International Straits and Navigational Freedoms

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During the seventies, law of the sea experts spent many long hours negotiating and drafting what would become the 1982 United Nations Convention on the Law of the Sea ("LOS Convention").[1] The product of this effort was significant: a comprehensive, responsive, soundly conceived, and up-to-date blueprint for orderly international maritime relations. Although they could not anticipate and debate every conceivable permutation of ocean space problem, they forged a strong framework with basic rules that apply across the board to order the complexities and resolve the ambiguities of particular international disputes—even disputes arising from situations not precisely prescribed within the Convention.

A recent dispute in Europe raised an important and unresolved question of international law not addressed specifically in the LOS Convention. The dispute arose over a Danish proposal to construct a bridge across the Great Belt, a strait used for international navigation. On May 17, 1991, Finland filed an application instituting proceedings before the International Court of Justice in the *Passage through the Great Belt (Finland v. Denmark)* case.[2] Finland argued that the proposed bridge, a fixed span with sixty-five meters of clearance, would

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1. United Nations Convention on the Law of the Sea, opened for signature Dec. 10, 1982, U.N. Doc. A/CONF.62/122, 21 I.L.M. 1261, 1261-87 (1982) [hereinafter LOS Convention].

2. Passage through the Great Belt (Fin. v. Den.), 1991 I.C.J. 12 (Provisional Measures, Order of July 29).

UAL-128

prevent Finnish drilling rigs from being towed in their vertical position across the Great Belt.[3] In Finland's view, the construction of a bridge impeding passage through the only deep-draft route connecting the Baltic with the North Sea would be contrary to international law.[4] Denmark filed its memorial with the ICJ on December 31, 1991; however, the parties reached an out-of-court settlement on September 3, 1992, when Finland accepted ninety million Danish kroner from the Danish government.[5] The ICJ thus never decided the merits of the case.

The United States was not a party to the ICJ case but has strongly urged that the basic rules codified in the LOS Convention should control. Although the articles of the LOS Convention pertaining to straits do not *per se* address the issue of bridges across straits, the transit passage articles clearly prohibit the unfettered, unilateral construction of a bridge across a strait used for international navigation (an "international strait").[6]

The main objective of this Article will be to present a comprehensive analysis of the rules of international law pertaining to straits and navigation through them, and to provide concomitant legal analysis to determine how bridges can "legally" be built across international straits. We will, moreover, analyze the technical principles and terms in the navigational articles because of their vitally significant role in regulating the various navigational regimes. In particular, we will discuss the six categories of international straits recognized in the Convention. We will also present the official position of the United States on the LOS Convention's navigational articles.[7]

In part I of this Article, we identify some of the practical effects upon international maritime navigation and commerce that arise with the construction of bridges. In part II, we explain the LOS Convention's navigational terms of art, with primary emphasis on their relationship and relevance to transit passage. We also analyze the correlative duties and obligations of both user and coastal states. Part III sets forth the six categories of international straits recognized by

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3. These drilling rigs required nearly 100 meters of clearance. In contrast, U.S. aircraft carriers, which rise no more than 41 meters, could easily pass under the proposed bridge.

4. *Passage through the Great Belt*, 1991 I.C.J. at 13-14.

5. Passage through the Great Belt (Fin. v. Den.), 1992 I.C.J. 348 (Order of September 10). This sum is the equivalent of $13.5 million.

6. LOS Convention, supra note 1, arts. 37-44.

7. It should be noted that the United States operates its freedom of navigation program in complete conformity with international law as reflected in the navigation articles of the 1982 LOS Convention.

the Convention, and explains the important juridical distinctions involved. We examine the overlay that exists between the regime that applies to article 38 straits ("normal" straits) and the regime in article 35(c) straits (straits governed "in whole or in part" by long-standing conventions in force) in more detail in part IV.

Finally, in part V, we present the international approach that the United States suggests for appraising future proposals concerning the construction of bridges over international straits. We argue that this approach furthers the central principles underlying the navigation articles of the LOS Convention by protecting navigation interests and equitably balancing the legitimate interests of both coastal and user states.

I. THE PRACTICAL PROBLEMS CREATED BY BRIDGES IN INTERNATIONAL STRAITS

The problem a bridge poses is obvious: it can impede, if not curtail, navigation. If the bridge is a non-fixed span (such as a drawbridge), the problem is greatly reduced, assuming that the main channel is under the non-fixed span, and is of sufficient depth to allow deep-draft vessels to pass. Nevertheless, a single movable span may still create problems in important straits restricted in width and congested with traffic if the bridge is not wide enough to allow traffic to pass in both directions. Other hydrographic characteristics of a strait, such as severe tides and currents, and perhaps even habitually occurring strong winds, may also effectively negate an otherwise acceptable design.

Another issue, squarely engaged in the *Great Belt* case, was "how high is high enough," or how much vertical clearance must exist under a fixed span in the main channel. The debate concerned whether the bridge should be high enough to accomodate all existing ships, all ships currently planned for construction, or even future ship designs which have not yet been contemplated. The United States believes the correct response is somewhere between the two extremes: an acceptable fixed span bridge should clearly accommodate ship designs which exist and those which are reasonably foreseeable in light of the navigational requirements of the particular strait.

Crucial to the application of this standard is what constitutes a "ship." The United States believes that a ship in this context includes any sea-going vessel designed for and capable of self-propulsion, when such propulsion is incident to the primary purpose for which it is normally used. Thus, if a drilling rig or other mobile unit is self-propelled, and this means of propulsion is normally used for transporting

and positioning it into place for exploitation, then it would be a ship. An extension of this view is that an object being towed would enjoy the same rights of navigation, provided it did not exceed the same height criterion.

II. CONVENTION NAVIGATIONAL REGIMES AND TERMS OF ART WITH EMPHASIS ON THEIR RELEVANCE TO TRANSIT PASSAGE AND APPLICABLE U.S. INTERPRETATIONS

Central to any meaningful understanding of the navigation rights and correlative duties of user states and strait states is an appreciation of the rationale behind the terms of art and definitions in the navigation provisions of the LOS Convention. The LOS Convention enables the practitioner to trace logically through complex factual situations that may arise (such as those in the *Great Belt* case) and provides the analytical tools to resolve difficult navigational disputes equitably and consistently.

A. *Genesis of the Regime of Transit Passage*

The regime of transit passage in international straits was shaped by several interrelated factors and developments in the law of the sea: the expansion of territorial seas to twelve miles;[8] the distinction between the right of innocent passage and high seas freedom of navigation; and, geographic, political, and economic realities.

Even before the Third U.N. Law of the Sea Conference first convened in the early seventies, the critical importance and unique nature of international straits were recognized.[9] These choke points form lifelines between the high seas. To preserve the high seas freedoms of navigation and overflight in international straits girded by often overlapping twelve-mile territorial sea claims, the navigational regime in international straits would need to provide the basic freedoms of high seas navigation. Although general support existed in the Conference for a twelve-mile territorial sea, this support depended on ensuring that an adequate navigation regime be created in international straits less than twenty-four miles wide at their narrowest point. Such a regime would be necessary to preserve the essential elements of the

8. The twelve-mile territorial sea displaced the earlier recognized three-mile territorial sea norm. LOS Convention, supra note 1, art. 3.

9. See generally Myres S. McDougal & William T. Burke, The Public Order of the Oceans 187-269 (1962).

UAL-128

right to freedom of navigation and overflight. The lesser navigational right of non-suspendable innocent passage was simply not sufficient.

Fundamental international commerce and security interests also required open access through international straits. Regardless of the breadth of the strait, whether five or twenty-four miles, certain freedoms, such as the continuous and expeditious transit in, under, and over the strait and its approaches, had to apply. Any codification of the law of the sea had to reflect this state practice as well as current political and military reality.

A regime of transit passage is also crucial to the maintenance of world peace and order. By relieving littoral states of the political burdens associated with the role of gatekeeper, the transit passage rules minimize the danger that strait states will be drawn into international conflicts.

B. *Innocent Passage*

A separate concept, different from the right of transit passage through international straits, is innocent passage through a coastal state's territorial sea. The customary international law definition of innocent passage prevailing before the LOS Convention was that contained in article 14 of the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone.[10]

Article 14(2) of the 1958 Convention states that "[p]assage means navigation through the territorial sea for the purpose either of traversing that sea without entering internal waters, or of proceeding to internal waters, or of making for the high seas from internal waters."[11] In addition, "[p]assage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State."[12] With the exception of two provisions, one requiring that submarines navigate on the surface and show their flag,[13] and the other relating to fishing vessels,[14] conduct that is "prejudicial to the peace, good order or security of the coastal State" was not defined, thereby leaving a fundamental definitional lacuna.

The important correlative restrictions on the coastal state in the territorial sea were that it must not hamper innocent passage through

10. Convention on the Territorial Sea and the Contiguous Zone, opened for signature Apr. 29, 1958, art. 14, 15 U.S.T. 1606, 516 U.N.T.S. 205 (entered into force Sept. 10, 1964) [hereinafter Territorial Sea Convention or 1958 Convention].

11. Id. art. 14(2).

12. Id. art. 14(4).

13. Id. art. 14(6).

14. Id. art. 14(5).

UAL-128

the territorial sea[15] and that it could not suspend "the innocent passage of foreign ships through straits which are used for international navigation."[16] A final important geographic caveat provided that "[w]here the establishment of a straight baseline in accordance with article 4 has the effect of enclosing as internal waters areas which previously had been considered as part of the territorial sea or of the high seas, a right of innocent passage . . . shall exist in those waters."[17]

The most significant change in the territorial sea regime is the exhaustive elaboration in LOS Convention article 19 of what constitutes non-innocent passage,[18] and in article 21 of what laws and regulations relating to innocent passage the coastal state can enact and enforce.[19] Although the International Law Commission prior to the Territorial Sea Convention recommended a list of coastal state laws and regulations similar to those contained in article 21 of the LOS Convention, it was never incorporated into the 1958 Convention. Articles 19 and 21 of the LOS Convention hence represent the definitive declaratory international law concerning the rights and obligations of the coastal state with respect to navigation within its territorial sea.

In the United States' view, the enumerations in articles 19 and 21 are all-inclusive. Thus, if a ship is in innocent passage, the ship may engage in any activity not prejudicial or proscribed by article 19(2), and a coastal state may enact only those laws and regulations prescribed in article 21. Perhaps the most important factor to be noted is the unwavering position of the United States and other major maritime powers that article 21 does not permit a coastal state to require prior permission from, or notification to, the coastal state for the exercise of the right of innocent passage. Although the LOS Convention is silent on this point, a number of developing coastal states maintain that earlier customary international law permitted a coastal state to require prior notification, and that therefore the Convention's drafters intended to codify existing state practice.[20] This is incorrect. The *travaux préparatoires* of the LOS Convention unequivocally indicates that this is not the case.

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15. Id. art. 15(1).
16. Id. art. 16(4).
17. Id. art. 5(2).
18. LOS Convention, supra note 1, art. 19.
19. Id. art. 21.
20. See Bureau of Oceans and International Environmental and Scientific Affairs, U.S. Dep't of State, Pub. No. 112, Limits in the Seas—United States Responses to Excessive National Maritime Claims 55 (1991) [hereinafter Limits in the Seas].

UAL-128

During the Sea-Bed Committee discussions (1970-73) which were intended to produce a draft convention text, many developing states prepared amendments to the predecessor of article 21(1) which would recognize such a coastal state right. The effort reached a climax during the final sessions of the Conference in 1980-82 and included the so-called Seven Power Proposal[21] which was introduced in both the ninth and eleventh sessions and subsequently styled the Twenty Power Proposal, having gained additional developing state sponsors.[22]

A Twenty-Eight Power Proposal attempted to secure the same objective by adding "security" to article 21(h), which enumerates the competences that the coastal state may exercise in its territorial sea.[23] The process culminated in a statement by the President of the Conference in Plenary that the sponsors of the amendment had agreed not to press it to a vote at his request.[24] Although the sponsors attempted to accomplish the same objective via declarations during the signing session, such declarations are *ultra vires* in that article 310 of the LOS Convention prohibits declarations which exclude or modify the legal effect of provisions of the LOS Convention.[25]

Finally, if there is any doubt concerning the law prior to 1982, the International Court of Justice, in the 1949 *Corfu Channel* case,[26] clearly stated that coastal states do not have a right to prohibit innocent passage in time of peace.[27] Also, coastal states may not subject the exercise of the right of innocent passage to a requirement of previous authorization from the strait state.[28]

Two final points should be noted regarding the innocent passage regime. First, under article 23 of the 1958 Convention and article 30

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21. Third United Nations Conference on the Law of the Sea, Second Committee Informal Meeting, U.N. Doc. C.2/Informal Meeting/58 (1980), reprinted in V Third United Nations Conference on the Law of the Sea: Documents 62 (Platzöder ed., 1984). The seven states were Argentina, China, Ecuador, Peru, Madagascar, Pakistan, and the Philippines. Id.

22. Third United Nations Conference on the Law of the Sea, Second Committee Informal Meeting, U.N. Doc. C.2/Informal Meeting/58/Rev.1 (1982), reprinted in V Third United Nations Conference on the Law of the Sea: Documents 62 (Platzöder ed., 1984).

23. Third United Nations Conference on the Law of the Sea, Plenary Proposals, Amendment to Article 21, 11th Sess., U.N. Doc. A/CONF.62/L.117/Corr.1 (1982), reprinted in XVI Third United Nations Conference on the Law of the Sea: Documents 29 (Platzöder ed., 1988).

24. Third United Nations Conference on the Law of the Sea, Plenary Summary Records, Consideration of Amendments to the Draft Convention, 11th Sess., 176th plen. mtg., U.N. Doc. A/CONF.62/SR.176 (1982), reprinted in XVIII Third United Nations Conference on the Law of the Sea: Documents 73 (Platzöder ed., 1988).

25. LOS Convention, supra note 1, art. 310.

26. Corfu Channel (U.K. v. Alb.), 1949 I.C.J. 4 (Apr. 9).

27. Id. at 28.

28. Id.

UAL-128

of the LOS Convention, "if any warship does not comply with the laws and regulations of the coastal State concerning passage in the territorial sea and disregards any request for compliance therewith which is made to it, the coastal State may require it to leave the territorial sea immediately."[29] Second, the September 23, 1989, Joint Statement by the United States and the former Soviet Union on the Uniform Interpretation of the Rules of International Law Governing Innocent Passage is a useful illustration of the interpretation given to the innocent passage regime.[30] The document sets forth the positions of two major maritime powers and may be considered highly persuasive evidence of how the LOS Convention is being applied in practice.

C. *Non-Suspendable Innocent Passage*

Under article 16(4) of the 1958 Convention, non-suspendable innocent passage applied to ships navigating through international straits between one part of the high seas and another part of the high seas or territorial sea of a foreign state.[31] The article was important because it recognized that in straits overlapped by opposite three-mile-wide territorial seas, the international community enjoyed unquestionable rights of navigation not subject to interference by the coastal nation. These rights have evolved into a regime guaranteeing transit in, under, and over international straits, codified under the rubric of "transit passage" in the LOS Convention. The current regime of non-suspendable innocent passage under customary law is extremely limited in application, and in almost all cases it has been superseded by the transit passage regime. The more limited regime of non-suspendable innocent passage, however, is still applicable to international straits governed by article 45(1)(b) (the "dead-end strait exception") and article 38(1) of the LOS Convention (the "Messina exception").

The dead-end strait exception is only applicable in the few geographic instances where the territorial seas area of one state is joined with the high seas or an exclusive economic zone by a strait which is bordered by one or more different states.[32] Without the right of non-suspendable innocent passage, the state at the end of the *cul-de-sac*

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29. Territorial Sea Convention, supra note 10, art. 23; LOS Convention, supra note 1, art. 30.

30. Union of Soviet Socialist Republics—United States: Joint Statement With Attached Uniform Interpretation of Rules of International Law Governing Innocent Passage, 28 I.L.M. 1444 (1989).

31. Territorial Sea Convention, supra note 10, art. 16(4).

32. LOS Convention, supra note 1, art. 45(1)(b).

UAL-128

would effectively be "landlocked" with a territorial sea leading nowhere.

The Corfu Channel is an example of a "Messina exception" strait in which non-suspendable innocent passage would apply. Thus, under the LOS Convention, the legitimacy of the actions of the Royal Navy in steaming through the Corfu Channel on October 22, 1946, would not have been open to question. Similarly, Albania would not have been able to maintain that the Corfu Channel was not an international strait on the grounds that it was only a route of secondary importance and not a necessary route between two parts of the high seas.[33]

Today, articles 34 and 38 would provide ready answers to these questions, but in 1949, resolution of the dispute required the International Court of Justice to state clearly that the Corfu Channel was used for international navigation and also that it was a useful route for international maritime traffic.[34] The inspiration for article 38(1) and article 45(1)(a) is directly attributable to the 1949 judgment.

The law as reflected in the LOS Convention, with its elaboration of what constitutes innocent passage, its statement of when non-suspendable innocent passage applies, and its precision concerning international straits, is a great improvement over the *status quo ante*. Had it existed in 1946, there surely would have been little debate surrounding the navigational rights at issue in the *Corfu Channel Case*.

D. *Transit Passage*

One of the two most important achievements of the drafters of the LOS Convention was the codification of the transit passage regime under articles 37-44.[35] The regime is applicable in international straits between "one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone."[36] The right of transit passage, unlike non-suspendable innocent passage, includes the right of overflight and submerged transit.[37]

The following U.S. interpretative positions are applicable to the transit passage regime. First, the language referring to "straits which are used for international navigation"[38] signifies all straits which are used or which may be used for navigation; therefore, all straits which

33. Corfu Channel (U.K. v. Alb.), 1949 I.C.J. 4, 12 (Apr. 9).
34. Id. at 27-29.
35. LOS Convention, supra note 1, arts. 37-44.
36. Id. art. 37.
37. Id. art. 38(2).
38. Id. art. 37.

are capable of being used are included. This interpretation is not based solely on geography. Prospective navigational use must be based on need; for example, new commercial trade routes superseding a former trade route which is no longer suitable due to environmental problems or a change in water depth, tides, or currents would qualify. Essentially, we place less emphasis on historical use and look instead to the susceptibility of the strait to international navigation.[39]

Second, it is the U.S. position that the right of transit passage applies not just to the waters of the straits, but to all normally used approaches to the straits. For example, it would not make sense to have the right of overflight apply within the cartographers' historical delineation of a certain strait but not to the restrictive geographical areas leading into or out of the strait, thereby preventing the exercise of the right of overflight.[40] Similarly, requiring ships or aircraft to converge at the hypothetical "entrance" to the strait would compromise navigational safety and defy common sense. For transit passage to have meaning, open over-water access through the approaches must be included.

Third, when the right of transit passage applies, it applies throughout the strait. The width of the transit corridor, in effect, is shore to shore.[41] It is perfectly legitimate for a strait state to avoid this shore-to-shore result by limiting its territorial sea claim. Japan, for example, has chosen to limit its territorial sea claim in five straits, creating a high seas corridor of similar convenience down the middle of those straits.[42] In such a case, innocent passage applies within the territorial sea areas, and high seas freedom of navigation applies throughout the corridors.

The foregoing result obtains because article 36 includes an exception to the application of part III of the LOS Convention when a high seas corridor exists through the strait. Article 36 states

> this Part [concerning straits used for international navigation] does not apply to a strait used for international navigation if there exists through the strait a route through the high seas or through an exclusive economic zone of similar convenience with respect to navigational and hydrographi-

39. See, e.g., Limits in the Seas, supra note 20, at 61-75.

40. Id. at 75.

41. See id. at 62-63. This result, of course, is subject to any International Maritime Organization approved traffic separation scheme that may be in place.

42. The Tsugaru Strait is one example of a strait where Japan has limited its territorial sea claim. See map 1 in the Appendix.

> cal characteristics; in such routes, the other relevant Parts of this Convention, including the provisions regarding the freedoms of navigation and overflight, apply.[43]

Thus, a coastal state may limit coast-to-coast overflight and submerged transit rights by ceding a high-seas passage from its territorial sea.[44]

Given the comparative complexity of the situations that article 36 envisages, it is useful to illustrate various hypotheticals. First, consider an international strait eighteen miles wide with a different strait state on each side. State A extends its territorial sea to twelve miles; state B remains at three miles, leaving a high seas corridor three miles wide. In this situation, innocent passage applies in both territorial seas, and article 36 is correctly invoked to make freedom of navigation apply only in the high seas corridor, assuming it is a route of similar convenience.

To some degree, this is inequitable for state B, since state A gains full benefit from state B's restraint. However, if state B extends its territorial sea to nine miles (presumably it would force state A to roll back its claim to the equidistant line, or nine miles), state B would force state A by its action to have transit passage apply in both states' territorial seas because no high seas route of similar convenience would then exist. On the other hand, if both state A and state B extend to seven miles, innocent passage would apply in each state's territorial sea with freedom of navigation applying in the high seas corridor beyond.

Fourth, it is the unequivocal position of the United States that the transit passage provisions of the LOS Convention reflect customary international law.[45] This position is independent of the questions concerning whether the 1982 Convention is in force and whether signatory states have ratified the Convention or non-signatories have acceded to it. The fact that today the vast majority of states claim a twelve-nautical mile-wide territorial sea, and a majority of coastal states claim exclusive economic zones clearly reflects the validity of this position since neither was recognized (indeed, the latter not even conceived) prior to the 1982 Convention.

Fifth, as with the user and coastal states' rights and duties under articles 19 and 21 of the innocent passage regime, the United States

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43. LOS Convention, supra note 1, art. 36.
44. It should be noted that article 36 was intended to apply in most instances to straits wider than 24 miles.
45. Proclamation No. 5928, 54 Fed. Reg. 777 (1989).

UAL-128

views article 42[46] as an all-inclusive list of the laws and regulations that strait states may adopt relating to transit passage.

III. THE SIX CATEGORIES OF INTERNATIONAL STRAITS

The different categories of international straits provided for in the LOS Convention differ to some degree depending on the nature of the strait involved. The categories are the "normal" international strait;[47] the article 36 strait;[48] the article 38(1) or "Messina exception" strait;[49] the article 45(1)(b) strait or "dead-end strait exception";[50] the international strait within archipelagic waters;[51] and the article 35(c) strait[52] (discussed separately in part IV).

A. The "Normal" Strait Used for International Navigation

The "normal" international strait is, from a geographic vantage, the most frequently occurring strait of importance to international commerce and navigation. There are well over 100 such international straits at present.[53] Under article 37, this type of strait connects "one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone."[54]

In the United States' view, it is immaterial whether or not ice covers such a strait during most or all of the year, because the right of transit passage covers overflight as well as submerged transit.[55] Submerged transit of submarines through international straits is addressed in article 39(1)(c), which provides that ships and aircraft, while exercising the right of transit passage, shall "refrain from any activities other than those *incident to their normal modes* of continu-

46. LOS Convention, supra note 1, art. 42.
47. The Strait of Gibraltar is one example of a "normal" strait. See map 2 in the Appendix.
48. Japan's Tsugaru Strait is an example of an article 36 strait. See map 1 in the Appendix.
49. An article 38(1) strait lies between "an island of a state bordering the strait and its mainland" and where "there exists seaward of the island a route through the high seas . . . of similar convenience." Id. art. 38(1). See map 4 in the Appendix for an illustration of the Strait of Messina.
50. This type of strait exists "[b]etween a part of the high seas or an exclusive economic zone and the territorial sea of a foreign State." Id. art. 45(1)(b). An example is the Gulf of Aqaba. See map 5 in the Appendix.
51. See map 3 in the Appendix illustrating Indonesia's claimed archipelagic strait baselines.
52. The Straits of Turkey provide an example of article 35(c) straits. See map 6 in the Appendix.
53. See Limits in the Seas, supra note 20, at 61-75 (giving specific examples of several international straits).
54. LOS Convention, supra note 1, art. 37.
55. See supra note 37 and accompanying text.

ous and expeditious transit . . . ."[56]

Because the normal mode for submarines to transit is under the surface, an unquestionable right is accorded to them under the Convention both in transit passage and archipelagic sea lanes passage. While this right is not explicitly included under article 38 (right of transit passage) as it is under article 53(3)[57] (definition of archipelagic sea lanes passage), this distinction is not a substantive one and does not diminish the right. Article 53(3) explicitly refers to "navigation . . . in the normal mode" simply to avoid any ambiguity in the archipelagic sea lanes passage articles concerning the duties of ships and aircraft under article 54, which incorporates *mutatis mutandis* into the transit passage articles 39, 40, 42, and 44.[58] The drafters wanted to leave no doubt that subsurface navigation is included in such waters, even though archipelagic waters also constitute the waters within archipelagic sea lanes.

This conclusion is confirmed by comparison with article 20 in the innocent passage articles, which requires submarines "to navigate on the surface and to show their flag."[59] The need for a specific provision indicates a view that, without one, subsurface navigation would be permissible. Moreover, since the waters of international straits were formerly high seas until overlapped by twelve-mile territorial seas, it is a conservative interpretation to maintain that what was specifically allowed before continues to be allowed unless specifically prohibited.

In the "normal mode"[60] also means, in the case of transit passage (and archipelagic sea lanes passage), that a ship's aircraft may both land and be launched.[61] This conclusion is corroborated by comparison with article 19(2)(e) regulating innocent passage, which prohibits "the launching, landing or taking on board of any aircraft."[62] If this were not permitted under transit passage, a prohibition would have been included under those articles as well.

56. LOS Convention, supra note 1, art. 39(1)(c) (emphasis added).

57. Id. art. 53(3). Article 53(3) provides that "[a]rchipelagic sea lanes passage means the exercise in accordance with this Convention of the rights of navigation and overflight in the normal mode solely for the purpose of continuous, expeditious and unobstructed transit. . . ." Id.

58. Id. art. 54.

59. Id. art. 20.

60. Id. art. 39(1)(c). Article 39(1)(c) provides that "[s]hips and aircraft, while exercising the right of transit passage, shall . . . refrain from any activities other than those incident to their normal modes of continuous and expeditious transit . . . ." Id.

61. As an example, it is normal practice for military ships to have fixed-wing or helicopter assets aloft during transit, consistent with the security needs of the force.

62. Id. art. 19.

UAL-128

Another unambiguous duty, imposed by article 44, requires that strait states "shall not hamper transit passage" and that "[t]here shall be no suspension of transit passage."[63] This is a far greater navigational right than that accorded ships under innocent passage because article 25(3) recognizes the right of a coastal state to "suspend temporarily in specified areas of its territorial sea the innocent passage of foreign ships if such suspension is essential for the protection of its security, including weapons exercises."[64] If suspension of innocent passage in the territorial sea occurs, it must be done "without discrimination in form or in fact among foreign ships" and "only after having been duly published."[65]

As is the case in all maritime jurisdictional belts, warships and other government ships operated for non-commercial purposes enjoy sovereign immunity in these straits. Article 34(2) states that "the sovereignty or jurisdiction of the States bordering the straits is exercised subject to this Part and to other rules of international law."[66] Article 42(5) provides that

> the flag State of a ship or the State of registry of an aircraft entitled to sovereign immunity which acts in a manner contrary to such laws and regulations or other provisions of this Part shall bear international responsibility for any loss or damage which results to States bordering straits.[67]

The applicable articles for the territorial sea are articles 30-32.[68]

B. *Article 36 Straits*

As discussed earlier in relation to transit passage, article 36, in its most interesting "hard law" applications, refers to straits in which a strait state chooses not to extend its territorial seas to twelve miles but rather restricts them to a limit which results in no territorial sea overlap and the continued existence of a high seas corridor.[69] It may also apply to international straits wider than twenty-four miles in their entirety, the principal situation envisaged by the United Kingdom when it introduced the original version of article 36 in the Single Negotiating Text in 1975.[70] As a practical matter, this becomes

63. Id. art. 44.
64. Id. art. 25(3).
65. Id.
66. Id. art. 34(2).
67. Id. art. 42(5) (laws and regulation of states bordering straits relating to transit passage).
68. Id. arts. 30-32.
69. See supra notes 42-44 and accompanying text.
70. Third United Nations Conference on the Law of the Sea, Informal Single Negotiating

UAL-128

meaningless at some point because the strait is no longer a strait, but a high seas area in which freedom of navigation applies, and the transit passage articles are inapplicable.

C. *Article 38(1) Straits*

Article 38(1) straits were conceived with the Strait of Messina in mind. Article 38(1) provides 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."[71] The regime of non-suspendable innocent passage applies in an article 38(1) strait in the area between the mainland and the island.

D. *Article 45(1)(b) Straits*

Article 45(1)(b) addresses dead-end straits and also provides that the regime of non-suspendable innocent passage shall apply in an international strait "between a part of the high seas or an exclusive economic zone and the territorial sea of a foreign State."[72] Because the strait does not, in its entirety, fit the article 37 definition of a strait, to which transit passage would apply, and because the regime of innocent passage would not be sufficient to meet a 45(1)(b) state's interests, the LOS Convention recognizes the right of non-suspendable innocent passage in these situations.[73]

E. *International Straits within Archipelagic Waters*

This important category of international straits is treated slightly differently from straits in which transit passage applies. These straits are located in whole or in part within the archipelagic waters of mid-oceanic archipelagic states.

The concept of the mid-oceanic archipelagic state permits states, which fulfill the criteria of land-to-water ratios contained in articles 46 and 47, to enclose ocean areas, previously high seas in nature, within straight baselines surrounding their outermost islands. This authority, however, is subject to the navigational right of archipelagic sea lanes passage.[74] Articles 46-54 of the LOS Convention require the

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Text, U.N. Doc. A/Conf.62/WP.8 (1975), reprinted in I Third United Nations Conference on the Law of the Sea: Documents 7 (Platzöder ed., 1982)

71. LOS Convention, supra note 1, art. 38(1).
72. LOS Convention, supra note 1, art. 45(1)(b).
73. Id.
74. Id. arts. 46-47.

UAL-128

archipelagic state to recognize and respect the navigational rights and freedoms applicable within archipelagic waters.[75] Archipelagic sea lanes passage applies to all international straits as well as to all other international sea lanes and air routes.[76]

The right of archipelagic sea lanes passage as articulated in article 53 is a key navigational freedom. This regime applies to all sea lanes and air routes designated by the archipelagic state.[77] The lanes and routes include all normal passage lanes and routes used for international navigation and overflight, and must be approved before their designation by the International Maritime Organization.[78] If an archipelagic state does not designate sea lanes or air routes, the right of archipelagic sea lanes passage "may be exercised through the routes normally used for international navigation."[79]

Article 53(3) defines archipelagic sea lanes passage as

> the exercise in accordance with this Convention of the rights of navigation and overflight in the normal mode solely for the purpose of continuous, expeditious and unobstructed transit between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone.[80]

Article 54 provides that certain transit passage articles (articles 39, 40, 42, and 44) apply *mutatis mutandis* to archipelagic sea lanes passage.[81] In straits within the archipelago, the only substantive difference between archipelagic sea lanes passage and transit passage is the "10 percent rule" continued in article 53(5).[82]

Four interpretative positions regarding the right of archipelagic sea lanes passage are, from our view and that of the international community, controlling. First, because the territorial sea of an archipelagic state extends seaward of the baselines enclosing the archipelagic

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75. Id. arts. 46-54.
76. Id. art. 53.
77. Id. art. 53(1).
78. Id. § 4.
79. Id. § 12.
80. Id. § 3; cf. id. art. 37 (The definition echoes almost verbatim that of the right of transit passage.).
81. See supra note 58 and accompanying text.
82. Article 53(5) states:

> Ships and aircraft in archipelagic sea lanes passage shall not deviate more than 25 nautical miles to either side of such axis lines during passage, provided that such ships and aircraft shall not navigate closer to the coasts than 10 percent of the distance between the nearest points on islands bordering the sea lane.

LOS Convention, supra note 1, art. 53(5).

waters, and therefore surrounds the latter, the approaches to the archipelagic sea lanes (and thus international straits) through the territorial sea are subject to archipelagic sea lanes passage and not innocent passage.[83] If this were not the case, the right of archipelagic sea lanes passage would be meaningless.

Second, only mid-oceanic island states such as Fiji and Indonesia qualify as archipelagic states. Article 46(b) defines archipelago as "a group of islands, including parts of islands, interconnecting waters and other natural features which are so closely interrelated that such islands, water, and other natural features form an intrinsic geographical, economic and political entity, or which historically have been regarded as such."[84] Mainland or continental states which have island possessions cannot treat those islands as archipelagic states even if they would otherwise fulfill the definitions and land-to-water ratios.

Third, if an archipelagic state selects only a percentage of its sea lanes and air routes, the other normal sea lanes and air routes will still be subject to the exercise of archipelagic sea lanes passage even if they have not been designated.[85]

Finally, article 52 means what it says; the right of innocent passage applies to all archipelagic waters which do not comprise sea lanes.[86] This point is mentioned because some doubt had earlier been expressed concerning article 53 on archipelagic sea lanes passage, and whether the article obviated the need for innocent passage in archipelagic waters as provided in article 52.

IV. STRAITS GOVERNED IN WHOLE OR IN PART BY LONG-STANDING INTERNATIONAL CONVENTIONS IN FORCE

The final category of straits under the LOS Convention, straits governed "in whole or in part" by long-standing international conventions in force, raises a different variety of complexities. The dispute concerning the construction of bridges over international straits has focused attention on these straits because Denmark claimed that the Great Belt Strait was such an article 35(c) strait.[87] Article 35(c) provides that transit passage articles do not affect "the legal régime in

83. See id. §§ 2-3.

84. Id. art. 46(b).

85. See id. art. 53(12). Article 53(12) provides that "[i]f an archipelagic State does not designate sea lanes or air routes, the right of archipelagic sea lanes passage may be exercised through the routes normally used for international navigation." Id. art. 53(12).

86. Id. art. 52(1).

87. See id. art. 35(c).

UAL-128

straits in which passage is regulated in whole or in part by long-standing international conventions in force specifically relating to such straits."[88]

During the Conference years, the Baltic straits were the subject of much discussion. The Treaty for the Redemption of the Sound Dues of March 14, 1857,[89] and the parallel Convention for the Discontinuance of the Sound Dues between Denmark and the United States of April 11, 1857,[90] ensure free navigation, and from that perspective, it is somewhat academic whether or not the Belts are considered 35(c) straits.

If these straits constitute article 35(c) straits, subsequent domestic legislation, absent the concurrence of other maritime states, cannot restrict navigational freedoms enjoyed under the applicable "long-standing convention." Article 35(c) straits were recognized as a special exception to part III of the LOS Convention only on the understanding that the 35(c) navigation regimes would not be unilaterally restricted. It is the United States' position that if such restriction occurs, the basis for this special exception disappears, and consequently, part III and the transit passage regime will apply.

At this point, it is useful to discuss several U.S. interpretative positions regarding article 35(c) straits. First, an interesting linguistic issue regarding the words "in whole or in part" is presented in article 35(c).[91] The phrase is susceptible of two interpretations. One interpretation might be called pre-emptive. If a 35(c) convention regulates the strait only in certain aspects (for example, commercial vessels but not airplanes) or in whole, then the strait is independent of the normal transit passage regime which does not apply. This occurs because the *chapeau* of article 35 states "[n]othing in this Part affects" article 35 subparagraphs (a), (b), and (c).[92] Under this interpretation those categories of vessels not regulated by the regime are regulated by other rules of customary international law, as evident in state practice.

The second interpretation would support the position that if a 35(c) regime regulates the strait only in part, then only that which is regulated will fall within article 35(c); the non-regulated categories will be governed by the transit passage regime. This interpretation is truer to the intent of the straits articles. Transit passage is the norm, and

88. Id.
89. Treaty for the Redemption of the Sound Dues, Mar. 14, 1857, 116 Consol. T.S. 357.
90. Convention for the Discontinuance of the Sound Dues, Apr. 11, 1857, U.S.-Den., 11 Stat. 719.
91. LOS Convention, supra note 1, art. 35(c).
92. Id. art. 35.

UAL-128

35(c) is only a narrow exception. In circumstances where the exceptional regime does not cover every angle, the normal regime should be used to fill in the gaps.

In each 35(c) strait, usage plays a role in determining the nature of the applicable 35(c) convention regime. Because each 35(c) strait regime is *sui generis* depending on the regime established under the particular "long standing convention" in question, the precise nature of the regime can most accurately be determined by the extent and nature of the navigational use developed therein. This usage is more indicative and determinant in cases in which the regime itself is imprecise. It is also valid to maintain that the less usage is evinced, particularly in the case of an imprecise conventional regime, the greater the justification in maintaining that "normative" customary international law standards will define the regime. A caveat, however, should be noted when separate bilateral agreements are in existence collaterally with the long-standing convention regime. If this is the case, the specific will prevail over the general, and the provisions of the bilateral agreement will determine the precise relationship between the parties.

A second characteristic of an article 35(c) strait is that it must be recognized by the international maritime community to qualify. This does not mean that all states must be parties to the convention regulating the specific strait. The 1881 Convention governing the Magellan Strait has only two parties (Chile and Argentina),[93] but all states enjoy the international transit rights enshrined in its provisions. Another example is the 1936 Montreux Convention.[94] Although the United States is not a party to the Convention, it has always complied with its longstanding provisions.

Article 35(c) conventions can be amended by the original parties; however, they have created rights affecting non-parties. As a general principle, amendments are not binding on non-parties, because they share neither the longstanding character nor international acceptance of the original provisions. Common sense must be applied in instances in which a strait state, bound by a 35(c) convention, is faced with significantly altered conditions, and reasonable changes gain

93. Boundary Treaty between the Argentine Republic and Chile, July 23, 1881, Arg.-Chile, art. 5, 159 Consol. T.S. 45. For a discussion of the Boundary Treaty between the Argentine Republic and Chile, see infra note 112 and accompanying text.

94. Convention Regarding the Régime of the Straits, July 20, 1936, 173 L.N.T.S. 213 [hereinafter Montreux Convention]. For a discussion of the Montreux Convention, see infra notes 102-108 and accompanying text.

UAL-128

wide acceptance.[95] This, however, is a subject which requires its own examination and is outside the scope of this discussion. Today, we recognize that ancillary provisions contained in a 35(c) convention (those not having to do with fundamental navigation rights) are not necessarily treated as immutable.

Third, article 35(c) straits can only be straits governed by long-standing conventions in force.[96] This is corroborated by the *travaux préparatoires* of the LOS Convention. However, if the article 35(c) convention lacks specificity, or its language is obscure due to terminology which has fallen into desuetude, the strait state is not absolved of its duty under customary international law to follow the appropriate customary international law norm even though the convention language at issue may appear to be narrower than that norm.

Finally, in construing article 35(c), it is useful to examine its principles in relation to the only straits actually submitted by the straits negotiating group as falling within the 35(c) exception.[97] The four straits are the Danish Straits, the Aaland Strait, the Turkish Straits (Bosphorus and Dardanelles), and the Strait of Magellan.

A. *The Danish Straits*

The Treaty for the Redemption of the Sound Dues of March 14, 1857,[98] and the parallel Convention for the Discontinuance of the Sound Dues between Denmark and the United States of April 11, 1857,[99] recognized "entire freedom of the navigation of the Sound and the Belts"[100] and "free and unincumbered navigation."[101] Although only surface navigation was in the contemplation of the parties in 1857 and not overflight or submerged transit, it cannot be reasonably maintained that they are *ipso facto* excluded from the central intent of the agreement that transit rights are free from dues and interference. In a similar vein, because the regime established was ostensibly the broadest regime possible to grant, subsequent developments in customary international law would be a legitimate means of interpreting its continued significance. The regime would preclude the Danes

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95. For example, such an instance might occur if a strait state were bound by a 35(c) convention to accept the currency of the Weimar Republic which subsequently becomes worthless.

96. LOS Convention, supra note 1, art. 35(c).

97. This exception was actively espoused from the very beginnings of the negotiations by Denmark.

98. Treaty for the Redemption of the Sound Dues, supra note 89.

99. Convention for the Discontinuance of the Sound Dues, supra note 90.

100. Id. art. I.

101. Id. art. III.

UAL-128

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.

B. *The Turkish Straits*

The Convention Regarding the Régime of the Straits signed at Montreux on July 20, 1936, commonly styled the Montreux Convention,[102] regulates transit and navigation in the Straits of the Dardanelles, the Sea of Marmara, and the Bosphorus, and replaces the Lausanne Convention of July 24, 1923, which formerly regulated the Straits.[103] Signed by the significant maritime powers of the day, it is comprehensive and explicit in regulating passage and is the classic example of an article 35(c) convention.

The major provisions state that in time of peace, merchant vessels enjoy complete freedom of transit and navigation,[104] as well as in time of war, subject to certain provisions. Also, in time of peace, and subject once again to specified provisions, warships including light surface vessels, minor war vessels, and auxiliary vessels enjoy freedom of transit, and other warships enjoy a right of transit.[105] Submarines of Black Sea powers may also travel on the surface by day for the purpose of rejoining their base, provided prior notification is given.[106]

Warships in transit are prohibited from launching or otherwise utilizing any aircraft.[107] Civil aircraft, however, may fly between the Mediterranean and Black Seas using air routes prescribed by Turkey, but must remain outside of forbidden zones established in the Straits and give prior notification.[108]

Because the Convention is so detailed, it is a convention which regulates passage "in whole," and the regime is *sui generis*. The United States has not protested any of its provisions, although it is clearly less than the right of transit passage and in certain facets, less than the right of non-suspendable innocent passage.

C. *The Aaland Island Strait*

The Convention on the Non-Fortification and Neutralisation of the

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102. Montreux Convention, supra note 94.
103. Protocol Relating to Certain Concessions Granted in the Ottoman Empire, July 24, 1923, 28 L.N.T.S. 203.
104. Montreux Convention, supra note 94, art. 2.
105. Id. art. 10.
106. Id. art. 12.
107. Id. art. 15.
108. Id. art. 23.

UAL-128

Aaland Islands signed in Geneva on October 20, 1921,[109] is a multilateral convention to which the United States is not a party. Nevertheless, the United States conducts itself in accordance with its terms. Article 5 provides that "[t]he prohibition to send warships into the zone described in article 2 or to station them there shall not prejudice the freedom of innocent passage through the territorial waters. Such passage shall continue to be governed by the international rules and usages in force."[110]

This regime regulates warship passage within three miles of the islands.[111] The three-mile zone takes up a small corner of the strait between Sweden and Finland. One may argue that the no-warship rule applies to the strait as a whole, but this is inconsistent with the terms of the 1921 treaty. Historically, it is interesting to note that the three-mile zone was independent of Finland's four-mile territorial sea claim.

D. *The Strait of Magellan*

The Boundary Treaty between the Argentine Republic and Chile signed in Buenos Aires on July 23, 1881, provides in article 5 that "Magellan's Straits are neutralized for ever, and free navigation is guaranteed to the flags of all nations."[112] Thus, the applicable juridical regime is free navigation. Some thoughts on that phrase were already mentioned in the discussion of the Danish 1857 Convention.[113]

V. AN INTERNATIONAL APPROACH TO FUTURE BRIDGE PROPOSALS OVER STRAITS USED FOR INTERNATIONAL NAVIGATION

From the foregoing, it should be evident that if the construction of a bridge across an international strait is not subject from its inception to internationally accepted safeguards and readily applicable standards, it could destroy the carefully crafted balance between strait states' and user states' rights and obligations that informs the Convention's navigational articles.

In crafting a reasonable international solution, we should look to

109. Convention Relating to the Non-Fortification and Neutralisation of the Aaland Islands, Oct. 20, 1921, 9 L.N.T.S. 211.

110. Id. art. 5.

111. Id. art. 2.

112. Boundary Treaty between the Argentine Republic and Chile, supra note 93.

113. See supra part IV.A.

the system whereby the international community, working through the International Maritime Organization as the "competent international organization," establishes sealanes and traffic separation schemes through international straits. To designate a sealane or traffic separation scheme under that system, a state submits a proposal to the International Maritime Organization with a view toward adoption by that body. To be adopted, the sealane or traffic separation scheme must conform to generally accepted international standards and regulations, and the state must give "due publicity" to its proposal.

Bridges have similar effects upon navigation that sealanes and traffic separation schemes do, and it is both reasonable and practical that comparable steps be followed in the construction of bridges. Because the United States does not believe that customary international law permits a state, acting unilaterally, to build a fixed bridge over an international strait, the use of a scheme for procuring international approval becomes especially important. Therefore, to unify state practice, the United States suggests that all future construction plans for bridges over international straits be submitted to the International Maritime Organization for review and approval.

Our suggestion consists of three elements. First, prior to the referral of a proposal by a strait state of plans to construct a fixed bridge, the strait state should be required to provide actual notice of the proposal well in advance to states through the International Maritime Organization. All states would then be given adequate opportunity to communicate their views to the proposing strait state, which would then be obliged to try to accommodate these views.

As part of this process, the International Maritime Organization would establish internationally recognized guidelines and standards to ensure that the construction of bridges will not hamper or impede navigation through international straits. These guidelines and standards would vary in part with regard to the type of international strait involved and other important considerations, such as the nature and density of the traffic through such a strait, the availability of equally practicable alternate routes, and the associated additional costs, if any, of the proposed bridge construction.

Finally, the strait state initiating the bridge construction proposal could only proceed with actual construction upon the determination by the International Maritime Organization that the proposal conforms to the established International Maritime Organization guidelines and standards.

By way of reference, the United States notes that Denmark gave notice to all states of its construction plans sixteen years ago and

UAL-128

invited interested states to submit their positions so it could try to accommodate them. The only state to submit its views prior to construction was the former Soviet Union. The Soviet government requested that the clearance of the main central span over the deep-water channel be increased to sixty-five meters. Denmark duly incorporated this request into the final construction plans.

Notice through the International Maritime Organization would ensure that the international community has the opportunity to address the potentially serious threats that bridges pose to international navigation. In this regard, the United States looks forward to working with other interested states to develop the requisite guidelines and procedures within the International Maritime Organization. We believe this process will provide the most equitable and effective means to address the issue and reduce the potential for adverse precedent in this field.

Recently, we have been informed of proposals to build bridges across other international straits. The United States will not acquiesce in the construction of such bridges unless internationally recognized guidelines and procedures are in place and have been complied with by the proposing strait state. To accept anything less, after the international community worked for so many years in the Law of the Sea Conference to establish a universally accepted navigation regime, would raise unacceptable, uncertain dangers in a field in which the international community requires predictability, stability, and the orderly development of a universally endorsed body of law of the sea norms.

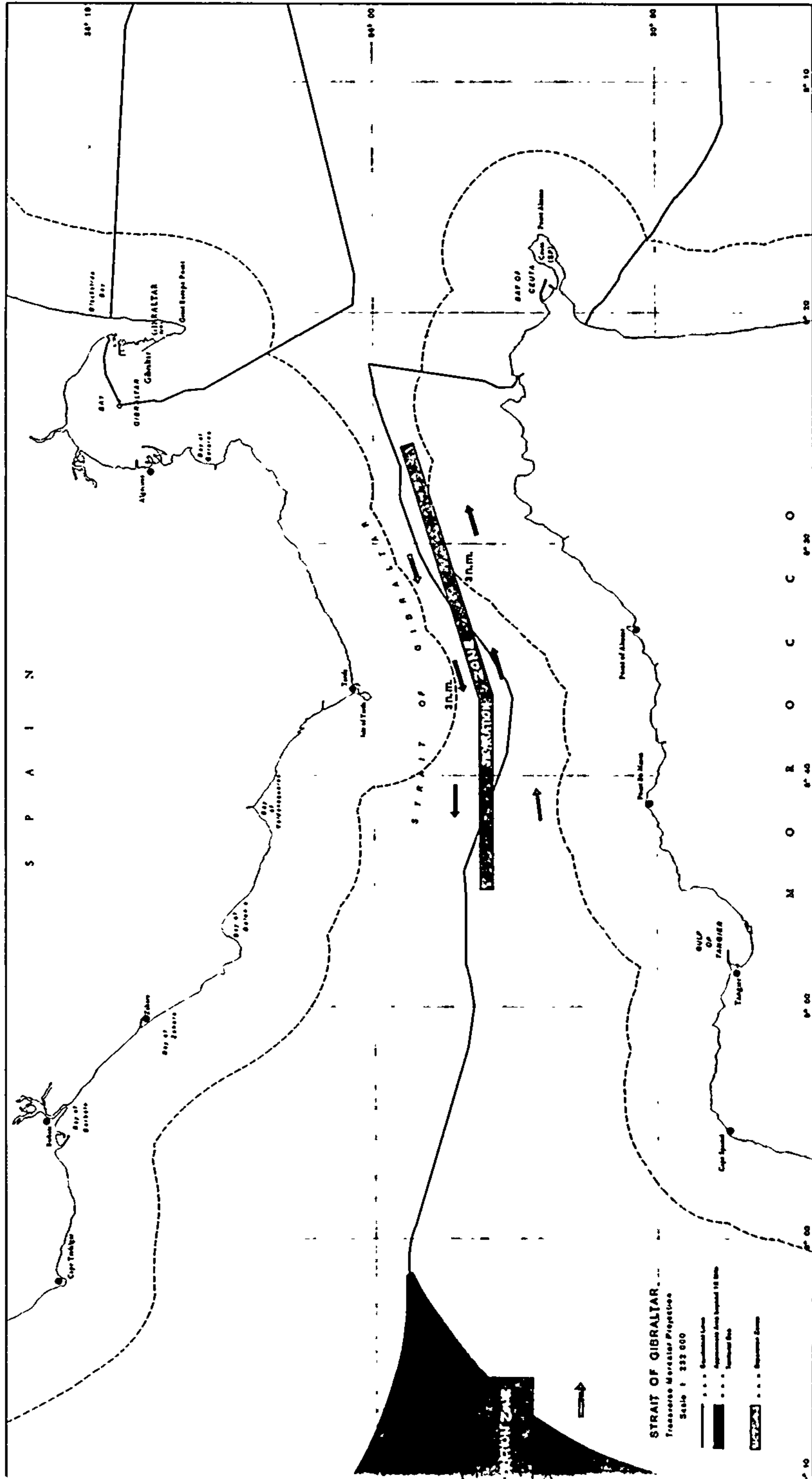
UAL-128

APPENDIX
MAP 1

JAPAN'S TERRITORIAL SEA LIMIT IN THE TSUGARU STRAIT

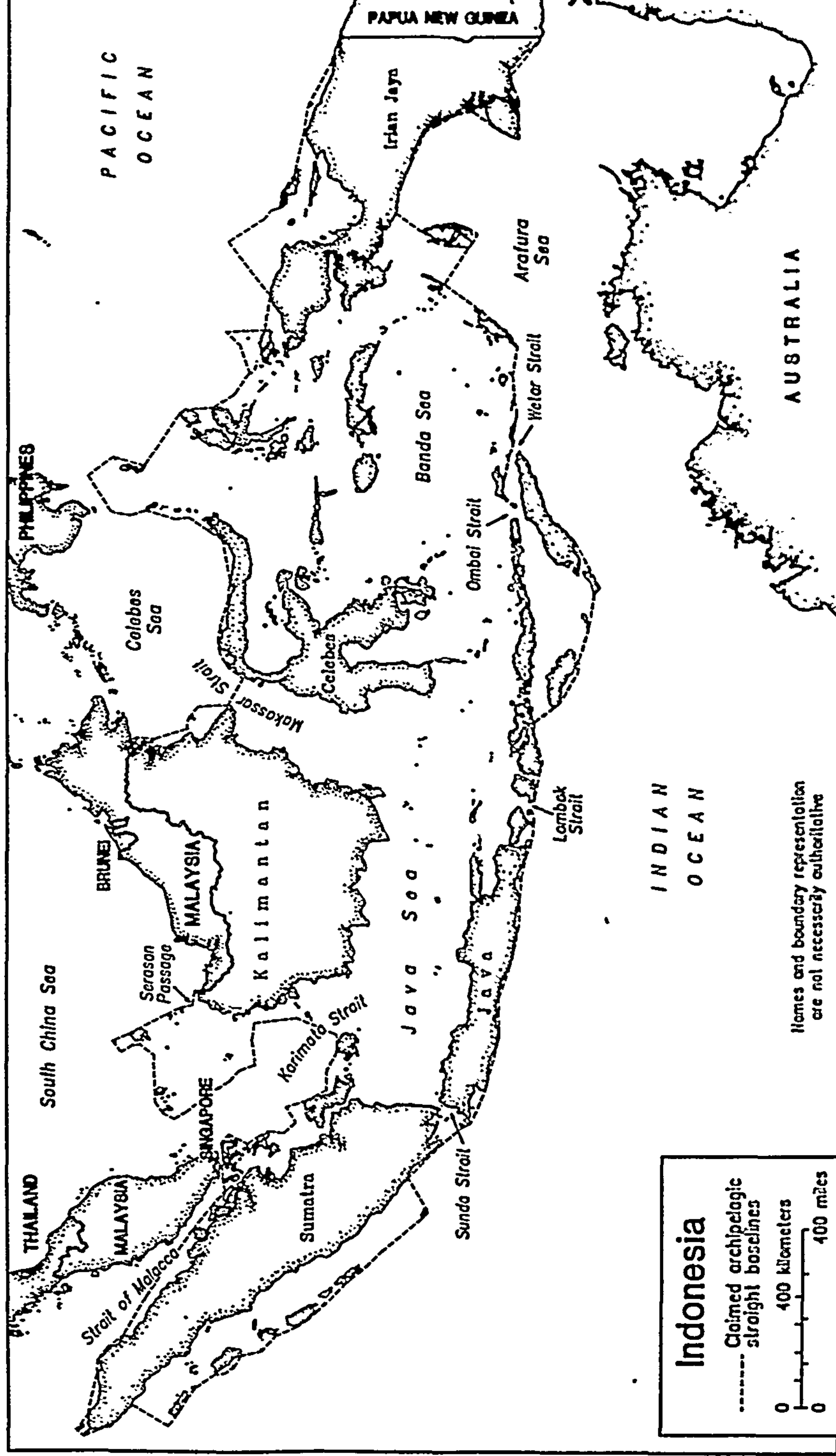
UAL-128

MAP 2



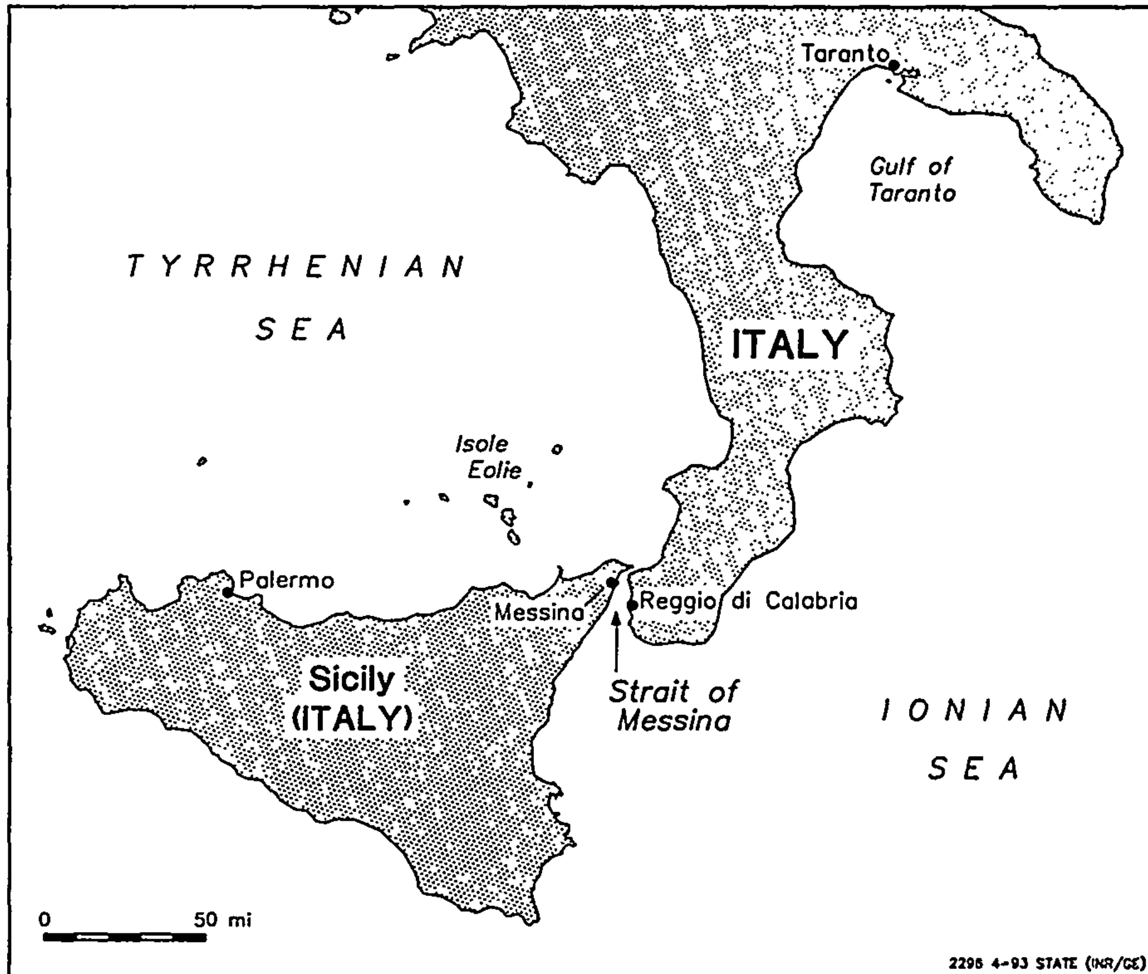
UAL-128

MAP 3



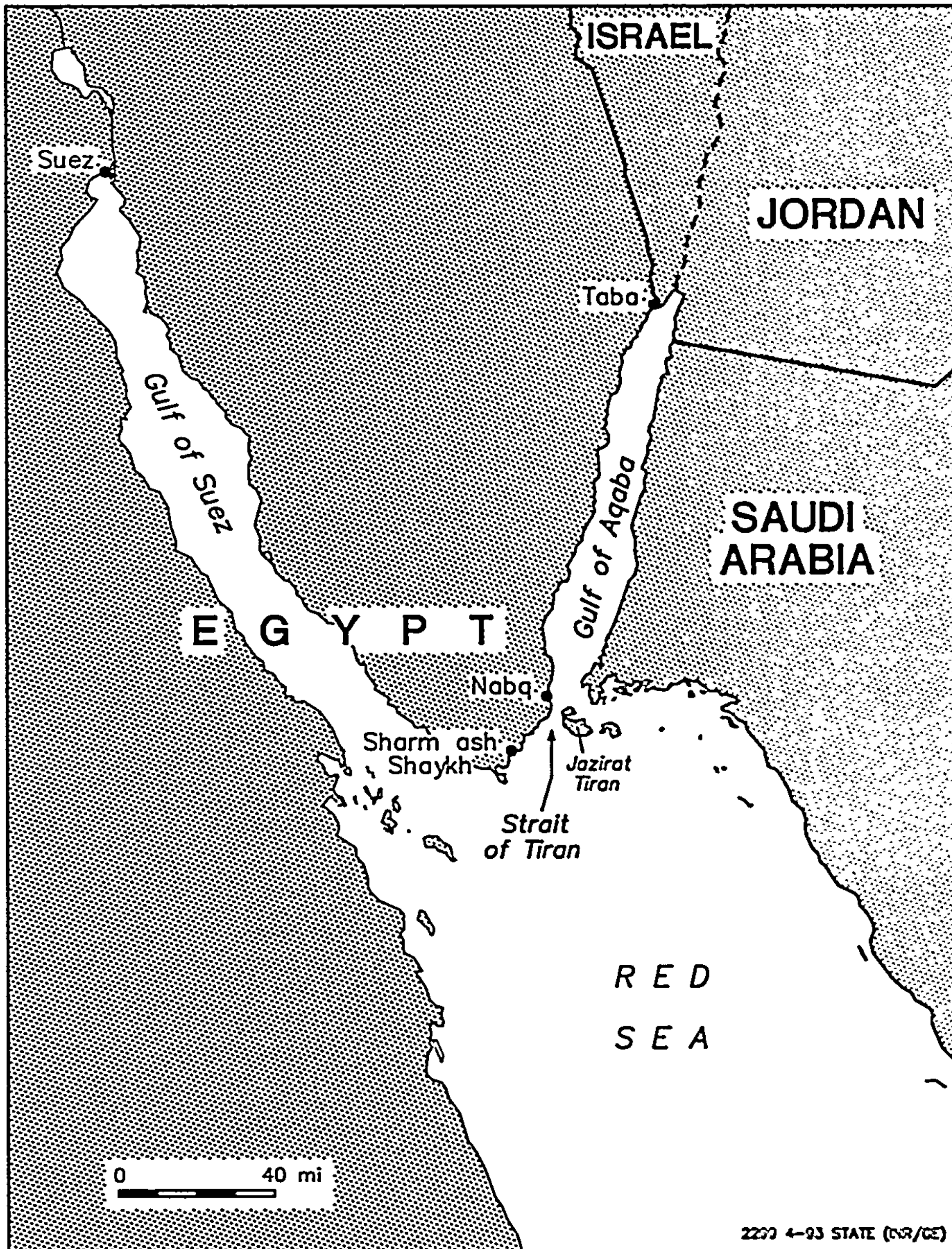
UAL-128

MAP 4



Names and boundary representation are not necessarily authoritative.

MAP 5



Names and boundary representation
are not necessarily authoritative.

UAL-128

MAP 6

Straits of Turkey

Names and boundary representation are not necessarily authoritative.

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