Legal and Practical Problems Governing International Straits[1]

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INTRODUCTION

The maritime nations have long insisted that international law protects free passage as a matter of right through international straits, and this position was adoped in Part III (Arts. 34–45) of the 1982 United Nations Convention on the Law of the Sea (LOS Convention).[2] The convention has not been ratified by many of the major maritime powers, but almost all countries have signed it,[3] and it is now in force for the 69-plus nations that have ratified it.[4] Its provisions on transit passage through international straits can be viewed as generally reflective of customary international law. Each strait, however, presents unique geographical and practical considerations, and some straits have historically been governed by unique legal regimes that are unaffected by the LOS Convention's provisions (Art. 35[c]). It is appropriate therefore to examine the straits individually and to examine common legal and practical problems raised by the regime of transit passage through international straits.

The rules recognized in the LOS Convention do not allow suspension of transit passage (Art. 44) and do not require innocence,[5] but they do impose

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2. United Nations Convention on the Law of the Sea, 10 December 1982, UN document A/Conf.62/122 (1982), reprinted in *International Legal Materials* 21 (1982): 1261–1354.

3. Countries that have signed but not yet ratified a treaty are obliged not to defeat the major purposes of the convention (Vienna Convention on the Law of Treaties, 23 May 1969, UN document A/Conf.39/27, Art. 18).

4. Singapore became the 69th country to ratify the treaty, on 17 November 1994.

5. Note the right of nonsuspendable innocent passage provided in Article 45 applicable to the exceptions provided in Articles 38(1) and 45(1)(b), which provide for nonsuspendable innocent passage through the island and mainland in the former case (e.g., Corfu Channel) and between a part of the high seas or an EEZ and the

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inter alia the following restrictions on transit passage: (1) transit passage must be solely for the purpose of continuous and expeditious transit (Art. 38[2]); (2) transiting ships must comply with generally accepted international regulations, procedures, and practices for safety at sea (Art. 39[2][a]) and for the prevention, reduction, and control of pollution from ships (Art. 39[2][b]); and (3) ships exercising the right of transit passage must proceed without delay through the strait and must refrain from any threat or use of force (Art. 39[1]).

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 "non-transit" 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, furthermore, allows states bordering 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" (Art. 42[1][6]), provided that such laws and regulations are not discriminatory and do not "in their application have the practical effect of denying, hampering or impairing the right of transit passage" (Art. 42[2]) and have been duly publicized (Art. 42[3]). With these governing principles in mind, we may examine the regimes that govern the individual straits and the practical problems that have emerged regarding transit through their waters.

INTERNATIONAL REGIMES GOVERNING STRAITS

The Turkish Straits[6]

The Turkish straits consist of the Dardanelles, which connect the Aegean Sea to the Sea of Marmara, and the Bosporus, 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 Bosporus to the Black Sea is about 160 miles (257 km).

The Dardanelles are roughly 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).

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territorial sea of a foreign state in the latter (e.g., Strait of Tiran) and the right of normal innocent passage applicable to the exception provided in Article 36 (e.g., waters between the United States and Cuba).

6. See generally Christos L. Rozakis and Petros N. Stagos, *The Turkish Straits* (Dordrecht, The Netherlands: Martinus Nijhoff, 1987).

The Dardanelles are deep, averaging 55 m, dropping to 91 m at their deepest point. Despite two major currents, a surface current and a more saline undercurrent, flowing in opposite directions, the Dardanelles are not difficult to navigate, because vessels can avoid the currents by staying in the middle. There are also numerous lights to aid nighttime navigation.

The Bosporus, narrow with abrupt and angular windings, tends 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 runs from 750 m to 2¼ miles (3.6 km) at its southern entrance. The depths in the main channel run from 36 to 124 m. Unlike the Dardanelles, its strong currents can make navigation difficult, if not dangerous.

The Turkish straits are among those referred to in Article 35(c) of the LOS Convention as being governed by "long-standing international conventions" that are unaffected by the LOS 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 the Montreux Convention of 1936.[7] 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 in fact 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 8 days in advance of the trip, and communicate to a Turkish signal station when the journey begins (Art. 13). Even in peacetime, vessels of war must begin passage only during daylight (Art. 10) and refrain from using any aircraft they may be carrying (Art. 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 (Art. 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" (Art. 11). Submarines can pass (but only on the surface) through the straits to rejoin their base in the

7. Convention regarding the Regime of Straits Signed at Montreaux, 20 July 1936, *League of Nations Treaty Series* 173:213–41, reprinted in Rozaki and Stagos (n. 6 above), pp. 153–64. The parties to this convention are Bulgaria, France, Greece, Japan (with reservations), Romania, Turkey, USSR, United Kingdom, and Yugoslavia. The treaty permitted Turkey to refortify the straits in exchange for guarantees of free transit, subject to a number of conditions.

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 convention as a practical matter prohibits aircraft carriers from transiting the straits.[8] 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 (Art. 18).

The convention thus gives Black Sea states particular rights not given to others, and it is unique in giving Turkey the paramount role in executing the convention. 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 it 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.[9] 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 (Art. 19). When Turkey is a belligerent, however, passage of all warships through the straits is "left entirely to the discretion of the Turkish government" (Art. 20).

The Baltic Straits[10]

The Baltic straits link the Baltic Sea to the Kattegat, which in turn leads into the Skagerrak and out to the North Atlantic Ocean. These straits, which lie predominantly within Danish and Swedish territory, include the Little Belt, the Great Belt, and the Sound.

The Little Belt, between Denmark's Jutland-Als and Fyn-Aerø, 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

8. David Froman, "Kiev and the Montreux Convention: The Aircraft Carrier That Became a Cruiser to Squeeze through the Turkish Straits," *San Diego Law Review* 14 (1977): 681.

9. Rozakis and Stagos (n. 6 above), p. 107.

10. See generally Gunnar Alexandersson, *The Baltic Straits* (Dordrecht, The Netherlands: Martinus Nijhoff, 1982).

the strait is limited to ships with a mast height of no more than 33 m. The current in the Little Belt is strong and unpredictable.

The Great Belt lies between Fyn-Langeland and Sjaelland-Lolland. This passageway, along with the Samsø 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 km. Depths vary from 20 to 25 m in the northern part of the belt to 66 m in the southern, 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 used by larger vessels because of insufficient depth south of Copenhagen and Malmö.

For more than four centuries (1429–1857), Denmark collected a transit duty on ships passing through the Sound, and these fees at their peak contributed about two-thirds of Denmark's budget.[11] Foreign governments and merchants protested these fees over the years, and the British challenged them directly in the first half of the 19th century, shelling Copenhagen in 1801 and capturing the Danish fleet in 1807. The Copenhagen merchants also saw these dues as limiting the trade into and out of their markets, and a canal was built across southern Sweden to circumvent the Danish fees. Finally, in 1845, the United States announced that it would not pay these fees as a matter of principle, citing the "public law of nations."[12] These dues were discontinued in 1857 with the signing of the Copenhagen Convention on the Sound and the Belts by the European shipping nations.[13] 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."[14] Since then, there have been no other multilateral treaties or conventions dealing with the Baltic straits except the Treaty of Versailles, which reiterated the right of "free passage into the Baltic to all nations."[15]

11. Ibid., p. 70. Swedish ships were exempt from the dues, but they still hurt Sweden, because foreign ships trading with Sweden had to pay the fees (p. 71).

12. Ibid., p. 72.

13. 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, signed at Copenhagen, 14 March 1857. To soften the financial blow to Denmark, the contracting parties paid an indemnity "corresponding to an annual income capitalized to the current value" (Alexandersson (n. 10 above), p. 73.

14. Convention between the United States of America and Denmark for the Discontinuance of the Sound Dues, signed at Washington, 11 April 1857.

15. Ibid., citing Art. 195 of the Treaty of Versailles.

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,[16] the Finnish, Swedish, and Danish delegates stated explicitly during the final 1981 session of the United Nations Conference on the Law of the Sea negotiations that the Baltic straits were covered by Article 35(c) and that their legal status should remain unchanged.[17]

The passage of warships through the Baltic straits has been regulated through Swedish and Danish laws on the admittance of foreign naval ships and military aircraft to their respective territories when each country is at peace.[18] Sweden allows foreign naval ships to pass through the Swedish part of the Sound according to the rules of innocent passage—they cannot stop or anchor, and submarines must operate on the surface.[19] Denmark too allows innocent passage through the strait as long as it does not involve claimed internal Danish waters. Passage of naval vessels through all three straits is subject to advance notification through diplomatic channels. Denmark requires authorization if more than three naval vessels flying the same flag are passing though the same part of the strait together, and requires submarines to pass on the surface.[20] 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."[21] Recently, the International Court of Justice was asked by Finland to resolve a problem raised by a project to build a bridge across the East Channel, which apparently would have blocked certain ships and oil rigs, but the issue was resolved by negotiations before the court had time to rule. Denmark agreed to pay Finland $16 million and the two countries agreed to explore ways to use an alternative but shallower strait through the Sound.[22]

16. Ibid., 73, citing the dispute between Erik Bruel, Wolfgang Graf Vitzthum, and Ib Andreasen.

17. United Nations Office of Legal Affairs, Division for Ocean Affairs and the Law of the Sea, *The Law of the Sea: Straits Used for International Navigation: Legislative History of Part III of the United Nations Convention on the Law of the Sea* (New York: United Nations, 1992), pp. 132, 149, 154, 156 (hereafter *Straits Legislative History*).

18. Alexandersson (n. 10 above), p. 82, citing a Swedish law of 3 June 1966 and a Danish law of 27 February 1976.

19. Ibid.

20. Ibid.

21. Ibid., p. 83.

22. Thomas A. Clingan, Jr., *The Law of the Sea: Ocean Law and Policy* (San Francisco: Austin and Winfield, 1994), pp. 118–21.

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.[23] 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 strait averages just over 4 miles (6.4 km), although the range varies from 22 miles (35 km) to roughly 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."[24] 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."[25] 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.

The question of suspension of passage under the 1881 treaty is unclear because the treaty is vague, but some Chilean legal authorities have said

23. Michael A. Morris, *The Strait of Magellan* (Dordrecht, The Netherlands: Martinus Nijhoff, 1989), p. 76, referring to the 1881 boundary treaty between Chile and Argentina, which is reprinted in the Morris volume at pp. 205–7. 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" (p. 79).

24. Lewis M. Alexander, *Navigational Restrictions within the New LOS Context: Geographical Implications for the United States* (Peace Dale, Rhode Island: Offshore Consultants, 1986), p. 143.

25. Morris (n. 23 above), p. 10. Morris gives two reasons to support the "innocent-passage" regime. First, Article 38 exempts from transit passage straights 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" (p. 103).

that noninnocent passage may be suspended.[26] Even though Chile has never suspended passage in modern times,[27] if it sought to challenge a ship transporting plutonium as noninnocent, for instance, it might have grounds to suspend passage or impose conditions.

The Strait of Hormuz[28]

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 52½ nm (97.3 km) to 20¾ nm (38.4 km). With the extension of the territorial sea to 12 nm, the strait falls within the overlapping Iranian and Omani territorial sea.

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. These countries have had disputes over islands and boundary delimitations, and the area in general has been an area of international tension and conflict.[29] No treaty governs this strait, and 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 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."[30] 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."[31] 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."[32]

26. Ibid., pp. 103–4.
27. Ibid.
28. See generally R. K. Ramazani, *The Persian Gulf and the Strait of Hormuz* (Dordrecht, The Netherlands: Martinus Nijhoff, 1979).
29. Ibid., pp. 72–88.
30. *Straits Legislative History* (n. 17 above), p. 138.
31. Ibid., p. 155.
32. Ibid.

The Strait of Bab al-Mandeb[33]

Linking the Gulf of Aden and the Red Sea, the Strait of Bab al-Mandeb is about 14½ 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. In 1973, the People's Democratic Republic of Yemen asserted its sovereignty over the strait.

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 the nonsuspendable, objectively innocent passage in the territorial seas for all ships of commerce and war in time of peace or periods of neither peace nor war. Because the Strait of Bab al-Mandeb fits within the definition of an international strait by linking two parts of the high seas—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 States–Israeli Assurances[34] and a 1978 unilateral declaration by the government of the People's Democratic Republic of Yemen (Southern Yemen).[35] In the closing negotiating session 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."[36]

The Strait of Gibraltar[37]

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 8 miles (13 km) wide at its narrowest point, the Strait of Gibraltar is unquestionably one of the most important passages in the

33. See generally Ruth Lapidoth-Eschelbacher, *The Red Sea and the Gulf of Aden* (Dordrecht, The Netherlands, Martinus Nijhoff, 1982).

34. *International Legal Materials* 14 (1975): 1468.

35. Lapidoth-Eschelbacher (n. 33 above), p. 149, quoting from UN document NV/78/63 (12 July 1978).

36. *Straits Legislative History* (n. 17 above), p. 157.

37. See generally Scott C. Truver, *The Strait of Gibraltar and the Mediterranean* (Dordrecht, The Netherlands: Martinus Nijhoff, 1980).

world's oceans. With the coming into force of the 12-nm territorial sea for coastal states,[38] the strait would have fallen almost entirely within Spanish and Moroccan territorial waters except for a portion of the northeastern section of the strait, which arguably would be under British control. Because this strait connects two major bodies of water and is essential for international transit, however, it is governed by the regime of transit passage through international straits.

The right of passage through the Strait of Gibraltar is not governed by any special regime provided for by treaty or convention. Historically, the earlier customary international law regarding passage through international straits in peacetime (nonsuspendable innocent passage) has been the rule that has been upheld by the Spanish government. Neither Spain, Morocco, nor the United Kingdom has yet ratified the LOS Convention, and during the Third United Nations Conference on the Law of the Sea (UNCLOS III), which led to the 1982 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 the coastal states. Historically, however, transit through the strait has been free and unimpeded for all vessels, although at times this free transit has had to be enforced with military might.[39] Since the drafting of the LOS Convention, no serious attempts have been made by coastal states to limit passage through the Strait of Gibraltar.[40]

The Strait of Dover[41]

Connecting the North Sea to the English Channel, the Strait of Dover historically has been open to ships passing through it. At its narrowest, the strait is only 18 nm wide. Prior to the international acceptance of the 12-nm territorial sea, the United Kingdom had never claimed any distance greater than 3 miles. Hence, even though the French adopted a 12-nm sea in 1971, the strait had a sufficient high seas route available for free navigation.[42]

Now, with the 12-nm territorial sea having been generally accepted, the narrowest portion of the strait would fall entirely under French and British territorial jurisdiction. Although neither country has yet become a party to

38. LOS Convention (n. 2 above), Art. 3.

39. See Truver (n. 37 above), pp. 178–81.

40. But see Jose A. de Yturriaga, *Straits Used for International Navigation: A Spanish Perspective* (Dordrecht, The Netherlands: Martinus Nijhoff, 1991).

41. See generally Luc Cuyvers, *The Strait of Dover* (Dordrecht, The Netherlands: Martinus Nijhoff, 1986).

42. Ibid., pp. 53–54.

the LOS Convention, both have indicated that they accept the convention's 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.[43] France, in declaring a 12-nm 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 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, vessel traffic has been managed for the last 150 years.[44] Carefully delineated traffic separation schemes have been established by national, regional, and international bodies,[45] and a high degree of cooperation has been established, which has sharply reduced the number of collisions in the strait.

Strenuous efforts have also been undertaken to reduce pollution from vessels in this strait, but these efforts have been notably less successful.[46] It has proved to be extremely difficult to enforce pollution-control regulations on vessels, and their incentives to comply are limited.

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, and it is designed to supplement, or even replace, the flag-state enforcement system that 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.[47] Each signatory agreed to harmonize its procedures to

43. Ibid., p. 54, citing Draft Articles on the Territorial Sea and Straits, 3 July 1974 (submitted to Committee II by the United Kingdom), Official Records vol. 3, UNCLOS III, UN document A/Conf.62/C.2/L.3 (1974).

44. See Cuyvers (n. 41 above), p. 62–77.

45. See map, ibid., p. 71.

46. 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 (p. 93, citing *International Legal Materials* 11 (1972): 262. Under this regime, a zone of joint responsibility was established for the Strait of Dover, which was allocated to Belgium, France, 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 (pp. 93–94).

47. Ibid., p. 103. This agreement was signed in The Hague on 2 March 1978.

inspect ships in its ports. The actual inspections were not, however, carried out with the vigor anticipated, and many lapses continued to occur.[48]

Another step that was 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% of the foreign vessels that visit its ports. It also establishes a commission to monitor the operations of each country and facilitate achievement of the goals of the memorandum. Each country is now vigorous in its inspection programs. This approach has been successful in uncovering deficiencies and in encouraging vessel owners to maintain their ships in better condition.[49]

The Strait of Malacca

The Strait of Malacca is critical to Japan and international shipping in general as it links the Pacific and Indian Oceans and is a major artery for the transport of Japanese oil and other commodities.[50] About 150 ships per day pass through the strait.[51] The Strait of Malacca is dangerous for shipping because it is quite shallow, the water level changes with the tides, and the seabed shifts, creating a grave risk of grounding.[52] Danger from collisions also exists because the waterway is often congested and the ships' speed makes it difficult for them to stop quickly.[53]

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 in navigation, but Singapore's overriding interest has always been in freedom of navigation. 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 strait open for its supertankers. In 1971, the three straits states asserted "[e]xclusive rights to cooperate and coordinate efforts for the safety of navigation in the straits." By the end of 1975, a series of accidents had increased the safety and environmental concerns, and Malaysia and Indonesia asserted their right to control the straits at UNCLOS

48. Ibid., pp. 103–4.
49. Ibid., pp. 107, 108–15.
50. Michael Leifer, *Malacca, Singapore, and Indonesia* (Dordrecht, The Netherlands: Martinus Nijhoff, 1978), p. 52.
51. Alexander (n. 24 above), p. 126.
52. Leifer (n. 50 above), pp. 55, 56. One notable grounding was the 244,000-ton Japanese tanker *Showa Maru*, which spilled 844,000 gal. of crude oil into the Strait of Singapore in January 1975.
53. Ibid., p. 53.

III. A safety agreement was signed in Manila in February 1977 during a meeting of the Association of Southeast Asian Nations (ASEAN), which included "a traffic separation scheme incorporating two deeper water channels." That same year, Indonesia, Malaysia, and Singapore reached an agreement limiting fully loaded tankers to about 230,000 dwt, by requiring an under-keel clearance of at least 3.5 m at all times.[54] Finance and control of pollution was left to the users of the straits.[55] The safety regime was not seen as contrary to the interests of Japan, the United States, and other marine powers, and has significantly improved the safety record in the straits.[56]

Both Malaysia and Indonesia have asserted that straits are part of their territorial seas[57] and that "the Straits of Malacca and Singapore are not international straits."[58] 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.[59] The major marine 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 strait has been generally open to all international transit, but Singapore and Indonesia opposed in 1993 the passage of a Japanese plutonium ship through the Strait of Malacca because of the danger of collisions and piracy.[60] Malaysia developed a plan to escort the ship through the strait if that route is taken,[61] but also threatened to block passage as a threat to its national security.[62] The ship did not pass through the strait, and instead went south around Australia.

54. Ibid., pp. 63, 69, 72, 205.

55. Ibid., p. 73. During the final negotiating session of UNCLOS III 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-m 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* (n. 17 above), p. 144.

56. Leifer (n. 50 above), pp. 73, 67.

57. Ibid., p. 91.

58. Joint Statement of the Governments of Indonesia, Malaysia, and Singapore, 16 November 1971, reprinted in Gary Knight and Hungdah Chiu, *The International Law of the Sea* (London: Elsevier Applied Science, 1991), p. 294.

59. Ibid., p. 88.

60. Reuters, 8 November 1992.

61. Agence France Press, 10 November 1992.

62. "Malaysia May Cite Security Laws to Block Japanese Plutonium Ship," UPI Business and Financial Wire UP01W, 24 September 1992. See generally Jon M. Van Dyke, "Sea Shipment of Japanese Plutonium under International Law," *Ocean Development and International Law* 24: 399–430 (1993).

The Lombok Strait and Archipelagic Waters

An archipelagic state enjoys a special status under the 1982 LOS Convention.[63] The breadth of the territorial sea (Art. 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 (Art. 49) and internal waters (Art. 50).[64] 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."[65] Vessels also have a right of innocent passage through archipelagic waters (Art. 52), subject to specific restrictions (Art. 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 that strait, is easily navigable. The Japanese use the Lombok route extensively for their supertankers because it is deep, even though it requires a longer route than Malacca.[66]

Indonesia considers the Lombok Strait to be part of its archipelagic waters.[67] Although Indonesia has not yet formally designated its "archipelagic sea lanes," the Lombok Strait is almost automatically in this category under Article 53(12), 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 to avoid its archipelagic waters, but also expressed concern that it did not have the power to prohibit the ship from passage through its sea-lanes. Indonesia offered protection to the ship if it did pass through its waters.[68]

63. LOS Convention (n. 2 above), Article 46(b), defines an archipelago as "a group of islands, including parts of islands, interconnecting waters and other natural features which are so closely interrelated that such islands, waters and other natural features form an intrinsic geographical, economic, and political entity, or which historically have been regarded as such." Article 46(a) defines an archipelagic state as "a State constituted wholly by one or more archipelagos and may include other islands."

64. See ibid., Arts. 9, 10, and 11.

65. Ibid., Art. 53; see generally Jon M. Van Dyke, Lewis M. Alexander, Joseph R. Morgan, eds., *International Navigation: Rocks and Shoals Ahead?* (Honolulu: Law of the Sea Institute, 1988).

66. Leifer (n. 50 above), pp. 80.

67. Ibid., pp. 91–92.

68. Reuters, 8 November 1992; Van Dyke (n. 62 above).

WHAT CONTROLS CAN COASTAL STATES EXERCISE OVER VESSELS ENGAGED IN TRANSIT PASSAGE THROUGH INTERNATIONAL STRAITS?

A wide range of questions have arisen regarding what regulations are permissible under the transit-passage regime established under the LOS Convention. Some types of regulations are clearly permissible.

- Traffic separation schemes and other safety measures can be established under Articles 41 and 42(1)(a). 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 International Maritime Organization) for adoption, and must be widely publicized. Traffic separation schemes have been adopted for many of the important straits, including Baltic, Dover, Gibraltar, Kerch, Bab al-Mandeb, Hormuz, Malacca-Singapore, and Kurile.[69]
- Pollution control regulations can be adopted under Article 42(1)(b). These regulations must be consistent with "applicable international regulations regarding the discharge of oil, oily wastes and other noxious substances in the strait."[70]
- Fishing regulations can be adopted under Article 42(c) to prevent fishing. Among these regulations can be the requirement to stow all fishing gear.
- 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).

These regulations 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.

69. Alexander (n. 24 above), p. 129.

70. 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 proposal, with 60 countries voting in favor, 29 against, and 51 abstentions; because the proposal did not receive the affirmative votes of two-thirds of those voting, it was deemed to have been defeated (*Straits Legislative History* [n. 17 above], pp. 136, 141–42). After Spain was defeated on this vote, it issued an "understanding" to the effect that "it considers that the provisions of [Article 42(1)(b)] do not prevent it from issuing, in accordance with international law, laws and regulations giving effect to generally accepted international regulations" (p. 156).

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]).

Regulating Gambling during Transit Passage

A question that is somewhat more difficult has arisen recently in the Strait of Malacca area with regard to gambling vessels. These ships leave Singapore, transit up the strait into the open ocean, and later return to Singapore. Can Malaysia enforce its laws against gambling against such vessels when they pass through Malaysia's territorial waters?

In my judgment, Malaysia can apply its laws to such vessels even though they are engaging in transit passage, but the method of enforcement is somewhat challenging.

Article 2(1) of the LOS Convention clearly states that each coastal state exercises "sovereignty" over its adjacent territorial sea. The rights associated with sovereignty include the right to govern behavior such as gambling, which is related to morals and a nation's conception of its police power necessary to protect public order.

Article 2(3) states that the exercise of sovereignty is "subject to this Convention and to other rules of international law," and this language thus refers to Articles 37–44 on transit passage through straits. These articles guarantee the right of passage but not the right to pursue activity deemed to be illegal by the coastal state during such passage. The right of passage is simply the right to go through the waters expeditiously. Activities unrelated to passage are not guaranteed or protected. Passage can of course be undertaken without gambling on board, and the suspension of gambling activities in no way hinders the free movement of the vessel.

A maritime state might argue pursuant to Article 27 that the coastal state should not exercise criminal jurisdiction over activities on a ship exercising its rights of passage unless "the crime is of a kind to disturb the peace of the country or the good order of the territorial sea." This phrase has usually been reserved for egregious crimes, such as murder or major assaults, but ultimately it is up to each coastal state to determine which types of activities disturb its "peace" and "good order."

How Malaysia would enforce a prohibition on gambling is a more difficult matter. It is inappropriate to interfere with the passage of the ship under Article 44. It will, therefore, be difficult to enforce a "no gambling" rule against a ship that never docks in Malaysia, has no financial links whatsoever with Malaysia, and flies the flag of a state that will not cooperate with Malaysia. If the ship does come into Malaysia, or has any financial investments in Malaysia, however, it can be punished with fines.

Measures to Deal with Pollution

The discussion above in the section on the Strait of Dover outlines the innovative measures taken in Europe to deal with the threats of pollution. Important initiatives have also been taken in the Malacca Strait, but the problem persists.

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 had compensation when other rules of liability were inadequate.[71]

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."[72] This assertion presents a dramatic challenge to the principle of unimpeded transit passage, but it is clearly necessary if coastal states are to protect and preserve their marine environment. The opposition in 1992 to the proposed passage of the Japanese plutonium ship presents an example where the straits states opposed passage because of the threat of major damage to the marine environment of the straits.

CONCLUSION

Many elements of the regime of transit passage through international straits remain unresolved. This juridical regime is an innovative compromise created during protracted multinational negotiations, so it is not surprising that some elements of the regime remain ambiguous. Only through state practice, negotiations, and the continual give and take of international activities will the precise outlines of this regime emerge.

In the meantime, coastal states bordering on straits can and must take steps to protect their environment. Although some tension may exist between these steps and the right of unimpeded transit passage, in the long run it should be possible to protect and enhance both these important interests.

71. *Straits Legislative History* (n. 17 above), pp. 3, 13.
72. Ibid., p. 144.