEU-POL1990CF.PDF>. The territorial sea limit established in this treaty was confirmed on 11 November 1994 by the Proclamation by the Federal Republic of Germany concerning the extension of the German territorial sea: UN DOALOS, National Legislation on the Territorial Sea, the Right of Innocent Passage and the Contiguous Zone (1995), 137.

²⁷ Cf. *Władysław Czapliński*, *International Legal Aspects of the Relations of Poland with Neighbouring States*, AVR 36 (1998), 425, 431.

²⁸ *Philip Jessup*, *The Law of Territorial Waters and Maritime Jurisdiction* (1927), xxxvi.

²⁹ See also *Stephen C. McCaffrey*, *The Law of International Watercourses* (2nd edn. 2007), 27.

navigation and other uses.³⁰ The same, regarding the regime of internal waters, may also be said of the Baltiysk Strait, flanked by Russian territory and linking the Vistula Lagoon or Bay and the Gdańsk Bay in the Baltic. It seems to be the common ground between Poland and Russia that the Vistula Bay comprises internal waters.³¹ That signifies the inapplicability of Art. 45. Due to occasional interruptions of shipping through the strait, Poland has been contemplating the excavation of a canal across the Vistula Spit, jointly owned by itself and Russia, in its part of the peninsula.³² Finally, it may be added that access to ports by foreign shipping is still not a customary right, with the coastal State in sole control in determining which of its ports are opened to international access.³³ The law of the sea wisely confines juridical straits to those between larger areas of sea in which a general right or freedom of navigation and even overflight exists.

- 13 It may be emphasized that Art. 45 (1) seems to be exhaustive of types of strait that are open to non-suspendable innocent passage. It follows that it is not possible to relate the right of innocent passage, as provided by Art. 45, to other types of strait. The number of straits falling under this provision, however, is not fixed. In cases where the geographical situation of a strait is physically altered, like the causeway that cuts across the Strait of Johor between Malaysia and Singapore, there may be room for considering the applicability of Art. 45 to other parts of the strait, which, still open to larger areas of sea, are subject to possible land reclamation and bridge-building plans by one of the coastal States.³⁴

2. The Regime of Innocent Passage in this Context

- 14 Art. 45 explicitly imposes the regime of innocent passage as contained in Part II on the two types of strait listed in its paragraph 1. The reason for the inclusion of those two types is well known.³⁵ However, it may be stressed that the regime of innocent passage as defined in Part II is to be applied in ‘all its respects’ to the two types of strait.³⁶ The only condition is that innocent passage through those straits may not be suspended, and it distinguishes the regime of innocent passage through international straits from that which applies in the territorial sea. The power to determine innocence or not is to be exercised chiefly by the coastal State subject to a detailed set of criteria laid down in Art. 19.³⁷

3. The Injunction against Suspension of Innocent Passage

- 15 This part of Art. 45 follows *verbatim* the terms of Art. 16 (4) CTSCZ. The injunction contained in the article against any attempt by coastal States to suspend, temporarily or permanently, the innocent passage through an Art. 45-type international strait by foreign ships, of whatever type, has been tested in practice. Italy has legislated in the Strait of Messina since 1985 that the waterway is closed to vessels of or over 50,000 tons carrying pollutants (such as oil), chemical products or any toxic substances on board.³⁸ For ships which intend to pass through the strait that are below that tonnage but over 6,000 in tonnage carrying crude oil,

³⁰ *Ibid.*, 197. Also see, Art. 5 United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses, GA Res. 51/229 of 21 May 1997, Annex.

³¹ Romain Yakemtchouk, *Le régime de la navigation à travers le détroit de Baltiysk*, *Revue du marché commun et de l'Union Européenne* 467 (2003), 225, 229.

³² Karagiannis (note 10), 184, 198.

³³ Cf. Louise de La Fayette, *Access to Ports in International Law*, *IJMCL* 11 (1996), 1, 4, 19, 22.

³⁴ ITLOS, *Case Concerning Land Reclamation by Singapore in and around the Straits of Johor* (Malaysia v. Singapore), Provisional Measures, Order of 8 October 2003, ITLOS Reports 2003, paras. 23 (3) (e), 106 (1) (c).

³⁵ Satya N. Nandan/David H. Anderson, *Straits Used for International Navigation: A Commentary on Part III of the United Nations Convention on the Law of the Sea*, *BYIL* 60 (1989) 159, 196–197.

³⁶ *Ibid.*, 197–198.

³⁷ Cf. Treves (note 5), 912; Ian Brownlie, *Principles of Public International Law* (7th edn. 2008), 187; see also Barnes on Art. 19 MN 7–9; and further Barnes on Art. 25 MN 5–8.

³⁸ Jia (note 1), 181 (footnote 91).

or ships over the 15,000 in tonnage, pilotage is compulsory.³⁹ Despite the protests from the US against the 1985 legislation,⁴⁰ Italy has maintained the laws in the strait, establishing a voluntary Vessel Traffic Service (VTS) for the strait in 2008.⁴¹ It may be noted that the navigational condition of the strait allows the biggest ships to pass through without difficulty, as the watercourse is very deep, from 70 to about 1,000 metres.⁴² This case shows that suitable navigational conditions do not necessarily determine the navigability of an international strait, and that local concerns with marine pollution may outweigh the navigational interests of foreign shipping. Then the issue seems to become one of the legality of prevention of the passage by specified ships with specified cargoes, which apparently implies that passage by such ships *per se* would not be innocent (→Art. 19).

Another circumstance that may give rise to concerns in this regard is the building of bridges 16 linking the two coasts of a strait of the Art. 37-type. Italy, for instance, started to consider the construction of fixed links over Messina Strait between its mainland and the Island of Sicily in the late 1960s.⁴³ The height of the bridge, following Italy's notification to the IMO of the project, is estimated at no less than 64 metres above sea level.⁴⁴ That would cause problems for the passage of certain oil rigs and platforms.⁴⁵ However, after the precedent of the Great Belt Bridge,⁴⁶ there seems to be little difficulty for Italy to rely on international toleration of its construction work over the Messina Strait. Legally speaking, however, the paucity of passage of oil rigs and the like through a strait does not obviate the question regarding a general right of passage by all ships, including, arguably, rigs or at least the carriers of them. Given the way in which the notion of international straits was brought into life by the ICJ in the *Corfu Channel Case*, the limited use of a waterway may not be decisive in settling arguments with foreign governments. What the *Passage through the Great Belt case* shows is that Finland, as the main user State affected by Denmark's project, has consented to a *lex specialis* between itself and Denmark in respect of one particular type of vessel its shipyards manufacture,⁴⁷ without touching on the general right of passage through the strait in question. The bilateral settlement of that dispute may be copied where impairment of passage is alleged under Art. 44.

³⁹ Italian Ministry of Infrastructure and Transport, VTS Messina Straits: User Manual, December 2009, available at: www.guardiacostiera.it/servizi/documents/manualivts/manualeutentemessina_inglese.pdf.

⁴⁰ US Naval War College, Excessive Maritime Claims, International Law Studies 66 (1994), 199.

⁴¹ Italian Ministry of Infrastructure and Transport (note 39), 001.

⁴² *Ibid.*, 005.

⁴³ Fabio Spadi, The Bridge on the Strait of Messina: 'Lowering' the Right of Innocent Passage, ICLQ 50 (2001), 411, 412.

⁴⁴ *Ibid.*, 417 (referring to IMO, Report of the Sub-Committee on Safety of Navigation, IMO Doc. NAV/35/14 of 2 February 1989).

⁴⁵ A similar height for the proposed Great Belt Bridge to be built by Denmark led to a Finnish Application to the ICJ in 1991, see *supra*, note 47; see also *Jia* (note 1), 118–120.

⁴⁶ The Finnish Application was withdrawn in 1992 from the ICJ after Denmark provided a 90 million kroner in payment: ICJ, *Case Concerning Passage through the Great Belt* (Finland v. Denmark), Order of 10 September 1992, ICJ Reports 1992, 348. The bridge or fixed link opened for rail traffic in 1997 and road traffic in 1998, with the clearance at the East Bridge at 65 metres, available at: <http://www.storebaelt.dk/english> (A/S Storebælt is the bridge operator).

⁴⁷ The debate over the scope of vessel or ship under the law of the sea assumed prominence in the proceedings involving Finland and Denmark, with, however, no definite conclusion following the discontinuance of the case by the parties: ICJ, *Case Concerning Passage through the Great Belt* (Finland v. Denmark), Finland's Memorial of 20 December 1991, paras. 444–478; Denmark's Counter-Memorial of 18 May 1992, para. 604, both available at: <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=a5&case=86&code=fd&p3=90>.