Transit Passage Through International Straits

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The Third United Nations Conference on the Law of the Sea (UNCLOS) began in 1974 in Caracas, Venezuela, amid great fanfare and high expectations. The delegations gathered to negotiate a comprehensive treaty that would clarify and bring certainty to the many ocean issues that had divided nations over the years. Eight years later, after long negotiating sessions that alternated between New York and Geneva, the United Nations Convention on the Law of the Sea (LOS Convention) was completed, and on 10 December 1982, 119 nations signed the document in Montego Bay, Jamaica. The Convention came into force in July 1994 after a sufficient number of countries had formally ratified the treaty.1

One of the central disputes among the countries negotiating this treaty concerned the width of the territorial sea, coastal State control of its adjacent offshore resources, and the navigational rights of commercial

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and military vessels to pass through straits and island archipelagos.\(^3\) The United States and other maritime powers initially resisted efforts to allow coastal countries to claim extended fisheries zones because they were concerned that such a zone could limit navigational freedoms. The United States was particularly concerned about its continuing ability to navigate its warships, including submerged submarines, through key international straits such as the Strait of Gibraltar (into the Mediterranean Sea), the Strait of Hormuz (into the Persian/Arabian Gulf), the Strait of Bab el Mandeb (into the Red Sea), the Strait of Malacca (connecting the Indian Ocean with the Pacific), the Dover Strait (through the English Channel), the Bering Strait (in the Arctic), and the Strait of Lombok (through the Indonesian archipelago). The United States was worried that if countries were allowed to extend their territorial seas from three to twelve nautical miles, no high seas corridors would remain in these narrow straits and control over passage might arguably fall under the control of the countries bordering on these key waterways. The United States maintained that free movement through these straits was essential to its national security and protested claims of expanding territorial seas.\(^4\) The U.S. position on navigational freedoms was supported during this period by the Soviet Union, which was also a major maritime power.

Opposing the position of the maritime countries was a group of strait States that included Malaysia, Indonesia, Spain, the Philippines, Cyprus, Egypt, Morocco, and Yemen. Spain and Malaysia argued that oil tankers presented serious pollution dangers to coastal countries.\(^5\) Malaysia argued that the passage of oil tankers should be viewed as “non-innocent” and that coastal countries should be allowed to regulate their passage.\(^6\) Draft


articles submitted by Malaysia, Morocco, Oman, and Yemen proposed a regime of innocent passage for travel through straits that would have required warships to seek authorization from coastal States prior to exercising innocent passage through territorial seas in straits.7 These proposals were rejected by the maritime powers and failed to receive the support of many other coastal States.8

The compromise that emerged during the protracted negotiations consisted of (a) allowing coastal States to extend their territorial seas to 12 nautical miles; (b) recognizing the right to “transit passage through international straits;” and (c) allowing countries to establish an exclusive economic zone (EEZ) out to a distance of 200 nautical miles from their coasts, governed by Part V of the Convention, Articles 55–75. The right of “transit passage through international straits,” as defined in the Convention, is nonsuspendable and applies to all vessels – military and commercial – and also to airplanes (Article 38(1)). Pursuant to the language in Article 39(1)(c), submarines are allowed to remain submerged when they exercise the right of transit passage.9

The position of the maritime countries that all ships should have the right to unimpeded passage through international straits was thus largely adopted in Part III (Articles 34–45) of the 1982 LOS Convention. Each strait, however, presents unique geographical and practical considerations, and some straits have historically been governed by unique legal regimes, which remain in force pursuant to Article 35(c) of the Convention. Professor Lewis M. Alexander, who served as the Geographer for the U.S. State Department during the 1980s, has identified 265 important straits around the globe,10 but the number would be much higher if every narrow

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8 Ibid.
9 S. N. Nandan, “Legal Regime for Straits Used for International Navigation,” in International Straits Symposium, supra note 1, at p. 7. “The common practice of submarines transiting some international straits while submerged is recognised in the provision that passing vessels refrain from any activities other than those ‘incident to their normal mode of continuous and expeditious transit’ (art. 39(1)(c)).”
waterway between bodies of land were counted. The specific rules that apply to individual straits are discussed in more detail below.

The Corfu Channel Case

The right to pass freely through international straits was not firmly established in international law until the *Corfu Channel Case*\(^1\) in 1949, when the International Court of Justice said that ships have the right of nonsuspendable innocent passage through such straits. In 1946, the United Kingdom sent four warships through the Corfu Channel, which separates the Greek island of Corfu and the Albanian coast. Several of the vessels were seriously damaged by mines in the channel and a number of British sailors were killed. Albania argued that the channel was not a necessary route between two parts of the high seas and, therefore, that no right of passage existed. Albania explained that this waterway was “only of secondary importance and not even a necessary route between two parts of the high seas, and that it is used almost exclusively for local traffic to and from the ports of Corfu and Saranda.”\(^12\) The International Court agreed that it was not a necessary route, but said that “[i]t has nevertheless been a useful route for international maritime traffic.”\(^13\) The decisive criteria is simply “its geographical situation as connecting two parts of the high seas and the fact of its being used for international navigation” and hence that “the North Corfu Channel should be considered as belonging to the class of international highways through which passage cannot be prohibited by a coastal State in time of peace.”\(^14\) As long as the passage

\(^1\) *Corfu Channel Case (United Kingdom v. Albania)*, [1949] I.C.J. Reports 4.
\(^2\) Ibid., at 28.
\(^3\) Ibid.
\(^4\) *Ibid.* The International Court also noted that British warships could pass through with crew and guns at the ready when Albanian shore batteries had previously fired at British ships, since “the measure of precaution” was not “unreasonable” under the circumstances. The Court ruled, however, that subsequent sweeping of the Corfu Channel of mines without Albanian consent was an impermissible use of force or enforcement jurisdiction in Albanian territorial waters. Especially unpersuasive was a British claim that it was acting to gather evidence (before it disappeared) concerning the illegal placement of mines in the channel.
through the waterway is innocent, passage of warships is permissible and the coastal State cannot require prior authorization.

States in time of peace have a right to send their warships through straits used for international navigation between two parts of the high seas without the previous authorization of a coastal State, provided the passage is innocent. Unless otherwise prescribed in an international convention, there is no right for a coastal State to prohibit such passage through straits in time of peace.15

This decision clarified a number of rules governing passage through straits, but disagreements continued regarding what activities qualified as “innocent,” and commentators differed on whether warships were entitled to pass under this regime.16 The text of Part III of the LOS Convention was designed to clarify these uncertainties.

What Controls can Coastal States Exercise over Vessels Engaged in Transit Passage through International Straits?

The rules recognized in the LOS Convention do not allow suspension of transit passage (Article 44) and do not require innocence,17 but they do impose, inter alia, the following restrictions on transit passage: (1) transit passage must be solely for the purpose of continuous and expeditious transit (Article 38(2)); (2) transiting ships must comply with generally accepted international regulations, procedures, and practices for safety at sea (Article 39(2)(a)) and for the prevention, reduction, and control of
pollution from ships (Article 39(2)(b)); and (3) ships exercising the right of transit passage must proceed without delay through the strait, must not engage in any research or fishing activities, and must refrain from any threat or use of force (Articles 39(1), 40, and 42(1)(c)).

Article 38(3) of the LOS Convention states explicitly that: “[a]ny activity which is not an exercise of the right of transit passage through a strait remains subject to the other applicable provisions of the Convention.” Any such “nontransit” activity, if undertaken in the territorial waters of a coastal State, would have to comply with the innocent passage provisions of Articles 17–26 of the Convention and the activity could be prevented if “noninnocent.”

The LOS Convention allows countries bordering on straits to establish certain types of regulations. Traffic separation schemes and other safety measures can be established under Articles 41 and 42(1)(a) of the LOS Convention, but Article 41(4) indicates that the International Maritime Organization (IMO) must approve a traffic separation scheme before it can be put into force.18 These must be developed in coordination with other adjacent or opposite States, must conform to generally accepted international regulations, must be submitted to the component international organization (the IMO) for adoption, and must be widely publicized. Traffic separation schemes have been adopted for many of the important straits, including the Baltic, Dover, Gibraltar, Kerch, Bab al-Mandeb, Hormuz, Malacca-Singapore, and Kurile Straits.19

Pollution control regulations can be adopted under Article 42(1)(b), which allows States bordering international straits to adopt laws and regulations with respect to “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.”20 However, such laws and regulations shall not be discriminatory,

18 See Nandan, supra note 9, at p. 6. Nandan states that traffic separation schemes “must first have been adopted by the competent international organization (art. 41), which would normally be the International Maritime Organization.”
19 Alexander, supra note 10, at p. 129.
20 During the final negotiating session in 1982. Spain objected to the word “applicable” in this provision because it meant that the regime that could be imposed on a ship would change with the flag of the ship, and urged instead that the phrase “generally accepted” be used in order to ensure a uniform standard. A vote was taken on Spain’s
nor “in their application have the practical effect of denying, hampering or impairing the right of transit passage” (Article 42(2)), and must have been duly publicized (Article 42(3)).

Fishing regulations can be adopted under Article 42(c) to prevent fishing, including the requirement to stow all fishing gear. Further, regulations can be adopted to control the loading, unloading, or transfer of any goods, any currency, or any person in contravention of the “customs, fiscal, immigration or sanitary laws and regulations” of the coastal State, under Article 42(d).

The question whether countries adjacent to straits can act to control pollution of their coasts was discussed during the Convention negotiations, and it has continued to be a difficult one. During the debates that created the transit passage regime, Norway, supported by Turkey, suggested establishing a mandatory insurance pool covering all shippers to guarantee that coastal States would be compensated when other rules of liability were inadequate.21

The regulations issued by strait States cannot discriminate against foreign ships nor can they have the effect of “hampering or impairing the right of transit passage” (Article 42(2)), and due publicity must be given to these regulations. Nonetheless, they can be promulgated, and foreign States whose flag vessels do not comply are responsible for “any loss or damage which results to States bordering straits” (Article 42(5)). Strait States also have a duty to “give appropriate publicity to any danger

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21 *Straits Legislative History, supra note 5, at pp. 3, 13.*
of navigation or overflight within or over the strait of which they have knowledge” (Article 44).22

With regard to passage through the territorial sea, the LOS Convention recognizes in Articles 22 and 23 that nuclear cargoes present unusual risks and allows them to be regulated accordingly. Article 23 states that restrictions should be arranged pursuant to “international agreements,” but no such agreements have yet been developed. Several countries (including Malaysia and Saudi Arabia) have concluded, therefore, that they are authorized to regulate such transports directly, until international agreements are completed.23

Straits States have Limited Abilities to Enforce their Regulations

During the final negotiating sessions in 1982, Indonesia, Malaysia and Singapore issued a joint statement that: “States bordering the Straits may take appropriate enforcement measures in accordance with article 233, against vessels violating the laws and regulations referred to in article 42, paragraph 1(a) and (b) causing or threatening major damage to the marine environment of the Straits.”24 This assertion challenged the principle of unimpeded transit passage, but was deemed necessary by the straits States to protect and preserve their marine environment.

Under the language of the LOS Convention, straits States are limited in their abilities to enforce their regulations, because under Articles 38(1), 42(2) and 44 they cannot impede, impair, hinder, deny, or suspend the right of transit passage. But they can, under Article 233, “take appropriate enforcement measures” in the event transiting vessels violate the regulations in a manner “causing or threatening major damage to the marine environment.”

22 This proposal was presented by the United Kingdom, with reference to the Corfu Channel decision, discussed supra text at notes 11–16. Nandan and Anderson, supra note 3, at p. 194.
23 See declarations filed by Saudi Arabia and Malaysia, Convention Overview, supra note 20.
24 Straits Legislative History, supra note 5, at p. 144; see also Malaysia’s declaration issued 14 October 1996 in Convention Overview, supra note 20, where Malaysia refers to the statement made on 28 April 1982 regarding Article 233.
Environment of the straits.

Enforcement actions under Article 233 are limited to "exceptional" cases, but the Malacca Straits States have interpreted Article 233 to allow them to take appropriate enforcement measures against ships passing through the Straits that fail to meet the 3.5 metre under-keel clearance requirement which they have established. Oman issued a statement when it signed the Convention in 1983 that it understood "that the application of the provisions of the Articles 19, 25, 34, 38 and 45 of the Convention does not preclude a coastal State from taking such appropriate measures as are necessary to protect its interests of peace and security." Professor Tullio Scovazzi of the University of Milan has suggested that the term "appropriate enforcement measures" should be interpreted "as allowing bordering States to forbid the passage of such ships." He has criticized the immunity given to warships as a "questionable exception to the principle that, in the field of protection of the environment, prevention is preferable to compensation." Satya Nandan, one of the major architects of the LOS Convention and now the Secretary-General of the International Seabed Authority, has said that, except in an Article 233 major damage situation, "the only means of enforcing international standards or laws and regulations against passing ships is through the flag State unless the ship voluntarily enters the


26 Nandan and Anderson, supra note 3, at p. 192.


28 Convention Overview, supra note 20.


30 Ibid.
port of the strait State.” The opposition in 1992 of Malaysia, Singapore and Indonesia to the proposed passage of the Japanese plutonium ship through the Malacca Straits presents an example where the straits States opposed passage because of the threat of major damage to the marine environment of the straits.

Is the Regime of Transit Passage through International Straits Now Binding Customary International Law?

The United States has not yet ratified the Law of the Sea Convention, but has argued vigorously that the regime of transit passage through international straits is now part of binding customary international law. On 17 August 1987, the United States said:

“The United States particularly rejects the assertions that the right of transit through straits used for international navigation, as articulated in the LOS Convention, are contractual rights and not codification of existing customs or established usage. The regimes of transit passage, as reflected in the Convention, are clearly based on customary practice of long standing and reflects the balance of rights and interests among all States, regardless of whether they have signed or ratified the Convention.”

Other countries have, however, viewed transit passage as emanating directly from the LOS Convention and thus not invocable by countries that are not contracting parties. Some commentators have suggested that the transit passage regime in the LOS Convention may not yet have been confirmed as customary international law because of “the attitude taken

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31 Nandan, supra note 9, at p. 7.
34 The Turkish scholar Nihan Ünlü lists the countries that “consider the regime of transit passage as an exclusive part of the UNCLOS” as Chile, Denmark, Egypt, Greece, Iran, Indonesia, Italy, Japan, South Korea, Malaysia, the Netherlands, Oman, and Spain. Ibid., p. 75.
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by a significant number of States which appear reluctant, either explicitly or implicitly, to accept the transit passage regime as a whole or some of its implications. Some Greek scholars have argued, for instance, that Turkey would not be entitled to invoke the right of transit passage through the Aegean Sea (if Greece were to claim 12 nautical mile territorial seas around its Aegean islands) because Turkey is not a contracting party to the LOS Convention.

Professor Scovazzi has explained that the Convention does not adequately protect the “vital concern” of States bordering straits regarding the protection of their marine environment. In particular, the Convention provides only limited authority to the bordering States to enforce their environmental regulations. It does not create an adequate liability regime, nor does it require the prior notification of transit of ultrahazardous cargoes that would allow coastal States to protect their coastal populations and resources. These inadequacies have led a number of straits-bordering States to promulgate regulations that appear to go beyond what is permitted by the Convention. Professor Scovazzi concludes that “[i]t is therefore possible to argue that the LOS Convention transit passage regime is still far from fully corresponding to present customary international law.”

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57 Scovazzi, supra note 35, at pp. 174–175.

58 Ibid., pp. 175–177.

59 Ibid., pp. 177–187, providing examples from the Malacca Strait, the Canadian Arctic Straits, the Russian Arctic Straits, and the Turkish Straits.

60 Scovazzi, supra note 29, at p. 344. See also, Hamzah bin Ahmad, “Global Funding for Navigational Safety and Environmental Protection,” in Straits of Malacca, supra
Security Concerns

Article 39(1)(b) requires vessels and planes that are exercising their right of transit passage to “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.” Warships can, however, according to Professor Bernard Oxman, travel through straits in “squadron formation,” and they may “communicate by radio, use radar or sonar, and, where circumstances permit, travel in defensive formation and use defensive maneuvers.”

Professor Oxman, of the University of Miami, who was a member of the U.S. delegation to the Law of the Sea negotiations, has also contended that the launching and recovery of aircraft from an aircraft carrier is a permitted activity during transit passage, so long as it does not constitute a threat or use of force against a straits State.

If a vessel does engage in an activity other than those permitted under the transit passage regime, Article 38(3) states that it remains subject to the “other applicable principles” of the Convention. But it is unclear exactly what actions the coastal State can take in the light of such a threat. What should happen if an airplane that is purporting to exercise transit passage over a strait strays over land and then drops anti-government leaflets to the residents below? Professor Oxman has acknowledged that straits States can take action under Article 233 against nongovernmental ships “causing or threatening major damage to the marine environment of the straits,” but he contends that no action can be taken against military ships or planes no matter how nefarious their behaviour might be. Nandan has commented that the only appropriate action is to require the ship or plane to continue expeditiously through the strait.

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note 1, at pp. 125, 131, “the concept of transit passage is relatively new and cannot be said to have acquired the status of customary international law.”


42 Ibid., p. 22.

43 Ibid., p. 27.
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It is implicit, therefore, that any activity threatening a coastal State would bring the ship or aircraft under the general regime of innocent passage and enable that State to require the vessel to leave the area expeditiously (art. 30), presumably in the direction it was travelling, since transit passage cannot be suspended for any reason (art. 44) – including threats to security.44

The recent security concerns of countries adjacent to the Malacca Straits and those using the Straits have been focused on piracy and terrorist bombings. In early July 2006, for instance, pirates boarded and robbed two ships in the Malacca Strait chartered by the United Nations carrying construction materials for tsunami-torn Aceh and attempted to board a Japanese cargo ship that was able to defend itself with floodlights and fire hoses.45 The major military powers and main users of the Straits have frequently expressed an interest in helping to patrol the Straits, but Malaysia and Indonesia have strenuously resisted this idea, saying that the only assistance they would be willing to accept would be information, intelligence, and technical equipment. Singapore and Indonesia have established a joint radar surveillance system in the Singapore Strait, called Project Supric, to allow their navies to observe activities in the Strait.46 These countries want to undertake the active security operations themselves. Activities such as providing armed escorting vessels to commercial vessels are expensive, however, and the question inevitably arises as to whether it would be lawful to introduce a compensation scheme so that the users of the straits would pay for the necessary security measures. As the materials below explain, payments for passage through straits have been utilized historically, in the Baltic Straits in particular47 and also in the Malacca Straits when they were under Portuguese control,48 payments are now required for certain services related to passage through the Turkish Straits,49 and payments are always required for passage through canals.50

44 Nandan, supra note 9, at p. 6.
47 See infra text at notes 87–118.
48 See infra text at notes 241–243.
49 See infra text at notes 126-127.
50 See infra text at notes 273–285.
Can Ships be Charged for Passing through Straits?

Article 37(1) of the LOS Convention says that “the right of transit passage . . . shall not be impeded,” but Article 42 allows countries bordering on straits to promulgate a variety of laws regulating passage. Article 43 says that “[u]ser States and States bordering a strait should by agreement cooperate” to establish navigational aids and “for the prevention, reduction and control of pollution from ships.” No such formal agreements have, however, been established yet under Article 43.

Article 26 is entitled “Charges Which May Be Levied Upon Foreign Ships,” and its paragraph 2 indicates that a coastal State can charge ships passing through its territorial sea “for specific services rendered to the ship.” Does this provision apply to a ship in the territorial sea of a country bordering on a strait while the ship is exercising its right to transit passage through the strait? No provision in Part III on “Straits Used for International Navigation” says explicitly that it does not apply and application of Article 26(2) does not directly conflict with the purposes of Part III.

If a ship is passing through a strait narrower than 24 nautical miles wide, it must of necessity be in the territorial sea of one of the strait States, but is a ship in the territorial sea of a strait state as a juridical matter when it is exercising its right of transit passage through the strait? One author has suggested that “[t]he transit passage regime implies, as regards navigation, that the strait is no longer to be considered as part of the territorial sea of a strait State and that coastal State powers in the strait are different from those it can generally exercise in the territorial sea.” 51 The strait States would generally disagree with this characterization and argue that “sovereignty and jurisdiction over the waters, air space, seabed, and subsoil of the straits are still subject to other rules of international law.” 52 Nandan has sided with the straits States on this issue and has said that “[t]here is nothing in the Convention which prohibits charges for similar

52 Ibid., see, e.g., W. Awang bin Wán Yaacob, “Regional Co-Operation and the Straits of Malacca,” in Straits of Malacca, supra note 1, at pp. 15, 21, citing Art. 26(2) of the LOS Convention for the proposition that “[t]herefore international law does indeed provide for riparian states situated along straits to impose charges on foreign ships, but for specific services rendered only.”
services [similar to the “specific services rendered to the ship allowed under Article 26(2)] in straits which are part of the territorial sea.”

The subject of compensation came up during the UNCLOS negotiations, with the strait States arguing in 1971 that they should be compensated for expenditures designed to promote navigational safety and the United States opposing any requirement of compensation. Professor Oxman has contended that the absence of specific language in Part III similar to that of Article 26(2) was not unintentional, that Article 43 was included to address the issue of fees in the context of straits, and hence that straits States cannot charge fees for services absent an Article 43 agreement. Article 43 is cast in “conditional, non-mandatory terms,” according to Nandan and David Anderson, and efforts to make its language obligatory were not accepted by the negotiating conference. As Nandan has explained, the problem of compensating strait States for their services was “addressed in a perfunctory manner in article 43 of the Convention, which exhorts user States to cooperate through agreements to assist strait States, [but] the fact is that apart from the exceptional case of Japan’s cooperation in respect of the Malacca and Singapore Straits, such cooperation has not materialized.”

Nandan has noted that the issue of compensation to strait states “has been festering for some time” and has explained that

Straits States are legitimately concerned with the financial burdens they have to bear for establishing and managing traffic separation schemes, for installing and maintaining navigational aids, and by the pollution they must

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Nandan, supra note 9, at p. 8.

54 Straits Legislative History, supra note 5, at p. 75, draft Art. 11(3). In 1973, Ecuador, Panama and Peru submitted a paper that suggested that strait States should be allowed to establish an “equitable charge” that would be administered by the “international ocean space institutions” to finance dredging, to promote navigational safety, and to compensate strait States for damage caused by passing vessels. Ibid., p. 102, Art. 40(2)–(3).

55 Ibid., p. 85.


57 Nandan and Anderson, supra note 3, at p. 193.

58 Ibid., pp. 193–194, citing Amendment C2/22 offered by Morocco in 1978 which would have substituted “shall” for “should.”

59 Nandan, supra note 9, at pp. 7–8.
endure, without receiving any corresponding benefits, since many ships transit straits en route to ports in other States.\textsuperscript{60} Nandan has noted that this “matter remains unresolved” and that “a meaningful global solution would be difficult to achieve.” He has suggested that the special circumstances of each strait need to be examined separately and that “[a]ccount also has to be taken of the sensitivity of the straits States to any diminution in the exercise of sovereignty over the strait.”\textsuperscript{61}

If Article 26(2) does apply to straits, for what “specific services” could strait States charge? Among those that might fall into the “specific services” category would be pilotage, towing, and escorting services, because they would be applied to specific vessels to ensure the success of their voyages. If a ship requests such services from the coastal State, then the charging of a fee would certainly seem appropriate. But can the strait State require a passing ship to accept such services if it does not want them?

One strait where a compulsory pilotage scheme seems to be emerging is the Torres Strait, between Australia and Papua New Guinea. In May 1996, the IMO approved a reporting regime for the Torres Strait region between Australia and Papua New Guinea and the inner route of Australia’s Great Barrier Reef.\textsuperscript{62} In 2003, Australia and Papua New Guinea jointly applied to have the Torres Strait area declared to be a particularly sensitive sea area (PSSA),\textsuperscript{63} which was subsequently approved. The IMO’s Maritime Safety Committee (MSC) and its Marine Environment Protection Committee (MEPC) have both endorsed Australia’s initiative to extend the mandatory pilotage provisions governing passage through the Great Barrier Reef (which has previously been designated as a PSSA) to the Torres Strait area.\textsuperscript{64} Although the United States has noted that this IMO action is only “recommendatory,”\textsuperscript{65} it will become mandatory, at least under Australian law, when Australia acts to extend its compulsory pilotage programme to the Torres Strait region. If the user States accept the duty to utilize an Australian pilot during passage through the Torres Strait pursuant to the

\textsuperscript{60} Ibid., p. 7.
\textsuperscript{61} Ibid., p. 8.
\textsuperscript{62} IMO Resolution MSC 52(66), 30 May 1996.
\textsuperscript{63} IMO Doc. MEPC 49/8 (submitted by Australia and Papua New Guinea).
\textsuperscript{64} MSC, 79/23.
\textsuperscript{65} MEPC, 49/22.
IMO resolutions, then their agreement would conform to the responsibility under Article 43 to reach agreements for navigational safety and "for the prevention, reduction and control of pollution from ships."

The Malacca Strait might be a logical candidate to be designated by the IMO as a particularly sensitive sea area because of the human and economic dependency on this Strait. Its economic importance as a transport channel is unquestioned, and the closure of the Strait because of an accident or act of terrorism would be disastrous to the region and the world, and would cause severe harm to other economic activities to the region including offshore fishing, tourism, and mangrove harvesting. The vulnerability of the Strait to an accident, act of terrorism, or act of piracy is also clear. If the Strait were to be designated as a PSSA, the countries bordering on the Strait would have strong arguments that they could require escorts and charge users for activities related to patrolling and protecting the Strait. Under Article 211(6)(a), they could petition the IMO to approve "laws and regulations for the prevention, reduction and control of pollution from vessels."

In September 1997, the United Kingdom submitted an information paper to the Legal Committee of the IMO entitled "Developing Principles for Charging Users the Cost of Maritime Infrastructure," which suggested that the Organization should develop a set of fair and equitable principles governing the charges that strait States could levy on users for navigational aids and other services to passing vessels. The paper argued that such aids were important to the shipping industry and that it was unfair to impose the expenses solely on the coastal States. The paper suggested that charges should be exacted on a nondiscriminatory basis and that they "would be linked to the recovery of costs, including capital investment and improvements, but there would be no element of profit since that

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67 See Nandan, supra note 9, at p. 8.
68 A distinguished Malaysian author has asserted this equitable perspective in stronger terms, noting that "maritime nations are concerned about collisions, pollution liability, higher navigational safety standards, low-level threats to navigation, such as piracy and thefts" and they "have demanded that navigational aids, charts and other services be secured for them to ensure the continued freedom of navigation," but "they are not prepared to contribute to the cost of providing all these public good in the straits. They insist on a free ride." Hamzah bin Ahmad, supra note 40, at pp. 132–133.
would amount to tax on traffic.” The IMO Legal Committee did not act on the proposal because of the complexity of the legal issues. One further reason why this problem is so vexing is that the issue cannot be left just for straits States and flag States to resolve, for many flag States, as it is well known, are mere flags of convenience with little or no capacity to assist. The term ‘user States’ in art. 43 must therefore include States other than flag States, whose nationals benefit from safe passage.

The category of “user States” must therefore also include “exporting states, receiving States, and States of ship-owners, insurers of ships and cargoes and major oil corporations whose global trade is facilitated.”

The Messina Exception – Article 38(1)

Which straits are subject to the regime of transit passage through international straits? Article 38(1) says that the right of transit passage does not apply “if the strait is formed by an island of a State bordering the strait and its mainland” and “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.” This provision is generally referred to as the Messina Clause “because it emerged from proposals put forward by Italy with implicit reference to the strait which separates the island of Sicily from the mainland.” But to what other straits does it apply? Two examples mentioned frequently are the Pemba and Zanzibar Channels separating the mainland of Tan-

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69 Nandan, supra note 9, at p. 8.
70 Ibid.
71 Ibid., pp. 8–9. Professor Oxman agrees that the term “user state” includes “those whose trade is carried through the straits” and includes both the purchasers and sellers of the goods. Oxman, “Observations on Article 43,” supra note 25.
72 Scovazzi, supra note 29, at p. 338. Professor Scovazzi has said that Article 38(1) will apply to the Strait of Messina “should it be demonstrated that there exists seaward of Sicily a route of similar convenience with respect to navigational and hydrographical characteristics.” Ibid., p. 350. The United States appears to have accepted that the “regime of non-suspendable innocent passage” applies to the Strait of Messina. Ibid., p. 351 (quoting from U.S. Dept. of State, Limits in the Seas, No. 112, p. 68).
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Zanzania from the offshore islands of Pemba and Zanzibar. Many relatively unimportant passageways, such as the waters between Cape Cod and the islands of Nantucket and Martha’s Vineyard on the East Coast of the United States, certainly also qualify. Professor Alexander has used the Messina Strait as providing a yardstick for when an alternative route is of “similar convenience” and has explained that a ship going from Marseilles to Trieste would have to travel 60 miles longer, requiring an additional five extra hours of steaming time, by going around Sicily rather than through the Strait of Messina. Using this guideline, he listed 22 straits that fit the Article 38(1) exception, six of which are in Canada, and three of which are in Japan. The Corfu Channel would not appear to qualify because “part of the strait lies between Corfu and Albania.”

The People’s Republic of China has taken the position that the Qiongzhou Strait between Leizhou Peninsula and Hainan Island is an Article 38(1) strait, and China’s straight baselines claim in its 1958 territorial sea declaration classified the waters in this strait as internal waters. The Qiongzhou Strait is about 50 miles long, ranges from 9.8 to 19 miles wide, and is an important shipping route connecting the South China Sea to the Gulf of Tonkin. In 1964, China issued regulations excluding foreign warships and regulating the passage of foreign commercial vessels in this waterway.

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73 Nandan and Anderson, supra note 3, at p. 181; Alexander, supra note 10, at p. 207, Table 14-E.
74 Alexander, supra note 10, at p. 157.
75 Ibid., p. 159. When Germany acceded to the LOS Convention on 14 October 1994, it included in its declaration a statement that “Article 38 limits the right of transit passage only in cases where a route of similar convenience exists in respect of navigational and hydrographical characteristics, which include the economic aspect of shipping.” Convention Overview, supra note 20.
76 Alexander, supra note 10, at pp. 206–207, Table 14-E.
77 Ibid. See also, Scovazzi, supra note 29, at p. 353, agreeing that the transit passage regime applies in the Corfu Channel. But see Nandan, supra note 9, at p. 5, listing “the Corfu Channel and the Pemba Strait” as examples of straits that are exempt from the transit passage regime under Article 38(1).
78 H. Kim, “Legal Status of the Cheju Strait,” in Istanbul Straits Symposium, supra note 1, at pp. 31, 33.
79 Ibid.
80 Ibid. Professor Alexander has accepted China’s claim as legitimate. See his Table 14-E in Alexander, supra note 10, at p. 207.
Some Korean scholars have argued that the Cheju Strait – which separates the Korean mainland from Cheju Island to the south – is an Article 38(1) strait, but Japan argues that the route around Cheju Island is not “of similar convenience” and thus challenges this claim. One Korean commentator, Hyun-Soo Kim, has observed that Cheju is “inseparable” from the Korean mainland, that reducing traffic “is essential not only for conserving living resources and ensuring the fishermen’s livelihood, but also to protect the security of Korea,” and that “Cheju Strait has not been used ordinarily for international navigation.” He explained that going around Cheju Island would add only 30–35 nautical miles to any voyage and that the route south of the island “is a safe navigational route… well-marked by lighthouses and other navigational aids.” Kim concluded:

When vessels have a choice in navigational routes where there exists a route of similar convenience, it is hoped that the special interest of a coastal State should be given a little more weight over the interests of maritime states. Accordingly, it can be easily concluded that the Cheju Strait meets the requirements of Article 38(1).

Kim recognized, however, that if Korea were to declare formally the Cheju Strait to be internal waters, it “would raise considerable legal conflicts with the maritime states.” Thus, he has suggested establishing a traffic separation scheme as an alternative way of protecting the fragile environmental resources of this region.

Straits “Regulated in Whole or in Part by Long-standing International Conventions”

Article 35(c) of the LOS Convention says that the regime of transit passage through international straits does not apply to “straits in which passage is regulated in whole or in part by long-standing international conventions in force specifically relating to such straits.” A definitive list of such straits does not exist, but most commentators agree that the Baltic or Danish

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81 H. Kim, supra note 78, at p. 33.
82 Ibid.
83 Ibid., p. 38.
84 Ibid., pp. 37–38.
85 Ibid., p. 40.
Transit Passage Through International Straits

Straits, the Turkish Straits, and the Strait of Magellan are included in this category, and some add the Aaland Strait to this list. These straits are governed by their applicable treaties, some of which are quite venerable, and thus have their own unique regimes that govern passage. The materials that follow discuss these straits in detail, and others that are governed by the transit passage regime, and then compares straits and canals.

The Baltic/Danish Straits

The right of passage through straits has had a tumultuous and contentious history, and unique legal regimes have developed for the many important straits that exist around the globe. Maritime States have always insisted on free passage for all ships, but countries fronting onto straits have likewise always tried to regulate such passage, and have frequently distinguished among types of ships and made distinctions between times of war and times of peace. The Baltic or Danish Straits provide an intriguing case study to illustrate the historical tensions regarding passage rights through

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86 W. L. Schachte, Jr. and J. P. A. Bernhardt, “International Straits and Navigational Freedoms,” Virginia Journal of International Law 33 (1993): 527, 546, reporting that the straits negotiating group at the Law of the Sea negotiations submitted that the Danish Straits, the Aaland Strait, the Turkish Straits (Bosphorus and Dardanelles), and the Strait of Magellan were the straits covered by Article 35(c). See also, R. Lagoni, “Straits Used for International Navigation: Environmental Protection and Maritime Safety in the Danish Straits,” in Istanbul Straits Symposium, supra note 1, at pp. 159, 170, agreeing that these four straits are the Article 35(c) straits. Professor Alexander listed only the Turkish, Danish, and Magellan Straits as covered by Article 35(c). Alexander, supra note 10, at p. 205, Table 14-B. When Finland signed and ratified the LOS Convention on 10 December 1982 and 21 June 1996, it issued a declaration saying: that the exception from the transit passage regime in straits provided for in article 35(c) of the Convention is applicable to the strait between Finland (the Aaland Islands) and Sweden. Since in that strait the passage is regulated in part by a long-standing international convention in force, the present legal regime in that strait will remain unchanged after the entry into force of the Convention. Convention Overview, supra note 20.

87 See, e.g., E. Bruel, International Straits (two volumes) (Copenhagen: Nyt Nordisk Forlag, 1947).

88 Sometimes the term “Baltic Straits” is used to refer to all the straits in the Baltic, including the Aaland Strait, with the term “Danish Straits” being used for the straits through and around the Danish peninsula; sometimes these straits through and adjacent to Denmark are called the “Baltic Straits.” In this essay, the term “Baltic Straits” refers to the straits leading into the Baltic through and around Denmark.
straits. These Straits link the Baltic Sea to the Kattegat, which in turn leads into the Skagerrak and out to the North Atlantic Ocean. They lie predominantly within Danish and Swedish territory, and include the Little Belt, the Great Belt, and the Sound. Some 150 ships pass through these Straits each day.89

The Little Belt, between Denmark’s Jutland-Als and Fyn-Aero, is divided by islands into channels. The channels most used for navigation are Aaro Sund and Baago Sund. Because of the Little Belt Bridge, passage through the strait is limited to ships with a mast height of no more than 33 metres. The current in the Little Belt is strong and unpredictable. At least one author has characterized the waters in the Little Belt as “internal waters.”90

The Great Belt lies between Fyn-Langeland and Sjaelland-Lolland. This passageway, along with the Samso Belt, the Fehmarn Belt, and the Kadet Channel, form one seaway for large vessels entering or leaving the Baltic. The Great Belt varies in width from 18.5 to 28.2 kilometres. Depths vary from 20 to 25 metres in the northern part of the Belt to 66 metres in the southern area, allowing the largest vessels to pass through.

The Sound is located between Sjaelland and Skåne in Sweden. It is divided into an eastern and western channel by the island of Ven. Traditionally, the Sound was the shortest and busiest route between the Baltic Sea and the Kattegat, but the Great Belt has replaced it as the route most often used by larger vessels because of the Sound’s insufficient depth south of Copenhagen and Malmø – it is only 26 feet deep in its southern sector. The maritime boundary between Sweden and Denmark was delimited in 1932.91

For more than four centuries (1429–1857), Denmark collected a transit duty on ships passing through these straits. At their peak, these fees contributed about two-thirds of Denmark’s budget.92 Foreign governments and merchants protested these fees over the years, and the British challenged them directly in the first half of the nineteenth century, shelling Copen-

hagen in 1801 and capturing the Danish fleet in 1807. The Copenhagen merchants also saw these dues as limiting trade into and out of their markets, and a canal was built across southern Sweden to circumvent the Danish fees. Although the United States agreed to pay the traditional dues in a treaty with Denmark in 1826,93 the United States announced in 1845 that it would not pay these fees as a matter of principle, citing the “public law of nations,”94 and denounced the 1826 Treaty in 1856. These dues were discontinued in 1857 with the signing of the Copenhagen Convention on the Sound and the Belts by the European shipping nations.95 Article I of the 1857 Convention contains the key language that: “No vessels shall henceforth, under any pretext, be subject, in its passage of the Sound or Belts to any detention or hindrance.” That same year, a special strait convention between the United States and Denmark was also signed in Washington, D.C. In exchange for $393 million, Denmark granted U.S. vessels free passage “in perpetuity.”96 Since then, no other multilateral treaties or conventions have dealt with the Baltic Straits except the Treaty of Versailles, which reiterated the right of “free passage into the Baltic to all nations.”97

It can be argued, based on the extraordinarily high sums paid by the United States and other nations for the right of “free passage” through the Danish Straits, that the maritime nations purchased this right in perpetuity with the massive lump sum they paid in 1857 and, therefore, that the right of passage cannot be characterized as “free.” Even today, disputes continue whether warships are entitled to free passage through the Baltic Straits or whether prior notification and authorization can be required. Sweden allows foreign naval ships to pass through the Swedish

93 E. Somers, “The Legal Regime of the Danish Straits,” in Istanbul Straits Symposium, supra note 1, at pp. 12, 16, citing Treaty of 26 April 1826 in Martens, NRG, 1st Series, VI, 919.

94 Alexandersson, supra note 92, at p. 72.

95 Treaty between Great Britain, Austria, Belgium, France, Hanover, Mecklenburg-Schwerin, Oldenburg, the Netherlands, Prussia, Russia, Sweden, and Norway and the Hanse Towns, on the One Part, and Denmark on the Other Part, for the Redemption of the Sound Dues, Copenhagen, 14 March 1857, 116 Consol. T.S. 357. To soften the financial blow to Denmark, the contracting parties paid an indemnity “corresponding to an annual income capitalized to the current value.” Alexandersson, supra note 92, at p. 73.


97 Alexandersson, supra note 92, at p. 73, citing Article 195 of the Treaty of Versailles.
part of the Sound according to the rules of innocent passage – they cannot stop or anchor and submarines must operate on the surface.98 Denmark also allows innocent passage through the Straits as long as the passage avoids claimed internal Danish waters.99 Passage of naval vessels through the Straits is subject to advance notification through diplomatic channels. Denmark requires authorization if more than three naval vessels flying the same flag are passing through the same part of the strait together and requires submarines to pass on the surface.100 According to Alexandersson, “the Swedish and Danish regulations on the use of the Baltic Straits are in agreement with international law, the Geneva Convention of 1958 on the Territorial Sea and the Contiguous Zone as well as customary law on the use of foreign territorial waters by navy ships.”101

The two 1857 treaties were written with only surface navigation in mind, but U.S. commentators have argued that they should now be viewed as authorizing free transit by submerged vessels and airplanes because the regime established in 1857 “was ostensibly the broadest regime possible to grant” and should be interpreted now in light of “subsequent developments of customary international law.”102 In the U.S. view, the regime governing these straits “would preclude the Danes from applying their domestic laws to foreign flags transiting the straits, except as recognized under the LOS Convention, and from applying their internal 1976 Ordinance to foreign warships.”103

This view is probably not widely shared by commentators in the Baltic region. Writing two decades ago, the German Professor Wolfgang Graf Vitzthum reported that the Danish and Soviet governments maintained that only merchant vessels were covered by the 1857 Conventions and that the Danes viewed their restrictions on the passage of warships described above as consistent with the 1857 Conventions and with the LOS Convention because these straits are exempt from the transit pas-

98 Ibid., p. 82, citing a Swedish law of 3 June 1966.
99 Ibid., citing a Danish law of 27 February 1976.
100 Ibid.
101 Ibid., p. 83.
102 Schachte and Bernhardt, supra note 86, at p. 546.
103 Ibid., pp. 546–547. See also, J. N. Moore, “The Regime of Straits and the Third United Nations Conference on the Law of the Sea,” American Journal of International Law 74 (1980): 77, 111, concluding that the Baltic Straits are covered by Article 35(c), but also that the 1857 Treaties “provide for freedom of navigation.”
The Danish diplomat, responding to Professor Vitzthum's presentation, said that the Baltic Straits are covered by Article 35(c)105 and that it is clear from the preamble and the whole purpose of the Convention that it does not cover warships. The passage of warships is regulated by the general international rule of innocent passage through international straits.106

Professor Rainer Lagoni has said that Denmark believes a regime of nonsuspendable innocent passage exists through the Danish Straits.107 In 1996, the IMO approved a mandatory ship reporting system in Denmark’s Great Belt Traffic Area.108

Although some scholars have expressed uncertainty whether a special regime established by “long-standing international conventions” and recognized under Article 35(c) of the LOS Convention exists for the Baltic straits,109 the Finnish, Swedish, and Danish delegates stated explicitly during the final 1981 session of the UNCLOS negotiations that the Baltic Straits were covered by Article 35(c) and that their legal status should remain unchanged.110 This understanding that the Baltic Straits are an Article 35(c) strait appears now to be generally accepted,111 although U.S. commentators have contended that “it is somewhat academic whether

104 Vitzthum, supra note 90, at p. 552. He cited the Danish expert Erik Bruel as having taken the position that “warships fall outside the scope of [the 1857 Treaties'] provisions,” ibid., citing Bruel, supra note 87, at pp. 41, 45. Vitzthum’s own analysis of the text and context of the 1857 treaties led him to conclude that the treaties “do not pertain to the rights of passage of warships,” ibid., p. 555. But he also concluded that the 1857 Treaties should be considered as dealing with commercial, fiscal and customs matters, ibid., p. 575, rather than as establishing a special straits regime for the Baltic Straits, and therefore that these straits should not be considered Article 35(c) straits, ibid., pp. 555–558, and that (at least as of the time he was writing (in 1980)) the regime of nonsuspendable innocent passage should apply in the Baltic Straits. Ibid., p. 565.


106 Ibid., p. 600.

107 Lagoni, supra note 86, at pp. 161–164.

108 IMO Resolution MSC.63(67), 3 December 1996.

109 Alexandersson, supra note 92, at p. 73, citing the dispute between Erik Bruel, Wolfgang Graf Vitzthum, and Ib R. Andreasen discussed supra in the text and notes.

110 Straits Legislative History, supra note 5, at pp. 132, 149, 154, 156.

111 See supra note 86.
or not the Belts are considered 35(c) straits” because the 1857 treaties “ensure free navigation.”112 Sweden and Finland ratified the LOS Convention in 1996, Germany ratified it in 1994, and Denmark ratified in 2004.113 Upon its ratification, Denmark issued a declaration stating that the Danish Straits are an Article 35(c) strait, governed by the Copenhagen Treaty of 1857.114

In 1991, Finland asked the International Court of Justice to resolve a problem raised by a Danish proposal to build a bridge across the East Channel, which would have blocked ships and oil rigs requiring a clearance greater than 65 metres.115 The issue was resolved by negotiations before the Court had time to rule. Denmam agreed to pay Finland $16 million and the two countries agreed to explore ways to use an alternative, but shallower, strait through the Sound.116

Environmental issues now loom large in the Baltic Straits region. The IMO has approved a traffic separation scheme and has recommended the use of a pilot when traversing the Sound and Great Belt.117 In 1991, a mandatory vessel traffic system (VTS) was established for the Great Belt, and in 1996 a mandatory ship reporting system was developed for this passage. In 2004, the IMO approved the designation of the Baltic Sea as a particularly sensitive sea area.118

112 Schachte and Bernhardt, supra note 86, at p. 544.
113 Convention Overview, supra note 20.
114 Ibid. The Danish declaration, issued 16 November 2004 stated that “the exception from the transit passage regime provided for in article 35(c) of the Convention applies to the specific regime in the Danish straits (the Great Belt, the Little Belt and the Danish part of the Sound), which has developed on the basis of the Copenhagen Treaty of 1857. The present legal regime of the Danish straits will therefore remain unchanged.”
115 Passage Through the Great Belt (Finland v. Denmark), [1991] I.C.J. Reports 12 (Provisional Measures, Order of July 29). Some drilling rigs require almost 100 metres of clearance. U.S. aircraft carriers require a clearance of only 41 metres, and could have passed under the proposed bridge. Schachte and Bernhardt, supra note 86, at p. 528 n. 3.
118 See IMO Doc. MEPC 51/8/1.
The Turkish Straits\textsuperscript{119}

The Turkish Straits consist of the Dardanelles, which connect the Aegean Sea to the Sea of Marmara, and the Bosphorus, which connects the Sea of Marmara to the Black Sea. The total navigable length of the Straits from the entrance to the Dardanelles from the Aegean Sea to the exit of the Bosphorus to the Black Sea is about 160 miles (257 km).

The Dardanelles are about 38 miles (61 km) long with a width ranging from a minimum of 3/4 mile (1.2 km) to a maximum of 4 miles (6.4 km). The Dardanelles are deep, averaging 55 metres and dropping to 91 metres at their deepest point. Despite two major currents, a surface current and a more saline undercurrent flowing in the opposite direction, the Dardanelles are not difficult to navigate because vessels can avoid the currents by staying in the middle. Numerous lights have been added to aid night navigation.

The Bosphorus is narrow with abrupt and angular turns, winding generally in a northeasterly direction from the Sea of Marmara to the Black Sea. It is about 19 miles (31 km) long, and its width fluctuates from 750 metres to 2.25 miles (3.6 km) at its southern entrance. The depths in the main channel run from 36 to 124 metres. Unlike the Dardanelles, its strong currents can make navigation difficult and sometimes dangerous.

In 2000, between 100 and 150 ships passed through the Turkish Straits each day, including 10–15 oil tankers.\textsuperscript{120} In the 1980s and early 1990s, some 10–30 collisions occurred annually, but this number was reduced to 2–4 annually after a traffic separation scheme was established for the Straits.\textsuperscript{121} The pressure on these Straits will continue to increase with movement of hydrocarbons from the Caspian Sea.\textsuperscript{122}

The Turkish Straits are one of the straits referred to in Article 35(c) of the LOS Convention as being governed by "long-standing international conventions" that are unaffected by the Convention's new rules. Transit through the Turkish Straits is currently controlled by Turkey, which exercises sovereign power in the Straits, but is governed by the provisions of

\textsuperscript{119} See generally, C. L. Rozakis and P. N. Stagos, \textit{The Turkish Straits} (Dordrecht: Martinus Nijhoff, 1987); Ünlü, \textit{supra} note 33.

\textsuperscript{120} Ünlü, \textit{supra} note 33, at p. 58.

\textsuperscript{121} \textit{Ibid.}, p. 60.

\textsuperscript{122} M. Hakkı Casin, "The Security and Legal Aspects of Turkish Straits," in \textit{Istanbul Straits Symposium, supra} note 1, at p. 86.
the Montreux Convention of 1936.\textsuperscript{123} This Convention recognized and affirmed in Article 1 the principle of freedom of transit and navigation by sea in the Straits as a principle of international law. Despite this commitment and a provision in Article 28 that it “shall…continue without limit of time,” the articles of the Convention place significant limitations on free passage. The Convention created different regimes for merchant vessels and warships. It further regulated transit based on when passage occurred – during time of war or time of peace. Finally, “time of war” was distinguished based on the belligerent or nonbelligerent status of Turkey.

Under the Montreux Convention, during times of peace both merchant vessels and warships enjoy freedom of transit and navigation in the Straits. Warships, however, must provide notice of their proposed transit at least eight days in advance of the trip and must communicate to a Turkish signal station when the journey begins (Article 13). Even in peacetime, vessels of war must begin passage only during daylight (Article 10) and must refrain from launching any aircraft they may be carrying (Article 15). Furthermore, the Convention limits the number of foreign naval vessels that can pass through the Straits at any one time to nine, weighing no more than 15,000 tons (Article 14), although the Black Sea nations may exceed this limit if their vessels pass through the Straits “singly, escorted by not more than two destroyers” (Article 11). Submarines can pass (but only on the surface) through the Straits to rejoin their base in the Black Sea, if they were constructed outside the Sea, and can transit outside for repair, if proper advance notification is given to the Turkish government. It has been asserted that the Montreux Convention as a practical matter prohibits aircraft carriers from transiting the Straits.\textsuperscript{124} The aggregate


tonnage of non-Black Sea powers cannot exceed 45,000 tons at any one time and the vessels of such powers cannot remain in the Black Sea more than 21 days (Article 18).

The Montreux Convention thus gives Black Sea States particular rights not given to others and it is unique in giving Turkey the paramount role in enforcing the Treaty. Not only does Turkey supervise the passage of vessels of war through the Straits, but it is also charged under Article 18 with monitoring the total number of warships in the Black Sea and determining when the Sea is “filled.”

In times of war, under Article 4, if Turkey is a nonbelligerent, merchant vessels can continue to enjoy freedom of transit and navigation in the straits. If Turkey is a belligerent, under Article 5, merchant ships not belonging to a country at war with Turkey also enjoy freedom of transit and navigation, provided that they enter the Straits only during the daytime and do not assist the enemy in any way. Under this provision, Turkey has an implied right to stop and search passing merchant vessels to assure that the vessels are not assisting the enemy.125 Finally, Article 6 of the Convention allows Turkey to regulate merchant vessel passage if Turkey determines that it is “threatened with imminent danger of war.”

If Turkey is a nonbelligerent, vessels of war of nonbelligerents continue to enjoy complete freedom of transit through the Straits, subject to the same conditions for passage during peacetime (Article 19). When Turkey is a belligerent, however, passage of all warships through the Straits is “left entirely to the discretion of the Turkish government” (Article 20).

Article 2 and Annex I of the Montreux Convention allow Turkey to levy some charges for general services on ships passing through the Strait, although Turkey has viewed the amount it can charge as inadequate to cover its actual expenses.126 Turkey is allowed to levy charges on the tonnage of passing vessels for sanitary control services, lighthouses, light and channel buoys, fog sirens, and direction-finding stations. In 1994, with IMO approval, Turkey established a traffic separation scheme.127 Turkey also promulgated that year, without complete IMO endorsement, the Turkish Straits Maritime Regulations, which established rules on ship

125 Rozakis and Stagos, supra note 119, at p. 107.
126 See generally, Ünlü, supra note 33.
127 IMO Resolution A.19/827 (Nov. 24, 1994); Ünlü, supra note 33, at p. 64.
reporting and the use of pilots and tugs.\textsuperscript{128} These rules were denounced by the Russian Federation as being contrary to “universally recognised provisions of the Law of the Sea by which no regulations issued by a coastal State may deny, hamper or impair the rights of freedom of passage through international straits” and also as being contrary to “the terms of the Montreux Convention, 1936.”\textsuperscript{129} The Legal Committee of the IMO noted that “a substantial number of States considered the Turkish regulations to be inconsistent with the Montreux Convention and the IMO rules and regulations” and decided that the IMO should look into this matter further.\textsuperscript{130} Turkey refrained from applying some of the regulations during this period of review, but reissued the regulations in 1998 affirming most of the requirements.\textsuperscript{131} In 2003, Turkey established a radar-based vessel control system at an initial cost of US$20 million.\textsuperscript{132}

The Strait of Magellan

Since the conclusion of a boundary treaty in 1881 between Chile and Argentina, it has been established that Chile has sovereignty over the Strait of Magellan, which intersects the southern tip of South America.\textsuperscript{133} The Strait spans 240 miles (386 km), measured by a straight east to west line. The total length of the Strait itself totals 311 miles, due to a bend around Brunswick peninsula, which accounts for its V-shape. The width of the

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\textsuperscript{129} Scovazzi, supra note 29, at p. 347 (citing IMO Doc. MSC/63/7/15 of 24 January 1994).

\textsuperscript{130} Ünlü, supra note 33, at p. 65.

\textsuperscript{131} Ibid., pp. 65–66.

\textsuperscript{132} See website of Turkish Ministry of Transport, General Directorate of Coastal Safety and Salvage Administration, <www.coastsafety.gov.tr>, 23 July 2006.

\textsuperscript{133} Michael A. Morris, The Strait of Magellan (Dordrecht: Martinus Nijhoff, 1989), p. 76, referring to the 1881 boundary treaty between Chile and Argentina, which is reprinted in the Morris volume at pp. 205–207. A 1977 arbitration decision by a panel of the International Court of Justice concerning a dispute over the Beagle Channel held that “the 1881 treaty had given Chile exclusive control over the strait…. [and] that the waters of the strait were likewise Chilean since Chile controls both shores.” Ibid., p. 79.
Strait averages just over four miles (6.4 km), although the range varies from 22 miles (35 km) to about 1½ miles (2.4 km). Westerly winds are prevalent throughout the year and tidal currents tend to be strong and unpredictable.

Article V of the 1881 Treaty states that “[t]he Straits of Magellan shall be neutralized for ever, and free navigation assured to the flags of all nations.” Because of this Treaty, the Strait of Magellan qualifies as one of the straits exempt from the rules promulgated in the LOS Convention because of Article 35(c). One commentator has interpreted the 1881 Boundary Treaty to say that “[t]here would seem to be no basic difference between the regime of transit as it exists now, based on the 1881 treaty, and that guaranteed in the 1982 Convention.” 134 Another author, however, has stated that the appropriate regime governing this Strait “would appear to be innocent passage rather than transit passage,” and that “Chilean authors have explicitly rejected the application of the transit passage regime to the Strait of Magellan.” 135 The significance of this distinction would be that, under an innocent passage regime, Chile could require submarines to travel on the surface of the Strait, prohibit overflight, and prohibit noninnocent passage, including transport of, say, ultrahazardous substances. 136

When Argentina ratified the LOS Convention on 1 December 1995, it submitted a declaration stating that the 1984 Peace and Friendship Treaty between Chile and Argentina “reaffirmed the validity of Article V of the Boundary Treaty of 1881 whereby the Strait of Magellan (Estrecho de Magallanes) is neutralized forever with free navigation assured for the flags of all nations.” 137 Chile’s declaration of 25 August 1997 contained

134 Alexander, supra note 10, at p. 143.
135 Morris, supra note 133, at p. 10. Morris gives two reasons to support the “innocent-passage” regime status in the Strait of Magellan. First, Article 38(1) of the LOS Convention exempts from transit passage straits formed by islands of a state and its mainland, and the configuration of the Strait of Magellan contains such geography. Second, “[b]ecause of the 1984 closing line drawn across the eastern mouth of the Strait of Magellan, the Atlantic side of the strait is fronted by an Argentine territorial sea and EEZ.” Ibid., p. 103.
136 Another author agreeing that planes have no right of overflight over the Strait of Magellan and that submarines cannot navigate submerged is M. T. Infante, “Straits in Latin America: The Case of the Strait of Magellan,” Ocean Development and International Law 26 (1995): 175, 183.
137 Convention Overview, supra note 20.
similar language, explaining that both the 1881 Boundary Treaty and an 1873 unilateral Chilean declaration state that:

the Strait of Magellan is neutralized forever with free navigation assured for the flags of all nations. . . . For its part the Argentine Republic undertook to maintain, at any time and in whatever circumstances, the right of ships of all flags to navigate expeditiously and without obstacles through its jurisdictional waters to and from the Strait of Magellan. 138

The question of suspension of passage under the 1881 Treaty is unclear because the Treaty is vague, but some Chilean legal authorities have said that noninnocent passage may be suspended. 139 Even though Chile has never suspended passage in modern times, 140 if it sought to challenge a vessel transporting plutonium as noninnocent, for instance, it might have grounds to suspend passage or impose conditions.

The Strait of Gibraltar

Bound on the north by Spain and on the south by Morocco, the Strait of Gibraltar connects the Atlantic Ocean to the Mediterranean Sea. Thirty-six miles (58 km) long and eight miles (13 km) wide at its narrowest point, the Strait of Gibraltar is unquestionably one of the most important passages in the world’s oceans, with an average of between 140 141 and 200 142 ships passing through the Strait each day. Many are tankers, which bring more than 200 million tons of oil through the Strait each year. 143 The Strait presents navigational challenges from changing and sometimes strong winds, periods of reduced visibility, and offshore shoals. A collision in 1979, for instance, cost 50 lives and spilled some 95,000 tons of crude oil. 144 In July 2000, two ferryboats collided near the Spanish port of Algeciras, killing five and injuring 17, caused by fog and the heavy summer traffic. 145 The Strait is now also used by Moroccans seeking a better life in Europe who

138 Ibid.
139 Morris, supra note 133, at pp. 103–104.
140 Ibid.
141 Times Atlas of the Oceans, supra note 89, at p. 151.
142 Ibid., p. 157.
143 Ibid.
144 Ibid.
attempt the crossing in small boats, leading frequently to accidents and drownings.\textsuperscript{146} In June 2002, Abu Zubair al-Haili, a Saudi national thought to be one of the top 25 Al Qaeda leaders, was arrested in Morocco and accused of plotting to blow up U.S. and British warships in the Strait of Gibraltar.\textsuperscript{147} The idea of connecting Spain with Morocco through an undersea railway tunnel, or even a bridge, remains under discussion, with various ideas being presented by futuristic thinkers.\textsuperscript{148}

Both sides of the Strait of Gibraltar were controlled by Carthage between 573 B.C.E. and about 190 B.C.E. During this time, Carthage prohibited (by force) non-Carthaginian ships from passing through the Strait.\textsuperscript{149} Again, between 711 A.D., when Muslim armies headed by Musa Ibn Nasayr and Tarik ibn Ziyad landed at Gibraltar Rock, and the early twelfth century, “[t]he Muslims completely controlled traffic in the strait for about 400 years, denying passage to all ships but their own.”\textsuperscript{150} Beginning in the twelfth century, trade increased from Western Europe into the Mediterranean region, and internal divisions among the Moors reduced their ability to limit passage through the Strait.\textsuperscript{151} Ships thus began to pass through the Strait, but were sometimes “subjected to savage attacks by pirates based along the North African shores.”\textsuperscript{152} The town of Gibraltar was captured by a joint British-Dutch invasion in 1704 during the War of Spanish Succession,\textsuperscript{153} and the British took advantage of this strategic location in its subsequent war with France and Spain, as well as during


\textsuperscript{149} Truver, supra note 16, at pp. 160–161.

\textsuperscript{150} Ibid., p. 162.

\textsuperscript{151} Ibid.

\textsuperscript{152} Ibid.

\textsuperscript{153} Ibid., p. 163.
the later Napoleonic Wars and the two World Wars. In 1942, allied control of the Strait permitted the invasion of North Africa.

Spain sought to recapture Gibraltar from Britain on several occasions, including the Great Siege of Gibraltar in 1779–1783, when it imposed a blockade to prevent any supplies going to the British garrison. On 13 March 1780, Spain issued the Ordinance Relating to Neutral Navigation which allowed neutral merchant ships to pass through the Strait if they had their papers and cargoes in good order, kept to prescribed sealanes, and avoided the Gibraltar area. These requirements have been described by one commentator “as completely legal measures under the customary rules of naval war at the time,” and that “[e]ven in the middle of the twentieth century, such action may be required by extreme circumstances and still remain within the bounds of legality.” Because of the continued tension between Britain and Spain, each required the ships of the other nation to show their flag when passing through the Strait until 1864 when Spanish shore batteries sank the British schooner The Mermaid, whose ensign was not clearly visible from shore because of a serious storm and high seas. After the Spanish rejected Britain’s subsequent protests, the dispute was submitted to a mixed claims tribunal, which in 1869 awarded 3,866 pounds to the British owners of the ship. The two countries agreed to drop the requirements that passing ships show their ensigns, but the agreement “made no mention of the customary regime of passage through straits,” and “no special significance can be attributed to the Declaration of 1865 regarding the right of passage through the Strait of Gibraltar.”

Although this issue is not entirely clear, the right of passage through the Strait of Gibraltar was apparently not governed by any special regime established by treaty prior to the 1982 LOS Convention. Some writers

154 Ibid., p. 5.
155 Ibid., p. 6.
156 Ibid., p. 168.
158 Truver, supra note 16, at p. 169.
159 Ibid., p. 170.
160 Ibid., p. 171.
have asserted that the 1904 Declaration between Great Britain and France respecting Egypt and Morocco\(^{161}\) guaranteed freedom of navigation through the Strait, but others have argued that the reference in this document to “free passage” simply protects whatever navigational rights existed through any strait,\(^{162}\) which was the regime of innocent passage of all vessels.\(^{163}\) Alexander has pointed out that the regime of nonsuspendable innocent passage did not emerge until the 1949 *Corfu Channel Case*\(^ {164}\) and that Spain has argued that the 1904 Declaration did not include freedom of overflight.\(^ {165}\) The United States did fly its planes from the United Kingdom over the Strait of Gibraltar in April 1986 when it bombed Libya, claiming the right to do so based on the transit passage regime established in the 1982 LOS Convention.\(^ {166}\)

The division of waters in the Gibraltar Strait is particularly challenging because Spain disputes the legitimacy of the United Kingdom’s 6.5 square kilometres enclave at the Port of Gibraltar, and Morocco likewise disputes the legitimacy of Spain’s enclaves in North Africa along the Moroccan coast. One commentator has explained that this patchwork of disputed land claims on both sides of the Strait has “brought the possibility of delimiting the waters of the Strait to a stalemate.”\(^ {167}\)

In 1760,\(^ {168}\) Spain claimed a six nautical mile territorial sea, which “placed the strait within Spanish territorial jurisdiction between the Spanish mainland and Ceuta [a Spanish enclave in North Africa], [but] Spain apparently never attempted to close the strait to any ship movements,

\(^{161}\) Declaration Between Great Britain and France Respecting Egypt and Morocco, together with the Secret Articles, London, 8 April 1904. The text of Article 7 of this agreement is found in Scovazzi, *supra* note 29, at p. 349, and in Truver, *supra* note 16, at p. 256.


\(^{163}\) Alexander, *supra* note 10, at p. 143.

\(^{164}\) *Corfu Channel Case (United Kingdom v. Albania)*, [1949] I.C.J. Reports 4 (April 9); see *supra* text at notes 11–16.

\(^{165}\) Alexander, *supra* note 10, at p. 144.

\(^{166}\) *Ibid*.


\(^{168}\) Truver, *supra* note 16, at p. 171.
either military or commercial.” With international acceptance of a 12 nautical mile territorial sea in the 1982 LOS Convention, the Strait now falls almost entirely within Spanish and Moroccan territorial waters, except for a disputed portion of the northeastern section of the Strait, which the British claim by virtue of the dependency it has maintained at the port of Gibraltar since 1704. Spain has been trying to negotiate with the British for joint sovereignty over Gibraltar and, in addition, has taken the position that the 1713 cession did not transfer any territorial waters to Britain. Britain currently argues that the “cession of a territory automatically carries the cession of the appurtenant territorial waters,” but in previous generations its officers recognized that the Treaty language was ambiguous and that any claim of offshore waters would be firmly opposed by Spain.

On the southern side of the Strait, Morocco has drawn straight baselines along its coast that may not be justified based on the language of Article 7 of the LOS Convention. The baselines "push[] the [median] line

169 Ibid., p. 169.
170 LOS Convention, supra note 2, at Art. 3.
173 Treaty of Utrecht, supra note 171.
175 Ahnish, supra note 167, at p. 291.
176 Ibid., p. 291.
177 Article 7(1) of the LOS Convention, supra note 2, permits countries to draw straight baselines only if their "coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity." If such lines are drawn, they "must not depart to any appreciable extent from the general direction of the coast." Ibid., Art. 7(3).
[claimed by Morocco] further north than a true median line (measured from the low-water line) to a marked degree, if one takes into account the narrowness of the area involved. More significantly, Morocco’s claimed line ignores the Spanish claimed land territory at the eastern end of the southern side of the Strait – the peninsula of Ceuta and the uninhabited islet Perejil (Parsley), which Spain retained after Morocco became independent in 1956. Ceuta was first occupied by Spain in 1580 and is now occupied by 70,000 Spaniards, many of Moroccan descent. Morocco has long complained that Spain’s retention of this peninsula is a vestige of colonial occupation, arguing that Ceuta is part of Morocco’s “national territory,” and that Spain’s occupation cannot be allowed to continue indefinitely. Spain has recently been obliged to build four metre high steel walls around its Moroccan enclaves to block African refugees seeking entry into Europe.

In the summer of 2002, Moroccan troops landed on the half mile wide Isla Perejil claimed by Spain 200 metres offshore of the southern coast and then withdrew after Spanish troops descended on the rock. Spain claims to have controlled the island since 1668, but has not maintained a permanent presence there for four decades. In recent years it has been inhabited only by goats. After mediation facilitated by the United States, Spain agreed to remove its forces and both sides agreed that the islet would be returned to its previous demilitarized, unoccupied status. One commentator has contended that “[i]t is unreasonable to argue . . . that the rock of Perejil . . . should be entitled to a full belt of territorial sea” because

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178 Ahnish, supra note 167, at p. 295.
180 Truver, supra note 16, at p. 162.
182 Slackman, supra note 179.
“it is a small, uninhabited rock and situated only 200 metres from the
coast of Morocco.”

During the negotiations that produced the 1982 LOS Convention, both
Spain and Morocco argued that the rule of innocent passage should govern
navigation through all straits encompassed by expanded territorial seas.
They argued further that the regime of innocent passage should apply only
to merchant vessels and that warships and submarines should be subject
to regulation by coastal States. Spain had previously taken the view that
the regime of nonsuspendable innocent passage applied in the Strait of
Gibraltar, and it viewed the concept of transit passage that was emerging
during the UNCLOS negotiations as “inherently non-innocent.”

Because of these concerns, Spain introduced amendments in 1978 to
the working draft text of the Convention that, if adopted, would have
provided that aircraft do not have the right of transit passage; would
have said explicitly that ships exercising transit passage could not engage
in acts of propaganda, collect information, or interfere with coastal State
communications; would have increased coastal State enforcement powers;
would have allowed coastal States to regulate navigational aids, cables, and
pipelines; and would have required ships passing through straits to have
adequate insurance to cover any loss or damage they might cause and
have required flag States to ensure prompt and adequate compensation for
such losses. At this same 1978 session, Morocco submitted “informal
suggestions” that would have prohibited ships and aircraft from any use
of weapons, the taking off or landing of aircraft from ships, hydrographic
surveys or other research activities, deliberate acts of pollution, all fishing
activities, intelligence-gathering by aircraft, and any interference with

186 Ahnish, supra note 167, at p. 282.
187 For a description of Spain’s initiatives during the negotiations in the 1970s, see J. A. de
Yturriaga, Straits Used for International Navigation – A Spanish Perspective (Dordrecht:
188 Ibid., p. 49, quoting from a 1971 speech made by Spain’s Minister for Foreign Affairs,
Gregorio Lopez-Bravo.
189 Truver, supra note 16, at p. 11, citing a private letter to the author from Jose Manuel
Lacleta, a member of the Spanish delegation, dated 11 May 1976.
190 K. L. Koh, Straits in International Navigation (London: Oceana Publications, 1982),
pp. 145–146, citing Second Committee, Informal C.2/Informal Meeting/4 of 26 April
1978, in R. Platzoder, Dokumente der Dritten Seerechtskonferenz der Vereinten Nationen –
coastal communications during transit passage.\textsuperscript{191} Morocco’s proposal would also have required ships to maintain radio contact during their passage and to inform coastal authorities of any damage, unforeseen stop, or other change required by \textit{force majeure}.\textsuperscript{192} Morocco supported Spain’s suggestions regarding insurance, liability, and compensation for damage.\textsuperscript{193} These proposals were rejected by the maritime nations, who argued that “the question of straits had been fully debated and the compromise reached should not be reopened.”\textsuperscript{194} Nonetheless, the proposals illustrate the views of the nations that border on the Gibraltar Strait and their unhappiness about the transit passage regime that emerged in the LOS Convention.

Maritime transit through the Gibraltar Strait has been free and unimpeded for all vessels during most recent periods of history, although at times this free transit has had to be enforced with military might.\textsuperscript{195} Since the drafting of the LOS Convention, no serious attempts have been made by Spain or Morocco to limit passage through the Strait of Gibraltar, but Spain did issue a declaration when ratifying the Convention saying that it understands that the straits regime in the Convention “is compatible with the right of the bordering State to enact and enforce in straits used for international navigation its own regulations, provided that such regulations do not interfere with the right of transit passage.”\textsuperscript{196} Spain’s declaration also stated that the requirement in Article 39(3)(a) that government aircraft exercising transit passage will “normally” comply with the Rules of the Air established by the International Civil Aviation Organization means that they will do so “except for force majeure or serious difficulty.”\textsuperscript{197}
1996, the IMO approved a mandatory ship reporting system for the Strait of Gibraltar.\textsuperscript{198} Spain and the United Kingdom both ratified the LOS Convention in 1997 (including conflicting declarations on the status of Gibraltar); Morocco ratified the Convention in 2007.\textsuperscript{199} In 1991, a Spanish commentator wrote that Spain was "the ideal 'persistent objector'" seeking to insist on a regime of nonsuspendable innocent passage and to oppose "the emerging customary rule on transit passage through straits used for international navigation,"\textsuperscript{200} but "political" realities later led to Spain's ratification of the Convention, which weakens Spain's position "despite the interpretive declaration attached to it."\textsuperscript{201}

The Strait of Hormuz\textsuperscript{202}

One of the most important waterways in the world, economically, politically, and strategically, the Strait of Hormuz connects the Persian Gulf to the Gulf of Oman. The Strait is about 104 miles (167 km) long at its median point. Its width varies from about 52.5 nautical miles (nm) (97.3 km) to 20.75 nm (38.4 km). With the extension of the territorial sea to 12 nm, the Strait falls within the overlapping Iranian and Omani territorial seas.

As of 1978, Iran and Oman were maintaining unimpeded transit through the Strait by means of the Iranian-Omani Joint Patrol of the Strait of Hormuz.\textsuperscript{203} These countries have had disputes over islands and boundary delimitations and the area in general has been an area of international tension and conflict. No treaty governs this Strait. From the perspective of the maritime powers it is the classic international strait through which transit must be permitted without interruption. During the final negotiating session of UNCLOS in 1982, however, Iran stated that it "could not give an unconditional guarantee of freedom of navigation"
and would “guarantee passage only to vessels that did not pose a threat to its security.” Iran also issued a “declaration of understanding” at the end of the negotiations in 1982 that the right of transit passage through international straits was a new international norm – the “product of quid pro quo which [does] not necessarily purport to codify the existing customs or established usage (practice) regarded as having an obligatory character” and hence that “only States parties to the Law of the Sea Convention shall be entitled to benefit from the contractual rights created therein.” At the same time, Oman issued an “understanding” that the transit passage regime “does not preclude a coastal State from taking such appropriate measures as are necessary to protect its interest of peace and security.”

The Strait of Bab al-Mandeb

Linking the Gulf of Aden and the Red Sea, the Strait of Bab al-Mandeb is about 14.5 miles (23 km) wide at its narrowest point and is bordered by Yemen, Djibouti and Ethiopia. All these littoral States have claimed a 12 nm territorial sea that precludes any area within the Strait from being high seas. Because no specific international agreement governs the Strait of Bab al-Mandeb, the Strait has been subject to the general regime of international straits, which, until the entry into force of the 1982 LOS Convention, was freedom of navigation and overflight in the high seas zone and nonsuspendable innocent passage in the territorial seas for all ships of commerce and war.

Because the Strait of Bab al-Mandeb fits within the definition of an international strait by linking one area of high seas or an exclusive economic zone with another such area – the Red Sea and the Gulf of Aden – the right of transit passage through international straits in Article 38 of the LOS Convention currently governs transit through the Strait. This liberal regime was also recognized in the 1975 Memorandum of Agreement between the Government of Israel and the United States: United

204 Strait Legislative History, supra note 5, at p. 138.
205 Ibid., p. 155.
206 Ibid.
208 LOS Convention, supra note 2, at Art. 37.
States-Israeli Assurances\textsuperscript{209} and in a 1978 unilateral declaration by the government of the People's Democratic Republic of Yemen (Southern Yemen).\textsuperscript{210} In the closing negotiating session of UNCLOS in 1982, however, the Yemen Arab Republic issued an “understanding” that reaffirmed its sovereignty over its territorial waters and asserted that “nuclear-powered craft, as well as warships and warplanes in general, must obtain the prior agreement of the Yemen Arab Republic before passing through its territorial waters, in accordance with the established norm of general international law relating to national sovereignty.”\textsuperscript{211}

\textit{The Strait of Dover/Pas de Calais}\textsuperscript{212}

Connecting the North Sea to the English Channel, the Strait of Dover/Pas de Calais historically has been open to ships. At its narrowest, the Strait is only 18 nautical miles wide. Prior to the international acceptance of the 12 nautical mile territorial sea, the United Kingdom had not claimed any distance greater than three miles. Hence, even though the French adopted a 12 nautical mile territorial sea in 1971, the Strait had a sufficient high seas route available for free navigation.\textsuperscript{213}

Now, with the 12 nautical mile territorial sea having been generally accepted, the narrowest portion of the Strait would fall entirely under French and British territorial jurisdiction, but both countries have indicated that they accept the LOS Convention regime of transit passage through the Strait of Dover. Both Britain and France have a great stake in free navigation. Britain, in fact, introduced the concept of transit passage.\textsuperscript{214} France, in declaring a 12 nautical mile territorial sea in 1971, foresaw the need to ensure free navigation “where the distance between the baselines of the French coasts and the baselines of the coasts of an opposite foreign

\textsuperscript{209} I.L.M. 1468 (1975).
\textsuperscript{211} Straits Legislative History, \textit{supra} note 5, at p. 157.
\textsuperscript{212} See generally, L. Cuyvers, \textit{The Strait of Dover} (Dordrecht: Martinus Nijhoff, 1996).
\textsuperscript{213} \textit{Ibid.}, pp. 53–54.
state is equal to – or less than – 24 miles, or does not allow any longer the existence of a zone of high seas sufficient for navigation.”

Because of the density of traffic in the Strait of Dover,$^{215}$ vessel traffic has been managed for the last 150 years.$^{216}$ A formal traffic separation scheme was adopted in 1972, approved by the IMO (then the Intergovernmental Maritime Consultative Organization), which is administered jointly by France and the United Kingdom.$^{217}$ This approach has established a high degree of cooperation and sharply reduced the number of collisions in the Strait. An under-keel clearance requirement of 5.2 metres has also been adopted for this Strait.$^{218}$ In 1998, the IMO approved the establishment of a ship reporting system,$^{219}$ and the following year, a mandatory ship reporting system was established for vessels more than 300 gross tons.$^{220}$

Strenuous efforts have also been undertaken to reduce pollution from vessels in the Strait, but these efforts have been notably less successful.$^{221}$ It has proved to be extremely difficult to enforce pollution control regulations on vessels and the incentives on vessels to comply are limited.

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$^{215}$ It has been estimated that:

In 2001, as many as 120,000 vessels passed through [the Dover Straits] and in addition there were 74,000 movements by ferries across the strait, carrying 21 million passengers. That year, 654 incidents were noted by the Dover Coastguards: 193 persons were rescued and 21 lost their lives.


$^{216}$ Cuyvers, supra note 212, at p. 62–77.

$^{217}$ See ibid., p. 71 (map); Anderson, supra note 215, at p. 27.

$^{218}$ Alexander, supra note 10, at p. 113.

$^{219}$ IMO Resolution MSC.85(70), 3 December 1998.

$^{220}$ Anderson, supra note 215, at p. 28.

$^{221}$ Ibid., pp. 93, 94–96. One notable effort is the Bonn Agreement for Cooperation in Dealing with Pollution of the North Sea by Oil, which was signed 9 June 1969 by Belgium, Denmark, France, Germany, the Netherlands, Norway, Sweden, and the United Kingdom. Ibid., p. 93, citing 11 I.L.M. 262 (1972). Under this regime, a zone of joint responsibility was established for the Strait of Dover, which was allocated to Belgium, Denmark, France, Germany, the Netherlands, Norway, Sweden, and the United Kingdom. Each state was given the responsibility of monitoring this strait and assessing the movements of oil. After 1979, the contracting parties agreed that this treaty should apply to other hazardous materials as well as to oil. In 1983, the agreement was formally replaced by the Bonn Convention for International Cooperation in Dealing with Pollution of the North Sea by Oil and Other Harmful Substances. Ibid., pp. 93–94.
One initiative that has been given increased recent attention has been to establish port State control. This approach, authorized in Article 218 of the LOS Convention, gives ports a responsibility to monitor vessels as they arrive. It is designed to supplement, or even replace, the flag-state enforcement system, which has proved to be inadequate because of the use of flags of convenience.

Two weeks after the Amoco Cadiz disaster in 1978, the countries of Belgium, Denmark, France, West Germany, the Netherlands, Norway, Sweden and the United Kingdom signed the Memorandum of Understanding between Certain Maritime Authorities on the Maintenance of Standards on Merchant Ships. Each signatory agreed to harmonize its procedures to inspect ships in its ports. The actual inspections were not, however, carried out with the vigour anticipated and many lapses continued to occur.

Another step taken was the Paris Memorandum of Understanding on Port State Control, which was approved in 1982 and has been supported by 14 Western European countries. This understanding requires each country to inspect at least 25 per cent of the foreign vessels that visit its ports. It also establishes a commission to monitor the operations of each country and to facilitate achievement of the goals of the Memorandum. Each country is now vigorous in its inspection programmes. This approach has been successful in uncovering deficiencies and in encouraging vessel owners to maintain their ships in better condition.

The Strait of Malacca

The Strait of Malacca is critical for international shipping, linking the Pacific and Indian Oceans, and it is a major artery for the transport of oil and other commodities. Some 150–200 ships pass through the Strait each day, or more than 50,000 each year. The Strait of Malacca

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222 Ibid., p. 103. This agreement was signed in The Hague on 2 March 1978.
223 Ibid., pp. 103–104.
227 Alexander, supra note 10, at p. 127.
is dangerous for shipping because it is quite shallow (requiring regular dredging), the water level changes with the tides, and the seabed shifts, creating serious risks of grounding.228 Danger from collisions also exists because the waterway is often congested and the ships’ speed makes it difficult for them to stop quickly.229 One report stated that 476 accidents occurred between 1978 and 1994.230 Another report stated that 500 accidents had occurred in the six years ending in 1993.231 Accidents involving oil tankers include the Showa Maru (1975), Diego Silang (1976), Nagasaki Spirit (1992), and Maersk Navigator (1993).232

The waters of the Strait of Malacca are divided among the three straits states – Singapore, Malaysia and Indonesia. All three have a common interest in safety and protection of the coastal environment, but Singapore’s overriding interest has always been in freedom of navigation and encouraging shippers to use the Strait and its port facilities. Japan, a major user of the Strait, conducted and paid for a number of hydrographic studies to improve safety, and has been vitally concerned with keeping the trait open for its supertankers. By the end of 1975, a series of accidents, including the Showa Maru tanker incident, called the “Torrey Canyon of the East,” had increased the safety and environmental concerns, and Malaysia and Indonesia asserted their right to control the Straits at the negotiations that produced the 1982 LOS Convention. A safety agreement was signed in Manila on 24 February 1977 during a meeting of the Association of Southeast Asian Nations (ASEAN). The Agreement included a 3.5 metre under-keel clearance requirement233 and a traffic separation scheme for “three specified critical areas of the Straits

228 Leifer, supra note 226, at pp. 55, 56. One notable grounding was the 244,000 ton Japanese tanker Showa Maru, which spilled 844,000 gallons of crude oil into the Strait of Singapore in January 1975. Alexander, supra note 10, at p. 113. See generally, “The Straits of Malacca: A Profile,” in Straits of Malacca, supra note 1, at p. 3.

229 Leifer, supra note 226, at p. 53.


231 Hamzah bin Ahmad, supra note 40, at p. 127, citing a report from Oil Companies International Forum, submitted to the IMO Sub-Committee on Safety of Navigation, 39th Session, 29 June 1993.

232 Ibid.

233 This 3.5 metre under-keel clearance requirement was approved by the IMO Assembly on 19 November 1981 in Resolution A.375(X). See W. Awang bin Wan Yaacob, supra note 52, at pp. 18–19.
of Malacca and Singapore, namely in the One Fathom Bank area, the Main Streets and Phillips Channel, and off Horsburg Lighthouse.234 The traffic separation scheme was amended in 1981 and 1998. The 3.5 metre under-keel clearance requirement has the effect of limiting fully loaded tankers to about 230,000 dwt and requiring larger tankers to go through the Sunda or Lombok Straits in Indonesia, which, respectively, add 600 and 1,000 nautical miles to the trip between the Middle East and Japan.235 In 1981, a Fund was established to provide compensation in the event of a spill, supported at present solely by Japan without contributions from other user States, and administered by Japan, Malaysia, and Singapore.236 A mandatory ship reporting system was adopted by the IMO in 1998 for ships passing through the Malacca and Singapore Straits.237

In recent years, the countries bordering on the Straits have installed sophisticated onshore and offshore navigational and safety aids to prevent collisions and pollution. Malaysia has invested RM 52 million to install 256 navigational aids and RM 100 million for a Vessel Traffic Management and Information Service (VTMIS).238 Singapore has, for instance, recently installed radar-based vessel monitoring system, at a cost of Singapore$40 million (with annual maintenance costs of about Singapore$1.5 million)


235 Leifer, supra note 226, at pp. 63, 69, 72, 205; Alexander, supra note 10, at p. 113. During the final negotiating session of the Third U.N. Conference on the Law of the Sea in 1982, Indonesia, Malaysia and Singapore presented a joint statement to the conference stating that in their view their enforcement of the requirement that vessels maintain a 3.5-metre keel clearance in the Malacca-Singapore Strait did not constitute an interference with the right of transit passage in violation of Article 42(2) or 44 of the LOS Convention. Straits Legislative History, supra note 5, at p. 144.


237 IMO Resolution MSC.73(69), 29 May 1998.

and spends Singapore$3 million annually to operate five lighthouses in the Strait.

The IMO has been trying to assist, developing the Marine Electronic Highway Project, which was initiated in 2001 in the Straits of Malacca and Singapore\(^{239}\) to guide ships through the Straits even during hazardous fog conditions. This project is expensive – costing US$15 million for a 100 kilometre stretch of the Strait of Malacca – and it remains unclear whether users of this system can be charged a fee under Article 26(2) of the LOS Convention.\(^{240}\)

Historically, charges have been imposed on ships passing through the Malacca Straits. When the Portuguese controlled the Straits, between 1511 and 1641, they imposed a toll on vessels.\(^{241}\) The Dutch took over the Strait in 1641 and carefully controlled passage.\(^{242}\) Not until 1824, when the Dutch signed the Treaty of London with the United Kingdom, was the right of passage for vessels of all nations established.\(^{243}\)

Both Malaysia and Indonesia have asserted that the Straits are part of their territorial seas\(^{244}\) and that “the Straits of Malacca and Singapore are not international straits.”\(^{245}\) The earlier position of Indonesia and Malaysia has been that “the regime of innocent passage should obtain in straits used for international navigation that have been assimilated either by territorial or internal waters,” such as the Strait of Malacca.\(^{246}\) The major maritime powers objected to this position as too restrictive, and, as noted earlier, the LOS Convention adopted the transit passage regime through international straits to ensure that straits would be open to navigation.

The Malacca Strait has been generally open to all international transit, but Singapore and Indonesia opposed in 1993 the passage of a Japanese

\(^{239}\) IMO Council, C93/6 at 18.

\(^{240}\) See supra text at notes 51–71.


\(^{242}\) Ibid.

\(^{243}\) Ibid.; the text of the 1824 Treaty of London can be found in Wikipedia, Anglo-Dutch, Treaty of 1824 (site visited 30 March 2008).

\(^{244}\) Leifer, supra note 226, at p. 91.


\(^{246}\) Leifer, supra note 226, at p. 88.
plutonium ship through the Strait because of the danger of collisions and piracy.247 Malaysia developed a plan to escort the ship through the Strait, if that route were taken,248 but also threatened to block passage as a threat to its national security.249 The ship did not pass through the Strait, and instead went south around Australia.250

The Lombok Strait and Archipelagic Waters

An archipelagic State enjoys a special status under the LOS Convention.251 The breadth of the territorial sea (Article 48) of such a State is measured from straight baselines around the islands under the rules articulated in Article 47. The waters inside such baselines are archipelagic waters (Article 49) and internal waters (Article 50).252 Archipelagic States are required to designate archipelagic sea lanes, through which the vessels of all States can exercise the right of archipelagic sea lanes passage, which is similar to the right of transit passage through international straits.253 Vessels also have a right of innocent passage through archipelagic waters (Article 52), subject to specific restrictions (Article 53).

The Lombok Strait passes between the Indonesia islands of Lombok and Bali. It is an alternative route to the Strait of Malacca and, unlike...
Transit Passage Through International Straits

that Strait, is easily navigable. Japanese supertankers use the Lombok route extensively because it is deep, even though the distance required by this route is longer than through the Malacca Strait.\textsuperscript{254}

Indonesia considers the Lombok Strait to be part of its archipelagic waters.\textsuperscript{255} Even if Indonesia did not formally designate this Strait as an archipelagic sea lanes, it would be almost automatically in this category under Article 53(12) of the LOS Convention, which says that “[i]f an archipelagic State does not designate sea lanes . . ., the right of archipelagic sea lanes passage may be exercised through the routes normally used for international navigation.”

Indonesia expressed its strong preference for the Japanese plutonium ship in 1993 to avoid its archipelagic waters, but also expressed concern that it did not have the power to prohibit the ship from passage through its sealanes.\textsuperscript{256} Indonesia offered protection to the vessel if it did pass through its waters.\textsuperscript{257}

The Situation in the Aegean Sea

Greece has declared territorial seas of only six nautical miles around its islands in the Aegean Sea. If it were ever to claim zones of 12 nautical miles around the islands in this crowded sea, it would be necessary to determine whether the right to transit passage would exist in every passageway or only in certain routes.\textsuperscript{258} One would think that this right of transit passage would exist at least for the major shipping routes leading from the Turkish Straits into the Mediterranean. However, one Greek scholar has suggested that “[i]t would be reasonable to assume” that “the narrows between the Kos and Astipalaia islands, Amorgos and Kalimnos, Naxos and Patmos, [and] Mikonos and Ikaria,” which he characterized as “borderline cases,” “fall short of the definition of straits used for international navigation, and consequently would be subject to the more restrictive, innocent passage

\textsuperscript{254} Leifer, supra note 226, at p. 80.
\textsuperscript{255} Ibid., pp. 91–92.
\textsuperscript{258} See Van Dyke, supra note 123, at pp. 83–85, 91–94.
regime.” These “borderline” “narrows” are, in fact, the major and most logical route to get from the Turkish Strait into the eastern Mediterranean and the many ports in the Middle East. But opinions are decidedly mixed on this topic. Commentators neutral to the Aegean region have observed that “minor” straits, including perhaps those in the Aegean that connect an EEZ or high seas area with a territorial sea, may be governed by the regime of “nonsuspendable innocent passage,” which differs from transit passage because it does not allow submarines to pass submerged, nor does it guarantee overflight rights of airplanes.

It is also unclear whether the right of transit passage would apply, for instance, to ships leaving the port of Izmir in Turkey and going to another Turkish port along the Turkish coast to the north or south. The second sentence of Article 38(2) says that transit passage includes “passage through the strait for the purpose of entering, leaving or returning from a State bordering the strait,” but what if the passage is from one port to another in the same State? Such a vessel would not be passing from one area

259 Politakis, supra note 36, at p. 301 (citing for support Nandan and Anderson, supra note 3); Politakis also acknowledged that the counter-argument can be made, i.e., “that all the above-mentioned straits should rather be regarded as organically interconnected, forming continuous maritime routes linking the Mediterranean with the northern Aegean, and thus subject to the transit passage rules.” Ibid., p. 302.


261 Compare the LOS Convention, supra note 2, Art. 39(1)(c), permitting submarines to transit in “their normal modes of continuous and expeditious transit” during transit passage through international straits, with Art. 20, which requires submarines to surface when exercising innocent passage.

262 LOS Convention, supra note 2, at Art. 37. See, e.g., Politakis, supra note 36, at p. 302: “It is important to note also that although a large interpretation of Arts. 37–38 and Arts. 53–54 might bring some Aegean straits within the ambit of transit passage, it is not at all clear whether ships heading to or departing from Turkish ports on the Aegean coast, such as that of Izmir, could be equally considered as engaged in transit passage…. [T]he traditional innocent passage regime would still apply to ships entering or clearing certain Turkish ports on the Aegean coast.” Article 45 indicates that the regime of nonsuspendable innocent passage would apply.
of high seas or EEZ into another and would not be involved in international navigation in the normal sense of that term. A final unresolved issue is what the passage rights through the Aegean would be in times of war. An Italian scholar has written that “the status of international straits in time of war has never been completely clarified.”

Greece opposed the concept of transit passage through international straits when this notion was being developed in the negotiations that led to the 1982 LOS Convention. When it signed the Convention in December 1982, Greece made the following declaration:

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 on 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 aircrafts 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 the aircrafts in transit as well as those of the coastal State are fulfilled.

This statement, repeated when Greece ratified the Convention in 1995, raises several issues, which would become particularly acute if Greece should ever extend its Aegean territorial seas to 12 nautical miles. Greece has asserted the right to designate those straits that international shipping

263 One Greek scholar has said that if Greece expands its territorial sea from six to 12 nautical miles, “it would be no longer possible for Turkish warships stationing at Izmir to join the high seas without first passing through Greek territorial waters, and thus subject to the regime of innocent passage.” Politakis, supra note 36, at p. 295.


(and aircraft) can utilize, but the United States and other maritime powers have argued that the transit passage right applies to every strait and that no rights of designation exist. Some commentators have speculated that Greece would like to “prevent Turkish aircraft from flying through straits near the Greek mainland, particularly the Kea Strait southeast of Athens.”267 The Kea Strait may not to be subject to transit passage under the regime established by the LOS Convention in any event because of the “Messina exception” in Article 38(1), which says that “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.”268

Other Important Straits

Other straits that provide important passageways include, the Strait of Tiran (leading into the Gulf of Aqaba),269 the Strait of Jubal (at the southern end of the Gulf of Suez), the Northwest Passage through Canada’s Arctic region,270 the Kerch Strait (connecting the Sea of Azov with the Black Sea), and the Kurile Strait. The crowded seas of Northeast Asia are full of important straits and the countries of this region have limited their territorial seas claims around the straits to promote free navigation through them. Japan, which asserts a 12 nautical mile territorial sea in general, claims only a three nautical mile territorial sea in the Soya Strait, the Tsugaru Strait, the eastern and western channels of the Tsushima

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269 When it ratified the LOS Convention on 26 August 1983, Egypt issued a declaration stating that the 1979 Peace Treaty between Egypt and Israel was consistent with Part III of the LOS Convention and that the Strait of Tiran was governed by Part III. Convention Overview, supra note 20.

270 Canada claims that the waters in the Northwest Passage are internal waters pursuant to a historic waters claim of Canada to these waters, but most of the rest of the world views it as an international strait. D. Ballingrud, “Warming May Open Northwest Passage Seaway,” Honolulu Star-Bulletin, 3 December 2002, p. C6, col. 5.
Strait, and the Osumi Strait.\textsuperscript{271} Both the Republic of Korea and Japan have limited their territorial sea claims around the land areas adjacent to the Korean Strait to three nautical miles in order to permit unimpeded passage through this area.\textsuperscript{272}

**Canals**

Canals are considered to be internal waters under the law of the sea and, therefore, no right of innocent passage exists through the canal itself. Because canals are human-made and always present unique problems of management, maintenance, financial integrity, and control, greater regulation of passage is permitted through these waterways. Passage through canals is generally governed by international treaties, such as the treaty that led to the return of the Panama Canal to Panama,\textsuperscript{273} which says that passage cannot be regulated in a discriminatory manner, but does allow for restrictions based on safety concerns. Article 1 of the 1888 Convention of Constantinople says that the Suez Canal "shall always be free and open, in time of war as in time of peace, to every vessel of commerce or of war, without distinction of flag."\textsuperscript{274} At least during the time the United States governed the Panama Canal, the obligation to keep the canal open for all ships was "somewhat less explicit."\textsuperscript{275}

The Kiel Canal, a 53 mile waterway linking the Baltic and North Seas, which can accommodate vessels of eight metres draft, opened through


\textsuperscript{272} See, e.g., C.-H. Park, "The Korea Strait," in *Van Dyke*, et al., supra note 234, at p. 173. Professor Oxman has written that the same approach of claiming limited three nautical mile territorial seas utilized by Japan and Korea to allow navigational freedom has also been used by "Germany and Denmark, and by Denmark, Sweden and Finland." B. H. Oxman, "Applying the Law of the Sea in the Aegean Sea," in B. Öztürk and N. Algan, eds, *Problems of Regional Seas 2001* (Istanbul: Turkish Marine Research Foundation, 2001), pp. 266, 279.


\textsuperscript{275} *Ibid.*
Germany in 1895 for the purpose of providing access to the sea by Germany’s navy and ensuring that its movement between the North Sea and the Baltic could not be cut off.\textsuperscript{276} The Versailles Treaty transformed it into an international waterway, saying:

\begin{quote}
The Kiel Canal and its approaches shall be maintained free and open to the vessels of commerce and of war of all nations at peace with Germany on terms of entire equality.\textsuperscript{277}
\end{quote}

In 1936, Germany declared that the Canal was not an international waterway and that foreign warships could pass through it only with advance authorization,\textsuperscript{278} which led to protests from France and Czechoslovakia.\textsuperscript{279} After World War II, no formal action was taken to internationalize the Canal, but it has been open to international transit.\textsuperscript{280} In 1980, two German commentators said that in the opinion of “most authors in international law – the internationalization system of the Versailles Treaty for the Kiel Canal has been abandoned.”\textsuperscript{281}

The Panama Canal Regulations, implemented by Panama when it assumed control, explicitly allow Canal authorities to prohibit ultrahazardous cargoes. The regulation “Denial of Passage to Dangerous Vessel” states that: “The Canal authorities may deny any vessel passage through the Canal when the character or condition of the cargo…is such as to endanger the structures pertaining to the Canal, or which might render the vessel liable to obstruct the Canal.”\textsuperscript{282} Article III(1)(a) of the 1977

\begin{quote}
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\textsuperscript{278} Ibid.
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\textsuperscript{279} Ibid.
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\textsuperscript{280} Alexander, supra note 10, at p. 181.
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\textsuperscript{282} 35 C.F.R. sec. 103.2.
\end{quote}
Treaty between the United States and Panama\(^{283}\) permits Panama to adopt regulations that are “necessary for safe navigation and efficient, sanitary operation of the Canal.” This Treaty emphasizes at several places the importance of keeping the Canal open for commerce and the necessity of providing sufficient security to ensure that it remains open.

Panama is entitled to demand full indemnity\(^{284}\) and insurance (as the Suez Canal does), an environmental impact assessment, notification and consultation with shipping States, and the development of emergency response plans for shipments transiting the Canal. The Panama Canal Authority requires that notification be given 30 days in advance of the arrival of a vessel in Canal waters for all cargoes of fissionable materials, in order to obtain approval to transit such cargo.\(^{285}\)

**Conclusion**

Professor Scovazzi has explained in his recent writings that the regime of transit passage through international straits is still in a period of evolution and that the rules found in the LOS Convention cannot yet be viewed as accepted customary international law in all respects. A few straits States, such as Iran and Turkey have not ratified the Convention, nor has one of the major maritime powers, the United States.\(^{286}\) Although the Convention contains a series of provisions articulating the principles that apply to the regime of transit passage, many ambiguities remain. Some straits are exempt under Article 35(c) because they are “regulated in whole or in part by long-standing international conventions,” and another group of straits are exempt under Article 38(1) because “there exists seaward of the island a route…of similar convenience with respect to navigational

\(^{283}\) *Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal, supra* note 274.

\(^{284}\) See Article 139 of the Regulations on Navigation in Panama Canal Waters: “[V]essels carrying radioactive substances shall be required to provide current proof of financial responsibility and adequate provision for indemnity to the Republic of Panama, the Authority, or any agency thereof, covering public liability and loss as a result of accidents owing to radioactive cargo.”

\(^{285}\) Regulations on Navigation in Panama Canal Waters, Article 137.

\(^{286}\) Convention Overview, *supra* note 20.
and hydrographical characteristics.” Canals, although they serve a similar
purpose as straits, are governed by a separate regime altogether. Judge David
Anderson suggested during an international conference that we should
examine the principles that govern navigational rights on international
rivers for ideas that would logically apply to straits.287 As environmental
and security concerns become more focused, it is probable that strait
States will take new initiatives to protect their coastal environments and
populations. It is likely, therefore, that conflicts will continue between
shipping and maritime powers and States bordering straits.

287 Judge Anderson made this suggestion during discussions at the meeting that produced
the Istanbul Straits Symposium, supra note 1, in Istanbul, 16 November 2002.